No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERMONT COX,

Petitioner,

v.

COMMISSIONER, PA. DEPT. OF CORRECTIONS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

STUART LEV
SENIOR LITIGATOR
Counsel of Record
LOREN STEWART
JAHAAN SHAHEED
JESSICA TSANG
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 540 West
Philadelphia, PA 19106
(215) 928-1100
Stuart_Lev@fd.org

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QUESTIONS PRESENTED

Rule 60(b)(6) authorizes a district court to grant relief from judgment for "any . . . reason that justifies relief" on a showing of "extraordinary circumstances." The first question presented here is one of first impression:

I. In habeas corpus proceedings, whether a district court deciding a motion for relief from judgment may ignore new exculpatory evidence when assessing whether a defaulted IATC claim is "substantial" under *Martinez v. Ryan*, 566 U.S. 1 (2012).

II. Whether Petitioner was entitled to a COA to allow the Court of Appeals to address the above question and determine whether his IATC claims were substantial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jermont Cox respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Third Circuit's denial of a certificate of appealability from the denial of Mr. Cox's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b).

OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (App.[1] 1–2) is unreported. The district court's memorandum opinion (App. 3–19) denying Mr. Cox's Motion for Relief from Judgment is unreported but available on Westlaw at *Cox v. Horn*, No. 00-5188, 2018 WL 4094963 (E.D. Pa. Aug. 28, 2018). The court of appeals' prior precedential opinion (App. 20–30) in this case reversing the district court's initial denial of Mr. Cox's Motion for Relief from Judgment is reported at *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014). The district court's first explanation and order (App. 31–34) denying Mr. Cox's Motion for Relief from Judgment is unreported.

The court of appeals opinion affirming the denial of Mr. Cox's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is available at *Cox v. Horn*, 174 F. App'x 84 (3d Cir. 2006). The district court order denying Mr. Cox's habeas petition is unreported but is available on Westlaw at *Cox v. Blaine*, No. 00-5188, 2003 WL 22238986 (E.D. Pa. July 23, 2003) (report and recommendation), and *Cox v. Horn*,

[1] "App." refers to Petitioner's Appendix that is filed concurrently herewith.

No. 00-5188, 2004 WL 7320193 (E.D. Pa. Aug. 11, 2004) (order adopting report and recommendation).

The Pennsylvania Superior Court's memorandum (App. 35–41) affirming the denial of state postconviction relief, *Commonwealth v. Cox*, No. 2529 Phila. 1998 (Pa. Super. July 15, 1999), is unreported. The Pennsylvania Superior Court's memorandum (App. 42–45) affirming Mr. Cox's convictions and sentences on direct appeal, *Commonwealth v. Cox*, No. 1303 Phila. 1994 (Pa. Super. June 2, 1995), is unreported.

JURISDICTION

The court of appeals issued its order denying Mr. Cox's Application for Certificate of Appealability on June 5, 2020. Pursuant to this Court's March 19, 2020, Order Regarding Filing Deadlines respecting the COVID-19 pandemic, this petition for certiorari is due 150 days from the date of the lower court judgment, or November 2, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 60 of the Federal Rules of Civil Procedure provides in pertinent part:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

STATEMENT OF THE CASE

Petitioner Jermont Cox seeks certiorari for this Court to review the Court of Appeals' refusal to grant a certificate of appealability (COA) and review the lower court's denial of his motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Mr. Cox was convicted of murder based on ballistics evidence, the statement of a purported eye witness, and a statement from Mr. Cox in which he admitted to the shooting but said it was accidental. He was convicted, sentenced to life in prison, and this murder conviction was offered as an aggravating circumstance in another case that led to a death sentence.

Twenty years after his conviction in this case, and years after his habeas claims of ineffective assistance of trial counsel (IATC) had been found defaulted, the forensic unit of the Philadelphia Police Department reviewed and revised the ballistics results that had been presented at trial. The new forensic evidence, which showed that two different guns had been used in the shooting, demonstrates that the prosecution's trial theory (that Mr. Cox was the sole shooter), the testimony of its star witness, the ballistics evidence offered at trial, and Mr. Cox's statement—were false. Mr. Cox has diligently sought relief from his conviction and sentence, based both on the new ballistics evidence and on his post-conviction counsel's ineffective abandonment of IATC claims during state collateral proceedings.

The district court denied Mr. Cox's motion for relief from judgment on the basis that the defaulted IATC claims he pursued were not "substantial." In so doing, however, the lower court did not consider the impact of the revised ballistics on the defaulted IATC claims. The lower court's analysis of deficient performance and

prejudice did not take into account the true facts of the case. Mr. Cox seeks certiorari for this Court to clarify an important question of first impression: whether a court considering a Rule 60(b)(6) motion may ignore new exculpatory evidence when assessing the substantiality of a defaulted IATC claim. Mr. Cox asks this Court to grant certiorari to address this question of first impression and establish a new rule to provide guidance to the lower courts.

In the alternative, at a minimum, the substantiality of Mr. Cox's defaulted IATC claims in light of the ballistics evidence is debatable among jurists of reason. If the Court does not grant certiorari to address the question of first impression, Mr. Cox respectfully requests that the Court grant certiorari, vacate the denial of a certificate of appealability, and remand with instructions to grant a certificate of appealability.

A. Factual Background

Early on July 19, 1992, Lawrence Davis was shot and killed during an altercation with a man named Larry Lee. *Cox*, 757 F.3d at 116; Notes of Testimony ("NT") 10/27/93 at 79. The forensic evidence consisted of two projectiles and a bullet fragment that the medical examiner recovered from Davis's body. NT 10/28/93 at 54, 92–93. The police arrested Jermont Cox six months later as he sat with his newborn son at Pennsylvania Presbyterian Hospital in West Philadelphia. NT 10/27/93 at 5, 34–35. While being interrogated at the police district, Mr. Cox purportedly gave a statement to the police in which he admitted to the shooting but said that it was accidental. *Cox*, 757 F.3d at 116; NT 10/27/93 at 19–20. According

to the statement, Mr. Cox alone shot the victim and there was only one gun involved. App. 5 n.1.

B. Trial

The prosecution's evidence against Mr. Cox at trial that is relevant to this appeal was: (1) Mr. Cox's inculpatory statement, (2) the testimony of purported eyewitness Kimberly Little, and (3) the ballistics testimony of Officer John Finor.

Kimberly Little lived on the second floor of a known drug house at 243 West Queen Lane in Philadelphia. NT 10/28/93 at 2. Ms. Little had some relationship with the leader of the drug operation, Larry Lee. She described the drug operation, knew the drug dealers' "shifts," and acknowledged that she had the beeper numbers for two drug bosses, Larry Lee and Tim Walker. *Id.* at 14, 35–36. Ms. Little testified that on the night of the shooting, she overheard an argument about drugs between Larry Lee and the deceased, Lawrence Davis, that escalated into a fight. *Id.* at 16-19. She testified that from the window of her apartment, she saw Mr. Cox exit a bar with a six pack of beer, retrieve a "big, black" handgun from a nearby parked car, walk up to the decedent, and fire three bullets at him. *Id.* at 20–22, 49. She stated that Mr. Cox sat down and drank a beer before getting into the car with Larry Lee and driving away. *Id.* at 23–24.

Ms. Little acknowledged that she made her observations from a window that was on the cross street (Newhall Street), not on Queen Lane where the shooting occurred. NT 10/28/93 at 20–21, 50. As such, the window she claimed to have looked out of was perpendicular to, and up the street from, the crime scene and did not look directly out at it. *Id.* at 51. A man named Keith Harris, who lived in the same

apartment, told police that Ms. Little was not in the apartment when the shooting occurred. *See* ECF No. 95-2 at 4.[2] Ms. Little had told Harris "that she was across the street and after she heard the shots she went to the corner and" saw two men pulling off. *Id.* Trial counsel did not question Ms. Little about having told Harris she was not in the apartment when the shooting occurred, nor did trial counsel call Harris as a witness.

Kimberly Little's sister, Mary Little, testified that she did not see the shooting, but heard the gun shots from the same apartment and looked out a different window. Mary Little's testimony differed from Kimberly Little's testimony in two respects: first, she said she saw a man throw a "shiny" object into the car, NT 10/28/93 at 69–70, not a "big black" handgun; and second, she said the men ran to the car and drove off, *id.* at 76, they did not stop to drink a beer first.

Philadelphia Police firearms examiner John Finor testified that the medical examiner recovered two bullets and one lead fragment from the decedent's body. *Id.* at 54. Officer Finor testified that there were insufficient microscopic characteristics to determine if both bullets were fired from the same weapon, but that the land and groove impressions on the two projectiles and their widths were "consistent with each other." *Id.* at 55-56.

Officer Finor further testified that, based on the number of shots, the possibility of an accidental shooting was unlikely. *Id.* at 57-58. Although no weapon

[2] Citations to "ECF No." refer to the CM/ECF electronically-filed documents in the district court below. *See Cox v. Horn*, No. 00-5188 (E.D. Pa.).

linked to the shooting was ever recovered, Officer Finor speculated that the weapon was a revolver because police did not recover any cartridge casings from the crime scene. *Id.* at 58. He testified that an accidental shooting was unlikely because, if the gun were a revolver, the shooter would have to "pull a double action trigger and/or cock the hammer every time" that a shot was fired. *Id.*

Trial counsel attempted to rebut this evidence with an ill-conceived "defense." On cross-examination and in closing argument, trial counsel tried to elicit information on a phenomenon known as "buck fever" to explain that multiple shots could have been an accident.[3] NT 10/28/93 64–65. Counsel did not retain a ballistics expert to advance this supposed defense or to contest the prosecution's ballistics evidence.

In closing argument, the prosecution relied on Officer Finor's testimony that the two bullets were "consistent with" each other to advance its theory that Mr. Cox fired all of the shots from a single gun, manifesting an intent to kill for first degree murder. The prosecutor argued: "there is one shooter and that shooter is the defendant, and that defendant is responsible for all the bullets that entered the body of the deceased." *Id.* at 124, 127.

Mr. Cox was convicted of first degree murder and related offenses and the case proceeded to a penalty phase at which the prosecution sought the death penalty. NT 10/29/93 at 2. The trial court sustained a defense demurrer to the

[3] The dictionary defines buck fever as "nervous excitement of an inexperienced hunter at the sight of game." *See* Merriam-Webster Online Dictionary (2020), *available at* https://www.merriam-webster.com/dictionary/buck%20fever (last visited Oct. 21, 2020).

aggravating circumstances and sentenced Mr. Cox to life without the possibility of parole. *Id.* at 7, 11.

C. Post-Verdict Motions and Direct Appeal

Mr. Cox filed a timely *pro se* post-verdict motion alleging that his trial counsel had failed to present a defense and failed to subpoena defense witnesses who would have testified that other people from the neighborhood were involved in the shooting and pressured Kimberly Little to give a false statement to police. NT 2/17/94 at 8–9, 15–16. Notwithstanding the allegations of ineffective assistance, the trial court did not appoint new counsel. Trial counsel continued to represent Mr. Cox during post-verdict motions and on direct appeal. The post-verdict motions were denied and, on June 2, 1995, the Pennsylvania Superior Court affirmed Mr. Cox's conviction and sentence in an unpublished memorandum opinion. *See* App. 42–45.

D. Initial PCRA Proceedings

Represented by new counsel, Mr. Cox sought state post-conviction relief. He alleged that trial counsel was ineffective for:

> (1) failing to present a defense that would negate the elements of first degree murder;
>
> (2) failing to impeach Kimberly Little with a prior inconsistent statement;
>
> (3) failing to investigate the familial relationship between Kimberly, Mary Little, and the victim;
>
> (4) failing to adequately investigate and present proof of legitimate employment to negate the drug-related theory proffered by the prosecution; and

(5) failing to investigate and impeach prosecution witnesses Kimberly and Mary Little with evidence of pending charges and probationary status.

In the course of an evidentiary hearing, PCRA counsel abruptly—and without consulting Mr. Cox—abandoned all but the last of the five IATC claims. NT 2/4/1998 at 22-23, 24. The PCRA court denied relief, finding that, though trial counsel was deficient for failing to impeach the Little sisters with their criminal records and probation status, Mr. Cox was not prejudiced because of other evidence suggesting Mr. Cox was guilty, including the ballistics evidence and his statement. In the appeal, Mr. Cox's counsel raised only the single IATC claim that had been preserved. The Pennsylvania Superior Court affirmed, likewise finding that Mr. Cox could not show prejudice: "Because there is additional evidence to sustain the conviction for first degree murder without taking into account the testimony of the witness in question, Cox has failed to show that he was prejudiced by his trial counsel's failure to impeach that witness." App. 40–41.

E. Federal Habeas Corpus Proceedings and Appeal

On October 12, 2000, Mr. Cox filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Mr. Cox raised eight claims for relief and alleged that his constitutional right to the effective assistance of counsel was violated by trial, appellate, and PCRA counsel's failures. The habeas petition included the four IATC claims that PCRA counsel had abandoned in state court as well as the exhausted failure-to-impeach IATC claim.

The district court denied the exhausted failure-to-impeach IATC claim, concluding that the state court reasonably found that, although trial counsel was

deficient for failing to properly investigate, Mr. Cox was not prejudiced because ballistics evidence dispelled Mr. Cox's claims of an accidental shooting. *See Cox v. Blaine*, No. 2:00-cv-05188, 2003 WL 22238986 (E.D. Pa. July 23, 2003). The district court found that the remaining IATC claims were procedurally defaulted because counsel had abandoned them during the evidentiary hearing. *See Cox*, 2003 WL 22238986 at *6-*7. The court of appeals affirmed. *See Cox v. Horn*, 174 F. App'x. 84, 87–89 (3d Cir. 2006).

F. 60(b) Motion, Denial, and Reversal

On June 20, 2012, Mr. Cox filed a Motion for Relief from Final Judgment pursuant to Fed. R. Civ. P. 60(b)(6) (the "First 60(b) Motion"), seeking relief from the dismissal of his habeas petition, in part, due to a change in procedural law established by *Martinez v. Ryan*, 566 U.S. 1 (2012), and its application to the facts and circumstances of his case. The district court denied the Rule 60(b) motion, finding that the change in the law wrought by *Martinez* could never constitute "extraordinary circumstances" for 60(b)(6) relief and issued a certificate of appealability. App. 31-34.

The court of appeals reversed. *See Cox*, 757 F.3d at 115. It reiterated that courts must take a "flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law, that takes into account all the particulars of a movant's case." 757 F.3d at 122. Because the full extent of what the extraordinary circumstances "would—or could—be in the context of *Martinez* was neither offered to the District Court by the parties nor discussed by

the Court," *id.* at 115, it remanded the case to the district court for a comprehensive consideration of Mr. Cox's entitlement to relief under Rule 60(b).

G. New Ballistics Evidence and Related Filings

On April 30, 2013, shortly before the Third Circuit issued its opinion, the prosecution produced a revised ballistics report.[4] *See* App. 46-49. The new report contradicted Officer Finor's testimony at trial. App. 49. Whereas Officer Finor had testified that he could not discern whether or not the two bullets were fired from same gun and that the land-and-groove markings on the two were "consistent with each other," NT 10/28/93 at 56, the new ballistics report revealed that the two bullets "were NOT fired from the same firearm." App. 48. The new ballistics report thus established that the prosecutor's closing argument that "there is one shooter and that shooter is the defendant, and that defendant is responsible for all the bullets that entered the body of the deceased," NT 10/28/93 at 124, was false.

In light of the new ballistics evidence, Mr. Cox filed a second 60(b) motion in the district court on August 5, 2013. *See Cox v. Horn*, No. 2:00-cv-5188 (E.D. Pa.) (ECF No. 82) (the "Second 60(b) Motion"). Mr. Cox argued that the new evidence undermined the integrity of the prior habeas proceedings, resulting in a procedural defect in the courts' prejudice analysis of the previously-defaulted IATC claims.

As a result of the new evidence, Mr. Cox also promptly returned to state court and filed a second petition for PCRA relief on June 28, 2013. The PCRA court

[4] The re-analysis was conducted in response to a federal court discovery order issued in Mr. Cox's other case. *See Cox v. Beard*, No. 00-5289 (E.D. Pa. Feb. 8, 2012) (ECF No. 17) (Order granting discovery).

denied the petition. On December 23, 2016, the Superior Court affirmed, finding that the Petition was not timely because it found that trial counsel—who Mr. Cox had alleged was ineffective—had not been diligent in seeking ballistics testing at the time of trial and immediately thereafter. *Commonwealth v. Cox*, No. 1671 EDA 2015, 2016 WL 7422770 (Pa. Super. Dec. 23, 2016).

H. The Second Denial of 60(b) Relief

On remand, the district court issued a memorandum opinion denying 60(b) relief. *See* App. 3–19. The district court found that it lacked jurisdiction over the second 60(b) motion because it was a second or successive petition lacking appellate authorization. App. 9–10. The district court reasoned that "new evidence presented in a Rule 60(b) motion, such as the new ballistics report, constitutes a 'claim' under *Gonzalez* [*v. Crosby*, 545 U.S. 524, 532 (2005)]." App. 9. It held in the alternative that the second 60(b) was untimely and lacked merit because, it reasoned, the new ballistics were not inconsistent with Mr. Cox's inculpatory statement. App. 10-14.

As to the initial 60(b) motion that was the subject of *Cox II*, the district court denied relief, concluding that the defaulted IATC claims were "neither meritorious nor substantial" pursuant to *Martinez*. App. 3, App. 14–17. The district court did not consider the new ballistics evidence in its analysis of the substantiality of the defaulted IATC claims. App. 14–17. As to PCRA counsel's effectiveness, the court reasoned that, because the claims were "not meritorious, let alone 'substantial,' PCRA counsel was not deficient for abandoning those claims; nor did the abandonment prejudice Cox." App. 17.

The district court noted that at least two of the factors under Rule 60(b) weighed in favor of granting 60(b) relief: (1) Mr. "Cox has diligently pursued his defaulted IATC claims," *see* App. 17–18, and (2) "the fact that [Mr.] Cox's conviction in the Davis murder case contributed towards his death sentence in another murder case weighs towards finding that extraordinary circumstances exist to permit *Martinez* relief," *see* App. 18. Those favorable factors notwithstanding, the district court found that "the rejection of [Mr. Cox's] defaulted IATC claims is sufficient to dispose of his Rule 60(b)(6) motion." App. 17. The district court did not grant a certificate of appealability, ECF No. 114, and denied Mr. Cox's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), ECF No. 132.

Mr. Cox sought COA from the court of appeals, which denied the application in a summary order. The court concluded that "reasonable jurists would not debate whether the District Court abused its discretion in denying his motions pursuant to Rule 60(b)," that "jurists of reason would agree that Appellant failed to demonstrate that his procedurally defaulted ineffective assistance of trial counsel claims are 'substantial,' i.e., that they have 'some merit,'" and that "[j]urists of reason would also agree that Appellant failed to demonstrate that the other factors we identified in his prior appeal counsel in favor of reopening the habeas proceedings." App. 1–2 (internal citations omitted).

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari on this Question of First Impression to Give Guidance to Lower Courts on How to Consider New Exculpatory Evidence Presented in a 60(b) Motion that Impacts the Analysis of Defaulted IATC Claims.

A. The Question of First Impression

This Court has never addressed whether a district court may consider new evidence offered in support of a 60(b)(6) motion where: (1) the new evidence is not offered in support of a claim that was previously adjudicated on the merits, and (2) the new evidence, though favorable, does not establish that no reasonable juror would have voted to find the defendant guilty. Because the precedents from this Court and the courts of appeal make clear that a 60(b) court should consider all aspects of a movant's case, this Court should conclude that a 60(b) court must consider new evidence offered in support of defaulted IATC claims.

1. New Evidence in Support of Previously-Adjudicated Claims

A Rule 60(b) motion offering new evidence to support a habeas claim that was previously-adjudicated on the merits "is in substance a successive habeas petition." *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). To hold otherwise would permit a habeas petitioner to file a successive habeas application disguised as a 60(b) motion and avoid the previous litigation bar imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. §2244(b)(1). It would also circumvent the requirements for seeking leave of the court of appeals to file a successive habeas petition. *See* 28 U.S.C. § 2244(b)(3)(A). No matter how it is packaged, new evidence in support of a claim that was previously adjudicated on the merits is, in truth, "a

second or successive application for habeas relief in disguise." *Moreland v. Robinson*, 813 F.3d 315, 322 (6th Cir. 2016); *Gonzalez*, 545 U.S. at 531 (construing as successive habeas petitions new claims not presented that allege "excusable neglect," previously-denied claims that are re-raised with "newly discovered evidence," and previously-denied claims re-raised based on "a subsequent change in substantive law"). If a claim has been previously denied on the merits, it is clear that new evidence will *not* be considered in support of a 60(b) motion.

The new evidence at issue here does not fall into this category. Mr. Cox does not raise claims that have been previously denied on the merits. The four IATC claims to which the new evidence applies here were deemed procedurally defaulted because counsel ineffectively abandoned them and have never been adjudicated on the merits.

2. Reliable New Evidence of Innocence Establishing that No Reasonable Juror Would Find the Defendant Guilty.

Where a defendant obtains new evidence that establishes her innocence, this Court has recognized an "innocence gateway" that can permit a court to adjudicate on the merits a claim that would ordinarily be procedurally defaulted or otherwise barred. This Court held in *Schlup v. Delo*, 513 U.S. 298 (1995), that courts may consider an otherwise-procedurally-defaulted habeas claim if two conditions are met: (1) that new reliable evidence exists, and (2) that it establishes that "no reasonable juror would have found the defendant guilty." *Id.* at 324, 328. In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the Court applied the same standard to consider habeas claims barred by the statute of limitations. *Id.* at 386. Because

60(b) motions that raise new claims are properly characterized as successive habeas petitions, courts have applied this same standard to 60(b) motions that assert actual innocence based on new evidence. *See, e.g.*, *Howell v. Superintendent Albion SCI*, -- F.3d --, 2020 WL 6155671, at *4 (3d Cir. Oct. 21, 2020) (applying *Schlup* standard to 60(b) motion filed after *McQuiggin*); *Satterfield v. District Attorney*, 872 F.3d 152, 154–55 (3d Cir. 2017) (noting that combination of *McQuiggin*'s change in the law and factual circumstances of Satterfield's claim on innocence *could* constitute extraordinary circumstances that would warrant relief from judgment, and remanding to district court for findings in the first instance).

The actual innocence gateway is narrow and its standard exacting. "[E]xperience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup*, 513 U.S. at 324; *McQuiggin*, 569 U.S. at 386 ("We caution, however, that tenable actual-innocence gateway pleas are rare").

The revised ballistics evidence in this case undercuts the prosecution's trial theory, raises serious questions about Kimberly Little's testimony, and casts doubt on Mr. Cox's inculpatory statement. Nevertheless, the revised evidence does not prove his actual innocence because it allows for the possibility that he fired at least one shot at the victim. The revised evidence no longer contradicts his defense of accident, as the firing of multiple shots did, but concededly still does not satisfy *Schlup*'s exacting standard. For that reason, the new evidence at issue in this 60(b) motion does not fall within the *Schlup/McQuiggin* rubric.

3. Rule 60(b)(6) Confers Broad Equitable Power and Requires Courts to Consider All Facts.

Rule 60 is broadly written and its history confirms that it was intended to confer expansive equitable power to provide relief from judgment when justice requires. In addition to the enumerated grounds for relief in subsections (1) – (5), the rule contains the broad "catchall" provision in subsection (6) that permits relief from judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6); *Buck v. Davis*, 137 S. Ct. 759, 772 (2017).

Rule 60 was "intended to completely replace the ancillary common law and equitable remedies of coram nobis, coram vobis, audita querela, bill of review and bill in the nature of a bill of review." *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 78 (5th Cir. 1970); *see also* Fed. R. Civ. P. 60 Advisory Committee Note to Subdivision (b) (1946 amend.) (describing "old common law writs and remedies" falling within the purview of rule 60(b)(6)).

The common law writs, found to apply in United States courts pursuant to the federal all-writs act, *United States v. Morgan*, 346 U.S. 502, 506–07 (1954), provided federal courts vast power to alter prior judgments to do justice. The writ of coram nobis "was available at common law to correct errors of fact" and "was allowed without limitation of time for facts that affect the validity . . . of the judgment." *See id.* at 507–08 (internal quotation omitted). The writ of coram vobis permitted a party to file a writ to raise a "fact which had escaped attention, and which was material in the proceeding." *Bronson v. Schulten*, 104 U.S. 410, 416 (1881). Similar to a writ of coram vobis, a bill of review permitted a party "to prove

facts which were in issue on the former hearing." *Craig v. Smith*, 100 U.S. 226, 233–34 (1879); *see also Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979). A writ of audita querela was a writ "of a most remedial nature . . . invented lest in any case there should be an oppressive defect of justice, where a party who has a good defence is too late in making it in the ordinary forms of law." *Humphreys v. Leggett*, 50 U.S. 297, 313 (1850).

Interpreting Rule 60(b)(6), the courts of appeal have uniformly recognized that it is designed to be expansive, flexible, and utilized to do justice. The rule is commonly described as providing "a grand reservoir of equitable power to do justice in a particular case." *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004). Nearly every court of appeal has used similar language to describe the vast scope of Rule 60(b)(6)'s conferral of equitable power.[5]

In addition, several courts of appeal have made explicit that courts should take "a flexible, multifactor approach to Rule 60(b)(6) motions . . . that takes into account all the particulars of a movant's case." *Cox*, 757 F.3d at 122 (citing *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 274 (3d Cir. 2002)); *see also McGuire v. Warden*, 738 F.3d 741, 750 (6th Cir. 2013) (requiring "that justice be done in light of all the facts"); *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (same); *cf.*

[5] *See Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 5 (1st Cir. 2001); *Hall v. Cmty. Mental Health Ctr.*, 772 F.2d 42, 46 (3d Cir. 1985); *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106-07 (4th Cir. 1979); *Balentine v. Thaler*, 626 F.3d 842, 846 (5th Cir. 2010); *Zagorski v. Mays*, 907 F.3d 901, 904 (6th Cir. 2018); *Ervin v. Wilkinson*, 701 F.2d 59, 61 (7th Cir. 1983); *Hoover v. Valley West D M*, 823 F.2d 227, 230 (8th Cir. 1987); *Hall v. Haws*, 861 F.3d 977, 987 (9th Cir. 2017); *Johnson v. Spencer*, 950 F.3d 680, 700–01 (10th Cir. 2020); *Nisson v. Lundy*, 975 F.2d 802, 806 (11th Cir. 1992); *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760, 765 (D.C.Cir.1995); *Lazare Kaplan Int'l, Inc. v. Photoscribe Techs., Inc.*, 714 F.3d 1289, 1295 (Fed. Cir. 2013).

Good Luck Nursing Home v. Harris, 636 F.2d 572, 577 (D.C. Cir.1980). Undersigned counsel is aware of no authority from this court or the courts of appeals that limits what facts may be considered in a 60(b)(6) motion.

In summary, Rule 60(b)(6) was constructed to take the place of the historic common law writs that permitted parties to correct errors of fact that affected the validity of the judgment (coram nobis), to highlight matters of material fact that had previously escaped attention (coram vobis), to remedy an oppressive defect of justice (audita querela), and to present new evidence to prove facts that were in issue in the former proceeding (bill of review). The courts of appeal have interpreted Rule 60(b)(6) as a vast reservoir of equitable power that empowers the court to do justice. And to do such justice, a court reviewing a Rule 60(b) motion should use a flexible, multifactor approach that considers *all* of the facts of the case.

4. The Court Should Establish a Rule Requiring Consideration of All Evidence In Support of Previously-Unadjudicated Claims

The Court should grant certiorari to establish a rule clarifying that courts should consider newly discovered evidence when adjudicating a properly-filed motion under Rule 60(b). The rule should clarify that new evidence may alter a court's analysis of defaulted IATC claims that are properly the subject of a Rule 60(b) motion, as in this case. Where those claims are considered in light of *all of the evidence*, a 60(b) court could properly assess whether defaulted IATC claims are substantial and deserve encouragement to proceed further. *Buck*, 137 S. Ct. at 773. Such a rule would be consonant with the expansive equitable power and the common law writs that undergird Rule 60(b).

The rule will be limited by this Court's precedents. Motions for relief from judgment that raise new claims or claims that were previously adjudicated (e.g., successive habeas petitions disguised as 60(b) motions) will be dismissed. *See Gonzalez*, 545 U.S. at 531. Motions for relief from judgment will be constrained by the movant's obligation to demonstrate "extraordinary circumstance," *Ackermann v. United States*, 340 U.S. 193, 199 (1950), by the strong policy in favor of the finality of judgments, *Gonzalez*, 545 U.S. at 535, and by notions of comity and federalism with respect to motions attacking state court judgments, *Cox*, 757 F.3d at 125. Each of these limitations will ensure that "[s]uch circumstances will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535.

To be sure, sometimes "the previously undisclosed fact" will not be "so central to the litigation that it shows the initial judgment to have been manifestly unjust." *Good Luck Nursing Home*, 636 F.2d at 577. In those cases, it will be simple enough for a district court to deny the motion, making clear that it has considered all evidence. But other times, as in this case, the new evidence calls into question the core facts of the case and places the defaulted IATC claims in a new light. Consideration of the new evidence renders "substantial" the defaulted IATC claims that might not otherwise have merited relief. *See infra*.

The proposed rule would not broaden the scope of Rule 60(b) relief under this Court's precedents. It would merely clarify the proper analytical approach for lower courts—particularly courts considering defaulted IATC claims in habeas cases. In so

doing, the rule would provide much-needed guidance and fulfill the historical intent and spirit of Rule 60(b).

B. Mr. Cox's Defaulted IATC Claims Are "Substantial" When Properly Considered in Light of All Aspects of the Case, Including the Revised Ballistics.

Mr. Cox's four defaulted IATC claims, considered individually and cumulatively, are substantial when considered in light of all of the facts. In the four defaulted IATC claims, Mr. Cox argued that trial counsel was ineffective for:

> (1) failing to present a defense that would negate the elements of first degree murder;
>
> (2) failing to impeach Kimberly Little with a prior inconsistent statement;
>
> (3) failing to investigate the familial relationship between Kimberly, Mary Little, and the victim; and
>
> (4) failing to adequately investigate and present proof of legitimate employment to negate the drug-related theory proffered by the prosecution.

The new ballistics evidence leads inexorably to the conclusion that Mr. Cox's claims are "substantial."[6] The new evidence contradicts Mr. Cox's inculpatory statement, undermines the testimony of purported eyewitness Kimberly Little, weakens the prosecution's theory of the case and specific-intent-to-kill for first degree murder, and profoundly affects the "some merit" and/or prejudice analysis underlying the defaulted IATC claims below. Viewed in light of all of the evidence, the defaulted

[6] The district court discussed the ballistics evidence extensively in the first section of its opinion, *see* App. 9–14, in which it found that the Second 60(b) Motion was a successive petition. Mr. Cox does not dispute that finding. He instead focuses on the *first* 60(b) motion and the defaulted IATC claims. The district court's analysis of the first 60(b) motion that contained the defaulted IATC claims fails completely to take into account the new forensic ballistics result. *See* A14–17.

IATC claims warrant relief from judgment under Rule 60(b)(6). But at this juncture, the inquiry is only whether they are "substantial" and whether reasonable jurists could disagree as to their substantiality.

1. The Failure to Defend Against First Degree Murder Claim

The new ballistics evidence most clearly impacts the "substantiality" analysis of Mr. Cox's claim that counsel was ineffective for failing to defend against the elements of first degree murder. A proper analysis of this defaulted IATC claim, taking into account the new ballistics evidence, leads to the conclusion that counsel performed deficiently and Mr. Cox was prejudiced. At a minimum, the claim is substantial.

Trial counsel's chosen trial defense was to suggest that Mr. Cox fired all of the shots that killed the victim but that Mr. Cox was excited and erratic when he did so, and therefore lacked intent for first degree murder. Counsel called the phenomenon "buck fever." NT 10/28/93 at 64-65. Defense counsel did not present an expert or other evidentiary support for this theory. Instead without any factual basis, he attempted to elicit his defense from the prosecution's expert. He asked the expert whether buck fever included "incidents of strange and relatively unexplained behavior . . . in hunters, shooting into the ground, shooting more shots than they ever realized, having an empty weapon, thinking they only shot once, things like that?" *Id.* at 65. The prosecution expert responded, "The term buck fever could apply to all those scenarios, I guess." *Id.* That was the entirety of the defense theory in this capital trial.

The district court ruled that defense counsel's "buck fever" defense was not deficient performance, did not consider whether Mr. Cox was prejudiced, and found that the claim was not substantial. App. 17. The district court's analysis of this claim did not cite or discuss the new ballistics evidence.

Had the district court truly employed a "flexible, multifactor approach . . . that takes into account *all the particulars* of a movant's case," *Cox*, 757 F.3d at 122 (emphasis added), it would have concluded that this claim is at the very least "substantial" and that Rule 60(b) relief was appropriate.

There are substantial questions concerning the reasonableness of counsel's performance. Rather than actually investigate the ballistics evidence, counsel chose to pursue a theory that had no evidentiary basis and no factual support. Had counsel conducted a reasonable investigation, and consulted any appropriate expert, it would have been revealed that the initial conclusion that the two bullets were "consistent" with one another (and likely came from the same gun) was false. Trial counsel could have used the new ballistics evidence to undermine Kimberly Little's testimony that Mr. Cox alone shot the victim with a single gun; it is belied by the science—two guns were used. The evidence would have cast doubt on the prosecution's investigation and theory of the case. It also would have negated the prosecution's argument—based on the number of shots that Mr. Cox supposedly

fired—that the shooting could not have been accidental and that Mr. Cox was guilty of an intentional, first degree murder.[7]

Trial counsel could and should have used the ballistics evidence to cast doubt on the veracity of Mr. Cox's inculpatory statement. In the statement, Mr. Cox supposedly confessed that he (and he alone) shot the victim with a single gun. App. 5 n.1. We now know that that cannot be true. App. 50 (new ballistics report). People confess—or falsely confess—for many reasons. Had trial counsel conducted a constitutionally-adequate investigation of the ballistics, he would have been able to cast doubt on the veracity of Mr. Cox's inculpatory statement.

In defending against this first degree murder charge, trial counsel should have investigated and called witnesses whose favorable accounts of the shooting were documented in their statements to police and passed in discovery. Trial counsel did not interview two witnesses, Charles "Buster" Reynolds and Tammy Williams, whose statements to the police implicated other men and contradicted aspects of the testimony of the Little sisters. *See* ECF No. 95-3 (police statement of Charles Reynolds reporting that the decedent was arguing with two black men, that a "third dud[e] came . . . out of the Shaw Apartment house right there on Newhall" and that the third guy "pointed [a] gun at me"); ECF No. 95-4 (police statement of Tammy Williams reporting that a man named Tylee had said that, "if he see anybody selling any drugs[,] he don't care who it is or whoever it was gone [*sic*] to

[7] Under Pennsylvania law, for a homicide to constitute first degree murder it must have been "an intentional killing." 18 Pa. C.S. § 2502(a); *Commonwealth v. Johnson*, 985 A.2d 915, 919 (Pa. 2009).

give it to him. He does have a gun because I seen it."). A witness named Ernest Coleman told police that he saw a man wearing no shirt run out of the apartment building across the street, the man ran towards where the shooting occurred, Mr. Coleman heard the shots, and then saw the shirtless man and two others run off. *See* Investigation Interview Record of Ernest Coleman (July 19, 1992) at 1. Mr. Coleman told police that it was the shirtless man from the apartment building who was the shooter. *Id.* Another witness to the crime, Frances Shaw, told the police that several individuals were involved in the shooting. *See* ECF No. 95-5.

Defense counsel did not present any of these witnesses at trial and there is no record that he even attempted to speak with them. That was deficient and Mr. Cox was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation").

Immediately after the trial, Mr. Cox expressed at post-sentence motions that trial counsel did not discuss the defense with Mr. Cox, nor did Mr. Cox even think it a defense. NT 2/17/94 at 20 ("When we came in here, Your Honor, he didn't have no defense. There was no defense."); *id.* at 8–16 (discussing witnesses that Mr. Cox asked his counsel to subpoena for trial; counsel did not).

Mr. Cox's claim that counsel was deficient has at least "some merit." Had the district court properly considered all facts of the case—including the new ballistics evidence—the inescapable conclusion is that this claim is at least "adequate to

deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 323 (2003).

2. The Remaining Defaulted IATC Claims

The new ballistics evidence that tends to undercut the prosecution's trial theory and contradicts its star witness also impacts the "substantiality" analysis of the other defaulted IATC claims.

The second defaulted IATC claim—that counsel failed to impeach Kimberly Little with her prior inconsistent statement—would have benefitted greatly from the new ballistics evidence. In that claim, Mr. Cox contended that counsel should have confronted Kimberly Little with the statement that she made to Keith Harris (or that counsel should have called Harris as a witness to testify to it). Specifically, Harris told police that "Kim said she was across the street and after she heard the shots she went to the corner and seen them, Black and Speedy pulling off." ECF No. 95-2 at 4. This statement suggested that, contrary to her trial testimony, Kimberly Little did not observe the shooting from the window of her second floor apartment. It also suggests that she did not actually *see* the shooting – she heard shots, went to the corner, and saw two people that she believed to be the assailants.

The new ballistics evidence raises further questions about the veracity of Ms. Little's statement—she testified that she saw one gun and one shooter, but the truth is that there were two guns and (presumably) two shooters. Taking into account "all the particulars of" Mr. Cox's case, *Cox*, 757 F.3d at 122, the combination of Ms. Little's prior inconsistent statement to Mr. Harris and the forensic evidence proves her statement to be false (or, at minimum, profoundly

misleading). And that is not surprising, considering other inconsistencies in her testimony.[8] Had the 60(b) court taken into consideration all of the facts and circumstances in the case, it would have found that at a minimum, "reasonable jurists could debate" whether this claim was "substantial," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and COA should have been granted.

The third defaulted IATC claim—that counsel failed to investigate the familial relationship between Kimberly Little, Mary Little, and the victim—also would have been significantly strengthened by the new ballistics evidence. The fact of a familial relationship between a witness and a victim may not, taken alone, be significant. But where, as here, there is evidence that the witness (Kimberly Little) is not being truthful, the family relationship takes on an enhanced significance. Trial counsel sought to discredit Ms. Little. Had counsel argued that she was biased against Mr. Cox—that she was willing to lie for the prosecution to secure a conviction for the shooting of a family member—the argument would have been buttressed significantly by forensics showing that Ms. Little's account of the shooting was false. As with the prior claim, had the lower courts taken into consideration all of the facts and circumstances in the case, they would have found

[8] Kimberly Little claimed she saw a "big black gun," while her sister described seeing a "shiny" object. *Compare* NT 10/28/93 at 49 *with id.* at 69–70. Kimberly Little claimed the shooter stopped and drank a beer before driving off while her sister claimed he ran to the car and drove off. *Compare* NT 10/28/93 at 40 *with id.* at 76.

that at a minimum, "reasonable jurists could debate" whether this claim was "substantial," *Slack*, 529 U.S. at 484, and COA should have been granted.[9]

II. If the Court Declines to Address the Question of First Impression, It Should Grant Certiorari, Vacate the Lower Court Decision, and Remand with Instructions to Grant a Certificate of Appealability so that the Court of Appeals May Consider the Substantiality of Petitioner's IATC Claims in Light of All of the Evidence.

Even if this Court does not accept this case to address the question of first impression described above, it should grant certiorari, vacate the denial of a certificate of appealability, and remand with instructions to issue a certificate of appealability. Trial counsel's failure to investigate in lieu of a "buck fever" strategy presents a substantial claim if ineffective assistance. For the reasons stated above, the Court of Appeals should have issued a certificate of appealability and addressed the "substantiality" of Mr. Cox's defaulted IATC claims considering all aspects of the case (including the new ballistics evidence). Indeed, the question of whether the court could consider the new evidence meets the standards for COA as it is debatable among reasonable jurists. Granting COA would have allowed the Third Circuit to address this important question with the benefit of full briefing and argument.

[9] The fourth defaulted IATC claim—that counsel failed to adequately investigate and present proof of legitimate employment—is not substantially changed by the new evidence. It does, however, contribute to the counsel's cumulative ineffectiveness that militated here in favor of granting Rule 60(b) relief or, at a minimum, granting a certificate of appealability.

CONCLUSION

For the foregoing reasons, Petitioner Jermont Cox respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit. In the alternative, Mr. Cox requests that the Court grant the petition, vacate, and remand with instructions for the Third Circuit Court of Appeals to grant a certificate of appealability.

Respectfully submitted,

/s/ Stuart Lev
STUART LEV
SENIOR LITIGATOR
Counsel of Record
LOREN STEWART
JAHAAN SHAHEED
JESSICA TSANG
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 540 West
Philadelphia, PA 19106
(215) 928-1100
Stuart_Lev@fd.org

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