No. 17-6239

In the Supreme Court of the United States

LEE E. MOORE,

Petitioner,

v.

CHARLOTTE JENKINS, WARDEN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Respondent
Charlotte Jenkins, Warden

CAPITAL CASE

QUESTIONS PRESENTED

Did the Sixth Circuit properly affirm the district court's denial of Moore's Federal Rule of Civil Procedure 60(b)(6) motion to reopen the judgment denying his petition for a writ of habeas corpus?

LIST OF PARTIES

The Petitioner is Lee Moore, an inmate at the Chillicothe Correctional Institution in Chillicothe, Ohio.

The respondent is Charlotte Jenkins, the Warden of the Chillicothe Correction Institution, who is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

COUNTERSTATEMENT 2

A. Lee Moore Robbed, Kidnapped, And Murdered Melvin Olinger 2

B. After A Jury Convicted Moore, Ohio Courts Upheld His Conviction And Sentence On Appeal And In Postconviction Proceedings 3

C. The District Court And The Sixth Circuit Denied Habeas Relief 4

D. The District Court And Sixth Circuit Denied Moore's 60(b) Application For Reopening 7

REASONS FOR DENYING THE WRIT 8

I. Moore's Petition Repeats Arguments That Were Raised In His Prior Cert Petition 8

II. *Martinez* And *Trevino* Are Inapplicable Because Moore's Ineffective-Assistance Claims Were Not Procedurally Defaulted 12

III. The Sixth Circuit Correctly Applied Well-Settled Precedent When Denying Moore's Ineffective-Assistance-Of-Counsel Claim 16

A. The Law Governing Ineffective-Assistance Claims Is Well Settled 16

B. Moore's Ineffective-Assistance Claim Lacks Merit 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page(s)**

Ackermann v. United States,
340 U.S. 193 (1950) 9

Agostini v. Felton,
521 U.S. 203 (1997) 8

Aikens v. Ingram,
652 F.3d 496 (4th Cir. 2011) 9

Buck v. Davis,
137 S. Ct. 759 (2017) 11, 13

Canales v. Stephens,
765 F.3d 551 (5th Cir. 2014) 11, 12

Cullen v. Pinholster,
563 U.S. 170 (2011) ..... *passim*

Edward H. Bohlin Co. v. Banning Co.,
6 F.3d 350 (5th Cir. 1993) 9

Eutectic Corp v. Metco, Inc.,
597 F.2d 32 (2d Cir. 1979) 9

Fairchild v. Trammell,
784 F.3d 702 (10th Cir. 2015) 12

Gonzales v. Crosby,
545 U.S. 524 (2005) 8, 11

Hall v. Haws,
861 F.3d 977 (9th Cir. 2017) 12

Harrington v. Richter,
131 S. Ct. 770 (2011) 16, 17

Jinks v. AlliedSignal, Inc.,
250 F.3d 381 (6th Cir. 2001) 9

Kagan v. Caterpillar Tractor Co.,
795 F.2d 601 (7th Cir. 1986) 9

Lubben v. Selective Service Systems Local Board,
453 F.2 645, 651 (1st Cir. 1972) 9

Martinez v. Ryan,
132 S. Ct. 1309 (2012) ..... *passim*

Martinez-Mcbean v. Gov't of V.I.,
562 F.2d 908 (3d Cir. 1977) 9

Moore v. Robinson,
134 S. Ct. 693 (2013) 7, 10

Morris v. Adams-Millis Corp.,
758 F.2d 1352 (10th Cir. 1985) 9

Padilla v. Kentucky,
559 U.S. 356 (2010) 16

Parks v. U.S. Life & Credit Corp.,
677 F.2d 838 (11th Cir. 1982) 9

Polites v. United States,
364 U.S. 426 (1960) 9

Salazar v. District of Columbia,
633 F.3d 1110 (D.C. Cir. 2011) 9

Sasser v. Hobbs,
743 F.3d 1151 (8th Cir. 2014) 12

Satterfield v. DA Phila.,
872 F.3d 152 (3d Cir. 2017) 12

State v. Moore,
689 N.E.2d 1 (Ohio 1998) ..... *passim*

State v. Moore,
704 N.E.2d 579 (Ohio 1999) 4

State v. Moore,
No. C-970353, 1998 Ohio App. LEXIS 4282 (Ohio Ct. App., Sept. 18, 1998) 4

Strickland v. Washington,
466 U.S. 668 (1984) 6, 16, 17, 18

Tharpe v. Warden,
No. 17-14027-P, 2017 U.S. App. LEXIS 18735 (11th Cir. Sept. 21, 2017) 12

Title v. United States,
263 F.2d 28 (9th Cir. 1959) 9

Trevino v. Thaler,
133 S. Ct. 1911 (2013) ..... *passim*

United States v. Young,
806 F.2d 805 (8th Cir. 1986) 9

Wellons v. Hall,
558 U.S. 220 (2010) 14

Williams v. Kelley,
854 F.3d 1002 (8th Cir. 2017) 12

Williams v. Taylor,
529 U.S. 362 (2000) 17

Yarborough v. Gentry,
540 U.S. 1 (2003) 16

Statutes, Rules, and Constitutional Provisions

28 U.S.C. § 2244(b)(3)(E) 11

28 U.S.C. § 2254(d)(1) 5

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

Fed. R. Civ. P. 60(b)(6) ..... *passim*

Other Authorities

12 Moore's Federal Practice § 60.22 (2017) 1

S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3) (10th ed. 2013) 2, 17

11 Wright & Miller, Federal Practice and Procedure §2857 13

INTRODUCTION

Lee Moore was sentenced to death for stealing Melvin Olinger's car, kidnapping him, and murdering him to cover up his crimes. Ohio courts affirmed Moore's convictions and sentence on direct appeal, and the Sixth Circuit denied his petition for a writ of habeas corpus. Moore sought review of that decision in this Court arguing, among other things, that the Court should vacate the Sixth Circuit's decision and remand for its reconsideration in light of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Instead, the Court denied his petition for a writ of certiorari. For several reasons, it should do the same with respect to his current petition.

First, Moore seeks to simply re-litigate *Trevino*-related claims that the Court already declined to address when it denied his earlier petition for a writ of certiorari. His request is a misuse of Rule 60(b). It is well-established that a Rule 60(b) motion to alter or amend a judgment is not a substitute for an appeal. 12 Moore's Federal Practice § 60.22 (2017). And if it is not appropriate to use a 60(b) motion as *substitute* for an appeal, then it is certainly not appropriate to use such a motion as a way of obtaining a *second* appeal.

Second, by their own terms, the Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino* do not apply here. Those decisions created a narrow opening for habeas petitioners to establish the cause and prejudice necessary to permit review of otherwise defaulted ineffective-assistance-of-trial-counsel claims. But Moore's ineffective-assistance-of-trial-counsel claim was *not* defaulted; the state courts rejected that claim on the merits. Thus, rather than apply *Martinez* and *Trevino*, Moore's petition actually asks the Court to *expand* those decisions and

create an exception to the limitations imposed by the Court's decision in 563 U.S. 170 (2011).

Third, Moore's ineffective-assistance-of-counsel claim does not present a question worthy of this Court's review. The law applicable to such claims is well-settled. At most, Moore seeks nothing more than fact-bound error correction. Not only does his petition therefore fail to present a question worthy of this Court's review, *see* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013), it also lacks substantive merit. The Sixth Circuit correctly held that the Ohio Supreme Court did not unreasonably apply clearly established federal law when it rejected Moore's ineffective-assistance claim on the merits.

COUNTERSTATEMENT

A. Lee Moore Robbed, Kidnapped, And Murdered Melvin Olinger

Lee Moore, together with Jason Holmes, wanted to steal a car. *State v. Moore*, 689 N.E.2d 1, 5 (Ohio 1998). The two men thus waited outside a bar in Fairfield, Ohio, until they saw Melvin Olinger getting into his car. Olinger, a business man from Chicago, was in Ohio to visit his parents and attend the calling hours for a friend who had passed away. *Id.* Moore forced Olinger into the trunk of Olinger's blue Ford Taurus at gunpoint before driving away with him in the car. *Id.* Moore then picked up Larry Kinley before driving Olinger's car to an industrial area of Cincinnati. *Id.* On the way, Moore informed Kinley that he planned to kill Olinger so that they would not get caught. *Id.*

Moore parked the car near a dumpster and let Olinger out of the trunk. *Id.* Kinley remained in the car, and although he testified that he did not witness what happened next, he said he heard Olinger pleading for his life. *Id.* Kinley testified that he then heard a gunshot and that Moore jumped into the car, laughing and asking "Did you see his dome get shot off?" *Id.* He also testified that Moore was upset that he had forgotten to ask Olinger for his ATM personal identification number before he shot him. *Id.* at 6.

The next day, Moore and Kinley used the credit card that they had stolen from Olinger to go shopping. *Id.* Moore purchased over $1,000 worth of clothing and jewelry at two Cincinnati J.C. Penny stores. *Id.* When Moore was arrested six days after Olinger's murder, the police confiscated several items of clothing that were believed to have been purchased with Olinger's card. *Id.* Following his arrest, Moore signed a Miranda waiver and admitted that he had robbed, kidnaped, and killed Olinger. *Id.* He maintained, however, that the shooting was accidental. *Id.*

B. After A Jury Convicted Moore, Ohio Courts Upheld His Conviction And Sentence On Appeal And In Postconviction Proceedings

A grand jury indicted Moore on three counts of aggravated murder, one count of aggravated robbery, and one count of kidnapping. *Id.* Each count included a firearm specification, and the three aggravated-murder counts each carried three death-penalty specifications. *Id.* A jury found Moore guilty on all counts and recommended that he receive a death sentence. *Id.* The court imposed the recommended sentence, while also imposing consecutive sentences for Moore's remaining convictions. *Id.* An intermediate appellate court affirmed. *Id.* at 6-7.

The Ohio Supreme Court upheld Moore's conviction and sentence on appeal. *Id.* at 7. Among other things, Moore argued on appeal that he had received ineffective assistance of trial counsel during mitigation. The Ohio Supreme Court rejected that argument. *Id.* at 14-15. After reviewing the trial record, it held that Moore had failed to demonstrate "a reasonable probability that, were it not for counsel's errors, the result of the trial court would have been different." *Id.* at 15 (citation omitted).

Moore also filed a petition for postconviction relief in state court. *State v. Moore*, No. C-970353, 1998 Ohio App. LEXIS 4282 (Ohio Ct. App., Sept. 18, 1998). As in his direct appeal, he alleged that he received ineffective assistance of counsel during the mitigation phase of his trial. *Id.* at *7-9. The trial court dismissed his claims "on the grounds that they were not supported by evidence outside of the record and were refuted by the evidence in the record." *Id.* at *8. The Ohio Court of Appeals affirmed. It criticized the trial court's reliance on res judicata, *id.* at *14 n.3, but nevertheless rejected Moore's claim on the merits because he "did not submit any evidence in support of his claim of ineffectiveness, and the existing record refutes his allegations that counsel failed to offer specific evidence in mitigation," *id.* at *9. The Ohio Supreme Court declined to accept Moore's appeal of that decision. *State v. Moore*, 704 N.E.2d 579 (Ohio 1999).

C. The District Court And The Sixth Circuit Denied Habeas Relief

Moore filed a petition for a writ of habeas corpus, raising 25 grounds for relief. Pet. App. 29. As is relevant here, Moore alleged that he received ineffective assistance of counsel during mitigation. *See* Pet. App. 37-46. Over the State's

objection, the district court granted Moore's motion for discovery, and he took depositions of his trial attorneys, mitigation specialist, and expert witness. *See* Pet. App. 141. After discovery, the district court granted a joint motion to expand the record to include evidence obtained through discovery. *Id*. The district court conditionally granted the writ as to ineffective assistance of counsel and improper jury instructions at Moore's sentencing. Pet. App. 133. A panel of the Sixth Circuit Court of Appeals reversed, denying habeas relief on all grounds. Pet. App. 134.

1. The Sixth Circuit rejected Moore's ineffective-assistance claim. Pet. App. 144-49. It initially noted that the district court had granted the petition after considering additional evidence not before the state courts in violation of *Cullen v. Pinholster*, 563 U.S. 170 (2011). Pet. App. 140-44. But it held that because the state courts had rejected Moore's ineffective-assistance claim on the merits, "review under § 2254(d)(1) [was] limited to the record before the state court when it ruled on the merits." Pet. App. 140-41 (citing *Pinholster*, 563 U.S. 170 at 180-81).

The Sixth Circuit also rejected Moore's argument that the State had waived *Pinholster's* limitations by jointly moving with the petitioner to expand the record. It initially held that even if the state had waived the limitation of § 2254(d)(1) to the state-court record, the standards in § 2254(d)(1) are "binding on federal courts" and may not be waived or altered by stipulation of the parties. Pet. App. 142-43. In the alternative, the court held that the State had not waived objection to consideration of newly submitted evidence. Pet. App. 143-44.

2. At Moore's request, the Sixth Circuit ordered additional briefing on the effect of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), *see* Pet. App. 144, which for the first time permitted claims of ineffective assistance of postconviction counsel to serve as cause and prejudice that will, in some instances, excuse the default of an ineffective-assistance-of-trial-counsel claim, 132 S. Ct. at 1320-21. The court rejected Moore's argument that despite the limitations imposed by *Pinholster*, *Martinez* allows a federal court to consider new evidence in support of a claim adjudicated on the merits in state court. Pet. App. 144. The Sixth Circuit held that "*Martinez* is inapplicable to [Moore's] case." *Id.* *Martinez*, the Sixth Circuit explained, allows factual development of a claim of ineffective assistance of trial counsel where such a claim was *procedurally defaulted* in state court because of ineffective assistance of counsel in a collateral proceeding. *Id.* *Martinez* was inapplicable to Moore's situation, the Sixth Circuit reasoned, because he had preserved his ineffective-assistance claim. *Id.*

3. Considering only the evidence before the Ohio courts, the Sixth Circuit held that the state court reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in concluding that Moore's trial counsel did not provide ineffective assistance in presenting his mitigation expert, Dr. Chiappone. Pet. App. 144-49. The court reasoned that, on the trial record, "[w]e do not know if Moore's counsel failed to prepare Dr. Chiappone adequately, failed to ask him what Moore had told him, or anything of the sort. Nor do we know if they undertook a thorough preparation. There is no evidence either way." Pet. App. 145.

Alternatively, the Sixth Circuit found that Dr. Chiappone's testimony—though it undercut his residual doubt theory at the guilt phase—was not prejudicial to his *mitigation* case. Pet. App. 147; *see also* Pet. App. 146. It noted that the "mitigation evidence in favor of Moore was not strong." Pet. App. 14. And it concluded that "the Ohio Supreme Court was not objectively unreasonable in holding that Moore was not prejudiced." *Id.*

Moore filed a petition for a writ of certiorari in which he argued, among other things, that the Sixth Circuit erred by failing to hold its decision until this Court decided *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Petition, *Moore v. Robinson*, No. 13-6519. He asked this Court to vacate the decision and remand with instructions to reconsider in light of *Trevino*. *Id.* The Court instead denied Moore's petition. *Moore v. Robinson*, 134 S. Ct. 693 (2013).

D. The District Court And Sixth Circuit Denied Moore's 60(b) Application For Reopening

Following the denial of his petition for a writ of certiorari, Moore filed a Fed. R. Civ. P. 60(b) application for reopening in the district court. In his motion, he argued that reopening was warranted in light of this Court's decision in *Trevino*. The district court denied his motion, Pet. App. 6 and 18, and the Sixth Circuit affirmed, Pet. App. 3. As it had previously, the appellate court held that Moore did not default his ineffective-assistance-of-counsel claim. *Id.* It therefore concluded that "*Trevino* has no effect on our prior" decision. *Id.* Judge Merritt dissented, writing that he would have granted habeas relief. Pet. App. 3-4.

Moore's petition for a writ of certiorari challenges the Sixth Circuit's decision affirming the district court's denial of his Rule 60(b) motion for relief from judgment, and again argues that relief is warranted in light of *Trevino*. Pet. 7-14.

REASONS FOR DENYING THE WRIT

I. MOORE'S PETITION REPEATS ARGUMENTS THAT WERE RAISED IN HIS PRIOR CERT PETITION

Moore's petition for a writ of certiorari does not identify any uncertainty about the standard applicable to Fed. R. Civ. P. 60(b)(6) motions for relief from judgment. Instead, his argument is best understood as a routine complaint that the Sixth Circuit applied the relevant standard incorrectly. *See* Pet. 23-26. His claimed split of authority is similarly unworthy of review: None of his cited decisions establish a conflict over the standards that apply to a Rule 60(b)(6) motion.

The standards applicable to a Rule 60(b) motion for relief from judgment are well-established. Relief is warranted under the rule only in a handful of specifically identified circumstances. As is relevant here, the "catch-all" provision of Rule 60(b)(6) states that a court may grant a motion for "any other reason justifying relief." *See* Fed. R. Civ. P. 60(b)(6); Pet. 2. But the "any other reason" language of the catch-all provision is limited; relief under that provision "requires a showing of 'extraordinary circumstances.'" *Gonzales v. Crosby*, 545 U.S. 524, 536 (2005). Such circumstances will rarely exist in the habeas context. *Id.* "[I]ntervening developments in the law by themselves" will also "rarely constitute the extraordinary circumstances required for relief under [the rule]." *Agostini v. Felton*, 521 U.S. 203, 239 (1997).

A party cannot demonstrate the extraordinary circumstances necessary for reopening when that party could have raised his or her claim by way of appeal instead. The Court has emphasized that a Rule 60(b) motion may not be used as a substitute for appeal. *See Polites v. United States*, 364 U.S. 426, 431 (1960); *see also Ackermann v. United States*, 340 U.S. 193, 198-202 (1950). The circuit courts of appeal universally apply this well-settled rule. *Lubben v. Selective Service Systems Local Board*, 453 F.2 645, 651 (1st Cir. 1972); *Eutectic Corp v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979); *Martinez-Mcbean v. Gov't of V.I.*, 562 F.2d 908, 911 (3d Cir. 1977); *Aikens v. Ingram*, 652 F.3d 496, 502 (4th Cir. 2011) (en banc); *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 356 (5th Cir. 1993); *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 386 (6th Cir. 2001); *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 606-07 (7th Cir. 1986); *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986); *Title v. United States*, 263 F.2d 28, 31 (9th Cir. 1959); *Morris v. Adams-Millis Corp.*, 758 F.2d 1352, 1357 (10th Cir. 1985); *Parks v. U.S. Life & Credit Corp.*, 677 F.2d 838, 840 (11th Cir. 1982); *Salazar v. District of Columbia*, 633 F.3d 1110, 1121-22 (D.C. Cir. 2011).

The Sixth Circuit applied this settled law and performed the proper Rule 60(b)(6) analysis, Pet. App. 1-3, despite Moore's claim otherwise, *see* Pet. 23. It considered whether Moore had established the requisite extraordinary circumstances necessary to justify relief, and concluded that he had not. Pet. App. 3. That decision was correct. Among other things, Moore's motion was not just a *substitute* for an appeal; it was an attempt to obtain a *second* appeal.

In his petition for a writ of certiorari, Moore claims that the courts below erred because they refused to reconsider their earlier denial of his habeas petition in light of this Court's decision in *Trevino*. Pet. 11-12. He raised similar arguments in his earlier petition for a writ of certiorari, however. *See* Petition, *Moore v. Robinson*, No. 13-6519. There, too, he claimed that he was entitled to relief because the Sixth Circuit had failed to address this Court's decision in *Trevino*. *Id.* Pointing to other cases that the Court had vacated and remanded with instructions to reconsider in light of that decision, Moore's earlier petition requested that the Court do the same in his case. *See id.* at 24. The Court denied his request. *Moore v. Robinson*, 134 S. Ct. 693 (2013).

Moore's current petition seeks the same relief that he was previously denied. He again asks the Court to "grant, vacate, and remand to the Sixth Circuit" for further consideration of *Trevino*. *See* Pet. 31. But repetition of arguments that not only could have been raised in a prior appeal, but *were in fact raised*, shows that the Sixth Circuit was correct when it held that Rule 60(b)(6)'s extraordinary circumstances requirement had not been satisfied. Rather than undermine the Sixth Circuit's reliance on the law-of-the-case doctrine, *see* Pet. App. 3, Moore's repetition of the same arguments that he made in his earlier appeal reinforce that aspect of the appellate court's decision. His repetition of claims that have already been raised and rejected also calls into question whether he should now even be permitted to appeal, or whether his claim should be dismissed as an improper challenge to the denial of permission to file a second-or-successive petition. *See*

Gonzalez, 545 U.S. 531-32 *and* 28 U.S.C. § 2244(b)(3)(E) (prohibiting the appeal of the denial of authorization to file a second-or-successive petition).

Additionally, although Moore now takes issue with the Sixth Circuit's analysis, he did not raise similar objections in the district court. The district court noted that Rule 60(b) relief is warranted only in extraordinary circumstances and that an application for reopening is not a substitute for appeal. Report and Recommendations, Doc. 183, PageID#11020-22. Moore at the time "agree[ed] that the recited standard for granting a motion for relief from judgment [was] correct." Pet. App. 7.

Moore is wrong when he suggests that the Sixth Circuit's Rule 60(b) analysis is contradicted by this Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017). *See* Pet. 18-23. In *Buck*, the Court assumed that *Martinez* and *Trevino* applied to the claims at issue and held that any argument to the contrary had been waived. 137 S. Ct. at 780. It did not, as Moore now appears to suggest, Pet. 18-23, hold that those decisions by themselves provide the basis for 60(b) relief. Instead, the Court *explicitly* "reach[ed] no broader determination concerning the application of these cases." *Buck*, 137 S. Ct. at 780. The Court also did not significantly modify Rule 60(b)(6)'s extraordinary circumstances test. It simply held that the Fifth Circuit had erred in its application of that test. *Id.* at 777-79.

Finally, Moore's claimed split of authority also fails to hold up under scrutiny. Most of the cases that he cites are irrelevant to the question presented here. For example, despite Moore's statement to the contrary, *Canales v. Stephens*,

765 F.3d 551 (5th Cir. 2014), *did not* involve "a 60(b)(6) motion premised upon *Martinez* and *Trevino*." *Compare* 765 F.3d 551 *with* Pet. 17. Two of the other decisions he cites likewise did not involve a Rule 60(b)(6) motion. *See Sasser v. Hobbs*, 743 F.3d 1151 (8th Cir. 2014) *and Fairchild v. Trammell*, 784 F.3d 702 (10th Cir. 2015). As for those decisions that *did* involve such a motion, *see* Pet. 24, they applied the same "extraordinary circumstances" standard as the Sixth Circuit. Two reached a different result for factual reasons. *See Satterfield v. DA Phila.*, 872 F.3d 152, 158-62 (3d Cir. 2017) and *Hall v. Haws*, 861 F.3d 977, 987-88 (9th Cir. 2017). But two of the cases that Moore now cites applied the same law as the Sixth Circuit *and* reached the same result: They too denied Rule 60(b) relief. *See* Pet. 24 (citing *Williams v. Kelley*, 854 F.3d 1002, 1009 (8th Cir. 2017) *and Tharpe v. Warden*, No. 17-14027-P, 2017 U.S. App. LEXIS 18735, *8 (11th Cir. Sept. 21, 2017).

II. *MARTINEZ* AND *TREVINO* ARE INAPPLICABLE BECAUSE MOORE'S INEFFECTIVE-ASSISTANCE CLAIMS WERE NOT PROCEDURALLY DEFAULTED

Even if the Court were inclined to accept Moore's invitation to address whether or how *Martinez* and *Trevino* apply in Ohio, this case would provide a poor vehicle to consider that question. By their own terms, those decisions are inapplicable here. *Martinez* serves only to excuse certain procedurally defaulted ineffective-assistance-of-trial-counsel claims. 132 S. Ct. at 1320. *Trevino* simply extended the reach of that decision to excuse the default of ineffective-assistance claims whenever a State "denies a meaningful opportunity" to raise that claim on direct appeal. 133 S. Ct. at 1921. Yet Moore did not default his ineffective-assistance-of-trial-counsel claim; he preserved it.

In his direct appeal, Moore raised the same claim that he raised in his petition for a writ of habeas corpus. He argued that his trial counsel provided ineffective assistance during mitigation. *State v. Moore*, 689 N.E.2d 1, 14-15. The Ohio Supreme Court rejected that claim, holding that Moore had not demonstrated "a reasonable probability that, were it not for counsel's errors, the result of the trial court would have been different." *Id.* at 15 (citation omitted).

It was the Ohio Supreme Court's rejection of Moore's claim on the merits that led the court below to conclude that neither *Martinez* nor *Trevino* applies here. Pet. App. 2-3. Although the Sixth Circuit did not determine whether those decisions apply to cases that arise in Ohio, it held that, even assuming that the decisions do apply, it would not matter. That is because "Moore did not default his ineffective assistance of counsel claim on collateral review in the state courts." Pet. App. 3. Thus, the Sixth Circuit correctly held, neither decision would reach claims, like Moore's, that were rejected on the merits in state court. Pet. App. 3. (Confirming that this case provides a poor vehicle to address Moore's question presented, Moore cannot demonstrate the extraordinary circumstances necessary to justify reopening if *Martinez* and *Trevino* do not apply. "'[A] good claim or defense' is a precondition of Rule 60(b)(6) relief." *Buck*, 137 S. Ct. at 780 (quoting 11 Wright & Miller, Federal Practice and Procedure §2857).)

In his petition, Moore does not dispute that he raised an ineffective-assistance-of-counsel claim on direct appeal; he simply argues that the courts below should have considered evidence that was developed in federal habeas proceedings

and that was never presented in state court. *See* Pet. 27. As he did in his prior cert petition, Moore suggests that *Martinez* (and by extension *Trevino*) provides a "vehicle" to consider the expanded habeas record. Pet. 9. He is wrong. Neither decision loosened the limits *Cullen v. Pinholster*, 563 U.S. 170 (2011), placed on the introduction of new evidence in habeas proceedings. What Moore asks, therefore, is not that the Court *apply* those decisions, but that it *expand* them. Combined with his sustained focus on the expanded record, *see ex.* Pet. 8, 13, and 16-17, Moore's request reveals that his true objective is to evade the limits that the Court established in *Pinholster*.

Moore cannot find support for his argument in *Wellons v. Hall*, 558 U.S. 220 (2010). *See* Pet. 27-29. That decision is both inapplicable and limited by this Court's subsequent decision in *Pinholster*. First, *Wellons* is distinguishable because it involved a factual and procedural history that is nearly the opposite of the one at issue here. In *Wellons*, the Court reversed an Eleventh Circuit decision that had applied a procedural bar to a claim that had been presented multiple times in state court. *Wellons*, 558 U.S. at 222. In this case, by comparison, the Sixth Circuit did not impose a procedural bar; unlike the Eleventh Circuit in *Wellons*, it held that the claim at issue *had not* been defaulted. Pet. App. 3. Second, even if some of the language in *Wellons* could have been read as permitting a federal habeas court to hold an evidentiary hearing any time a state postconviction court declines to permit further factual development of an already-decided claim, such an interpretation is now precluded by *Pinholster*. *See Pinholster*, 563 U.S. at 181-82 (habeas review is

"limited to the record that was before the state court that adjudicated [a] claim on the merits").

Moore is also incorrect when he suggests that failing to develop additional evidence in postconviction can somehow transform a preserved claim into a defaulted one. *See* Pet. 29-30. He argues that his ineffective-assistance claim was never fully presented in state court because it was raised on direct review, rather than in postconviction. *Id.* But the dissenting opinion below shows why Moore is wrong. Although Judge Merritt wrote in dissent that he would have granted relief on Moore's ineffective-assistance claim, he did not find it necessary to rely on the expanded record to reach that conclusion. Pet. App. 3. Instead, he indicated that the relevant "facts were before the Supreme Court of Ohio on direct appeal" and that the state court had "the sentencing phase errors in the transcript before it." Pet. App. 4. Judge Merritt dissented in Moore's earlier appeal as well, and there too he concluded that one "need look no further than the trial transcript" to see that Moore's claim had merit. Pet. App. 163.

The dissent's repeated reliance on the direct-appeal record does more than undermine Moore's claim that proper review of his claim required consideration of additional evidence. It also shows that Moore's real objection is to the Sixth Circuit's outcome, not its analysis. What he truly seeks is another opportunity to contest whether the Ohio Supreme Court reasonably applied clearly established federal law when it denied habeas relief on his ineffective-assistance claim.

III. THE SIXTH CIRCUIT CORRECTLY APPLIED WELL-SETTLED PRECEDENT WHEN DENYING MOORE'S INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM

Confirming that certiorari is not called for here, Moore's underlying ineffective-assistance-of-counsel claim would not warrant further review even if Rule 60(b)'s other requirements were met. The law applicable to such claims is well-settled. And the Sixth Circuit correctly applied that law when it determined that the Ohio Supreme Court did not unreasonably apply clearly established federal law by rejecting Moore's claim on direct appeal.

A. The Law Governing Ineffective-Assistance Claims Is Well Settled

It is well-established that ineffective-assistance claims have two parts. First, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, a defendant must demonstrate prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* The party bringing an ineffective-assistance claim must also "overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry,* 540 U.S. 1, 8 (2003) (per curiam).

In the habeas context, *Strickland*'s already deferential standard of review is made "doubly" so. *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011). Petitioners like Moore must first "surmount[] *Strickland*'s high bar," *Padilla v. Kentucky*, 559

U.S. 356, 371-72 (2010), for proving both deficient performance and actual prejudice, *Strickland*, 466 U.S. at 687. They must then show that there is no "reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 131 S. Ct. at 788. To do so, they must show that a state court's decision was "an *unreasonable* application of federal law," which is different from "an incorrect application." *Williams v. Taylor*, 529 U.S. 362, 410-11 (2000).

Moore does not suggest that the Sixth Circuit failed to apply this controlling standard. *See* Pet. 19-36. He does not even allege that that it applied it *incorrectly*. Even if he did, his argument would still amount to nothing more than error correction. That, however, is simply "outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of the certiorari." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013).

B. Moore's Ineffective-Assistance Claim Lacks Merit

Moore's ineffective-assistance claim relies almost entirely on evidence that was introduced for the first time in federal court. *See* Pet. 7-9 and 21-23. But, as discussed above, *Pinholster* limits the available evidence to that which was before the state court. 563 U.S. 170 at 180-81. The Sixth Circuit's original opinion properly applied established law when it concluded that, in light of the evidence presented in state court, "the Ohio Supreme Court was not objectively unreasonable in holding that Moore was not prejudiced" by his trial counsel's performance during mitigation. Pet. App. 147. It had no reason to revisit that conclusion in light of Moore's Rule 60(b) motion. Pet. App. 3.

Even if Moore's new evidence could now be considered, he still would not be able to show that he is entitled to relief. His claim focuses on the ineffectiveness requirement of *Strickland*'s first prong, but ignores the prejudice requirement of its second. The Ohio Supreme Court, however, rejected Moore's claim on *both* grounds, holding that he had not demonstrated "'a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.'" *Moore*, 689 N.E.2d at 15.

Granting Moore's requests—for relief from judgment and to consider the expanded record—would not change the fact that he has not shown, and still cannot show, that he is entitled to relief. As the Sixth Circuit previously held, "[t]he mitigation evidence in favor of Moore was not strong." Pet. App. 147. Among other things, his evidence of a troubled background was weak; there was no evidence of parental abuse or neglect, and no indication of low intelligence. *Id.* Moreover, substantial evidence illustrated that Moore intentionally shot the victim, including, for example, testimony from an accomplice that he had laughed afterward and asked, "Did you see his dome get shot off?" *Id.* Even assuming that his counsel's performance was lacking, and even accounting for the new evidence developed in federal court, Moore still offers no compelling argument about how he was prejudiced as a result.

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

/s/ Eric E. Murphy
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL PETERSON
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Respondent
Charlotte Jenkins, Warden