CAPITAL CASE

No. 17-6239

In the Supreme Court Of the United States

LEE EDWARD MOORE,

***Petitioner*,**
v.

CHARLOTTE JENKINS, Warden,

Respondent.

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

REPLY IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE - QUESTIONS PRESENTED

In its previous ruling, the Sixth Circuit relied on the Fifth Circuit's restrictive interpretation of *Martinez v. Ryan*, 566 U.S. 1 (2012), and refused to consider the stipulated expanded record offered to show post-conviction counsel's ineffectiveness and, consequently, a record that demonstrated cause and prejudice for any default of the ineffectiveness mitigation claims. The Sixth Circuit declined Petitioner's request that the court wait for this Court's ruling in *Trevino v. Thaler,* 133 S.Ct. 1911 (2013), which invalidated the Fifth Circuit's restrictive interpretation of *Martinez.* The Sixth Circuit applied the restriction invalidated in *Trevino,* and rejected Petitioner's bid to await this Court's *Trevino* ruling. Thereafter, the Sixth Circuit relied on the earlier ruling as law of the case – even though it refused to await *Trevino* and it acknowledged that *Trevino's* application was an "open" question within the Sixth Circuit. This manipulation of the law of the case doctrine raises the following question:

1. When a *subsequent* United States Supreme Court case expands the doctrine of cause and prejudice to cover a default that occurred in this case and represents a substantial change in the law, does a federal court abuse its discretion when it relies on the earlier decision and applies "law of the case" to avoid the application of the *subsequent* United States Supreme Court case?

In looking at the 60(b)(6) requirements, the Magistrate found that Petitioner had been diligent in pursuing the 60(b) remedy and that he presented a colorable claim of *Trevino* ineffectiveness regarding a meritorious ineffective assistance of trial counsel claim. Rather, than consider the "extraordinary circumstances" test from *Liljeberg* and *Buck*, the courts below simply stopped with law of the case. This singular approach violates the wide ranging inquiry due in a 60(b) circumstance where a petitioner has acted with diligence and presents a colorable claim. The Sixth Circuit's disposition of this issue raises the following question:

2. When there has been a finding of a habeas petitioner's diligence in developing and presenting the 60(b) motion, and a finding that the habeas petitioner has established the ineffective assistance of post-conviction counsel, does a federal court err when it fails to apply the *Buck* test?

The State of Ohio argued and the Ohio Supreme Court held that Petitioner's trial ineffectiveness claim was speculative, which would require consideration of off-the-record evidence. Petitioner has always acted with diligence, and he has presented a colorable claim of the ineffective assistance of post-conviction counsel. However, the Sixth Circuit refuses to apply *Trevino* in these circumstances. The Sixth Circuit's disposition of this issue raises the following question:

3. What interplay exists between *Martinez/Trevino*, when a diligent habeas petitioner presents a colorable post-conviction ineffectiveness claim, with *Williams v. Taylor*, 529 U.S. 420 (2000), *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), superseded by *Williams v. Taylor*, 529 U.S. 420 (2000) on other grounds; *Cone v. Bell*, 556 U.S. 449 (2009) and *Wellons v. Hall*, 558 U.S. 220 (2010)?

REPLY IN SUPPORT

Accuracy should never fall prey to advocacy. Whether intentional or a product of Respondent's counsel being new to the case, Respondent's false narrative should not serve as a basis to deny the a writ of certiorari in this case. Rather, this Court must premise any ruling on the facts and procedural history of this case – not on "alternative facts" suggested by a party. The record supports Petitioner's factual and procedural accountings, and Petitioner invites this Court to request the record to confirm.

Respondent also fails to oppose or answer Petitioner's first cert question;[1] the Sixth Circuit applied law of the case doctrine where this Court subsequently issued the modifying precedent of *Trevino v. Thaler,* 133 S.Ct. 1911 (2013). Thus, the Sixth Circuit applied law of the case to matters of law resolved in *Trevino,* but never considered by the district court or Court of Appeals. This constitutes waiver of arguments. Sup Ct. R. 15.2; *Oklahoma v. Tuttle*, 471 U.S. 808, 816 (1985); *Alabama v. Shelton*, 535 U.S. 654 (2002). Petitioner's proposition that the Sixth Circuit's refusal to consider *Trevino* and *Agostini v. Felton*, 521 U.S. 203 (1997) in the 60(b) context remains unopposed.

Respondent also waived other significant points. The Magistrate found two critical facts in Petitioner's favor: 1) he diligently pursued the 60(b) remedy; and 2) Petitioner presents a colorable claim of post-conviction counsel's ineffectiveness for failing to investigate and present the evidence that Petitioner and Respondent presented to the district court in the stipulated expanded record. App. 17. Long-standing Sixth Circuit precedent states, "a party shall file objections [to a Magistrate's Report] with the district court or else waive [its] right to appeal."

[1] This is identical to what happened below. Where in spite of Respondent not defending the district court's application of law of the case, the court affirmed on that basis.

United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981). This Court endorsed the Sixth Circuit's strict waiver rule in *Thomas v. Arn*, 474 U.S. 140 (1985). Therefore, Petitioner stands before this Court having exercised the requisite diligence and possessing a substantial ineffective assistance of counsel claim.

Petitioner's case is very close. A Magistrate, a District Court Judge, and a Dissenting Circuit Judge all believed that even applying AEDPA deference – Petitioner was entitled to habeas relief. A Majority of Sixth Circuit Judges reversed concluding that the Ohio Supreme Court's ruling was reasonable. In so doing, those Judges relied on a finding rebutted by the sworn testimony of trial counsel that was contained in the expanded record. *See* Brief in Opposition ("BIO") p. 6.[2] Respondent does not contest that the stipulated record rebuts the illusory reasons used by those judges. Nor does Respondent contest the Sixth Circuit's refusal to consider the evidence supporting the relief granted by the district court that directly relates to trial counsel's mitigation ineffectiveness. There is no dispute that the Sixth Circuit's refusal to consider this supporting evidence was the direct result of post-conviction counsel's ineffectiveness, i.e., failure to develop the supporting evidence contained in the stipulated expanded record. This is so despite the fact that Respondent originally agreed to the expansion of the record.

A. Petitioner Seeks An Initial Evaluation Of The Merits of His Rule 60 Motion. – The Sixth Circuit's Ruling Effectively Renders *Trevino* Inapplicable To Any Rule 60 Analysis And Renders *Agostini* A Nullity.

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[2] Respondent paints an incomplete picture of the Sixth Circuit's ruling. Part of the Judges' analysis was the potential that Dr. Chiappone perjured himself on the stand, when he could have "made it up on the spot." (App. 145). Thus, the Sixth Circuit denied an IAC claim on the basis that a defense expert presented perjured testimony to a jury. Evidence that "cooked" Petitioner. R. 176-3 Deardorff Dep. p. 89 PageID# 10604.

1. The Sixth Circuit Applied Law of the Case to a Holding It Had Not yet Rendered, Thus Foreclosing Proper Application of *Trevino* and *Agostini*

Respondent ignores a contradiction in the Sixth Circuit's opinion. The Sixth Circuit firmly held that it has not yet decided the contours of *Trevino* in Ohio. App. 3 ("This court has not yet determined whether *Trevino* applies to cases that arise in Ohio."). It has stated the same on other occasions. *See also Landrum v. Anderson*, 813 F.3d 330, 336 (6th Cir. 2016); *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014), *McGuire v. Warden*, 738 F.3d 741, 751-52 (6th Cir. 2013). If it is an *open* question, there can be no previous ruling in Petitioner's case, otherwise the question would be *closed*.

When Petitioner's case was previously before the Sixth Circuit, this Court had yet to decide *Trevino*. The Sixth Circuit ignored Petitioner's request to await this Court's ruling. *Trevino* issued **after** the Sixth Circuit decided Petitioner's case. Consequently, the Sixth Circuit could not have considered the implications of *Trevino* in Petitioner's circumstances, and indeed, recognized it herein as an open question. Nevertheless, the Sixth Circuit applied law of the case to foreclose application of *Trevino,* having declined to wait for this Court's ruling during the underlying merits appeal. That is, it applied "law of the case" to a ruling it had not rendered. "[T]the doctrine [of law of the case] posits that when a court decides upon a **rule of law**, that decision should continue to govern **the same issues** in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618 (1983) (emphasis added). As the Sixth Circuit has not yet addressed *Trevino* in the context of Petitioner's facts and the Ohio scheme, and recognized the same, law of the case cannot now foreclose consideration of Petitioner's Rule 60 motion, as erroneously held by the Sixth Circuit.

Indeed, this Court's issuance of controlling authority **after** the Sixth Circuit ruled on the merits of the habeas petition, underscores the Sixth Circuit's improper boot-strapping of the law

of the case doctrine to foreclose any consideration of *Trevino* in the context of the evidence submitted in support of Moore's Rule 60 motion. The implications of this important question are significant. The ruling below eviscerates the supremacy of this Court's precedent; by using law of the case to neuter, this Court's binding precedent. This Court recognized in *Agostini*:

> Nor does the 'law of the case' doctrine place any additional constraints on our ability to overturn *Aguilar*. Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. The doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.

Id. at 236 (citations and internal quotes omitted). Thus, the Sixth Circuit's ruling renders both *Agostini* and *Trevino* a nullity in the Rule 60 context. It improperly truncated that consideration of an appropriate Rule 60 motion by applying law of the case in violation of *Agostini*.

Respondent incorrectly states that, "Moore's motion was not just a *substitute* for an appeal; it was an attempt to obtain a *second* appeal." BIO p. 9. Respondent argues in effect that Petitioner should have raised *Trevino* before it issued. First, it ignores that Petitioner informed the Sixth Circuit that this Court had accepted for review *Trevino* and asked the Sixth Circuit to await this Court's ruling. That Court declined the invitation. Respondent fails to explain how Petitioner was to raise *Trevino* before the ruling existed.

Moreover, Petitioner's Rule 60 motion was neither a substitute for appeal nor a second appeal. Rather, it is an attempt to get the district court to consider the record that should have been, but was not developed by post-conviction counsel - a failure that led to reversal of the relief granted in the habeas proceeding. No court has considered that record or the merits of Moore's Rule 60 motion despite Petitioner's repeated efforts, and in apparent contravention of this Court's rulings in *Trevino* (excusing the default in developing that record) and *Agostini* (prohibiting application of law of the case to a Rule 60 motion in the circumstances of this case).

Indeed, the Sixth Circuit's refusal to do follow that precedent has led to the court rendering findings or conclusions directly contradicted by that stipulated record.[3]

2. Petitioner's Inclusion Of The *Trevino* Argument In His Cert Petition Regarding The Initial Habeas Ruling Has No Effect On His Rule 60/*Trevino* Argument Here

Respondent notes that Petitioner raised a *Trevino* argument in his previous petition for writ of certiorari regarding the reversal of relief granted in his habeas proceeding. This Court denied the petition in that case. BIO p. 10. To the extent, Respondent suggests that Petitioner's previous cert petition has some preclusive effect here, he is wrong. A simple order denying a petition for certiorari reflects nothing on this Court's view of the merits. It is a maxim that "the denial of writ of certiorari imports no expression of opinion on the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923); *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995). Respondent provides no basis to abandon this long-standing authority.

Moreover, the question raised here is how federal courts should address *Trevino* in the context of a Rule 60 motion, while being faithful to *Agostini's* restraint on the application of law of the case. That question was not addressed in the appeal of the habeas ruling.

Respondent's argument also ignores that Petitioner's Rule 60 arguments could not have been made any earlier.[4] In its original holding, the Sixth Circuit *incorrectly* predicted that *Martinez* would not be extended by this Court to apply in states like Ohio. It used that error to

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[3] See Petition for Writ of Certiorari, at pages 14-15 and 16-17 for a discussion of this point.

[4] Respondent has taken inconsistence positions before this Court. The Sixth Circuit holds the failure to pursue cert against habeas petitioners in the context of the court's 60(b) diligence inquiry. *Sheppard v. Robinson*, 807 F.3d 815, 821 (2015) (affirming the denial of 60(b) discussing habeas petitioner's failure to raise in a cert petition a *Martinez* argument, when *Martinez* issued a month before cert petition was filed in the original habeas appeal). This Court should take judicial notice that the same attorney herein successfully argued in his BIO at p. 13 in *Sheppard v. Robinson*, Case No. 15-9638, that the failure to include *Martinez* in the original habeas cert exhibited a lack of diligence pursuant to *Gonzales v. Crosby*, 545 U.S. 524, 537 (2005). This Court denied cert. *Sheppard v. Robinson*, 137 S.Ct. 1201 (2017). Respondent, having successful manufactured a procedural ruling on a 60(b) regarding diligence for failing to raise in a cert application, should not be permitted to take an inconsistent position herein.

refuse to consider a record that post-conviction counsel failed to develop, a record that fully supports the claim on which he received habeas relief. As it happens, this Court's holding in *Trevino* exposed the Sixth Circuit's error. Nevertheless, the court below compounds its error by refusing to consider *Trevino* in the context of the record submitted in support of Morre's rule 60 Motion. In so doing, it constricts the application of *Trevino* and *Aogostini* in a manner never envisioned by this Court.

The courts below have found that Petitioner has acted diligently at all times – and Respondent never objected to those findings. Petitioner simply asks that the federal courts act consistent with *Trevino* and *Agostini* and consider the record that should have been developed by post-conviction counsel - a failure that led to his death sentence. No court has considered that record despite Petitioner's repeated diligent efforts. In short, the Sixth Circuit's refusal to comply with this precedent resulted in it rendering findings or conclusions directly contradicted by sworn testimony contained in a stipulated record submitted in support of the Rule 60 motion. Petitioner simply wants a first, full and fair consideration of his claim.

3. Petitioner Seeks Review Of The Sixth Circuit's Refusal To Conduct Any Analysis Required By Rule 60 Under The Rubric Of Law Of The Case

Respondent seems to suggest that Petitioner has committed some waiver for failing to object to the District Court's pronouncement of the extraordinary circumstances test. BIO p. 11. While it is true that Petitioner did not contest the general description of the 60(b) test in the courts below, those courts improperly truncated or avoided applying the test by dismissing the Motion through the misapplication of law of the case doctrine, an application that is directly contrary to the holding in *Agostini*. Therefore, even though the courts below found Petitioner diligent (App. 17), that Petitioner presented a substantial post-conviction ineffectiveness claim (*Id.*), that the State invited a ruling that the claim could only be fully raised in state post-

conviction, and that he was presenting a colorable trial ineffectiveness claim, none of that mattered to the court below. In the mind of the Sixth Circuit, law of the case trumped all of those extraordinary circumstances. That action demonstrates the Sixth Circuit's core error – it avoided the extraordinary circumstances plenary analysis mandated by Rule 60 and *Agostini* in favor of the rote application of the law of the case doctrine.

Respondent mischaracterizes Petitioner's argument by suggesting incorrectly that he contends *Trevino* alone demonstrates "extraordinary circumstances." BIO p. 11. To the contrary, Petitioner has never argued that *Trevino* alone satisfied the extraordinary circumstances test. Rather, Petitioner as argued throughout the proceedings below "extraordinary circumstances" were demonstrated by all of the following: (1) the Sixth Circuit's previous refusal to consider *Trevino's* application to Petitioner's case; (2) the substantial body of evidence demonstrating trial counsel's utter failure to prepare for the "devastating testimony" offered by their own expert; (3) the uncontradicted affidavit of post-conviction counsel, detailing his failure to develop that same record in state post-conviction; (4) the finding of the Ohio Supreme Court, invited by the State of Ohio, that Petitioner's IAC claim relating to failing to properly prepare for their own experts testimony was "speculative" because no record had yet been developed; (5) the Sixth Circuit's reversing relief on that IAC mitigation claim on a factual basis that was directly contradicted by that record; and (6) the undisputed finding that Petitioner was diligent in seeking Rule 60 relief. However, that review has never occurred due to the application of the law of the case doctrine.

Respondent wrongly suggests that the Sixth Circuit conducted the required 60 (b) extraordinary circumstances test. BIO p. 9. That simply is not accurate. While the Sixth Circuit indicated that Rule 60(b)(6) required application of the extraordinary circumstances test, it ruled

that law of the case **alone** prevented the satisfaction of the extraordinary circumstances test. App. 2-3. Rather than endorsing such a narrow construct as applied by the Sixth Circuit, this Court requires federal courts to engage in a thorough and wide-ranging examination related to the existence of "extraordinary circumstances." *Buck v. Davis*, 137 S.Ct. 759, 778 (2017). That has never happened in Mr. Moore's case. Rather, in Petitioner's case, the Sixth Circuit simply applied law of the case and nothing else. As noted by the Dissent, the Panel Majority simply "ignored" the strength of the merits of the underlying claim.

Respondent argues this is mere error correction. BIO p. 8. To the contrary, The Questions Presented would require this Court to resolve a conflict among the Circuits on the same questions. The Questions presented also ask this Court to address a ruling by the Sixth Circuit that dramatically undercuts this Court's prior holdings in *Trevino* and *Agostini,* and, consequently, demonstrates that the Sixth Circuit decided these important questions of law in a manner that conflicts with this Court's authority. Sup. Ct. R. 10(c). These important and profound questions merit review by this Court. The Sixth Circuit is ignoring this Court's precedent and rendering it a nullity. It is not too much to ask that the Sixth Circuit get it right in a capital case.

4. There Is A Distinct Conflict Among The Circuits Regarding The Application Of *Trevino*

The conflict of authority frames the improper application of law of the case. Respondent argues that "None of the cases cited by Petitioner establish a conflict over the standards that apply to a Rule 60(b)(6) motion." BIO p. 8. Petitioner has not argued a conflict in the application of Rule 60 standards. Rather, the conflict resides in the manner in which the Sixth Circuit considers *Trevino* in the context of Rule 60 while ignoring *Agostini's* limitation in application of law of the case: "The doctrine does not apply if the 'court is convinced that [its

prior decision] is *clearly erroneous and would work a manifest injustice.'" Agostini,* 521 U.S. at 236 (emphasis added).

In his initial brief, Petitioner demonstrated the conflict between the Sixth Circuit's use of law of the case to foreclose merits consideration of a *Trevino* Rule 60 motion and the rejection of that rule in favor of consideration of the Rule 60 merits in cases where *Trevino* is raised. *Compare* holding in *Moore* with *McMasters v. United States*, 260 F.3d 814, 818 (7th Cir. 2001); *Wong v. Wells Fargo Bank N.A.*, 789 F.3d 889, 898 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 507, 193 L. Ed. 2d 398 (2015); *Canales v. Stephens*, 765 F.3d 551, 567 (5th Cir. 2014) ((remanding for proper assessment of the denial of a 60(b)(6) motion premised upon *Martinez* and *Trevino*); *Sasser v. Hobbs*, 743 F.3d 1151 (8th Cir. 2014) (remanding for a *Trevino* hearing); *Fairchild v. Trammell*, 784 F.3d 702 (10th Cir. 2015) (recognizing application of *Trevino* where no meaningful opportunity to develop record on direct appeal).[5] *See* Petition for Writ of Certiorari pp. 16-17. Given this disparity in the handling of the *Trevino*/Rule 60 issue between the Sixth and other Circuits, intervention and resolution of that conflict by this Court is critical.

B. Petitioner's Post-Conviction Counsel Failed To Develop Evidence On A Claim The State Of Ohio Successfully Argued To The Ohio Supreme Court Had To Be Raised In Post-Conviction.

Respondent next argues that *Trevino* does not apply because there was no default, because the state courts decided the merits of his IAC mitigation claim. BIO p. 12-13. Respondent overlooks the undisputed record showing that Petitioner's post-conviction counsel defaulted in developing the record that was necessary to support that claim. Failure to develop a factual basis for a claim constitutes a default. As noted in the Petition, "there was no reason 'to

[5] Respondent contends that the division of authority is not as pronounced because the authority relied on is not completely raised in the 60(b) context. BIO p. 12. However, the Sixth Circuit relied upon those Sister Circuits to wrongly restricted *Martinez*. Those decisions and that they have been overruled demonstrates that the Sixth Circuit's original decision is modified by the change in the law caused by *Trevino*. Therefore, they do support a split in the Sixth Circuit's refusal to recognize *Trevino* and give it effect – unlike the other Sister Circuits.

distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim.'" *Williams v. Taylor*, 529 U.S. 420, 433, (2000), quoting *Keeney v. Tamayo–Reyes,* 504 U.S. 1, 8 (1992). Indeed, the Sixth Circuit's refusal to consider that record, which Petitioner filed in support of his Rule 60 motion, implicitly recognized the default.

No one disputes the facts regarding the failure to develop the claim relating to trial counsel's neglect to prepare for their own expert's "devastating testimony." Petitioner's post-conviction counsel did nothing to investigate the apparent error, and submit records or affidavits in support of a petition. R. 168-1 (Declaration) PageID# 4580–4583. Nor did he develop any of the record supporting the IATC mitigation claim that Moore has presented in the stipulated expanded record, but not considered by the Sixth Circuit because Petitioner failed to present that record to the state court. Post-conviction counsel conceded that there "was no strategic or tactical reason for not investigating, securing and presenting evidence related to ineffective assistance of trial counsel claims." *Id.* at ¶19, PageID# 4583. This record, which post-conviction counsel failed to develop, and Petitioner filed in support of his Rule 60 motion, fully supports the relief initially granted by the district court that was reversed by the Sixth Circuit. It is fair to conclude that such reversal would not have occurred but for the Court of Appeals refusal to consider that record. *Trevino* excuses Moore's default in developing that record and gives the federal courts authority to now consider that record pursuant to Rule 60. *Agostini,* 521 U.S. at 236.

Respondent does not faithfully characterize the precise ruling by the Ohio Supreme Court regarding the ineffective assistance of trial counsel claim. Respondent ignores that the State of Ohio conceded that Petitioner should raise this claim via Ohio's post-conviction process because:

"the record on appeal is not adequate to support a claim that trial counsel were not properly prepared to present Dr. Chiappone." (State's Direct Appeal Brief, R. 173-1 p. 58, PageID# 7375). The Ohio Supreme Court agreed, noting that Petitioner's arguments on direct appeal were "purely speculative," thereby agreeing that further factual development of the ineffectiveness claim was necessary in state post-conviction. *State v. Moore*, 689 N.E.2d 1, 14 (Ohio 1998).

Respondent's arguments underscore the need to accept cert. No federal court should reward the State for successfully arguing that a claim is speculative and requires off the record evidence, and then argue, after inviting that ruling, that post-conviction counsel's failure to develop that record is irrelevant to a Rule 60 motion under *Trevino* and *Agostini.*

In one fashion, Respondent is correct, "*Trevino* simply extended the reach of [*Martinez*] to excuse the default of ineffective-assistance claims whenever a State 'denies a meaningful opportunity' to raise that claim on direct appeal." BIO p. 12. The Ohio Supreme Court in this case, at the insistence of the State, held that the meaningful opportunity to raise the ineffectiveness claim was in state post-conviction. Yet, Petitioner's post-conviction counsel failed to investigate and present the claim, which the district court found to be colorable. App. 17.

Respondent then mischaracterizes Petitioner's argument as an attempted end run around *Cullen v. Pinholster*, 563 U.S. 170 (2011).[6] Neither 2254(d) nor *Pinholster* prohibit factual development in appropriate circumstances. Respondent's argument to the contrary inappropriately boot-straps or subsumes the ultimate 2254(d)(1) question as the equivalent of the

[6] *Pinholster* should not be read to allow a federal court to rule on a factual question in a manner it knows or should know to be false. A party cannot argue something they know not to be true. A party would be subjected to sanctions, and rightfully so, if they so argue. A federal court should not be exempted from such a requirement. Petitioner's third certiorari question fairly includes this facet.

threshold 60(b) question. *Pinholster* in no way limits availability of relief under Rule 60 in the limited circumstances described in *Agostini.* Nor did it overrule *Agostini.* Yet that is arguably the effect of the Sixth Circuit's ruling here. Again, the application of *Pinholster* or, for that matter 2254(d)(1), is irrelevant to consideration of whether Petitioner can meet his burden under the applicable Rule 60(b) question.

Justice Sotomayor noted the Majority expressly left open the opportunity of later developed evidence by a diligent petitioner. "The majority presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence if he can show cause and prejudice for his failure to present the "new" claim to a state court." *Pinholster,* 131 S. Ct. at 1418 (Sotomayor, J., dissenting). Here, Petitioner's new facts were not properly presented to the state court due to the ineffective assistance of post-conviction counsel. *Trevino* permits consideration of such new evidence where the default is the product of post-conviction counsel's constitutionally deficient performance and the federal courts have found Petitioner to have acted with diligence.

Pinholster does not foreclose a cause and prejudice analysis now required by *Martinez* and *Trevino* where, as here, post-conviction counsel fails even to attempt to develop a record to support a compelling ineffectiveness claim. The whole purpose of those cases was to open up consideration of an undeveloped claim if you can show ineffective assistance of post-conviction counsel. The uncontradicted record in support of the Rule 60 motion demonstrates such ineffectiveness. Simply, *Trevino* does not create an exception to *Pinholster;* rather it simply required the court below to consider evidence of post-conviction counsel's ineffectiveness in failing to develop the IATC mitigation record that is submitted in support of a Rule 60 motion.

Perhaps Respondent's mischaracterization of Petitioner's arguments stems from a misunderstanding of this Court's *Wellons v. Hall*, 558 U.S. 220 (2010) decision. *Wellons* concerned a habeas petitioner that received merits review on direct appeal, then re-raised the issue in post-conviction to supplement the claim with evidence, and the post-conviction court found the claim to be procedurally defaulted. This Court held that the lower court's application of procedural default was improper, that the merits should be considered, and remanded for factual development that Petitioner had been deprived of due to the application of the procedural default by the state court. In Petitioner's circumstance, where the State of Ohio successfully argued that the claim had to be raised in post-conviction – reasonable post-conviction counsel should have investigated and presented such evidence. The failure of post-conviction counsel to develop such evidence is the precise basis upon which this Court premised both *Martinez* and *Trevino* – to correct this type of attorney malfeasance. Under *Agostini,* Rule 60 provides the vehicle to do just that.

Respondent's arguments are internally inconsistent and boil down to this: *Pinholster* cannot be impacted by any decision that comes after it (*Martinez* and *Trevino*), but any decision that came before it (*Wellons* and *Agostini*) must clearly be substantially altered by it or overruled altogether. Petitioner is unaware of such "a heads I win, tails you lose" principle of law. Rather, federal courts must give effect to this Court's precedents and how they inter-relate; as opposed to a patchwork application of principles to justify a result. Otherwise, the efficacy and reach of this Court's authority is limited.

C. Petitioner's IAC Mitigation Claim Has Never Been Meaningfully Based On The Entire Record.

Respondent prematurely argues the underlying merits of the mitigation ineffectiveness claim, but does so while ignoring the record submitted in support of the Rule 60 motion. Neither

court below has considered that record, having terminated the Rule 60 analysis with application of law of the case. Petitioner is simply attempting to have the courts below conduct a proper 60(b)analysis, i.e., thorough and wide ranging examination required by this Court in *Buck v. Davis*, 137 S.Ct. at 777-778. To do that, the district court should be required to determine whether the Sixth Circuit's error in failing to predict *Trevino's* extension of *Martinez,* in light of the entire record submitted in support of that claim and submitted with the Rule 60 motion, warrants reopening of the habeas proceedings for a full and fair consideration of Petitioner's ineffectiveness claim. To reiterate, the district court found that Petitioner has presented plausible claims of both post-conviction IAC and trial counsel mitigation IAC. Moreover, 3 of the 5 jurists reviewing the claim (without consideration of the record submitted with Petitioner's Rule 60 motion) found his claim meritorious. Given that, Petitioner welcomes a review of that record by the courts below. But they so far interjected law of the case to prevent that review.

Finally, Respondent prematurely argues the prejudice component, and contends that failure to prepare for the testimony of Petitioner's only expert, Dr. Chiappone, caused no prejudice. (BIO p. 7). Consideration of this element is likewise premature as neither the district court nor the Sixth Circuit reached that issue. Nevertheless, a full merits consideration of Petitioner's motion would satisfy this component. The prosecutor relied heavily on the district court has characterized as Chiappone's devastating testimony. In addition, the sentencing judge expressly relied on that testimony in imposing a sentence of death. R. 128, pp. 47-48. Petitioner is confident that, once he receives plenary consideration of his Rule 60 motion and the evidence submitted in support thereof, he will meet the prejudice component.

CONCLUSION

For the foregoing and previous stated reasons, this Court should grant Petitioner's Petition and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit. Alternatively, this Court should grant, vacate and remand for a consideration of Petitioner's claims by the Sixth Circuit in a manner in compliance with this Court's precedent.

Respectfully Submitted,

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