

Capital Case

Case No. _____

October Term, 2017

IN THE SUPREME COURT OF THE UNITED STATES

**PERCY HUTTON,
PETITIONER,**

v.

**TIM SHOOP, Warden,
RESPONDENT.**

**On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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**** CAPITAL CASE ****

QUESTION PRESENTED FOR REVIEW

1. The Sixth Circuit denied Mr. Hutton's Rule 60(b) motion on the basis that it was a "second or successive" habeas petition. The question at issue is whether the Sixth Circuit, along with several other circuits, has grossly misinterpreted the Court's precedents with respect to the difference between a Rule 60(b) motion and a "second or successive" habeas petition such that Rule 60(b) motions have lost all function in habeas?

PARTIES TO THE PROCEEDINGS

The Petitioner is Mr. Percy Hutton, an inmate imprisoned at the Chillicothe Correctional Institution.

The Respondent is Mr. Tim Shoop, the Warden of the Chillicothe Correctional Institution. Mr. Shoop is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Percy Hutton respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's decision, *In re Hutton*, No. 16-3724, 2017 WL 6603596 (6th Cir. Dec. 4, 2017), is reproduced at Pet. App. A-1 to A-3. The unpublished *en banc* denial is reproduced at Pet. App. A-4. The unpublished Memorandum of Opinion and Order, *Hutton v. Mitchell*, No. 1:05 CV 2391, 2016 WL3445397 (N.D. Ohio, Jun 23, 2016), is reproduced at Pet. App. A-5 to A-10.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered judgment on December 4, 2017. Mr. Hutton's petitions for rehearing and rehearing *en banc* were denied on January 26, 2018. The Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law."

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Percy Hutton, an Ohio death row inmate, was convicted of aggravated and attempted murder and sentenced to death by a jury in January 1986. Although he maintains his innocence, and the factual predicates purportedly supporting his guilt are illogical, Mr. Hutton was denied relief in state and federal court. Mr. Hutton filed a Petition for Writ of Habeas Corpus in the district court on December 15, 2005. He amended his Petition on June 20, 2011, setting forth thirteen grounds for relief, two of which alleged ineffective assistance of counsel (“IAC”).

I. Ineffective Assistance of Trial Counsel

Mr. Hutton’s IAC claims stem from the fact his counsel failed to investigate and present significant mitigating evidence at trial. Specifically, Mr. Hutton’s trial counsel failed to discover that, because Mr. Hutton was subjected to severe neglect and abuse at home, he was placed in Beech Brook—a residential facility for vulnerable children—from the ages of nine to eleven. Mr. Hutton first raised the ineffective assistance of his trial counsel on direct appeal, at which time he was represented by David Doughten. The Ohio Supreme Court denied Mr. Hutton’s IAC claim on the merits, noting that he failed to meet his burden because “the record [did] not show what investigations [trial] counsel did or did not make.” *State v. Hutton*, 559 N.E. 2d 432, 447 (Ohio 1990). This ruling is consistent with Ohio law that IAC claims supported by evidence de hors the record must be raised in state post-conviction proceedings. *State v. Dixon*, 805 N.E. 2d 1042, 1056 (Ohio 2004).

Mr. Hutton, still represented by David Doughten, raised his IAC claim again in his first post-conviction petition. In support of his claim, Mr. Hutton submitted an affidavit from a family member who briefly and in passing acknowledged that Mr. Hutton was treated at Beech Brook. Mr. Doughten did not investigate or present any substantive information regarding Mr. Hutton's time at Beech Brook, nor did he present any evidence of the documented horrific home conditions that landed him there. Further, Mr. Doughten later acknowledged he had no strategic reason for failing to investigate and present the evidence. All this extensive evidence was readily available and noted in detail within the available records from Beech Brook. Without any new evidence to consider, the state courts dismissed Mr. Hutton's IAC claim finding that there was insufficient evidence of a substantive ground for relief. *State v. Hutton*, No. 76348, 2004 WL 1575248 *3 (8th Dist. July 15, 2004).

After Mr. Hutton was denied relief in the state courts, Mr. Doughten was again appointed to represent Mr. Hutton in federal habeas. Because Mr. Doughten was unaware of the extensive information he himself had not investigated, he did not provide any new substantive information demonstrating the importance of the Beech Brook information for mitigation purposes. Nor did he raise any issue regarding his own performance in post-conviction. As such, the district court denied habeas relief on Mr. Hutton's IAC claim.

II. Ineffective Assistance of Post-Conviction Counsel

While Mr. Hutton's habeas petition was still pending in the district court, the Court decided *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), where it held, for the first time,

that the ineffective assistance of state post-conviction counsel can serve as cause and prejudice to lift a procedural default on ineffective assistance of trial counsel claims. Because state post-conviction counsel's incompetence was not a valid gateway through a procedurally defaulted IAC claim until after the *Martinez* decision. Doughten did not investigate any new claims. And because Mr. Doughten obviously had a conflict of interest with respect to raising his own ineffectiveness in post-conviction he could not raise it as cause for failing to litigate trial counsel's ineffectiveness. As a result, Mr. Hutton procedurally defaulted any fact-specific Beech Brook claim.

After the district court denied his habeas petition Mr. Hutton timely filed a Rule 59(e) motion seeking to amend or alter the district court's denial of his habeas petition on the basis that Mr. Doughten, was ineffective as state post-conviction counsel, and as habeas counsel had a clear conflict of interest in raising his own ineffectiveness as cause for procedurally defaulting a trial counsel IAC claim specific to the mitigation phase of Mr. Hutton's trial. That IAC claim was now a viable and cognizable claim available for review under *Martinez*. The district court denied the motion. While on appeal the Sixth Circuit granted Mr. Doughten's motion to withdraw and appointed new counsel.

III. Rule 60(b) Litigation

Mr. Hutton, now represented by new, un-conflicted counsel moved under Rule 60(b)(6) seeking relief from judgment in the district court based on the conflict of interest that prevented his habeas counsel (Mr. Doughten) from litigating a viable IAC claim that was procedurally defaulted because of the ineffective assistance Mr. Doughten rendered during his representation of Mr. Hutton as his state post-conviction counsel. The district

court denied Mr. Hutton’s motion, holding that it was an improper “second or successive habeas petition.” The Sixth Circuit affirmed.

The fact that Mr. Hutton’s post-conviction counsel also served as his original habeas counsel is a clear conflict of interest constituting both a unique and extraordinary circumstance. Because Mr. Hutton’s ineffective assistance of trial counsel claims are premised upon entirely new facts that went undiscovered and uninvestigated in state post-conviction, in spite of the extensive information in the Beech Brook records being readily available, it is certainly not surprising that it remained uninvestigated and unlitigated in habeas. This claim of constitutional magnitude, along with the defaulted claims in the habeas petition, remain unaddressed on the merits and procedurally defaulted solely because of the extraordinary conflict of interest that enveloped Mr. Doughen as Mr. Hutton’s original habeas counsel.

REASONS FOR GRANTING THE PETITION

The Court should grant review for three reasons. First, the Sixth Circuit’s order denying Mr. Hutton’s Rule 60(b) motion demonstrates the Sixth Circuit still misunderstands the difference between a “true” 60(b) motion and a “second or successive habeas petition.” This misunderstanding has resulted in a per se bar on all true Rule 60(b) motions in federal habeas in the Sixth Circuit Court of Appeals. Second, the Sixth Circuit’s lack of understanding as to the role of Rule 60(b) motions in habeas is not unique—several circuits continue to categorically deny Rule 60(b) motions in disregard of the Court’s holdings in both *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and *Martinez v. Ryan*, 566 U.S. 1 (2012), resulting in a circuit split. Third, the Sixth Circuit improperly

denied Mr. Hutton’s Rule 60(b) motion based on the flawed analysis prevailing in this circuit split.

I. The Sixth Circuit’s Failure to Recognize the Difference Between Rule 60(b) Motions and “Second or Successive Habeas Petitions” Has Created a Per Se Bar on Rule 60(b) Motions in Federal Habeas.

The Sixth Circuit denied Mr. Hutton’s Rule 60(b) motion on the basis that it was an improper “second or successive habeas petition.” *In re Hutton*, No. 16-3724, 2017 WL 6603596 (6th Cir. Dec. 4, 2017). In reaching its decision, the court relied, in part, on its analysis in *Post v. Bradshaw*, 422 F.3d 419 (6th Cir. 2005), and this Court’s holding in *Gonzalez*. But the Sixth Circuit’s approach to deciding Rule 60(b) motions remains flawed for two reasons: (1) continued reliance on *Post* is misplaced as it directly contradicts the Court’s decision in *Martinez*, regarding the proper role of Rule 60(b) in habeas proceedings; and (2) the Sixth Circuit has misinterpreted the Court’s holding in *Gonzalez* with respect to what constitutes an “extraordinary circumstance” warranting Rule 60(b) relief.

A. The Sixth Circuit’s Holding in *Post* Was Repudiated by the Court in *Martinez v. Ryan*.

In *Post*, the Sixth Circuit denied a habeas petitioner’s Rule 60(b)(6) motion alleging ineffective assistance and “inexcusable neglect” of his habeas post-conviction counsel. 422 F.3d at 425. The Sixth Circuit acknowledged that, while it had previously held “inexcusable neglect” of counsel to be a cognizable claim under Rule 60(b)(6), such a ruling would be inapposite in *Post* because the petitioner’s habeas claims were both subject to and precluded by 28 U.S.C. § 2254(i), which expressly provides that ineffective assistance during federal and state post-conviction proceedings is not a valid claim for

relief in habeas. *Id.* at 422–23. As the Sixth Circuit explained: “The language of this statute is clear. It expressly bars relief **grounded on claims** of incompetent or ineffective counsel in federal post-conviction proceedings. *Post*, 422 F.3d at 423. (Emphasis added.) The Sixth Circuit’s reliance on *Post* in Rule 60(b) litigation is inappropriate as it interprets Section 2254(i) in a manner that repudiates the Court’s *Martinez* decision. *Post* stands for the proposition that Rule 60(b)(6) motions predicated on any allegation of ineffective assistance of post-conviction counsel, whether an actual claim of counsel ineffectiveness or whether referenced in some procedural context, can never be granted in habeas because such claims are precluded by Section 2254(i) of the AEDPA. The *Post* court conflated its equitable obligations under Rule 60(b)(6) with the statutory requirement of §2254(i), to create a per se bar on all Rule 60(b)(6) motions predicated on ineffective assistance of post-conviction or habeas counsel, regardless of whether it is raised as an actual claim for relief or, as in Mr. Hutton’s case, a mere factor to be considered in analyzing some unique and extraordinary circumstance under Rule 60(b). But this Court has since held that Rule 60(b) and Section 2254(i) should not be treated as one in the same. *Martinez*, 566 U.S. at 17.

In *Martinez*, the Court was tasked with determining whether the state of Arizona improperly prevented Martinez, a habeas petitioner, from raising the ineffective assistance of post-conviction counsel as “cause” for procedurally defaulting his ineffective assistance of trial counsel claims. 566 U.S. at 9. The Court explained that, while ineffective assistance of post-conviction counsel is not a valid “ground for relief” under §2254(i), ineffective assistance of *trial* counsel is “a claim that AEDPA does not bar.” *Id.*

at 17. So even though AEDPA “preclude[d] Martinez from relying on the ineffectiveness of his post-conviction attorney as a ‘ground for relief,’ it [did] not stop Martinez from using it to establish ‘cause.’” *Id.* When used as cause to provide a gateway for a habeas court’s review of a procedurally defaulted IAC claim, the ineffectiveness of state post-conviction counsel is not being put forth as a claim or ground for relief. The Court invalidated the Sixth Circuit’s analysis in *Post* by clarifying that Rule 60(b) and § 2254(i) serve different purposes, and therefore Rule 60(b) motions predicated on ineffective assistance of state post-conviction counsel should not be *automatically* subject to a § 2254(i) analysis.

In spite of *Post*’s conflict with *Martinez*, the Sixth Circuit and its lower courts continue to rely on a *Post*-style analysis in denying Rule 60(b) motions predicated on ineffective assistance of post-conviction counsel regardless of the context in which it presents. *See, e.g., Tyler v. Anderson*, 749 F.3d 499, 511 (6th Cir. 2014) (“We leave for another day whether *Martinez* abrogated *Post* ’s interpretation of 28 U.S.C. § 2254(i).”); *Armstrong v. Romanowski*, No. 08-14961, 2014 WL 222327, at *2 (E.D. Mich. Jan. 21, 2014) (“Section 2254(i) has been construed ‘to mean what it says: to bar a Rule 60(b) motion based on the ineffectiveness of habeas counsel.’”) (internal citations omitted).

The Court should grant review to make clear that its holding in *Martinez* is that Rule 60(b)(6) motions alleging ineffective assistance of state post-conviction as a gateway through a procedurally defaulted trial IAC claim counsel should not be automatically denied under 28 U.S.C. § 2254(i), and thereby prevent a per se bar on Rule 60(b)(6) motions in habeas in the Sixth Circuit.

B. The Sixth Circuit’s Misunderstanding of *Gonzalez* Has Resulted in a Categorical Denial of All Rule 60(b) Motions Predicated on an “Intervening Change in Law.”

Notwithstanding its inappropriate reliance on *Post*, the Sixth Circuit has made it even more futile for habeas petitioners to seek Rule 60(b)(6) relief because of its lack of understanding of the Court’s holding in *Gonzalez*.

In *Gonzalez*, a federal habeas petitioner moved under Rule 60(b)(6) to reopen his habeas proceeding which had been dismissed as time barred. 545 U.S. at 527. The petitioner argued that an intervening change in the law—specifically, a case that altered the way tolling is calculated for the purposes of AEDPA’s statute of limitations—would have rendered his petition timely, and he was therefore entitled to relief under Rule 60(b)(6). *Id.* The Court noted that, while “Rule 60(b) has an unquestionably valid role to play in habeas cases,” Rule 60(b) motions that “attack[] the federal court’s previous resolution of a claim *on the merits*” must be denied as improper “second or successive habeas petitions.” *Id.* at 532, 534. The Court emphasized that true Rule 60(b) motions are those that attack the integrity of the proceedings, not the merits. The Court held that, while the petitioner’s motion was a true Rule 60(b) motion, it ultimately lacked merit. *Id.* at 535–36. The Court explained that movants seeking relief under Rule 60(b)(6) must be able to demonstrate “extraordinary circumstances” warranting relief, and the intervening change in law in this case was not extraordinary because (1) the petitioner’s case was not pending when the change occurred; and (2) the petitioner was not diligent in pursuing the statute of limitations issue. *Id.* at 536–38.

The Sixth Circuit’s misunderstanding of *Gonzalez* is made clear by its decision in *Post*. In *Post*, the Sixth Circuit held that the petitioner’s Rule 60(b)(6) motion was a “second or successive habeas petition” under *Gonzalez* by noting that “[i]t makes no difference that [Post’s] motion itself does not attack the district court’s substantive analysis of [his] claims . . . all that matters is that Post is ‘seek[ing] vindication of’ or ‘advanc[ing]’ a claim by taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition.” 422 F.3d at 424–25. This sort of “inevitable merits” approach inappropriately broadens the scope of *Gonzalez*’s prohibition. The Court explicitly held in *Gonzalez* that Rule 60(b) remains available in habeas, yet the Sixth Circuit’s *Post* decision presumes that any Rule 60(b) motion that “inexorably leads” to a new merits decision thereby “advances a claim” and is a “second or successive habeas petition” in disguise. Because the entire purpose of Rule 60(b) is to challenge the integrity of a proceeding in order to have a second chance at a fair merits decision, the “inevitable merits” approach precludes any and all Rule 60(b) motions from moving forward. As a practical matter, it eviscerates the Rule.

The Sixth Circuit also misunderstands the directive of *Gonzalez* with respect to determining whether changes in law are extraordinary circumstances. In deciding Rule 60(b)(6) motions predicated on an intervening change in law, the Sixth Circuit foregoes an analysis of the fact-specific reasons the circumstances do or do not rise to the level of “extraordinary.” The Sixth Circuit is content to pay lip service to *Gonzalez* by holding that changes in law are categorically not extraordinary. This categorical denial of “change in law” Rule 60(b)(6) motions is particularly problematic for habeas petitioners

seeking to advance their procedurally defaulted ineffective assistance of counsel claims following the Court’s decision in *Martinez*.

In *Abdur’Rahman v. Carpenter*, the Sixth Circuit denied a habeas petitioner’s Rule 60(b)(6) motion in part on the grounds that it was predicated on the intervening change of law in *Martinez*. The court noted in passing that, “even if *Martinez* did apply [to the claims], that case was a change in decisional law and does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief.” 805 F. 3d 710, 714 (6th Cir. 2015). This passing comment has become the law in the Sixth Circuit, leading to the interpretation that no change in the law can be considered extraordinary. *See e.g., Sheppard v. Robinson*, 807 F.3d 815, 820–21 (6th Cir. 2015) (“[O]ur court has already held that the Supreme Court’s decision in *Martinez* and its follow-on decision in *Trevino v. Thaler* . . . are not “extraordinary” within the meaning of Rule 60(b)(6).”) (internal citations omitted).

The Sixth Circuit has missed the point of *Gonzalez*. The Court did not hold that a change in law is never extraordinary—if it had, it would not have cited the fact-specific reasons for denying Gonzalez’s motion on the merits. The Court should grant review to ensure that the Sixth Circuit’s flawed Rule 60(b) analysis does not render the motion entirely useless in habeas to address what are, in Mr. Hutton’s case, truly unique facts of extraordinary consequence. Additionally, *Martinez/Trevino* are extraordinary decisions. For the first time the Court recognized that ineffective assistance of post-conviction counsel could serve as cause and prejudice to permit merits review of

otherwise defaulted claims. These decisions permitted habeas petitioners an opportunity for real merits review of significant and fundamental Sixth Amendment claims.

II. The Circuits are Split on the Circumstances Under Which They May Grant a Prisoner’s Rule 60(b) in Federal Habeas.

This misconception regarding the difference between Rule 60(b) motions and “second or successive” habeas petitions is not novel, nor confined, to the Sixth Circuit. Despite having explicit guidance from this Court, the circuits remain divided over how to evaluate 60(b)(6) motions in habeas proceedings. The result is that two directly conflicting lines of authority have emerged. The Fourth, Fifth, Sixth, and Eleventh Circuits categorically deny habeas petitioner’s Rule 60(b)(6) motions based on a flawed interpretation of *Gonzalez* and its progeny. By contrast, the Third, Seventh, and Ninth correctly conduct a case-by-case analysis reviewing the equities of a Rule 60(b)(6) motion based on *Martinez*. This entrenched (and judicially acknowledged) circuit split has wide-ranging implications for capital habeas petitioners that stands in need of resolution by this Court.

A. Four Circuits Have Adopted a Categorical Approach Whereby They Automatically Deny Rule 60(b)(6) Motions Premised on *Martinez* as an Intervening Change in Law.

Four circuits systematically deny 60(b)(6) motions premised on *Martinez*, holding that, under *Gonzalez*, *Martinez*’s change in decisional law is insufficient to reopen a judgment even in the face of equitable considerations relevant to a particular case that strongly suggest that relief is warranted. These courts hold that all relief can only be considered if the petitioner can meet the high standards of a successive petition pursuant to 28 U.S.C. § 2244. As a result, in these circuits, a categorical bar on Rule 60(b)(6)

motions exists, leaving the lives of many capital habeas petitioners hanging in the balance.

The Fifth Circuit was first to adopt this erroneous categorical approach in *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012). In *Adams*, the district court dismissed a capital habeas petitioner's ineffective assistance of counsel claims as procedurally defaulted under Texas law, finding that errors by petitioner's state post-conviction counsel could not excuse the default pursuant to *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). *Id.* at 315. After this Court's decision in *Martinez*, the petitioner filed a Rule 60(b)(6) motion, seeking relief from the district court's judgment denying his habeas petition. *Id.* at 316. In arguing that 60(b)(6) relief was warranted, the petitioner cited several factors that collectively established "extraordinary circumstances": (1) *Martinez* marked a substantial change in federal habeas corpus law; (2) the capital nature of his case; and (3) "the equitable imperative that the true merit" of his claims be heard. *Id.* at 319. In addition, petitioner filed a motion for stay of execution pending the district court's ruling on his 60(b)(6) motion. *Id.* the district court granted the stay of execution. *Id.* In vacating that order as an abuse of discretion, the Fifth Circuit determined that the 60(b)(6) motion would not succeed because, under its precedents, "a change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds from a final judgment." *Id.* Moreover, the Fifth Circuit broadly concluded that petitioner's 60(b)(6) motion was "without merit" because *Martinez* was "simply a change in decisional law" and its development of procedural default principles was "hardly extraordinary." *Id.* at 320.

The Fifth Circuit has steadfastly followed *Adams* ever since and unfailingly denies a COA to any petitioner whose Rule 60(b)(6) motion is premised on *Martinez*. See *In re Paredes*, 587 Fed. Appx. 805 (5th Cir. 2014) (denying a COA and stay of execution to a death-row petitioner who filed a 60(b)(6) motion premised on *Martinez*, holding that “changes in decisional law . . . do not constitute the ‘extraordinary circumstance’” required for granting 60(b)(6) relief); *In re Edwards*, 865 F.3d 198 (5th Cir. 2017) (holding that petitioner’s 60(b)(6) motion under the *Martinez* and *Trevino* standards constituted a second-or-successive petition). Under this approach, the Fifth Circuit fails to address in any meaningful way a petitioner’s individual circumstances that may provide a sufficient basis for 60(b)(6) relief in conjunction with *Martinez*’s change in law, thereby depriving the Court’s decisions in *Martinez* of any practical substance. Further, this runs contrary to *Gonzales*, which made clear that, in denying 60(b) relief on the merits, “extraordinary” circumstances require fact specific review. See, i.e., *Gonzales*, 545 U.S. at 536-37 (denying relief on fact specific basis).

The Eleventh Circuit similarly applies a categorical bar on Rule 60(b)(6) motions predicated on a change in law. In *Arthur v. Thomas*, the Eleventh Circuit erroneously recounted that “the U.S. Supreme Court has already told us [in *Gonzalez*] that a change in decisional law is insufficient to create the ‘extraordinary circumstance’ necessary to invoke Rule 60(b)(6).” 739 F.3d 611, 631 (11th Cir. 2014). As such, the court held that the change in decisional law created by the *Martinez* rule was similarly insufficient to invoke Rule 60(b)(6). *Id.* The misstatement of the law in *Arthur* has led the Eleventh Circuit to routinely deny Rule 60(b)(6) motions predicated on *Martinez*. See, e.g.,

Hamilton v. Sec’y, Fla. Dep’t of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015) (“*Arthur* is controlling on us and ends any debate among reasonable jurists about the correctness of the district court’s decision under binding precedent.”).

In its only published decision addressing the question, the Fourth Circuit held that “a change in decisional law subsequent to a final judgment provides no basis for relief under [a *Martinez*-based] Rule 60(b)(6)” motion. *Moses v. Joyner*, 815 F.3d 163, 169 (4th Cir. 2016). In *Moses*, the Fourth Circuit reasoned that “the change in procedural default rules occasioned by *Martinez* fell short of ‘extraordinary.’” The Fourth Circuit made clear that it believed *Gonzalez* required this result, noting it “had no authority to depart from the rulings of the Supreme Court or its own.” As a result, like the Fifth, Sixth, and Eleventh Circuit, the Fourth Circuit determined that a Rule 60(b)(6) motion premised on *Martinez/Trevino* is categorically ineligible for relief regardless of the individual circumstances of a petitioner’s case.

B. The Third, Seventh, and Ninth Circuits Properly Analyze *Martinez*-Based Rule 60(b)(6) Motions on a Case-By-Case Basis.

In contrast, the Third, Seventh, and Ninth Circuits recognize that a change in decisional law, even in the habeas context, may be adequate, either standing alone or in tandem with other factors, to invoke relief from final judgment under Rule 60(b)(6).

In *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), the Third Circuit vacated the district court’s decision, which had adopted the Fifth Circuit’s reasoning in *Adams*. The *Cox* court made it clear that that Fifth Circuit’s ruling in *Adams* was squarely at odds with the equitable aims of Rule 60(b)(6). *Id.* at 121. The Third Circuit, while observing that a change in law will “rarely” justify Rule 60(b)(6) relief, adopted a “flexible, multifactor

approach to Rule 60(b)(6) motions, including those built upon [*Martinez*’s] post-judgment change in the law, that takes into account all the particulars of a movant’s case.” *Id.* at 121-25. In regards to finality in habeas proceedings, the Third Circuit recognized that “what the court did [in *Martinez*] was significant” and in turn, “sharply altered *Coleman*’s well-settled application of procedural default and altered the law of every circuit”. *Id.* at 124.

In particular, the Third Circuit took issue with the Fifth Circuit’s refusal “to consider the full set of facts and circumstances attendant to the Rule 60(b)(6) motion under review” and with its decision to “end its analysis after determining that *Martinez*’s change in the law was an insufficient basis for 60(b)(6) relief” without considering “the capital nature of the petitioner’s case” and other relevant factors. *Id.* at 122. For this reason, the Third Circuit believed a “case-dependent analysis” was imperative to not only safeguard the equitable aims of Rule 60(b)(6) but to also fully implement the Court’s mandate in *Gonzalez*. *Id.* at 123. Accordingly, the Third Circuit instructed the district court to conduct a “comprehensive analysis” weighing “the jurisprudential change rendered by *Martinez*,” “the merits of the petitioner’s underlying ineffective assistance of counsel claim,” “petitioner’s diligence in pursuing review of his ineffective assistance claims,” and “the capital nature of his case.” *Id.* at 124–26.

The Seventh Circuit also adopted a case-dependent analysis when deciding Rule 60(b)(6) motions. In *Ramirez v. United States*, the Seventh Circuit noted that, because Rule 60(b)(6) is an equitable remedy, “[i]t thus requires the court to examine all of the circumstances, bearing in mind the need for the party invoking the rule to demonstrate

why extraordinary circumstances justify relief.” 799 F.3d 845, 851 (7th Cir. 2015). The court held that the petitioner was entitled to Rule 60(b) relief based not only on the change in law, but also based on a consideration of “the diligence of the petitioner; whether alternative remedies were available but bypassed; and whether the underlying claim is one on which relief could be granted.” *Id.*

The Ninth Circuit also properly interprets the Court’s decision in *Gonzalez* by weighing the individual circumstances of a case in determining whether a Rule 60(b)(6) motion predicated on *Martinez* should be granted. In *Phelps v. Alameida*, the court noted the Supreme Court’s decision in *Gonzalez* effectively overruled its own precedent that previously provided that Rule 60(b)(6) motions can never be predicated on intervening changes in the law. 569 F.3d 1120, 1132 (9th Cir. 2009). The court held that, per *Gonzalez*, it was required to consider Rule 60(b)(6) motions on a case-by-case basis, rather than by applying a per se rule. *Id.* at 1132–33. In holding that the petitioner’s motion should have been granted, the court considered, *inter alia*, the petitioner’s diligence, whether a favorable ruling would disturb finality, and the delay between the final judgment and filing the motion. The Ninth Circuit routinely relies on this equitable, case-by-case analysis in granting Rule 60(b)(6) motions. *See e.g., Hall v. Haws*, 861 F.3d 977, 987 (9th Cir. 2017); *Jones v. Ryan*, 733 F.3d 825 (9th Cir. 2013).

III. The Sixth Circuit Improperly Denied Mr. Hutton’s Rule 60(b) Motion to Re-Open His Federal Habeas Petition.

Mr. Hutton sought relief under Rule 60(b) to reopen his habeas proceeding to address a constitutional and substantive post-conviction claim that was not presented to the state post-conviction court and not presented to the federal habeas court. As set forth

above, the Sixth Circuit’s decision in *In re Hutton*, No. 16-3724, 2017 WL 6603596, at *1 (6th Cir. Dec. 4, 2017), conflicts with Supreme Court precedent. Mr. Hutton’s Rule 60(b)(6) motion was improperly denied due to a pervasive misinterpretation of that precedent in the Sixth Circuit and in the lower courts. First, Mr. Hutton’s pleading was a “true” 60(b) motion within the meaning of *Gonzalez*. Second, the claimed intervening change in law, triggered by *Martinez* and *Trevino*, applies to Mr. Hutton’s case. Third, the change in law occasioned by *Martinez/Trevino* in combination with the equitable considerations unique to Mr. Hutton’s case weigh in favor of addressing the merits of his 60(b)(6) motion.

A. Mr. Hutton’s Rule 60(b)(6) Motion Did Not Constitute an Impermissible Second or Successive Habeas Petition.

In affirming the district court’s denial of Mr. Hutton’s 60(b)(6) motion, the Sixth Circuit conflated the standards for relief under Rule 60(b) with standards for second or successive habeas petitions under AEDPA in direct contravention of this Court’s holding in *Gonzalez*. Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances, including

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Rule 60(b)(6) “vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” *Klapprott*

v. United States, 335 U.S. 601, 615 (1949). A motion filed pursuant to Rule 60(b)(6) is addressed to the sound discretion of the trial court guided by accepted legal principles applied in light of all relevant circumstances, but may be granted only in “extraordinary circumstances.” *Gonzalez*, 545 U.S. at 533-36. Notably, a Rule 60(b)(6) motion is not appropriate to reargue issues that the court has already considered and decided. *Id.*

Additionally, when a district court is presented with a Rule 60(b)(6) motion after it has denied the petitioner’s federal habeas petition, the court must first determine whether the motion is a “true” Rule 60(b) motion or constitutes an impermissible second or successive application under the AEDPA. As articulated by this Court, a Rule 60(b) motion is a second or successive petition only if it in substance or effect asserts or reasserts a previously decided federal basis for relief from petitioner’s underlying conviction. *See Gonzalez*, 545 U.S. at 532 (“A motion can be said to bring a ‘claim’ sufficient to bring the motion within the requirements of 2244 if it attacks the federal court’s *previous resolution of a claim* on the merits.”) (Emphasis added). More specifically, a pleading is a “true” Rule 60(b) motion if it either: (1) challenges only procedural ruling of habeas court which precluded a merits determination of the habeas application; or (2) challenges a defect in the integrity of the federal habeas proceeding, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition. *Id.*

Mr. Hutton’s Rule 60(b)(6) motion challenged a “defect in the integrity of the federal habeas proceeding,” namely, appointed habeas counsel was also Mr. Hutton’s state post-conviction counsel. *Id. See, e.g., Brooks v. Bobby*, 660 F.3d 959, 963 (6th Cir.),

cert. denied, 565 U.S. 1047 (2011) (observing that a conflict of interest “could under sufficiently egregious conditions haunt the integrity of a first federal habeas proceeding”). The Court in *Gonzalez* explained that a motion under Rule 60(b) is not barred where a petitioner “merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.” *Id.* at 532 n.4. The Beech Brook IAC claim was never raised nor properly litigated in state post-conviction, and was likewise never presented to the district court. It was never addressed on the merits, remains unexhausted, and thus, procedurally defaulted.

The inherent conflict of interest created by the fact that habeas counsel was also state post-conviction counsel precluded Mr. Doughten, in his capacity as appointed habeas counsel, from raising his own ineffectiveness as “cause and prejudice” for the procedurally defaulted Beech Brook trial IAC claim. He did not (because he could not) revisit, or re-investigate his own ineffectiveness as cause and prejudice for failing to litigate the relatively obvious but never previously investigated or litigated Beech Brook claim. For this reason, the integrity of the federal habeas proceedings was called into question. As such, Hutton’s Rule 60(b)(6) motion did not attack the merits of his underlying conviction but rather the manner in which his habeas judgment was procured without review of a substantive trial IAC at mitigation claim that was never presented to the habeas court because Mr. Doughten never presented it to the state post-conviction court when he was counsel of record. That clear and obvious conflict of interest should

have been considered as a unique and extraordinary circumstance, well beyond the control of Mr. Hutton, that impacted the integrity of the habeas proceedings.

B. Mr. Hutton is Entitled to Review of his Rule 60(b) Motion to Reopen the Judgment Denying his Federal Habeas Petition Under the *Martinez/Trevino* Standards.

The Sixth Circuit’s misinterpretation of *Gonzalez* renders Rule 60(b) unavailable in habeas cases, which means the merits of Mr. Hutton’s trial IAC claim will never be addressed even though Mr. Hutton can establish the factual predicates for the *Martinez* exception in the context of a truly unique set of extraordinary circumstances beyond his control that accounts for the failure to raise that substantive claim in federal habeas. To establish “cause” to overcome procedural default under *Martinez*, the petitioner must show:

(1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law requires that an “ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding” or where the state procedure makes it virtually impossible for state post-conviction counsel to adequately present an ineffective of assistance of trial counsel claim on direct review.

Trevino, 569 U.S. at 423-429 (citing *Martinez*, 132 U.S. at 1318–1319, 1320–1321).

First, Mr. Hutton’s claim of ineffective assistance of trial counsel was a “substantial” claim in that the Beech Brook records and their mitigating significance heavily supports an IAC claim at Mr. Hutton’s trial. A “substantial” claim is one that has some merit or that has some factual support. *Martinez*, 132 U.S. at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). In Mr. Hutton’s case, trial counsel rendered

ineffective assistance at the penalty phase by failing to investigate and present evidence of Mr. Hutton's terrible abuse and severely troubled childhood as demonstrated by his commitment to Beech Brook. Trial counsel's decision not to investigate did not reflect reasonable professional judgment. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The readily available Beech Brook records would have provided powerful mitigation evidence in favor of a life sentence, yet they were never discovered until current habeas counsel requested them. *See Morales v. Mitchell*, 507 F.3d 916, 951 (6th Cir. 2007) (prejudice found "when the jury was deprived of non-cumulative mitigating evidence such as severe physical, psychological, or sexual abuse, a violent upbringing, or abject poverty").

Moreover, the "cause" for the procedurally-defaulted Beech Brook claim was Mr. Doughten's ineffective assistance during the state collateral review proceeding, which was the "initial" review proceeding in respect to that claim. As state post-conviction counsel, Mr. Doughten never investigated or sought to obtain Mr. Hutton's still readily available records from Beech Brook. Upon review of the record, it is clear that information about Mr. Hutton's childhood institutionalization had been conveyed to Mr. Doughten at the time of litigating state post-conviction. If the jury had known about this portion of Mr. Hutton's life, it is very likely it would not have sentenced him to death. Mr. Hutton's state post-conviction counsel, was charged with litigating that claim pursuant to Ohio's post-conviction statute. However, because he failed in that responsibility, Mr. Doughten caused Mr. Hutton's trial IAC claim to become procedurally defaulted.

Lastly, Ohio law requires that a claim of trial IAC for failure to investigate must be raised at the initial review collateral proceedings. The forum that Ohio courts favor for trial IAC claims turns on whether the claim is supported by the record. *Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012). If evidentiary support can be found in the record, Ohio courts not only allow—but require—that the claims be brought on direct appeal, through the application of res judicata. *Id.* However, Ohio state courts have found that when trial IAC claims are not based on the record, they are better suited for post-conviction proceedings. *State v. Dixon, supra*; *State v. Harrington*, 876 N.E.2d 626, 629 (Fourth Dist. 2007). A claim of trial IAC for failure to investigate, as in the instant case, cannot be raised without an investigation subsequent to trial, as evidence of counsel’s ineffectiveness is not a part of the trial record. Mr. Hutton’s Beech Brook IAC claim consists entirely of recently discovered evidence outside the record. This means that this particular claim could only have been raised on state post-conviction review and not on direct appeal.

C. Equitable Considerations Unique to Mr. Hutton’s Case Weigh in Favor of Addressing the Merits of His Rule 60(b)(6) Motion.

The Sixth Circuit’s categorical denial of Rule 60(b) motions premised on an intervening change in law precluded the initial merits review of Mr. Hutton’s trial IAC claim that *Martinez* prescribes. For this reason, the court made no attempt to address the specific facts of this case, which arguably would have identified a most unique and remarkably prejudicial conflict of interest that would have allowed the court to address those circumstances as rising to the level of “exceptional or extraordinary” as required

by Rule 60(b)(6). Had it done so, the Sixth Circuit would have realized Mr. Hutton's case is one of those rare cases about which the Court in *Gonzalez* was concerned.

In *Martinez*, the Court substantially changed the landscape petitioners have to navigate when they seek to claim trial IAC in federal habeas proceedings. This was undoubtedly a reflection of the distinction between capital cases and noncapital cases. It is beyond dispute, both legally and logically, that there exists a “heightened ‘need for reliability in the determination that death is the appropriate punishment in a specific case.’” *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)). See also *Oregon v. Gaze*, 546 U.S. 517, 525 (2006) (same); *Deck v. Missouri*, 544 U.S. 622, 632-33 (2005) (“stress[ing] the ‘acute need’ for reliable decision making when the death penalty is at issue”) (citations omitted). A sentence of death, once carried out, may not be undone. As Justice Brennan noted in his separate opinion in *Strickland*, federal courts “have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding.” *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part).

In this sense, the importance of Mr. Hutton's case is clear. Mr. Hutton's execution is set for June 22, 2022. If the Court denies his petition for certiorari, Mr. Hutton will be executed without any state or federal court ever having reviewed his ineffective assistance of counsel claim. The Court must take Mr. Hutton's case in order to allow the

district court to review his trial IAC claim on the merits and to avoid a truly egregious denial of due process.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Hutton respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully Submitted,

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