No. 17-8686

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

BRIEF IN OPPOSITION

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CAPITAL CASE – EXECUTION SCHEDULED FOR JUNE 22, 2022

QUESTION PRESENTED

The Ohio Supreme Court denied—on the merits—Percy Hutton's claim that his trial counsel provided ineffective assistance by failing to investigate and present mitigation evidence. The federal district court found this claim preserved, but also rejected it on the merits. In the meantime, this Court issued *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), which held that the ineffective assistance of counsel in *state collateral proceedings* may sometimes excuse the procedural default of an ineffective-assistance-of-*trial*-counsel claim. This Court issued *Martinez* and *Trevino* before the district court's opinion denying Hutton's habeas petition, and those decisions also addressed a procedural-default issue whereas the district court here denied Hutton's claim on the merits.

Hutton nevertheless moved under Rule 60(b)(6) to reopen the judgment, claiming for the first time that *Martinez* and *Trevino* entitled him to a hearing in which he could present additional mitigation evidence that was discovered after the district court's ruling denying his claim. Yet 28 U.S.C. § 2244(b)'s ban on second-or-successive petitions typically bars petitioners from using a Rule 60(b) motion to relitigate a claim that has been rejected on the merits. *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005). The district court held that Hutton's motion qualified as a second-or-successive petition subject to § 2244(b). The Sixth Circuit agreed.

The question presented is: Was Hutton's Rule 60(b) motion a "second or successive habeas corpus application" within the meaning of 28 U.S.C. § 2244(b)?

LIST OF PARTIES

The Petitioner is Percy Hutton, an inmate at the Chillicothe Correctional Institution in Chillicothe, Ohio.

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

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COUNTERSTATEMENT

In September 1985, "Percy Hutton accused two friends, Derek Mitchell and Samuel Simmons Jr., of stealing a sewing machine, in which he had hidden $750." *Jenkins v. Hutton*, 137 S. Ct. 1769, 1770 (2017). Ultimately, Hutton avenged their alleged theft by kidnapping and killing Mitchell, and by kidnapping and attempting to kill Simmons. *See id.* Over the thirty-plus years since the murder, Hutton has received substantial process in the state and federal courts.

A. State Proceedings

A jury convicted Hutton of aggravated murder and found two aggravating circumstances that triggered Hutton's death-penalty eligibility (that Hutton committed the murder while kidnapping Mitchell and while attempting to murder Simmons). *Id.* The jury recommended that Hutton receive the death penalty, and the trial court imposed that sentence. *Id.* at 1771.

Hutton appealed. An intermediate appellate court initially reversed his convictions. *State v. Hutton*, 559 N.E.2d 432, 438 (Ohio 1990). But the Ohio Supreme Court reversed that decision, affirmed Hutton's convictions, and remanded for the intermediate appellate court to conduct an independent review of Hutton's sentence. *Id.* at 447-48. When doing so, the Ohio Supreme Court rejected Hutton's claim that his trial counsel had provided ineffective assistance by "fail[ing] to investigate possible mitigating evidence." *Id.* at 446. On remand, the intermediate appellate court affirmed Hutton's sentence. *State v. Hutton*, 797 N.E.2d 948, 955 (Ohio 2003). That court also denied Hutton's later application to reopen his direct

appeal based on the alleged ineffective assistance of his appellate counsel. *Id.* The Ohio Supreme Court affirmed both decisions. *Id.* at 964.

Hutton also filed two petitions for state post-conviction relief. Both petitions alleged, among other things, that his trial counsel had provided ineffective assistance at his trial's penalty stage. *State v. Hutton*, No. 80763, 2007 Ohio App. LEXIS 4771, at *2 (Ohio Ct. App. Oct. 11, 2007); *State v. Hutton*, No. 76348, 2004 Ohio App. LEXIS 3356, at *12 (Ohio Ct. App. July 15, 2004). The intermediate appellate court denied the ineffective-assistance claim in Hutton's first petition on res judicata grounds because he had raised it on direct appeal, *Hutton*, 2004 Ohio App. LEXIS 3356, at *1, and it denied the ineffective-assistance claim in his second petition because it was untimely, *Hutton*, 2007 Ohio App. LEXIS 4771, at *4-5.

B. Federal Proceedings

Hutton filed an initial federal habeas petition in 2005; he filed an amended petition in 2011. *Hutton v. Mitchell*, No. 1:05-CV-2391, 2013 U.S. Dist. LEXIS 80443, at *32-34 (N.D. Ohio June 7, 2013). He reasserted that his trial counsel had provided ineffective assistance at his trial's penalty stage, alleging that counsel failed to investigate and present an adequate case in mitigation. *Id.* at *34-35, *52.

1. The federal courts rejected Hutton's habeas claims

In June 2013, the district court denied Hutton's petition. *Id.* at *202. It initially held that Hutton preserved the ineffective-assistance claims that he had presented on direct appeal to the Ohio Supreme Court, including the claim that counsel failed "to investigate and present mitigation evidence." *Id.* at *61. Yet the court also recognized that the deferential standards from the Antiterrorism and

Effective Death Penalty Act (AEDPA) applied to claims that state courts rejected on their merits. *Id.* at *36-37, *44. Applying those deferential standards to Hutton's ineffective-assistance arguments, the court held that "the state court was not unreasonable in denying Hutton's claims related to his counsel's performance in preparing for and presenting evidence during the penalty phase of his trial." *Id.* at *105. Starting with counsel's alleged deficient performance, the court found that much of the evidence on which Hutton relied was, in fact, presented at the trial's guilt phase. *Id.* at *105-09. Turning to any prejudice, the court found that the alleged evidence that counsel failed to present did not create a reasonable probability that the jury would have returned a life sentence. *Id.* at *113-17. The court did, however, grant a certificate of appealability on this claim. *Id.* at *201.

Less than two weeks after the district court denied Hutton's petition, he moved to amend the judgment under Rule 59(e). Citing *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), Hutton asked the district court "to dismiss its judgment denying his Petition; appoint new counsel; allow his current habeas counsel to withdraw; and allow new counsel sufficient time to review the record and file an amended petition if necessary." *Hutton v. Mitchell*, No. 1:05-CV-2391, 2013 U.S. Dist. LEXIS 113375, at *2 (N.D. Ohio Aug. 9, 2013). Hutton argued that one of his lawyers, David Doughten, had represented him both in the state post-conviction proceedings and in the federal proceedings, which created a conflict of interest because Doughten could not assert his own ineffectiveness so as to excuse any procedural default for his claims. *Id.* at *6. The court rejected this

motion because *Martinez* and *Trevino* did not count as "intervening law"; this Court had decided both cases *before* the district court denied Hutton's petition. *Id.* at *6-7. Since Hutton could have raised these arguments before the district court's ruling, they were now "barred." *Id.* at *7.

Hutton appealed to the Sixth Circuit. With briefing on the merits ongoing, Hutton filed a motion to remand in the Sixth Circuit so that newly appointed counsel could argue that *Martinez* excused any procedurally defaulted claims. Hutton asserted that a "conflict of interest" prevented his earlier federal habeas counsel, Doughten, from asserting his own ineffectiveness in state post-conviction proceedings under *Martinez*. *Hutton v. Mitchell*, No. 13-3968, 6th Cir. R.45-1, at 2 (6th Cir. Apr. 23, 2015). The Sixth Circuit denied the motion to remand. *Id.* at 3. It noted that Hutton already had the opportunity to present *Martinez* and *Trevino* claims in the district court, but did not do so. *Id.* While it acknowledged that one of Hutton's federal habeas counsel (Doughten) had also been counsel in the state post-conviction proceedings, Hutton's *other* federal habeas lawyer had not been involved in those state proceedings. *Id.* Hutton failed to explain why this other lawyer could not have timely asserted any valid claims under *Martinez* and *Trevino*. *Id.*

Later, in its decision on the merits, the Sixth Circuit denied Hutton's ineffective-assistance-of-trial-counsel claim, concluding that the state court's rejection of it was not "an unreasonable application of clearly established law." *Hutton v. Mitchell*, 839 F.3d 486, 505 (6th Cir. 2016). Yet the Sixth Circuit also granted Hutton relief from his sentence on a different ground. *Id.* at 495-500. This

Court summarily reversed that portion of the decision. *Jenkins*, 137 S. Ct. at 1773. On remand, the Sixth Circuit affirmed the district court's total denial of Hutton's § 2254 petition. *Hutton v. Jenkins*, 704 F. App'x 584, 585 (6th Cir. 2017). After the Sixth Circuit denied en banc review, Hutton filed a petition for a writ of certiorari from that decision. *Hutton v. Shoop*, No. 17-8421 (filed Apr. 3, 2018). That separate petition for a writ of certiorari remains pending in this Court.

2. The federal courts rejected Hutton's Rule 60(b) motion on the ground that it was a second-or-successive petition

Hutton's current petition for a writ of certiorari involves a different motion. In March 2016, while his appeal was pending in the Sixth Circuit, Hutton moved for relief from judgment under Rule 60(b)(6). Pet. App. A-7. This motion "advanc[ed] the same argument under *Martinez* and *Trevino*" that had already been rejected by the district court when denying Hutton's motion to amend the judgment under Rule 59(e) and by the Sixth Circuit when denying Hutton's motion to remand. *Id.* at A-6 to A-7. Hutton argued that his state post-conviction counsel (Doughten) had been ineffective in failing to introduce his "medical records from Beech Brook, the residential facility where [he] was placed from age nine to eleven," and a psychologist's evaluation highlighting the records' significance. *Id.* at A-7. Hutton alleged—again based on *Martinez* and *Trevino*—that Doughten's ineffectiveness *in the state post-conviction proceedings* should excuse the alleged procedural default of this ineffective-assistance-of-trial-counsel claim. *Id.* And the fact that Doughten represented Hutton in the federal proceeding, Hutton added, should excuse his failure to timely present this new evidence *in the federal habeas litigation*. *Id.*

Finally, the failure to introduce this evidence at the *underlying trial's* penalty stage, Hutton concluded, qualified as ineffectiveness assistance of trial counsel justifying relief from his capital sentence. *Id.*

Invoking *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the district court treated Hutton's Rule 60(b) motion as an improper attempt to file a second-or-successive petition under 28 U.S.C. § 2244(b). Pet. App. A-9 to A-10. The court reasoned that "the very premise of the Motion is incorrect." *Id.* at A-9. *Martinez* and *Trevino*, the court noted, were reserved for habeas petitioners who had *procedurally defaulted* their underlying ineffective-assistance-of-trial-counsel claims. *Id.* But Hutton had preserved his claims based on counsel's mitigation efforts, and those claims failed *on their merits*. *Id.* The court next added that, even if *Martinez* applied, Hutton's motion was still a second-or-successive petition because the Sixth Circuit had already considered and rejected his claim when denying his motion to remand. Pet. App. A-9 to A-10. Lastly, the court noted that 28 U.S.C. § 2254(i) barred any claim tied to Hutton's *federal* counsel's alleged ineffectiveness. At bottom, the court concluded, Hutton's motion was "just a vehicle to supplement a previously litigated claim with new evidence—a clear successive petition." Pet. App. A-10. It thus referred the motion to the Sixth Circuit for that court to decide whether Hutton could satisfy § 2244(b)'s demanding standards for filing a second petition. *Id.*

The Sixth Circuit held that "[t]he district court properly construed Hutton's motion for relief from judgment as a motion for a second or successive habeas corpus petition." Pet. App. A-2. The court noted that, under *Gonzalez*, a claim

qualifies as second or successive if it "'attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.'" *Id.* (quoting *Gonzalez*, 545 U.S. at 531). That is precisely what Hutton sought to do here—attack the district court's decision denying his ineffective-assistance-of-trial-counsel claim on the merits based on trial counsel's alleged failure to present the additional mitigation evidence that Hutton belatedly identified. *Id.*

REASONS FOR DENYING THE WRIT

I. HUTTON MISTAKENLY SUGGESTS THAT THE SIXTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THE SUPREME COURT'S *MARTINEZ* DECISION

Hutton initially asks for this Court's review on the ground that the Sixth Circuit's test to decide whether a petition is second or successive conflicts with the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Pet. 5-11. There is no conflict. *Martinez* and *Trevino* addressed a procedural-default question that this case does not implicate, and those two decisions did not say anything about the question that this case does involve: When should a Rule 60(b) motion be treated as a "second or successive habeas corpus application" within the meaning of 28 U.S.C. § 2244(b)?

A. To begin with, this case does not even implicate the questions presented in *Martinez* and *Trevino*. *Martinez* established a rule for those States that *legally compelled* habeas petitioners to raise ineffective-assistance-of-*trial*-counsel claims in state collateral proceedings. 566 U.S. at 4-5. In those States, the

Court held, the "ineffective assistance" of counsel "in an *initial-review collateral proceeding* on a claim of ineffective assistance at *trial* may provide cause for a procedural default in a federal habeas proceeding." *Id.* at 9 (emphases added). Put another way, if a lawyer provides ineffective assistance in a state collateral proceeding by failing to raise (and thereby defaulting) an ineffective-assistance-of-trial-counsel claim, that separate and distinct ineffective assistance may be used as a reason to overlook the procedural default and consider the ineffective-assistance-of-trial-counsel claim in federal court. Yet the Court also recognized the narrow nature of its holding, noting that the case did "not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." *Id.* at 16. The Court held only that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17.

Trevino extended *Martinez*'s narrow rule to those States that *practically*—if not *legally*—require habeas petitioners to assert ineffective-assistance-of-trial-counsel claims for the first time in state collateral proceedings. 569 U.S. at 417. *Trevino* held that "the Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 428. Given that conclusion, the Court saw no difference between the Texas system

that made it practically impossible to bring ineffective-assistance-of-trial-counsel claims and the Arizona system that made it legally impossible to do so. *Id.* at 429.

Neither holding matters here. In *Martinez* and *Trevino*, habeas petitioners sought to overcome a procedural default of their ineffective-assistance-of-trial-counsel claims so that those claims could be heard *on their merits*. In this case, the district court and the Sixth Circuit "did *not* find Hutton's ineffective-assistance claim based on [trial] counsel's failure to investigate and present mitigation evidence procedurally defaulted." Pet. App. A-9. Instead, "the district court considered and rejected" Hutton's claim that his counsel had undertaken inadequate mitigation efforts "*on the merits*." *Id.* at A-2 (emphasis added). Unlike the petitioners in *Martinez* and *Trevino*, Hutton *preserved* his ineffective-assistance claim by raising it on direct appeal in the Ohio Supreme Court. *See Hutton*, 2013 U.S. Dist. LEXIS 80443, at *60-61. In short, Hutton has already received the very result that the *Martinez* and *Trevino* petitioners sought with their claims that state collateral-review counsel had been ineffective—namely, review of their ineffective-assistance-of-*trial*-counsel claims on the merits.

B. That the federal courts denied—*on the merits*—Hutton's claim that his trial counsel ineffectively investigated and presented mitigation evidence also shows why his Rule 60(b) motion was a second-or-successive application.

Section 2244(b) provides two procedural rules "for claim[s] presented in a second or successive habeas corpus application," depending on whether or not the relevant claim was presented in the first application. If the claim "*was* presented in

a prior application," it "shall be dismissed." 28 U.S.C. § 2244(b)(1) (emphasis added). If the claim "was *not* presented in a prior application," the statute requires dismissal unless the petitioner either (1) relies on a new rule of constitutional law made retroactive by this Court or (2) identifies new facts that could not have been diligently discovered earlier and that show that the petitioner is not guilty of the underlying offense. *Id.* § 2244(b)(2) (emphasis added).

In *Gonzalez*, this Court reconciled § 2244(b)'s limits on second-or-successive petitions with Rule 60(b)'s procedures for reopening final judgments. The Court held that, under § 2244(b), "an 'application' for habeas relief is a filing that contains one or more 'claims.'" 545 U.S. at 530. It added that, "[i]n some instances, a Rule 60(b) motion will contain one or more 'claims,'" and be subject to the limits on second-or-successive petitions in § 2244(b). *Id.* at 531. As an example of the prohibited types of Rule 60(b) motions, the Court identified a motion "seek[ing] leave to present 'newly discovered evidence,' Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied." *Id.* The Court, by contrast, held that a Rule 60(b) motion is proper if it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532. It identified the Rule 60(b) motion in that case—which sought to invoke a change in the case law interpreting the *federal statute of limitations*—as an example of a motion that did not assert a "claim" subject to § 2244(b) because it addressed a procedural issue unrelated to the merits of the petition. *Id.* at 533.

Hutton's Rule 60(b) motion falls on the prohibited side of this line. His Rule 60(b) motion "base[d] the request [to reopen the judgment] on 'newly discovered evidence' related specifically to one of his ineffective-assistance sub-claims" that the district court had *already* rejected. Pet. App. A-7 (quoting Hutton's Rule 60(b) motion). Specifically, Hutton pointed to his "medical records from Beech Brook" and "an evaluation from a psychologist" about those records as support for his claim that trial counsel was ineffective in presenting mitigation evidence at his trial's penalty stage. *Id.* This is precisely the type of Rule 60(b) motion that *Gonzalez* held should be treated as second or successive under § 2244(b): Hutton seeks "to present 'newly discovered evidence,' Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied." 545 U.S. at 531. *Gonzalez* thus compels the result here: Hutton's motion triggers § 2244(b)'s second-or-successive limits.

It also does not matter whether Hutton's Rule 60(b) motion should be viewed as presenting new evidence in support of an *old claim* (subject to § 2244(b)(1)) or as presenting a *new claim* (subject to § 2244(b)(2)). Either way, the claim is second or successive. And either way, the claim is subject to dismissal. In that respect, Hutton nowhere suggests he could meet § 2244(b)(2)'s rules. As the Sixth Circuit noted, "neither *Martinez* nor *Trevino* created a new rule of constitutional law made retroactive by the Supreme Court," and Hutton has not shown that he was diligent in obtaining this new evidence or that it proves his innocence. Pet. App. A-2.

C. Hutton's competing interpretations of *Martinez* and *Gonzalez* lack merit. He initially claims that *Martinez* actually says something about the scope of

Rule 60(b). Pet. 7-8. But *Martinez* does not even mention Rule 60(b), let alone discuss its interaction with § 2244(b). That case instead arose in the ordinary course following a *final judgment* in the district court; it did not arise from the district court's denial of a *Rule 60(b) motion*. *Martinez*, 566 U.S. at 7-8. So it is unsurprising that this Court's decision would not mention Rule 60(b)'s scope or its relationship to § 2244(b)'s limits on second-or-successive petitions.

Hutton also wrongly argues that the Sixth Circuit's holding that his petition was second or successive conflicts with *Gonzalez* by eliminating any ability for habeas petitioners to file Rule 60(b) motions. Pet. 9-10. The Sixth Circuit's decision does no such thing. It narrowly applies only where, as here, the federal courts considered (and rejected) a claim *on the merits* when entering a final judgment. Pet. App. A-2, A-7. That Hutton seeks to relitigate a once-rejected claim turns his Rule 60(b) motion into a second-or-successive application because "it attacks the federal court's previous resolution of a claim *on the merits*." *Gonzalez*, 545 U.S. at 532. When, by contrast, a Rule 60(b) motion has invoked *Martinez* after a federal court has rejected a claim on *procedural-default* grounds, the Sixth Circuit has treated the motion's request to reopen as a proper Rule 60(b) motion, not as a second-or-successive application. *See, e.g.*, *Miller v. Mays*, 879 F.3d 691, 698-706 (6th Cir. 2018) (treating motion as proper Rule 60(b) motion rather than a second-or-successive application, but rejecting it on the ground that petitioner failed to show the "extraordinary circumstances" necessary to reopen a final judgment).

In sum, this case represents a straightforward application of *Gonzalez*, and does not even implicate the issues in *Martinez* or *Trevino*. So Hutton's alleged conflict with this Court's case provides no basis for the Court's review. Instead, this case represents merely a fact-bound application of *Gonzalez*'s clear rules.

II. THIS CASE IS AN IMPROPER VEHICLE TO RESOLVE ANY CIRCUIT CONFLICT OVER WHEN *MARTINEZ* MAY JUSTIFY RELIEF UNDER RULE 60(B)(6)

Hutton next argues that this Court should grant review because the Sixth Circuit has held—categorically—that *Martinez* and *Trevino* can never justify relief from a final judgment under Rule 60(b)(6)'s catchall provision. Pet. 10-11. Adding an all-purpose provision on top of the specific grounds identified in other portions of the rule, Rule 60(b)(6) permits reopening a final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The Sixth Circuit's categorical approach, Hutton argues, adds to a deep circuit conflict over whether *Martinez* and *Trevino* may justify relief under Rule 60(b)(6). Pet. 12-17. He is mistaken. The alleged circuit conflict provides no basis for review here.

Most importantly, this case does not even implicate the alleged conflict. As noted, the Sixth Circuit rejected Hutton's motion on the ground that Rule 60(b) did not apply because he had already litigated the merits of his ineffective-assistance claim to a final judgment and sought to use Rule 60(b) to litigate those merits a second time. Pet. App. A-2. In addition, this Court issued both *Martinez* and *Trevino before* the district court's final judgment in this case, so those cases do not even qualify as intervening changes in law for purposes of Rule 60(b)(6). *Cf. Gonzalez*, 545 U.S. at 536 (denying petitioner's Rule 60(b) motion, because a

changed interpretation of the statute of limitations is not an "extraordinary circumstance"). This case thus does not offer a proper vehicle to consider when, if ever, a change in law like *Martinez* can provide the "'extraordinary circumstances'" that the Supreme Court has said are necessary to reopen a final judgment under Rule 60(b)(6). *Id.* The Court should not consider Rule 60(b)(6)'s scope in a case in which the lower courts did not consider Rule 60(b)(6)'s scope.

Even if this case did involve Rule 60(b)(6), Hutton misreads the Sixth Circuit cases asking whether *Martinez* and *Trevino* can justify relief. The Sixth Circuit holds to a narrow principle: "[t]he single fact of" the change of law brought about by *Martinez* and *Trevino* is not "*by itself*" "sufficient to warrant reopening the final judgment against [a] defendant." *McGuire v. Warden*, 738 F.3d 741, 750, 758 (6th Cir. 2013) (emphasis added). Or, as the court more recently put it, *Martinez* and *Trevino* "do not *alone* 'sufficiently change[] the balance of the factors for consideration under Rule 60(b)(6) to warrant relief.'" *Miller*, 879 F.3d at 698 (emphasis added). These statements do not mean that those two decisions can *never* support relief—but they must be combined with other factors. That is why the Sixth Circuit's decisions have gone on to ask whether other factors "in addition to *Martinez* and *Trevino*" justified relief under Rule 60(b)(6) on a "fact-specific" and "'case-by-case inquiry.'" *Id.* at 699, 702 (citation omitted). The Sixth Circuit's approach is thus more nuanced than Hutton's categorical claim suggests.

This nuanced approach, moreover, aligns the Sixth Circuit's decisions with those circuit decisions with which Hutton claims a conflict. Pet. 15-17 (citing

Ramirez v. United States, 799 F.3d 845 (7th Cir. 2015); *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014); *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009)). In these decisions, these courts (like the Sixth Circuit) hold that a case-by-case approach applies to determine whether changed law (like *Martinez*) suffices to warrant relief under Rule 60(b)(6). The Third Circuit, for example, explained that "the jurisprudential change rendered by *Martinez*, *without more*, does not entitle a habeas petitioner to Rule 60(b)(6) relief." *Cox*, 757 F.3d at 124 (emphasis added). The Seventh Circuit also refused to re-open a case on the basis of *Martinez* and *Trevino*, recognizing that "[a] change in law *alone* will not suffice" to meet Rule 60(b)(6)'s standards. *Ramirez*, 799 F.3d at 850 (emphasis added); *see also Nash v. Hepp*, 740 F.3d 1075, 1077 (7th Cir. 2014) (noting that "[t]he recent changes in the law of procedural default do not give Nash grounds for relief under Rule 60(b)(6)"). The Ninth Circuit, too, recognizes that a "case-by-case approach" applies to decide whether changed law warrants relief under Rule 60(b)(6). *Phelps*, 569 F.3d at 1133; *cf. Jones v. Ryan*, 733 F.3d 825, 840 (9th Cir. 2013) ("On balance, the Supreme Court's decision in *Martinez* does not constitute such an 'extraordinary circumstance' as to warrant reopening of Jones's case under Rule 60(b)(6)."). In short, the circuit "law on this issue reflects an admirable consistency." *Moses v. Joyner*, 815 F.3d 163, 169 (4th Cir. 2016). No circuit conflict exists.

III. HUTTON'S ARGUMENTS ABOUT THE MERITS OF THE QUESTION PRESENTED MERELY DISPUTE THE APPLICATION OF SETTLED LAW TO HIS FACTS

Hutton lastly argues the merits—asserting both that the Sixth Circuit wrongly treated his Rule 60(b) motion as a second-or-successive petition under

§ 2244(b), and that he can satisfy Rule 60(b)(6)'s demanding standards for reopening final judgments. Pet. 18-24. He is again mistaken.

To begin with, Hutton's merits arguments here provide no reason for this Court's intervention. Instead, he initially challenges the Sixth Circuit's application of well-settled law (*Gonzalez*) to his unique facts. And he then merely argues for the application of Rule 60(b)(6)'s well-established standards, but offers no reasons (other than *Martinez* and *Trevino*) for reopening the judgment. So these arguments provide no grounds for granting review in this fact-intensive case.

Regardless, Hutton's merits arguments are mistaken. He asserts that *Gonzalez*'s rules for second-or-successive petitions do not cover his Rule 60(b) motion because the motion attacks a defect in the federal habeas proceeding—namely, his counsel's representation of him in both the state post-conviction proceedings and the federal habeas proceedings. Pet. 19-20. That is wrong. *Gonzalez* rejected this specific claim, noting that an "attack" on federal "habeas counsel's omissions" "ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." 545 U.S. at 532 n.5. That is what Hutton seeks to do here—claiming that his federal counsel wrongly failed to uncover his medical records and a psychologist's evaluation of them. Pet. App. A-7. And he uses these records simply to obtain a second chance to argue his claim that trial counsel provided ineffective assistance at the penalty stage of his case.

In this respect, Hutton has not identified a new claim (as he suggests, Pet. 20), but instead merely presents new evidence in support of an old one. Indeed, the district court spent pages detailing why it was denying his ineffective-assistance claim alleging that trial counsel failed "to investigate and present sufficient mitigating evidence." *Hutton*, 2013 U.S. Dist. LEXIS 80443, at *99-118. The additional evidence that Hutton now provides merely seeks to relitigate that previous ruling. Furthermore, the state courts already adjudicated Hutton's ineffective-assistance claim that was based on his counsel's mitigation efforts, Pet. App. A-5, so AEDPA's deferential standards apply. 28 U.S.C. § 2254(d)(1). Under those standards, this Court's precedent barred Hutton from even presenting the new evidence on which his Rule 60(b) motion relies for the first time in federal court. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (noting that review under AEDPA "is limited to the record that was before the state court that adjudicated the claim on the merits"). So even if he had timely presented this evidence in federal court, the federal courts would have been precluded from considering it.

Even if this were a "new" claim, it would still be second or successive under § 2244(b). That provision applies to *both* a claim that was already presented in an initial application, 28 U.S.C. § 2244(b)(1), and to a claim that was not presented in an earlier application, *id.* § 2244(b)(2). If this new evidence qualifies as a "new claim" that was not presented in an earlier application (as Hutton suggests), he does not even attempt to meet the demanding standards that would be necessary to assert it under § 2244(b)(2). This new evidence falls far short of "establish[ing] by

clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Hutton] guilty of the underlying offense." *Id.* § 2244(b)(2)(B)(ii). So this "new claim" v. "old claim" debate is irrelevant.

Lastly, even if this case were governed by Rule 60(b)(6)'s standards rather than § 2244(b)(2), Hutton has identified nothing other than *Martinez* and *Trevino* to meet that rule's "extraordinary circumstances" requirement. Pet. 23-24. And, as noted, even the circuit courts on which Hutton relies agree that those two cases, "without more, [do] not entitle a habeas petitioner to Rule 60(b)(6) relief." *Cox*, 757 F.3d at 124. That is especially true where, as here, they came out *before* the final judgment that the petitioner seeks to reopen.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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