

No. \_\_\_\_\_

**In the  
Supreme Court of the United States**

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ANTHONY CARDELL HAYNES,  
*Petitioner,*

v.

LORIE DAVIS, Director,  
Texas Department of Criminal Justice,  
Correctional Institutions Division,  
*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE**

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## CAPITAL CASE

### QUESTIONS PRESENTED

This Court granted Mr. Haynes’ petition for *certiorari* and remanded this case to the Fifth Circuit, *Haynes v. Thaler*, 569 U.S. 1015 (2013), “to allow Haynes to pursue his ineffective assistance of trial counsel claim on remand if this Court in *Trevino* [*v. Thaler*, 569 U.S. 413 (2013)] rejects the single ground relied upon by the Fifth Circuit for denying Haynes’ application for a certificate of appealability.” *Haynes v. Thaler*, 133 S. Ct. 639 (2012) (mem.) (Statement of Sotomayor, J. and Ginsburg, J., respecting grant of stay of execution). The Fifth Circuit in turn granted a certificate of appealability (“COA”) and remanded the case to the district court. Yet there was no real review of the merits of Haynes’ claim, just a “facial review” that did not consider the underlying facts of the claim, by that Court’s own admission.

A divided panel of the Fifth Circuit then denied relief, despite the dissent’s holding that “Haynes presents a substantial ineffective-assistance-of-trial-counsel claim that has never been properly considered and ...the district court abused its discretion in failing to reopen his case.” *Haynes v. Davis*, 733 F. App’x 766, 771 (Dennis, J., dissenting) (App. A 4). The dissent also found that “the district court failed to consider all of the relevant factors and misevaluated the factors it did consider;” that there was no real merits review; that the claim was substantial; and that a major ground relied upon by the majority, “finality,” was not a decisive factor in the context of Rule 60(b). (App. A 4-8). Another ground for denial, that the claim under Rule 60(b)(6) was an impermissible “substitute for appeal,” was inapplicable, as the rationale for *Trevino* was that it applied in states where the IATC claim could not practically be brought on appeal.

This case therefore presents the following questions:

1. Did the Fifth Circuit majority err in finding that there were no “extraordinary circumstances” and that the claim was not sufficiently “substantial” to warrant relief under Rule 60(b)(6)?
2. Did the Fifth Circuit majority err in holding that Haynes’ claim had been considered on the merits and that the district court’s “facial review” was sufficient when the underlying facts of the claim were not considered and there was no real merits review?
3. Did the Fifth Circuit majority contravene *Gonzalez v. Crosby*, 545 U.S. 524 (2005) and *Buck v. Davis*, 137 S. Ct. 759 (2017) in holding that “finality” is a determinative factor in the context of Rule 60(b), and did it err in holding that the claim was merely a “substitute for appeal” when it could not have been brought on appeal?

### **LIST OF PARTIES**

Pursuant to Sup. Ct. R. 14.1(b), the following list identifies all of the parties before the Texas Court of Criminal Appeals, the United States District Court for the Southern District of Texas and the Fifth Circuit Court of Appeals:

Petitioner is Anthony Cardell Haynes, an inmate confined pursuant to a conviction of capital murder and sentence of death in the custody of the Texas Department of Criminal Justice.

Respondent is Lorie Davis, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division. Her predecessors in that position, Rick Thaler and William Stephens, were also parties in prior proceedings in federal district court, the Fifth Circuit and this Court.

### **RULE 29.6 STATEMENT**

Petitioner is not a corporate entity.

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Appendix C: *Haynes v. Stephens*, No. H-05-3424, 2015 WL 6016831 (S.D. Tex. Oct. 14, 2015) (denying the claim; granting a certificate of appealability (“COA”) on the issue.

Appendix D: *Haynes v. Stephens*, 576 F. App’x 364 (5th Cir. 2014) (on remand from this Court, granting a COA and remanding to the district court).

Appendix E: *Haynes v. Thaler*, 569 U.S. 1015 (2013) (granting *certiorari* and remanding to 5th Circuit).

Appendix F: *Haynes v. Davis*, 18A 221 (application of petitioner for an extension of time to file a petition for certiorari, granted by Justice Alito on August 30, 2018, docket sheet reflecting that order).

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ANTHONY CARDELL HAYNES,  
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LORIE DAVIS, Director,  
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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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Anthony Cardell Haynes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

**OPINIONS BELOW**

The Fifth Circuit decision sought to be reviewed is reported as *Haynes v. Davis*, 733 F. App'x 766 (5th Cir. 2018)(2-1 decision), and is attached as Appendix A. The Fifth Circuit order denying the petition for rehearing, *Haynes v. Davis*, No. 15-70038 (5th Cir. June 20, 2018) is attached as Appendix B. The district court order from which Mr. Haynes's appeal was taken, *Haynes v. Stephens*, No. H-05-3424, 2015 WL 6016831 (S.D. Tex. Oct. 14, 2015), is attached as Appendix C. The Fifth Circuit opinion on remand from this Court, granting a certificate of appealability ("COA") and remanding the matter to the district court is reported as *Haynes v. Stephens*, 576 F. App'x 364 (5th Cir. 2014) and is attached as Appendix D. The order from this Court granting

Haynes' petition for writ of certiorari and remanding it to the Fifth Circuit is reported as *Haynes v. Thaler*, 569 U.S. 1015 (2013) and is attached as Appendix E. The application of petitioner for an extension of time to file this petition for certiorari was granted by Justice Alito on August 30, 2018, and the docket sheet reflecting that order, *Haynes v. Thaler*, 18A221, is attached as Appendix F. The two earlier unreported opinions of the federal district court dealing with this claim are attached as Appendix H. *Haynes v. Quarterman*, 2007 WL 268374 (S.D. Tex. Jan. 25, 2007) (relevant excerpt); *Haynes v. Thaler*, 2012 WL 4739541 (S.D. Tex. Oct. 3, 2012).

### **STATEMENT OF JURISDICTION**

This case was initiated in the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. §§ 2241 and 2254 and FED. R. CIV. P. 60(b)(6). The United States Court of Appeals for the Fifth Circuit exercised appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c). A divided panel of the Fifth Circuit issued its decision denying habeas relief on June 20, 2018. Justice Alito granted an extension of time, to and including October 18, 2018, to file a petition for writ of certiorari. The jurisdiction of this Court is invoked under the United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1); this Court has jurisdiction over the issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 and 2253, petitioner having asserted below and asserting herein deprivation of rights guaranteed by the United States Constitution.

### **CONSTITUTIONAL PROVISIONS INVOLVED**

The questions presented implicate the Fifth Amendment to the United States Constitution, which provides in pertinent part that “[n]o person...shall be deprived of life, liberty or property, without due process of law.”

The questions also implicate the Sixth Amendment right to counsel: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

## **STATEMENT OF THE CASE<sup>1</sup>**

### **A. Course of Prior Proceedings.**

This matter is before the Court as a result of a grant of certiorari. *Haynes v. Thaler*, 569 U.S. 1015 (2013) (App. E). In light of *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013),<sup>2</sup> it was remanded to the Fifth Circuit to consider Mr. Haynes’ underlying claim of ineffective assistance of trial counsel (“IATC”). This claim was originally brought in the federal district court under FED. R. CIV. P. 60(b)(6). Haynes will first describe the relevant procedural history of the claim because the diligence with which Haynes pursued his IATC claim, and his

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<sup>1</sup> As used in this petition, “RR” refers to the Reporter’s Record (the trial transcript) in *Haynes v. State*, No. 783872, 263rd Judicial District Court of Harris County, Texas, as assembled by the United States District Court for the Southern District of Texas and transmitted to the Fifth Circuit. “CR” refers to the Clerk’s Record of these proceedings. “ROA” refers to the federal record on appeal in *Haynes v. Davis*, 733 F. App’x 766 (5th Cir. 2018) (App. A).

<sup>2</sup> *Martinez* held that ineffective assistance of initial state habeas counsel “may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial,” *Martinez*, 566 U.S. at 9, where the IATC is a “substantial” claim. *Trevino* held that *Martinez* applied to states like Texas, where the defendant did not have a “meaningful opportunity to raise [an IATC] claim on direct appeal.” *Trevino*, 569 U.S. at 429.

argument that state habeas counsel's ineffectiveness caused the claim's default, are both relevant to whether the Fifth Circuit majority erred in holding that Rule 60(b)(6) relief was not warranted.

This is a capital habeas corpus matter brought by petitioner Anthony Cardell Haynes, a Texas death row inmate in the custody of Respondent (hereafter, "the Director"), pursuant to 28 U.S.C. §§ 2253 & 2254. Haynes was convicted of killing off-duty Houston Police Officer Kent Kincaid on May 22, 1998, TEX. PENAL CODE § 19.03(a)(1), and was sentenced to death. As the Fifth Circuit dissent observed, "[a]t the time of the capital crime in question, Anthony Haynes was nineteen years old, had no prior criminal record, and was apparently under the influence of drugs." *Haynes v. Thaler*, 733 F. App'x 766, 770 (5th Cir. 2018) (Dennis, J. dissenting) (App. A 4). And "[a]t the punishment phase of his capital trial, Haynes was deprived of the opportunity to present his best defense. *Id.*"<sup>3</sup>

In state habeas, "Haynes was deprived of the opportunity to raise his ineffective assistance of trial counsel claim in state court by what appears to have been egregiously deficient post-conviction counsel." *Id.* That application alleged absolutely no extra-record facts that could have been discovered through reasonable investigation and included not a single fact or declaration regarding trial counsel's inadequate penalty phase investigation or the availability of any witnesses or evidence that could have been presented. And in federal court "Haynes was deprived of federal review of his claim by a procedural bar that the Supreme Court has since expressly lifted." *Id.*

## **B. How The Underlying IATC Claim Was Previously Raised.**

### **i. Haynes's first attempt to present the claim.**

Haynes, through undersigned appointed counsel, first raised his IATC claim in his initial

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<sup>3</sup> The "best defense" to which Judge Dennis referred are the declarations of 39 uncalled potential punishment-phase witnesses, included herein as Appendix G.

federal petition for writ of habeas corpus, filed in the district court on October 5, 2005. It was Claim Number One in the petition, and occupied 134 pages with 25 sub-claims, including the claims presently before the Court. (*Haynes v. Dretke*, No. 4:05-cv-03424 (S.D.Tex.) (App. H) [ROA.130-268]). Haynes also raised a separate claim that ineffective assistance of state post-conviction counsel (“IAHC”) was the cause of the failure to raise this claim in the state courts, and was cause for any default. [ROA.307-329]. The district court denied all funding to investigate these claims, despite two such requests (*Haynes v. Dretke*, Docket Nos. 18, 23), on the grounds that the claims were defaulted.

On January 25, 2007, the district court denied the petition and a COA as to all claims. *Haynes v. Quarterman*, 2007 WL 268374, No. H-05-cv-3424(S.D. Tex. Jan. 25, 2007) (App. H). Applying established Fifth Circuit precedent at the time, Haynes’ IATC claim was held to be procedurally defaulted because state habeas counsel had failed to present the extra-record evidence in state post-conviction proceedings. The district court also rejected Haynes’s argument that state habeas counsel’s grossly deficient performance should excuse any default applicable to the IATC claim. *Id.* at \*8.<sup>4</sup> Haynes also requested a stay and abeyance of the federal proceedings in order to present and exhaust this claim in the state courts, but this was also denied. *Id.* at \*37.

On appeal, the Fifth Circuit also held that Haynes’s IATC claim was procedurally defaulted and therefore it was not reviewed. *Haynes v. Quarterman*, 526 F.3d 189, 195 (5th Cir. 2008). However, that Court granted Haynes a COA on a claim under *Batson v. Kentucky*, 476 U.S. 79

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<sup>4</sup> The district court included a short “alternative merits review” in which the ineffective assistance of counsel claims were denied on the merits without any specific discussion of the roughly 130 pages devoted to the claim in the federal petition. *Id.* at \*8-\*9 (App. H). However, that “alternative merits review” was flawed as the non-specific findings did not comport with the record, did not address the lack of investigation by the trial attorneys or the many individual declarations attached as exhibits, and made logical errors.

(1986) relating to jury selection. *Haynes*, 526 F.3d at 202-203. Subsequently, the Fifth Circuit granted relief on the *Batson* claim. *Haynes v. Quarterman*, 561 F.3d 535 (5th Cir. 2009). However, this Court granted the State’s petition for *certiorari*, summarily reversed and remanded the case to the Fifth Circuit for re-consideration of the *Batson* issue. *Thaler v. Haynes*, 130 S. Ct. 1171, 1175 (2010). On August 19, 2011 the Fifth Circuit denied relief on the *Batson* claim. *Haynes v. Thaler*, 438 F. App’x 324 (5th Cir. 2011). Haynes’s petition for writ of *certiorari* in this Court was denied on April 23, 2012. *Haynes v. Thaler*, 566 U.S. 964 (2012). On June 28, 2012, the trial court set an execution date of October 18, 2012 for Mr. Haynes.

**ii. Haynes’s second attempt to present the claim.**

Seven years after Haynes first sought equitable relief from his state habeas counsel’s deficient representation, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), holding that the failure of initial state habeas counsel to present an IATC claim could be an exception to federal procedural default. In the aftermath of *Martinez*, on September 24, 2012, Haynes filed in the district court a “Motion for Relief From Judgment Pursuant to FED. R. CIV. P. 60(b)(6),” based on trial counsel’s failure to present significant mitigating evidence (the IATC claim), and a motion for a stay of his execution. Those motions were denied by the district court on October 3, 2012. *Haynes v. Thaler*, 2012 WL 4739541 (S.D. Tex., Oct. 3, 2012) (App. H). Once again, there was no real merits review, as the district court itself admitted: “[w]ithout addressing the individual basis for each unexhausted, factually dependant claim, the court notes that none of his arguments facially command habeas relief.” *Id.* at \*2 (emphasis added). As the IATC claims were “factually dependant,” they naturally depended on their individual facts, as does any claim. But because the claims were not “individually addressed” as to their facts by the district court, no real review ever took place, factually or legally. Thus, this “review” failed to consider the individual equities of the

case before it, as is necessary under Rule 60(b)(6). *See, e.g., Cone v. Bell*, 556 U.S. 449, 474–75 (2009) (cited in *Haynes*, 733 F. App’x at 722 (App. A 5); *Diaz v. Stephens*, 731 F.3d 370, 377-379 (5th Cir. 2013); *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004).

On October 3, 2012, Haynes filed a motion for a COA and for a stay of execution in the Fifth Circuit. In a split decision, that Court held that state habeas counsel’s deficiency in failing to raise the IATC claim did not establish cause to excuse the procedural default. *Haynes v. Thaler*, 489 F. App’x 770 (5th Cir. 2012) (*per curiam*).

A majority of the divided Fifth Circuit panel resolved this case on the inapplicability of *Martinez* to Texas cases, in accord with *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012), and the related holding of *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012) that “*Martinez* did not constitute an ‘extraordinary circumstance’ allowing the reopening of judgment under Rule 60(b)(6).” *Haynes*, 489 F. App’x at 772. The Fifth Circuit majority, in denying Haynes’s application for a COA and his motion for a stay of execution, held that “*Ibarra* is controlling precedent. Accordingly we hold that it forecloses the relief Haynes seeks.” *Id.* at 772. There was a reference, without analysis, to the district court’s “alternative merits review,” *Id.* at 771. The panel majority did not discuss the merits of Haynes’s underlying IATC claim or the district court’s merits review.

However, Judge Dennis’s dissent did discuss the merits of the underlying IATC claim, based on *Wiggins v. Smith*, 539 U.S. 510 (2003), at length. *Haynes*, 489 F. App’x at 773,777-779 (Dennis, J., dissenting). While not directly addressing the district court’s alternative merits review, Judge Dennis found that Haynes’s *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]/*Wiggins* IATC claim warranted the grant of a COA, *Haynes*, 489 F. App’x at 775, and that the claim also had merit even under the stricter requirements of Rule 60(b)(6). *Id.* at 777.

Haynes filed a petition for certiorari. On October 18, 2012, this Court granted a stay of

execution. *Haynes v. Thaler*, 133 S. Ct. 498 (2012). In a subsequent statement respecting the stay, the Court explained it was “to allow Haynes to pursue his claim on remand if this Court in *Trevino* [*v. Thaler*, 569 U.S. 413 (2013)] rejects the single ground relied upon by the Fifth Circuit for denying Haynes’ application for a certificate of appealability.” *Haynes v. Thaler*, 133 S. Ct. 639 (2012) (mem.) (Statement of Sotomayor, J, and Ginsburg, J., respecting grant of stay of execution). That single ground—the Fifth Circuit’s holding in *Ibarra*, that *Martinez* did not apply to Texas cases—was indeed subsequently rejected in *Trevino* which overruled *Ibarra* and held that *Martinez* applies to Texas cases. *Trevino*, 569 U.S. at 429. This Court then vacated the Fifth Circuit’s decision and remanded the case “for further consideration in light of *Trevino v. Thaler*.” *Haynes v. Thaler*, 569 U.S. 1015 (2013) (App. E).

**iii. Haynes’s third attempt to present the claim.**

On remand, the Fifth Circuit ordered the submission of letter briefs addressing the effect of *Trevino* on the case. In his brief, Haynes argued that he should be allowed a full and fair consideration of his claim on remand; that he was entitled to a COA and a remand to the district court for full factual development; that his underlying IATC claim was substantial; that his state habeas counsel was ineffective (“IAHC”); that the district court’s 2007 “alternative merits review” was flawed; that *Adams v. Thaler* does not control the outcome; and that relief is available under Rule 60(b)(6). The Director vigorously opposed a remand and the granting of a COA.

On July 28, 2014, the Fifth Circuit rejected the Director’s assertions that remand would be futile and ordered that “[p]ursuant to the Supreme Court’s order, we GRANT Haynes’s application for a COA and REMAND to the district court to reconsider its denial of Haynes’s Rule 60(b)(6) motion in light of *Trevino*.” *Haynes v. Stephens*, 576 F. App’x 364, 365 (5th Cir. 2014) (App. D).

**iv. Haynes' fourth and current attempt to present the claim.**

Haynes once again presented his IATC claim to the district court in his Rule 60(b)(6) motion. He also requested a stay and abeyance and a remand of the case to the state court, as he had during the initial district court proceedings. After briefing, on October 14, 2015, the district court denied Haynes' Rule 60(b)(6) motion and denied his request for a stay and abeyance to return to state court, but granted a COA. *Haynes v. Stephens*, 2015 WL 6016831 (S.D. Tex., Oct. 14, 2015) [ROA.2511-2529] (App. C). Once again, there was no real "merits review," just references to the district court's two prior "reviews."

On appeal in the Fifth Circuit, after oral argument, in a split decision, that Court denied Haynes' claim of ineffective assistance of counsel at the punishment phase ("IATC"). *Haynes v. Davis*, 733 F. App'x 766 (5th Cir. 2018) (App. A).

**C. Statement of Facts and Summary of the Trial.**

Petitioner, an African-American, was charged with the killing of off-duty Houston Police Officer Kent Kincaid on May 22, 1998. On that night, Anthony Haynes got together with two friends, one of whom had a significant history of delinquent behavior, and they drove around Houston in a pickup registered in Petitioner's father's name. 24 RR 59-77; 25 RR 26, 180. They decided to raise some money and drove up to pedestrians, pretended to ask directions, and then pointed a pistol at them. The gun was not fired and the victims who refused to hand over their wallets and ran away were not pursued or fired upon. *Id.*

Later that same evening, Haynes fired the pistol into the air as he drove the truck. *Id.* Officer Kincaid's wife testified that as they were driving in their SUV, "something was thrown at our windshield." 23 RR 109-110. The off-duty officer, who was on his way to a sports bar with his wife, was understandably irate, as it cracked the windshield. 23 RR 110-111. A truck had passed

their vehicle at the time of the impact, so the officer turned around and followed it. 23 RR 112, 139. After several blocks, the truck turned and pulled into a driveway and Sgt. Kincaid stopped and blocked it with his vehicle. 23 RR 113-114. The officer got out of his SUV, dressed in jeans with a pullover short-sleeved shirt and boots. 23 RR 115, 116, 138. Nothing in his appearance indicated that he was a police officer. 23 RR 141.

Sgt. Kincaid began to question the driver of the truck, Anthony Haynes. 23 RR 116. The officer asked to see a driver's license, and then reached in his back pocket to show his police identification. 23 RR 118-119, 140, 142. Then the driver shot him and he fell. 23 RR 119. The truck was eventually traced to Haynes, who was soon arrested and charged with the capital murder of a police officer who was "acting in the lawful discharge of an official duty." 25 RR 178-181. The jury found Haynes guilty of capital murder on September 17, 1999.

### **REASONS FOR GRANTING CERTIORARI**

As Judge Dennis' dissent points out, the majority opinion makes numerous errors that contravene this Court's settled jurisprudence under Rule 60(b), *Martinez* and *Trevino*. Left uncorrected, the majority opinion would sanction a denial of relief when there has been no real merits review or a "facial review" of the facts by the district court, even where there is substantial and overwhelming evidence supporting the claim and showing Rule 60(b) "exceptional circumstances."<sup>5</sup> The majority opinion would also contravene this Court's holdings in *Gonzalez v. Crosby*, 545 U.S. 524 (2005) and *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) which explicitly reject

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<sup>5</sup> As the dissent points out, regarding the district court's three-sentence "alternative merits review," this Court "has rejected a similarly cursory alternative holding as insufficient to constitute review on the merits," citing *Cone v. Bell*, 556 U.S. 449, 474-75 (2009). *Haynes*, 733 F. App'x at 772 (App. A 5) (Dennis, J., dissenting). Thus, *Cone* would also be implicated if the majority opinion is allowed to stand.

the notion of “finality” in the context of Rule 60(b).

This Court remanded the case to the Fifth Circuit and that Court, in turn, remanded it to the district court with instructions to “reconsider its denial of Haynes’s Rule 60(b)(6) motion in light of *Trevino*...without additional advisory instructions as to how to exercise its discretion when considering whether Haynes meets the prerequisites for obtaining relief under Rule 60(b)(6).” *Haynes*, 576 F. App’x at 365 (5th Cir. 2014) (App. D 1). As Judge Dennis of that Court pointed out in his concurring opinion on remand:

In its previous decision denying Petitioner’s motion for relief from judgment, the district court stated that it had ‘already reviewed the merits of Haynes’ *Strickland* claim in the alternative and found it to be without merit’ and that therefore ‘he has already received all the relief he has requested.’ *Haynes v. Thaler*, No. H-05-3424, 2012 WL 4739541, at \*5-6 (S.D.Tex. Oct. 3, 2012). The district court was apparently referring to three sentences of an earlier opinion... The district court did not conduct an analysis of—or even discuss—the post-conviction evidence. Given the cursory nature of this analysis, I would instruct the district court to reconsider the Petitioner’s ineffective-assistance-of-counsel argument on remand. (*Haynes*, 576 F. App’x at 366) (App. D 2).

Yet, once again, no reconsideration, review, analysis or discussion of Haynes’s evidence (including the many declarations and affidavits appended herein at App. G) occurred in the district court in this latest round. The district court merely referred to its prior “reviews” which likewise never dealt with the facts of his claim, maintaining the fiction that there had been an actual prior merits review. *Haynes v. Stephens*, 2015 WL 6016831 (S.D. Tex. Oct. 14, 2015 (App. C). That court denied Haynes’ motion on three grounds upon which it had previously relied:

1) That Haynes has not shown “exceptional circumstances” to merit relief under Rule 60(b)(6). *Haynes, supra*, at \*5 (App. C 4-5).

2) That the merits of Haynes’s *Strickland* claim do not entitle him to relief from judgment. *Id.* at \*5-\*6 (App. C 5).

3) That Haynes has failed to show “actual prejudice” to overcome the procedural default and that “Haynes has not shown that had state habeas counsel raised the same claim as in his federal petition, a state court would have granted the habeas writ.” *Id.* at \*6 (App. C 5-6).<sup>6</sup> *See also Haynes*, 733 F. App’x at 768. (App. A 2).

As to the first ground, Haynes has shown that there are exceptional circumstances here that justify relief under Rule 60(b)(6), yet neither the district court or the Fifth Circuit ever examined the individual circumstances of Haynes’s IATC claim and erred in holding that “the district court reviewed the merits of Haynes’ underlying IATC claim on multiple occasions.” *Haynes*, 733 F. App’x at 769. (App. A 3). As to the second ground, there was merely a re-iteration of the previous “reviews” which similarly failed to deal with the actual merits of Haynes’ claim. Once again, there was no analysis or discussion of the post-conviction mitigating evidence presented in the 39 declarations (App. G) by either the district court (App. C) or the Fifth Circuit (App. A). And as to the third ground, Haynes also shows that the district court and the Fifth Circuit simply ignored a lengthy, detailed and massive showing of “actual prejudice” in holding that Haynes is merely arguing for a “better mitigation strategy” and “the merits of Haynes’ IATC claim are not particularly compelling.” *Haynes*, 733 F. App’x at 769 (App. A 3). The Fifth Circuit also denied Haynes’ claim under Rule 60(b)(6) on grounds of finality, a ground explicitly rejected by this Court “in the interpretation of a provision [Rule 60(b)] whose whole purpose is to make an exception to finality.” *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). To date, despite three opportunities, there has been no real “merits review” by either the district court or the Fifth Circuit.

The district court, in simply referencing and deferring to its prior holdings without

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<sup>6</sup> The district court conceded that the first ground upon which it had originally relied, Fifth Circuit precedent, was no longer valid, as *Trevino* and *Martinez* had overruled *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012). *Id.* at \*4 (App. H).

considering the merits or the evidence, did not fulfill the Fifth Circuit’s explicit instructions to afford Haynes a reconsideration of his 60(b)(6) motion and his *Strickland* claim. Nor did the Fifth Circuit fulfill the intent of this Court in granting certiorari and remanding it in light of *Trevino*. (App. E). Even though the Fifth Circuit left the review to the discretion of the district court, this non-review was an abuse of that discretion. As that Court has held, “[a] trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence.” *United States v. Ebron*, 683 F.3d 105, 153 (5th Cir. 2012).

**I. The Fifth Circuit Majority Opinion Erred in Finding That There Were No “Extraordinary Circumstances” And That The Claim Was Not Sufficiently “Substantial” To Warrant Relief Under Rule 60(b)(6).**

The district court’s “second reason”<sup>7</sup> for denying the Rule 60(b)(6) Motion was that “[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment.” *Haynes v. Stephens*, 2015 WL 6016831 at \*5 (App. C 4-5). Likewise, the Fifth Circuit held that “[t]he gravamen of Haynes’ argument is that, because he has a substantial IATC claim and that his state habeas counsel was deficient in failing to raise it, he has established ‘extraordinary circumstances’ warranting relief from judgment. We disagree.” *Haynes*, 733 F. App’x at 769 (App. A 3). Yet Haynes did not base his claim solely on the change on law under *Trevino*, nor was the district court or the Fifth Circuit in any position to find that there were no Rule 60(b) “extraordinary circumstances” because neither court examined the specific merits of the claim.

**A. The Fifth Circuit majority erred in finding no “exceptional circumstances.”**

In determining “extraordinary circumstances” for purposes of Rule 60(b)(6), both the change

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<sup>7</sup> As noted *supra*, the first reason was Fifth Circuit precedent which the district court conceded was no longer valid. *Haynes*, 2015 WL 6016831 at \*4 (App. H).

in decisional law under *Martinez/Trevino*, and the specifics of Haynes's IATC claims must be considered. *See, e.g., Ackermann v. United States*, 340 U.S. 193, 199 (1950) (in some circumstances, a change in the can be the kind of "extraordinary circumstance"...that constitutes a "reason justifying relief from the operation of the judgment" within the meaning of Rule 60(b)(6)).

Here, however, as the dissent points out, "the district court failed to consider all of the relevant factors and misevaluated the factors it did consider. While the majority opinion at least places this case in the proper framework, it stumbles in its assessment of significant factors." *Haynes*, 733 F. App'x at 771 (App. A 5). Additionally, "*the district court's opinion denying Haynes habeas relief entirely failed to engage with the specifics of Haynes' ineffective-assistance-of-counsel claim.*" *Id.* (emphasis added).

#### **B. The standards for IATC claims.**

This Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established the well-known two-step process for assessing a Sixth Amendment claim of ineffective assistance of counsel: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. To establish deficiency, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Any deference afforded counsel's informed, strategic choices does not eliminate counsel's duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690–91. This requires showing that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Specifically, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Applying *Strickland*’s two-pronged inquiry, this Court has found that trial counsel’s failure to adequately investigate available mitigating evidence amounts to ineffective assistance of counsel. *See Williams v. Taylor*, 529 U.S. 362, 395 (2000).

Likewise, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court held that trial counsel’s inadequate investigation of a capital defendant’s social history and consequent failure to present mitigating evidence amounted to a violation of the defendant’s Sixth Amendment right to effective assistance of counsel. *See also Rompilla v. Beard*, 545 U.S. 374, 389 (2005) (failure to review evidence provided by the prosecution which contained information that would lead a reasonable attorney to investigate further). Counsel has an “obligation to conduct a thorough investigation of the defendant’s background.” *Porter v. McCollum*, 558 U.S. 30, 39 (2009). Applying *Strickland*, *Wiggins*, and *Rompilla*, the Fifth Circuit has held that, “[i]n investigating potential mitigating evidence, counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary.” *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). Neither was done by Haynes’ trial counsel.

### **C. The “substantiality” standard under *Martinez*.**

*Martinez*’s first relevant requirement is that “a prisoner must [] demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003), describing the standards for certificates of appealability). *Trevino* did not modify that requirement. The standard of “substantiality” under *Martinez* is substantially similar to the standards for a COA, which Haynes was granted by the Fifth Circuit.

*Haynes*, 576 F. App'x 364 at 365. See *Miller-El* at 336-338; accord *Tennard v. Dretke*, 542 U.S. 274, 276 (2004) (“A COA should issue if the applicant has ‘made a substantial showing of the denial of a constitutional right,’ 28 U.S.C. §2253(c)(2), which we have interpreted to require that the ‘petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,’”); *Smith v. Dretke*, 422 F.3d 269, 273 (5th Cir. 2005) (“we must be mindful that ‘a claim can be debatable even though every jurist of reason might agree, after the COA has been granted, and the case has received full consideration, that petitioner will not prevail,’”) citing *Miller-El* 537 U.S. at 338.

The Fifth Circuit majority opinion denied Haynes’ claim on the basis “even if we were to agree with Haynes that he has raised a colorable claim with respect to the adequacy of his state habeas counsel, he would still be unable to claim the benefit of *Martinez* and *Trevino*” because “to overcome default, a prisoner must also demonstrate that the underlying [IATC] claim is a substantial one.” *Haynes*, 733 F. App'x at 770, quoting *Martinez*, 566 U.S. at 14. The majority concluded that because Haynes’ claim was not “substantial,” he “has not demonstrated ‘extraordinary circumstances’ warranting relief from judgment.” *Id.*

However, the Fifth Circuit had already found that Haynes’ IATC claim was substantial. On remand, on July 18, 2013, that Court ordered the submission of letter briefs addressing the effect of *Trevino* on the case. On July 28, 2014, the Fifth Circuit granted Haynes a COA and remanded to the district court “to reconsider its denial of Haynes’ Rule 60(b)(6) motion in light of *Trevino*.” *Haynes v. Stephens*, 576 F. App'x 364, 365 (5th Cir. 2014) (App. D 1).

**D. Haynes showed that his claim is “substantial” and showed deficient performance and prejudice under *Strickland*.**

In summary, this claim massively demonstrates deficient performance, the first prong of the

test under *Strickland*. Haynes’ trial attorneys presented very little mitigating evidence at the brief punishment phase of his trial: only a minister who testified regarding the Navy “BOOST” Program<sup>8</sup> in which Haynes was enrolled, a staff chaplain who testified as to Haynes’s good behavior in jail awaiting trial and his remorse, two very brief witnesses who had little to say about Haynes’s background, and Haynes’s father and two grandmothers, all of whom were only perfunctorily questioned. 28 RR 156-174; 29 RR 26-119. As Judge Dennis’ dissent put it, “[s]everal witnesses who testified at trial claimed that counsel did not properly prepare them. Trial counsel presented only a handful of witnesses, some of whom did not seem to know Haynes well.” *Haynes*, 733 F. App’x at 774 (App. A 7) (Dennis, J., dissenting). Yet the district court praised defense counsel and the trial court itself in holding that “[t]he record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure that Haynes’ constitutional rights were protected and viable defenses pursued.” (*Haynes, v. Quarterman*, 2007 WL 268374 at \*9) (App. H).<sup>9</sup> Similarly, the Fifth Circuit majority held that “the record indicates that Haynes’ trial counsel was more than adequate and that counsel’s penalty-phase investigation was sufficiently diligent.” *Haynes*, 733 F. App’x at 770 (App. A 3). Nor does the district court’s holding that “Haynes’ allegations do not show flagrant omissions by the players involved at his trial” (*Haynes, v. Quarterman*, 2007 WL 268374 at \*9) (App. H); *cited in Haynes*, 733 F. App’x at 772 (App. A 5),

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<sup>8</sup> “BOOST” stands for the Navy’s “Broadened Opportunity for Officer Selection and Training” Program, which was designed to offer a career-path for future naval officers.

<sup>9</sup> In another instance showing the cursory nature of the district court’s review, the record showed that the judge who conducted the *voir dire*, Judge H. Lon Harper, was actually cleaning two pistols on the bench in full view of the prospective jurors when they were being questioned during *voir dire*, hardly indicative that the trial court was assiduously guarding Haynes’ constitutional rights. [See, e.g., ROA.795]. Judge Harper was officially reprimanded for his conduct in Haynes’s case. See “Judge Reprimanded For Repairing Revolvers On Bench,” by Mary Flood, *Houston Chronicle*, July 13, 2000, Sec. A page 25.

Dennis, J, dissenting) comport with the facts. Haynes overwhelmingly demonstrated a willful failure to investigate and interview witnesses and the defense attorneys' virtual abdication of the need to present mitigating evidence that cannot, by any stretch of the imagination, be called "the exercise of strategy," as the district court termed it (*Haynes, v. Quarterman*, 2007 WL 268374 at \*9) (App. H)<sup>10</sup> or merely an argument for a "better mitigation strategy" or a "different strategy," as the Fifth Circuit termed it. *Haynes*, 733 F. App'x at 770. (App. A 3).

The un-presented mitigation witnesses<sup>11</sup> are summarized as follows:

1) Declaration of Eric Haynes (Haynes's uncle) [ROA.2361-62 (App. G 2-3)<sup>12</sup>] ("Neither of the defense attorneys spoke to me at the time of the trial;" he was a willing witness; would have testified to Haynes' good character, low risk of future dangerousness, and pride in his ROTC progress);

2) Declaration of Tiffany Deckard (close friend) [ROA.2363-64 (App. G 4-5)] ("I did not talk to [co-counsel] Mr. Jones at all, he "basically brushed me off;" she would have testified to Haynes's low risk of committing future dangerous acts; could have discredited key prosecution

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<sup>10</sup> These holdings are in both the district court's 2007 "alternative merits review" of this claim (*Haynes v. Quarterman*, 2007 WL 268374 at \*8-\*9 (App. H)) and the October 3, 2012 Order where the district court repeated the earlier "alternative merits review" in rejecting Haynes's Rule 60(b)(6) motion. (*Haynes v. Thaler*, 2012 WL 4739541 at \*5-\*6 (App. H)). Many of that court's holdings regarding aggravating evidence do not comport with the record. There was no evidence that Haynes "had threatened police officers in the past" (*Id.* at \*6), just one incident at school where Haynes was acting out and later befriended the officer in question (22 RR 79-91). There is no evidence "he had previously assaulted his three-year old sister" (*Id.*); Dr. Silverman's affidavit stated that Haynes' family "were concerned about his potential for assaultiveness towards his 3 year old sister." [ROA.942]. Nor did Haynes "often threaten[] to kill hospital staff" (*Id.* at \*6) and there is no "unremitting drug use that began at age 13." (*Id.*)

<sup>11</sup> These declarations are at App. G.

<sup>12</sup> App. G pagination is at the upper right hand of the page, "Page \_\_\_\_ of 58," as it was numbered in the district court.

witness Col. Davis<sup>13</sup>; and could have presented Haynes' version of the ROTC events and his remorse);

3) Declaration of Earl Washington, Sr.(Houston Fire Dept. colleague of Haynes's father) [ROA.2365-66 (App. G 6-7)] (the attorneys "never contacted" [him]; he was willing to testify to Haynes's church activities, religious faith and church attendance, participation in Sunday school and youth ministry, pride in ROTC, that he had heard Col. Davis speak well of Haynes, and he knew Haynes as a good kid and non-violent);

4) Declaration of Lawrence Hughes [ROA.2369-70 (App. G 10-11)] (never asked to testify but if asked he would have provided crucial testimony about Haynes's use of crystal methamphetamine, irrational behavior, and paranoia at the time of the murder, and that Haynes was a victim of a recent robbery);

5) Declaration of Kenneth Porter [ROA.2371 (App. G 12)](neighbor)(defense investigators or attorneys never contacted him; he would have been willing to testify for Haynes regarding his good character and low probability of committing future violent acts);

6) Declaration of Lee Esther Porter [ROA.2372 (App. G 13)] (neighbor)(defense attorneys or investigators never contacted her; she would have been willing to testify for Haynes regarding his good character, respectful attitude and low probability of committing future violent acts);

7) Declaration of Beverly Scott [ROA.2373 (App. G 14)] (next-door neighbor)(defense attorneys or investigators never contacted her; she would have been willing to testify for Haynes regarding his good character, respectful attitude and low probability of committing future dangerous

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<sup>13</sup> The prosecution had so little in terms of aggravating evidence against Haynes that Col. Davis, the titular head of ROTC, was called as a State's witness about what amounted to nothing more than a shouting match. Yet this was deemed to be a critical part of the State's case for "future dangerousness."

or violent acts);

8) Declaration of Debra Swisher [ROA.2374] (App. G 15) (friend of Haynes's)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes being "soft-spoken, intelligent, polite," his pride in ROTC, low risk of future violent acts);

9) Declaration of Sheila Haynes [ROA.2375] (App. G 16) (aunt)(talked to by attorneys, but never called as a witness; she would have testified to Haynes's good attitude and low risk of future dangerousness);

10) Declaration of Sgt. Allen Harris [ROA.2376-77] (App. G 17-18) (teacher, ROTC instructor)(talked to attorneys only superficially; he was willing to be a witness regarding Haynes' success in ROTC; he was actually running the ROTC program, not Col. Davis, who was only the titular head; would have given a completely different picture of the ROTC "shouting match" than key prosecution witness Col. Davis; and believed that Haynes had a low probability of future dangerousness) ;<sup>14</sup>

11) Declaration of Bonita Thierry [ROA.2380] (App. G 21) (friend of family)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes's non-violence, low risk of future violence, good behavior);

12) Declaration of Leon Tousant [ROA.2381] (App. G 22) (friend of Haynes)(defense attorneys or investigators never contacted him; he would have been willing to testify regarding Haynes's good character, hard working attitude, aversion toward violence, and Tousant saw the crime as an aberration);

13) Declaration of Barbara Taveras [ROA.2382] (App. G 23) (ROTC friend of

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<sup>14</sup> Sgt. Harris actually had much more contact with Haynes than Col. Davis in the ROTC program and, had he been called, the prosecution would not have been able to exaggerate a minor classroom argument into a case for a likelihood of committing future violent acts.

Haynes)(defense attorneys or investigators never contacted her; she would have been willing to testify about Sgt. Harris as really running the ROTC program, not Col. Davis, Haynes's respectful attitude, interest in a military career; and Taveras saw the crime as an aberration);

14) Declaration of Ron Royal [ROA.2383] (App. G 24) (friend)(defense attorneys or investigators never contacted him; he would have been willing to testify about Haynes's non-violence, attraction to a military career, and Royal saw the crime as out of character);

15) Declaration of Debra Elaine Haynes [ROA.2384] (App. G 25) (aunt)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes being a "good boy, obedient...did not cause problems and was well behaved," very low risk of committing future dangerous acts);

16) Declaration of Richard Haynes [ROA.2385] (App. G 26) (uncle)(defense attorneys or investigators never contacted him; they talked with them briefly at trial and was given the brush-off; he would have been willing to testify regarding Haynes's non-violent nature, good behavior, and strong religious background);

17) Declarations of Sharon Davis McElroy [ROA.2386-87] (App. G 27-28) (friend of family)(defense attorneys or investigators never contacted her; she would have been willing to testify that Haynes was quiet and obedient, never violent, and she saw the crime as very out of character);

18) Declaration of Rhonda Jackson [ROA.2388] (App. G 29) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify that Haynes was well behaved, respectful, the crime was out of character; he was a low risk of committing future acts of violence, and he showed remorse);

19) Declaration of Sheila Waters [ROA.2389] (App. G 30) (friend of family)(defense

attorneys or investigators never contacted her; she would have been willing to testify about Haynes's church and bible class attendance, orientation toward a military career, that the crime was out of character and Haynes would be a low risk to commit future dangerous acts);

20) Declaration of Socorro Herda [ROA.2390-93] (App. G 31-34) (friend and ROTC classmate)(defense attorneys or investigators never contacted her; she would have been willing to testify regarding Haynes's wish for a military career, that he "is one of the most sincere and honest people [she] had ever known," his "fervent" involvement in a church group, his non-violent nature; she saw the crime as out of character; and Haynes's low risk of future offenses);

21) Declaration of Renee Lewis [ROA.2394] (App. G 35) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify about her life-long knowledge of Haynes's good character, politeness, and low chance of re-offending);

22) Declaration of Renita Royal [ROA.2395] (App. G 36) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify about his good nature and low risk of committing future dangerous acts);

23) Declaration of Yolondo Gaines [ROA.2396] (App. G 37) (family friend)(defense attorneys or investigators never contacted her; would have been willing to testify about her long knowledge of Haynes's good character, respect toward authority, ADHD, passion for the military, spiritual values, and she saw the crime as out of character);

24) Declaration of Debbie Moerbe [ROA.2397-2400] (App. G 38-41) (family friend)(only received a short telephone call from investigator and was not called by defense; she would have testified regarding her long knowledge of Haynes being "honest and open," being a mediator, kind and helpful, good deeds, having a good relationship with his stepfather, lack of anger or violence; the untrustworthiness of key prosecution witness Timothy Reese; and Haynes's low risk of future

violent acts);

25) Declaration of Lawrence Tate [ROA.2401] (App. G 42) (friend, ROTC classmate)(defense attorneys or investigators never contacted him; he would have been willing to testify about Haynes's good nature, ability to get along with people, and Tate saw the crime as out of character);

26) Declaration of Ryan Braud [ROA.2402] (App. G 43) (friend)(defense attorneys or investigators never contacted him; he would have been willing to testify about Haynes being picked on, his outgoing and non-violent nature, his nervousness and lack of sleep the day after the crime, and his low probability of being violent in the future);

27) Declaration of Cherrie McGlory [ROA.2403] (App. G 44) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify for Haynes);

28) Declaration of Ivory Jackson [ROA.2404] (App. G 45) (great-aunt)(defense attorneys or investigators never contacted her; she would have been willing to testify about her 19 year long knowledge of Haynes's good manners, politeness, respectful attitude, church attendance, and low risk of future violence);

29) Declaration of Melvin Brock [ROA.2405] (App. G 46) (friend)(defense attorneys or investigators never contacted her; he has known Haynes from his birth and would have been willing to testify about his knowledge of Haynes's politeness and low risk of future violent acts);

30) Declaration of Portia Rose [ROA.2406] (App. G 47) (local attorney friend of the family)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes's respectful attitude, church and ROTC activities, pride in the BOOST program, and non-violent nature);

31) Declaration of Darryl Smith [ROA.2407] (App. G 48) (friend)(defense attorneys or

investigators never contacted him; he has known Haynes since he was a child, would have been willing to testify about his good manners, respect, politeness and low risk for future violence);

32) Declaration of Bonita Padmore [ROA.2408-09] (App. G 49-50) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify regarding Haynes's good manners and respect, military plans, and low risk of future violence);

33) Declaration of Devlin Jackson [ROA.2410] (App. G 51) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes's good character, non-violent nature and low risk of future violence);

34) Declaration of Nezdra Ward [ROA.2411] (App. G 52) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes's good behavior and manners; she saw the crime as out of character; and Haynes's low risk of future violence);

35) Declaration of Toya Terry [ROA.2412-13] (App. G 53-54) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes's participation in a medical volunteer visiting program; his respect toward others; Haynes's extreme remorse after the crime; his good nature and low danger of future violence);

36) Declaration of Cleophis Lewis [ROA.2414] (App. G 55) (neighbor)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes's decent and responsible character and his low risk of committing future dangerous acts);

37) Declaration of Courtney Davis [ROA.2415] (App. G 56) (stepfather)(talked to by investigator, never called at trial; he would have testified to his good relationship with Haynes);

38) Declaration of Angela Malcolm [ROA.2416] (App. G 57) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify about Haynes's courtesy

and respect for authority figures);

39) Declaration of Tiombe Davis [ROA.2417] (App. G 58) (friend)(defense attorneys or investigators never contacted her; she would have been willing to testify about Sgt. Harris as actually running the ROTC program; she could have given another version of the verbal incident with Col. Davis; she would have testified to Haynes's non-violent character and his low risk of future violence).

Most of these potential witnesses were never contacted by the defense attorneys, so this failure cannot be seen as "strategic," *Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003), nor, as the Fifth Circuit termed it, "no more than a claim that a different strategy could have been 'more effective'" or that "a *better* mitigation strategy [may have been] available to defense counsel." *Haynes*, 773 F. App'x at 770 (App. A 3) (emphasis in original).

Additional areas of deficient performance and prejudice were identified in the Fifth Circuit dissent:

1) "[A] mitigation specialist who opines that counsel's investigation was extremely limited in depth and breadth as a function of its unreasonably late start." *Haynes*, 773 F. App'x at 773 (App. A 6) (Dennis, J., dissenting).

2) Judge Dennis also points out that

[T]he record reveals that counsel delayed psychological evaluations until after the trial had begun. Given Haynes' history of significant mental-health interventions, of which competent counsel should have been aware, counsel should not have waited until the last minute to solicit expert evaluations...According to Haynes' post-conviction expert, mental-health professionals would not have had sufficient time to make a reasonable assessment within the timeframe counsel's tardy investigation allowed. Unsurprisingly, then the trial experts' reports were unhelpful, and extensive mental-health evidence presented by the State went unchallenged and uncontextualized.

*Id.* at 773-774 (App. A 6)

3) Additionally

counsel waited until shortly before trial to conduct most lay-witness interviews. When they finally did begin their investigation, they failed to speak to multiple character witnesses suggested by Haynes's parents and turned away witnesses who reached out to them. Trial counsel presented only a handful of mitigation witnesses, some of whom did not seem to know Haynes well.

*Id.* at 774. (App. A 6).

4) Judge Dennis summarized the many affidavits and declarations:<sup>15</sup>

By contrast, federal habeas counsel has presented affidavits from dozens of Haynes's friends, family, and acquaintances, representing a veritable cross-section of Haynes's community. Affidavits from two of Haynes's ex-girlfriends, in addition to affirming Haynes's good character, describe how upset and remorseful Haynes was after the shooting. Other affidavits attest that Haynes was a "good kid" and "very respectable," that he was not violent, and that he was not likely to be a future danger. Several affidavits state that Haynes was not hostile toward authority figures or police officers. An affidavit from Haynes's teacher avers that Haynes was among the best students in his school's ROTC program. There is no basis in this record to conclude that counsel's failure to present these witnesses resulted from a strategic decision when their principal mitigation theory seems to have been that Haynes was a good kid. Rather, trial counsel's mitigation presentation appears to have been needlessly and inexplicably meager.

*Id.* (App. A 7).

5) The dissent also pointed to the lack of mental health evidence<sup>16</sup> which shows both deficient performance and prejudice:

In addition, federal habeas counsel has presented evidence of Haynes's history of mental-health problems and Attention Deficit Hyperactivity Disorder, Haynes's drug use at the time of the murder, and his low risk of future violence.<sup>17</sup> Because of their late and limited investigation, trial counsel failed to present this evidence, which would have augmented Haynes's case for a life sentence in multiple, significant ways, presenting a stronger case for both mitigation and a lack of future dangerousness.

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<sup>15</sup> Collected herein at App. G.

<sup>16</sup> See Declaration of Dr. Mark Cunningham at 39-40 [ROA.859-860]; Dr. Young's report is at ROA.906-907.

<sup>17</sup> This evidence was exhaustively presented in the affidavits from experts Drs. Cunningham, Rosen, and Silverman. [See ROA.839; 928-936; 940-946].

Additional details of Haynes's childhood would have shown a more complete picture of chaos and abuse, undercutting the idea that Haynes had a privileged upbringing—one of the principal themes of the prosecution's penalty-phase case...The evidence would have presented a stronger case that Haynes was distraught and immediately remorseful after the murder, countering another one of the prosecution's principal themes.  
*Id.* (App. A 7).

6) Additionally, drug addiction,<sup>18</sup> family problems,<sup>19</sup> and lack of future dangerousness<sup>20</sup> were not presented, which shows both prongs of the *Strickland* test:

A robust mitigation presentation would also have revealed that Haynes was predisposed to addiction and likely high on methamphetamine on the night in question, presenting a much stronger argument to support trial counsel's theory that Haynes was a fundamentally good person whose night of violent crime was influenced by drug dependency and intoxication...It would also have explained the interrelation of Haynes's home life, mental-health problems, behavioral problems, and substance-abuse problems, with likely repercussions for the jury's assessment of Haynes's moral blameworthiness...Additional evidence would have "humanize[d]" Haynes by showing how many people in his life thought of him as a good person: As the affidavits of over forty lay witnesses show, he was well liked by his family members, friends, acquaintances, and teachers. Furthermore, it would have provided the jury with a better framework for assessing Haynes's risk of future violence in prison, which was likely to be low given Haynes's good behavior in institutional settings and the fact that experts thought the structure of prison would abate the risk of violence.  
*Id.* (App. A 7).

In summary, this claim massively demonstrated deficient performance and prejudice, both prongs of the test under *Strickland* and *Wiggins*. Thus, both the district court's and the Fifth Circuit majority opinions were based on a fundamental misunderstanding of both the facts and this Court's

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<sup>18</sup> See affidavits from experts Drs. Rosen, and Silverman. [See ROA.928-936; 940-946].

<sup>19</sup> See Cunningham Declaration at 25-35. [ROA.844-854].

<sup>20</sup> Expert testimony would have been of great assistance here, through the testimony of mental health professionals and experts such as Drs. Cunningham [ROA.820-896], Silverman [ROA.940-946] and Rosen. [ROA.928-936].

remand order, which could account for the failure to consider the merits of the claim.

The district court failed to afford even a cursory review of Haynes' IATC claim and it simply rubber-stamped its prior holdings. In the district court, Haynes's offered a lengthy showing of the two kinds of actual prejudice: 1) the *Strickland* prejudice prong [ROA.2312-2322]; and 2) *Martinez* prejudice to excuse the procedural default ("cause and prejudice"), in other words, prejudice suffered because of the failure of initial state habeas counsel ("IAHC") to present the IATC claim in the first state post-conviction proceedings. [ROA.2322-2326]. Yet this showing was completely ignored.

At the time of the trial, Haynes had *no criminal record, arrests or prior convictions* and was well-liked amongst family, friends, acquaintances and teachers. Most of the State's evidence at the punishment phase consisted of the robberies allegedly committed *immediately prior to and on the same night* as the shooting, as Judge Dennis has pointed out. *Haynes*, 733 F. App'x at 775 (App. A 8) (Dennis, J., dissenting) ("Before the night of the offense, Haynes had no criminal record, let alone one that would portend a capital offense. Given the relatively limited case in aggravation, which mainly included Haynes' actions the night of the murder and evidence of his mental-health problems, this was a case in which presentation of the available mitigation evidence was very likely to persuade at least one juror that Haynes was not 'deserving of execution.'").

**E. Haynes has shown that his state habeas counsel was ineffective ("IAHC").**

The second relevant requirement under *Martinez/Trevino* is a showing that the state habeas counsel was ineffective (IAHC). *Trevino*, 133 S. Ct. at 1918 (citing *Martinez*, 132 S. Ct. at 1320).

In 2001, Haynes's appointed state habeas attorney Richard Wheelan filed a state habeas corpus petition that was based solely on the trial record and reflected no extra-record investigation whatsoever. *Ex Parte Anthony Cardell Haynes*, No. 783872-A. [ROA.686-744]. In that 50-page

petition, the statement of facts and introduction comprised almost 20 pages. [ROA.694-710]. The first claim, an oft-rejected claim challenging the constitutionality of the mitigation special issue, comprised another 20 pages. [ROA.712-732]. The second claim, also oft-rejected, regarding the failure to inform the jury that failure to answer a special issue would result in a life sentence, was another 4 pages. [ROA.733-736]. Two other short claims related to record-based claims of ineffective assistance of counsel and improper prosecutorial argument. No extra-record facts were alleged which would have demonstrated a reasonable probability that Mr. Haynes would have been sentenced to life. Judge Dennis' dissent held that Haynes was "deprived of the opportunity to raise his ineffective assistance of trial counsel claim in state court by what appears to have been egregiously deficient post-conviction counsel." *Haynes*, 773 F. App'x at 770 (App. A 4) (Dennis, J., dissenting). That is clear from the record.

## **II. The Fifth Circuit Majority Erred In Holding That Haynes' Claim Had Been Considered On The Merits and That the District Court's "Facial Review" Was Sufficient.**

The Fifth Circuit majority held, following *Seven Elves v. Eskenazi*, 635 F.2d 396402 (5th Cir. 1981) that "whether 'there is merit in [Haynes'] claim' only becomes a relevant factor in the Rule 60(b) analysis if 'there was no consideration of the merits' below." *Haynes*, 733 F. App'x at 769 (App. A 3). The majority also held, contrary to the record, that "[h]ere, the district court reviewed the merits of Haynes' underlying IATC claim on multiple occasions." *Id.* However, as discussed *supra*, the district court never evaluated the specifics of Haynes's IATC claims.<sup>21</sup> Judge Dennis' dissent points out the flaws in the district court's holding and the Fifth Circuit majority opinion:

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<sup>21</sup> As the district court held, "[w]ithout addressing the individual basis for each unexhausted, factually dependant claim, the court notes that none of his arguments facially command habeas relief." *Haynes VI* at \*2.

though purporting to discuss the merits, the district court’s opinion denying Haynes habeas relief entirely failed to engage with the specifics of Haynes’s ineffective-assistance-of-counsel claim...The district court addressed Haynes’ fact-intensive claim in three sentences:

[A]s noted by respondent, Haynes’ argument is essentially “not that counsels’ performance should have been better, rather, his argument is that counsel should have investigated and presented evidence at the punishment phase in a completely different manner.” The record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure that Haynes’ constitutional rights were protected and viable defenses pursued. Haynes’ allegations do not show flagrant omissions by the players involved in his trial; rather, they merely demonstrate the exercise of strategy and typify the maxim that “the Constitution entitles a criminal defendant to a fair trial, not a perfect one.” *Haynes v. Quarterman*, No. H-05-3424, 2007 WL 268374, at \*9 (S.D. Tex. Jan. 25, 2007) (citations omitted). The Supreme Court has rejected a similarly cursory alternative holding as insufficient to constitute review on the merits. *Cone v. Bell*, 556 U.S. 449, 474–75, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009). *Haynes*, 733 F. App’x at 772 (Dennis, J., dissenting) (App. A 5).

When this Court granted certiorari and remanded the case to the Fifth Circuit, *Haynes v. Thaler*, 569 U.S. 1015 (2013) (mem.) (App. E), and the Fifth Circuit then remanded it to the district court, *Haynes v. Stephens*, 576 F. App’x 364 (5th Cir. 2014) (App. D), the next step in the process was for that court to conduct a reconsideration of the IATC claim. Yet that was never done. The district court simply reiterated its original holding that it was “strategy” to fail to interview or investigate the thirty-nine mitigating witnesses when there was no strategic reason for that omission;<sup>22</sup> held incorrectly that these witnesses were merely “cumulative;” held that Haynes was only arguing that the trial attorneys’ penalty phase performance should have been “different” but not “better;”<sup>23</sup> and used an incorrect standard to deny the IATC claims (the “substantial likelihood”

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<sup>22</sup> As almost all of them had never been interviewed or talked to by trial counsel, this precludes the finding that the failure to present them at trial was in any way “strategic” or that Haynes is merely arguing for a “*better* mitigation strategy.” *Haynes*, 733 F. App’x at 770 (App. A 3) (emphasis in original).

<sup>23</sup> Diverging somewhat from the district court, the majority opinion holds that “[t]he thrust of Haynes’ argument seems to be that there may have been a *better* mitigation strategy available to defense counsel. But this amounts to no more than a claim that a different strategy could have

*pre-Strickland* [*v. Washington*, 466 U.S. 668 (1984)] test of *United States v. Frady*, 456 U.S. 152, 172 (1982) rather than the “reasonable probability” test of *Strickland*, 466 U.S. at 694).<sup>24</sup> Yet the Fifth Circuit majority opinion took no note of these flawed and incorrect findings and held that “Haynes has already received a more in-depth merits review of his claims than he was likely entitled from the district court.” *Haynes*, 733 F. App’x at 770 (App. A 4).

It is incorrect to assert that Haynes received a review of the merits of his IATC claim[s], let alone an “in-depth” merits review “on multiple occasions,” *Haynes*, 733 F. App’x at 769 (App. A 3), because the district court itself repeatedly admitted it has not done that. In its 2007 initial ruling, the district court admitted that “[w]ithout addressing the individual basis for each unexhausted, factually dependant [sic] claim, the court notes that none of his arguments facially command habeas relief.” *Haynes*, 2007 WL 268374 at \*9 (App. H) [ROA.1633]. In its next ruling in 2012, the district court simply quoted that former ruling verbatim. (*Haynes v. Thaler*, 2012 WL 4739541 (S.D.Tex., Oct. 3, 2012)) at \*2, \*5 (App. H). And in its latest 2015 holding, the district court once again simply quoted the 2007 holding verbatim without examining the individual claims or the evidence supporting them. *Haynes v. Stephens*, 2015 WL 60116831 (S.D.Tex. Oct. 14, 2015)) at \*2 (App. C 2). Although the majority opinion held that “as the district court has repeatedly noted, the merits of Hayes’ IATC claim are not particularly compelling,” *Haynes*, 733 F. App’x at 769 (App. A 3), the district court was in no position to make that evaluation, as neither the claims nor any of the supporting evidence was given more than a “facial” review.

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been ‘more effective.’” (*Haynes*, 733 F. App’x at 770) (App. A 3). Yet the failure to interview almost all of the 39 declarants could not have been “strategy” as defense counsel had no way of telling what the vast majority of them might say. (*See App. G*).

<sup>24</sup> The district court’s 2007 “alternative merits ruling” in *Haynes v. Quarterman*, 2007 WL 268374 (S.D.Tex. Jan.25, 2007) is at App. H.

In addition to the 39 affidavits presented herein (App. G), Haynes raised many separate penalty-phase IATC claims (Claims I(a); I(d); I(f) through I(j); Claims I(l) through I(o); I(q); I(u); I(s); and I(y)) in his original federal petition and in his Rule 60(b) motion in the district court. As each IATC claim is “factually dependent,” they naturally depended on their individual facts, as does any claim. Yet the facts underlying these individual IATC claims were never discussed by the district court or the Fifth Circuit majority, and the individual claims themselves were never mentioned, just lumped together as a generic claim of ineffective assistance of trial counsel.

Because the claims were not “individually addressed” as to their facts by the district court, no real review ever took place, either factually or legally.<sup>25</sup> This “review” failed to consider the individual equities of the case before it, as is necessary under Rule 60(b)(6). *Diaz v. Stephens*, 731 F.3d 370, 377-379 (5th Cir. 2013); *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004). And the district court’s repeated explanation as to why such a factual review was unnecessary, that none of the claims “facially command habeas relief,” was simply incorrect and contrary to the record.<sup>26</sup>

Haynes’s 60(b)(6) motion in the district court presented these claims in detail in 20 pages of fact-pleading (motion at 13-31) [ROA.1943-1961] and it specified 12 separate failures of trial counsel at the punishment phase of the trial. [ROA.1953-1960]. The 39 declarations were all discussed in that motion (at 13-20) [ROA.1943-1950] as were the expert declarations. The Fifth Circuit determined that this was “substantial” evidence when it granted a COA. *Haynes v. Stephens*,

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<sup>25</sup> Or even “facially,” as each claim, on its face, presented a viable constitutional theory of relief.

<sup>26</sup> In fact, in its 2012 opinion the district court contradicted itself on this very point when it held that “Haynes’ pleadings present a *possibility* that the jury would have assessed his sentence differently had trial counsel called different witnesses.” *Haynes*, 2012 WL 4739541 at \*5 (App. H) (emphasis in original). If they presented such a “possibility” then the claims should not have been summarily dismissed for not “facially command[ing] habeas relief.” *Haynes*, 2007 WL 268374 at \*9 (App. H).

576 F. App'x 364, 365 (5th Cir. 2014) (App. D 1). Yet all that happened in the district court in 2012 and 2015 was a repetition of the 2007 non-review of this evidence and these IATC claims. The district court's "merits reviews" were merits reviews in name only, as Judge Dennis points out in his dissent. ("[T]hough purporting to address the merits, the district court's opinion denying Haynes habeas corpus relief entirely failed to engage with the specifics of Haynes's ineffective-assistance-of-counsel claim.") *Haynes*, 733 F. App'x at 772 (App. A 5). In the district court's last "review" in 2015 (App. C), the pre-*Martinez/ Trevino*<sup>27</sup> procedural bar no longer existed, yet all that happened was a reference to and quotation of the earlier rulings which occurred when there was still such a procedural bar.

Additionally, the majority opinion holds that Haynes is arguing only that "a different strategy could have been more effective," which falls far short of the required showing that "but for counsel's errors, the result of the proceeding would have been different," *Haynes*, 773 F. App'x at 770 (App. A 3), quoting *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007). As pointed out by the dissent:

The majority opinion once again misrepresents the relevant legal standard by suggesting that Haynes must establish that counsel's deficient performance necessarily altered the outcome of his case...In fact, Haynes' ultimate burden is only to show 'a probability sufficient to undermine confidence in that outcome.' *Porter v. McCollum*, 558 U.S. 30, 44...And his only burden at this stage is to show that his claim is substantial. See *Martinez*, 566 U.S. at 14...*Seven Elves*, 635 F.2d at 402. *Haynes*, 773 F. App'x at 775 (App. A 7) (Dennis, J., dissenting).

*Strickland* explicitly disavowed the outcome-determinative standard ("we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"), *Strickland*, at 693, as did *Porter v. McCollum*, 558 U.S. 30, 44 (2009) (*per curiam*) ("[w]e do not require a defendant to show "that counsel's deficient conduct more likely than not

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<sup>27</sup> *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

altered the outcome” of his penalty proceeding, but rather that he establish “a probability sufficient to undermine confidence in [that] outcome.”)

The majority opinion’s reliance on the district court’s “alternative merits review” also errs, as the dissent points out, because the “Supreme Court has rejected a similarly cursory alternative merits holding as insufficient to constitute review on the merits.” *Haynes*, 773 F. App’x at 772, citing *Cone v. Bell*, 556 U.S. 449, 474-75 (2009)) (“Neither the Court of Appeals nor the District Court fully considered whether the suppressed evidence might have persuaded one or more jurors that Cone’s drug addiction...was sufficiently serious to justify a decision to imprison him for life rather than sentence him to death.”).

### **III. The Fifth Circuit Majority Contravened *Gonzalez* And *Buck* In Holding That “Finality” Is A Determinative Factor In The Context of Rule 60(b) And Erred In Holding That This Claim Was Merely A “Substitute For Appeal.”**

The Fifth Circuit majority also denied Haynes’ claim under Rule 60(b)(6) on grounds of “finality,” a ground explicitly rejected by this Court “in the interpretation of a provision [Rule 60(b)] whose whole purpose is to make an exception to finality.” *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005).

The relatively short majority opinion “repeatedly cites to finality interests, but this cannot overcome the strong showing in favor of reopening Haynes’s case,” as the dissent held. *Haynes*, 733 F. App’x at 775 (App A 8). The majority opinion relied heavily on finality in balancing “the remaining equitable factors...against granting relief under Rule 60(b)(6):

In addition to considering whether the district court conducted a merits review, we also take into account the fact that “final judgments should not be lightly disturbed” and that “the Rule 60(b) motion is not to be used as a substitute for appeal.” *Seven*

*Elves*, 635 F.2d at 402. Again, finality is a particularly strong consideration in the habeas context....Haynes was convicted by a jury in state court nearly twenty years ago. He has been litigating his claims in federal court for over a decade, and this case has gone through multiple cycles of review. As the court stated in *Diaz*, the “State’s strong interest in the finality of [Haynes’] conviction and sentence[ ] and the delay that will undoubtedly result from reopening this long-closed case all weigh in favor of denying [his] Rule 60(b)(6) motion.” *Id.* at 378. Moreover, to the extent that the underlying purpose of Haynes’ motion is to force this court to review the merits of his IATC claim, he is impermissibly using Rule 60(b)(6) as a “substitute for appeal.” *Seven Elves*, 635 F.2d at 402. Haynes has already received a more in-depth merits review of his claims than he was likely entitled from the district court, and his Rule 60(b)(6) motion is an improper vehicle for relitigating them. *Haynes*, 733 F. App’x at 770 (App. A 4).

This holding is wrong on two counts and, left uncorrected, will undermine this Court’s clear instruction in *Gonzalez* and *Buck* that finality is not a concern in the context of Rule 60(b) motions. *Gonzalez* held that “we give little weight to respondent’s appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive.” *Gonzalez*, 545 U. S. at 529. So too, last year this Court in *Buck* similarly rejected “finality” as a concern in Rule 60(b) cases: “[i]n opposition, the State reminds us of the importance of preserving the finality of judgments... But the ‘whole purpose’ of Rule 60(b) ‘is to make an exception to finality.’” *Gonzalez*, 545 U.S., at 529, 125 S. Ct. 2641. And in this case, the State’s interest in finality deserves little weight.” *Buck*, 137 S. Ct. 759, 779.

Additionally, the Fifth Circuit majority’s repeated holding that “the Rule 60(b) motion is not to be used as a substitute for appeal,” *Haynes*, 733 F. App’x at 768, 770 (App. A 3-4), citing *Seven Elves*, 635 F.2d at 402, makes little sense. The whole rationale for *Trevino* was based on the fact that IATC claims such as Haynes’ *could not* practically be raised on appeal. As noted *supra*, *Trevino* held that *Martinez* applied to states like Texas, where the defendant did not have a “meaningful opportunity to raise [an IATC] claim on direct appeal.” *Trevino*, 569 U.S. at 429. Haynes’ 60(b) motion was never “a substitute of appeal,” because it could not have been raised on appeal, nor was

there any supporting legal authority for the motion prior to *Trevino*. The majority opinion erred in considering the claim a “substitute for appeal,” an equitable factor that weighed heavily in denying Haynes’ 60(b) motion.

### **CONCLUSION**

For the foregoing reasons, this Court is respectfully requested to grant this petition for writ of certiorari.

Respectfully Submitted,

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