No. 18–6471

IN THE

Supreme Court of the United States

ANTHONY CARDELL HAYNES,
Petitioner,

v.

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

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
stephen.hoffman@oag.texas.gov

Counsel for Respondent

CAPITAL CASE
QUESTION PRESENTED

Petitioner Anthony Cardell Haynes was convicted and sentenced to death for murdering police officer Kent Kincaid. Haynes has already unsuccessfully challenged his conviction and sentence with a direct appeal, a state habeas application, and a federal habeas petition. After his execution date was set, Haynes moved the district court under Federal Rule of Civil Procedure 60(b)(6) to reopen its final judgment denying habeas relief on his procedurally defaulted ineffective-assistance-of-trial-counsel (IATC) claims following the Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court denied Haynes's Rule 60(b)(6) motion, noting that, among other reasons, the Fifth Circuit had held in *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012), that *Martinez* was not applicable to Texas cases. The Fifth Circuit affirmed, but this Court stayed Haynes's execution, vacated the judgment, and remanded the case back to the Fifth Circuit for reconsideration in light of *Trevino v. Thaler*, 569 U.S. 413 (2013), which overruled *Ibarra* and applied *Martinez* to Texas.

In turn, the Fifth Circuit remanded Haynes's case back to the district court. The district court denied Haynes's Rule 60(b)(6) motion for a second time, holding that many of its additional reasons for denying relief prior to *Trevino* remained valid, namely that: (1) a change in decisional law like *Martinez* does not, by itself, constitute an extraordinary circumstance warranting relief, and Haynes failed to clearly identify any other exceptional grounds; (2) the court had already considered the underlying merits of Haynes's claims and found no basis for relief; and (3) Haynes failed to demonstrate actual prejudice stemming from state habeas counsel's purported failure to raise his IATC claims. While "confident of its conclusion that Haynes is not entitled to relief under Rule 60(b)(6)," the district court nevertheless granted a certificate of appealability (COA). The Fifth Circuit denied Haynes's appeal, affirming the district court's denial of Haynes's Rule 60(b)(6) motion. The Fifth Circuit agreed that Haynes had failed to show extraordinary circumstances and moreover found that "the merits of Haynes'[s] IATC claim are not particularly compelling." Haynes now petitions for certiorari review, raising the following question:

1. Did the district court abuse its discretion when it denied Haynes's Rule 60(b)(6) motion?

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INTRODUCTION

In 1998, Haynes[1] shot and killed Houston Police Department Officer Kent Kincaid. Haynes was charged with capital murder, found guilty, and sentenced to death. On federal habeas appeal, Haynes raised numerous grounds for relief in his 456-page petition, including an unexhausted IATC claim with multiple subparts arguing that counsel failed to adequately prepare and present mitigating evidence. The district court rejected these claims as procedurally barred and without merit, and this decision was affirmed on appeal. Years later, on the eve of his execution date, Haynes filed a Rule 60(b)(6) motion asking the district court to reopen its judgment in light of the Court's decision in *Martinez*. Both the district court and the Fifth Circuit denied the request, relying in part on the Fifth Circuit's previous decision in *Ibarra*. However, this Court stayed the execution and remanded for further consideration based on its decision in *Trevino*, which overturned *Ibarra*. The Fifth Circuit then returned the case to the district court. *Haynes v. Stephens*, 576 F. App'x 364, 365 (5th Cir. 2014) (unpublished).

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[1] Respondent Lorie Davis is referred to herein as "the Director." "ROA" refers to the record on appeal. "RR" refers to the reporter's record of transcribed trial proceedings. "CR" refers to the clerk's record of pleadings and documents filed in the trial court. "SHCR" refers to the clerk's record in Haynes's state habeas proceeding. All references are preceded by volume number and followed by page number(s) where necessary.

On remand, the district court concluded that, regardless of *Trevino*, Haynes had not demonstrated that he was entitled to post-judgment relief on his multifaceted IATC claim or that the court erred in denying his Rule 60(b)(6) motion. But while "the court [was] confident in its conclusion that Haynes is not entitled to relief under Rule 60(b)(6)," to reduce delay and expedite appellate consideration, the court issued a COA on whether Haynes had shown that Rule 60(b)(6) relief is warranted. *Haynes v. Stephens*, CIV.A. H–05–3424, 2015 WL 6016831 (S.D. Tex. Oct. 14, 2015); ROA.2511–29.

The denial of a Rule 60(b)(6) motion is reviewed merely for abuse of discretion. *Buck v. Davis*, 137 S. Ct. 759, 777–78 (2017); *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011). "Deference [] is the hallmark of abuse-of-discretion review." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). Here, the district court clearly did not abuse its discretion in denying Haynes's Rule 60(b)(6) motion. Haynes argues that he is entitled to relief under Rule 60(b)(6) because of the Court's holdings in *Martinez* and *Trevino*, wherein the Court determined that the ineffective assistance of state habeas counsel can constitute the cause necessary to overcome the procedural default of a substantial IATC claim. But the district court correctly held that the change in decisional law wrought by *Martinez* was not an "extraordinary circumstance" that will support relief under Rule 60(b)(6). ROA.2520–21. Indeed, as demonstrated below, this conclusion is amply supported by

precedent from the Fifth Circuit and the other circuit courts, as well as the text of *Martinez* itself. Nevertheless, even assuming that *Martinez* did constitute an extraordinary circumstance and that it applied to this case (which it does not), the district court found that Haynes has already received any and all relief that he would be entitled to under *Martinez—i.e.*, an adjudication of his multi-part *Strickland*[2] claim on the merits. ROA.2521–23. The district court further held that Haynes had failed to show actual prejudice even if he could demonstrate cause under *Martinez* because "Haynes has not shown that had state habeas counsel raised the same claims as in his federal petition, a state court would have granted the habeas writ." ROA.2523–24. Each of these determinations independently precludes habeas relief from being granted in this case. Lastly, the Director notes that Haynes fails to establish that he would be entitled to the equitable benefits that *Martinez* would offer should it apply because he fails to show that his state habeas counsel was ineffective or that his underlying IATC claims are substantial.

The Fifth Circuit appropriately affirmed the district court's discretionary decision to reject Haynes's Rule 60(b)(6) motion. *Haynes v. Davis*, 733 F. App'x 766 (5th Cir. 2018) (unpublished). It agreed with the district court that Haynes had not shown extraordinary circumstances, that the merits of Haynes's IATC

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[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

claims were "not particularly compelling," and that, because Haynes's IATC claims were not compelling, Haynes could not show the substantiality required for *Martinez* relief. *Id*. at 769–70. Haynes's petition does not demonstrate any special or important reason for this Court to review the court of appeals' decision, and this Court typically does not engage in routine error correction.[3] Judicial restraint is further warranted in this case because Haynes does not show that a split exists among the circuit courts regarding any relevant issue. This Court should deny Haynes's attempts to delay these proceedings further by requesting the re-adjudication of claims long since rejected as both procedurally unsound and meritless. Accordingly, no writ of certiorari should issue.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals (CCA) summarized the facts[4] of the offense in its opinion on direct appeal:

> The record reflects that on the night of the offense, Sergeant Kincaid and his wife were leaving home in their Jeep Cherokee. They were apparently several blocks outside the Houston city limits when they passed Haynes's vehicle and something hit and

[3] While disagreeing with the result, the Fifth Circuit dissent acknowledged that the majority put the case in the "proper framework." *Haynes*, 733 F. App'x at 771.

[4] The state court's factual findings are entitled to a presumption of correctness on federal habeas review. 28 U.S.C. § 2254(e)(1). To the extent that Haynes contests any factual matter ascertained by the state court, he must offer clear and convincing evidence in rebuttal.

cracked the Kincaids' windshield on the driver's side. Sergeant Kincaid turned his vehicle around to investigate the incident, thinking that a rock had been thrown at his windshield. In fact, Haynes had fired a shot at the Kincaids' vehicle. Haynes turned his own vehicle around and parked next to the Kincaids' Jeep. Sergeant Kincaid got out and approached Haynes'[s] truck. Sergeant Kincaid calmly told Haynes, "You hit my window." Haynes said, "I accidentally threw something at your window." Sergeant Kincaid replied, "I am a police officer. Let's talk about it." As he asked to see Haynes'[s] driver's license, Kincaid reached toward his back pocket, presumably for his police identification. At that instant Haynes shot Kincaid. Sergeant Kincaid was declared brain-dead upon arriving at Hermann Hospital. His organs were harvested for transplantation, and he was declared dead shortly after 3:00 a.m. on May 23, 1998. The cause of death was a gunshot wound to the head.

The record establishes that Sergeant Kincaid was a Houston police officer and that he was off-duty at the time of his death. Assistant Police Chief Jeraldine Stewart testified that department policies require both on-duty and off-duty officers to take prompt and effective police action for any violation of law committed in their presence. According to Stewart, when an off-duty officer takes such action, he is considered to be discharging his official duty. Stewart testified that Houston police officers are authorized to investigate any offense threatening the public safety outside the City of Houston. Stewart testified that she had reviewed the police report and determined that Sergeant Kincaid had been performing an official duty when he stopped Haynes.

[. . .]

On the night of the offense, Haynes committed a string of armed robberies before he murdered Sergeant Kincaid. Under the pretense of asking for directions, Haynes would call a victim over to his vehicle and then point a gun at him, demanding his wallet. In this manner, Haynes approached three victims immediately before killing Sergeant Kincaid. Haynes then fired his gun out of his vehicle while passing the Kincaids. Haynes admitted that he shot Sergeant Kincaid because he was a police officer and, showing no remorse, bragged to friends that he had killed a police officer.

> Haynes also told people that he should have killed Nancy Kincaid, so that there would have been no witness to the murder. . .

Haynes v. State, No. 73,685, slip op. at 3–5 (Tex. Crim. App. 2001) (not designated for publication).

II. Punishment Evidence

During the punishment phase of trial, the State introduced evidence concerning the string of armed robberies that Haynes and two accomplices committed immediately prior to murdering Sergeant Kincaid. Officer Todd Miller, a detective with the Houston Police Department's Homicide Division who previously testified during the guilt phase of trial about Haynes's taped statements confessing to the murder, testified that Haynes also confessed in the statements to committing three aggravated robberies shortly before he shot Sergeant Kincaid. 28.RR.4–9. Officer Miller identified the unedited tapes of Haynes's statements, which were then played for the jury, and stated that police were able to locate two of the three robbery victims from the statements. 28.RR.8–9. One of the robbery victims, Chris Dicken, testified that he was outside of his house with his ex-wife and their daughter when the driver of a dark Chevrolet S–10 truck pulled up and asked for directions, then pointed a gun at him and said, "One more thing. Give me your wallet." 28.RR.17–20. Dicken identified photos of Haynes's truck as being similar to the truck used to rob him and testified that the tattoo on Haynes's right arm is the same or

similar tattoo that the driver of the truck had on his right arm. 28.RR.20–23. The other robbery victim, Alexandro Aglesis, testified that a truck pulled up next to him while he was visiting a friend and asked for directions, but as he walked over to the truck he heard the sound of a gun being loaded followed by the driver pointing a gun at him and saying, "Give me all of your money." 28.RR.31–36. Although Aglesis ran away and the truck promptly drove off, Aglesis was still able to describe the driver as a black male, age 17–18, skinny, with short hair, and identified photos of Haynes's truck as being the same or similar to the truck used to rob him. 28.RR.36–41.

The State then introduced evidence concerning Haynes's explosive temper. First, Lt. Colonel Larry Davis, the senior ROTC instructor at Haynes's high school, testified that in November of 1996 Haynes became so upset and disruptive after an exam that Davis had to call the campus police to escort Haynes away because he was concerned about the safety of students as well as himself. 28.RR.48–53. Haynes also confided to Colonel Davis that he held a gun to his father's head during an argument. 28.RR.57–58. Haynes exhibited large mood swings, which Colonel Davis believed to be drug-induced. 28.RR.58. Colonel Davis testified that he found Haynes unfit to be recommended for further military training. 28.RR.59–60.

Officers Michael Rios and Vicki Ruhman, both police officers assigned to Haynes's high school, testified that in November of 1996 Haynes had an

outburst in the school nurse's office where he acted like he was going to throw a phone at someone. 28.RR.76–142. According to the officers, Haynes appeared to be under the influence of marijuana, and repeatedly yelled at the officers to leave him alone, even stating to one of the officers that "I could kill you." 28.RR.80–123. Haynes had to be handcuffed. 28.RR.84.

Pam Rogers, the medical records custodian for the University of the Behavior Health Association, and Judy Miller, the health information manager for the West Oaks Hospital, both testified. 28.RR.143–54. Rogers testified that Haynes was seen by the University Behavioral Health Clinic on three separate occasions for rage and anger issues, and was then admitted to West Oaks Hospital on November 1, 1996, for intermittent explosive disorder and cannabis dependence. 28.RR.145–47. The records indicated "assaultiveness toward [his] three-year-old sister," that Haynes tried to kill the family dog, and that while at the hospital Haynes attacked a staff member with a shower curtain rod. 28.RR.147. Miller elaborated that during Haynes's brief stay in the hospital, Haynes had anger outbursts where he kicked walls and yelled profanities, threatened to kill the hospital staff, and "blow them all away" with his gun. 28.RR.151–53.

Finally, as a rebuttal witness who was called out of order, the State offered the testimony of Roy Smithey, the chief investigator for the special prosecution unit that investigates and prosecutes felony offenses occurring

inside the prison system. Smithey spoke generally about the differences in the classification and security level of death row inmates as opposed to capital offenders sentenced to life in prison, and testified about the prevalence and opportunity for violence and drug use within the prison population. 29.RR.5–12.

In response, the defense presented testimony attempting to demonstrate that Haynes was generally a good person who should not be considered a future danger to society. Quarracy Smith, a minister who met Haynes in the summer of 1997 while they were enrolled in the Navy's "boost" program designed for outstanding ROTC students that are potential officer candidates, first testified generally about the "boost" program and mentoring Haynes while they were in the program together. 28.RR.155–64. Smith stated that Haynes did well academically for a while and began to take an interest in religion, but eventually lost focus and fell below the standard required to complete the program. 28.RR.161–63. According to Smith, because Haynes did not finish the program and was not eligible to go to Morehouse College as he planned, his backup plan was either to enlist in the Marines or to attend Prairie View A&M. 28.RR.164. Smith stated he had spoken to Haynes several times about the murder of Sergeant Kincaid and that Haynes sounded scared and did not know what to do, but that Haynes also felt remorse and took responsibility for the

killing, and he expressed sympathy for Mrs. Kincaid and her family. 28.RR.165–68.

The defense then called George Burrell, a staff chaplain with the Harris County Sheriff's Department who came to know Haynes while Haynes was incarcerated at the Harris County Jail. 29.RR.25–26. Burrell testified briefly that he saw Haynes once or twice a week and that he never saw Haynes argue, fight, violate rules, or lose his temper while he was in jail; however, Haynes was housed in a secure unit of the jail where contact with other inmates is very limited. 29.RR.27–35. Larry Britt, a fire inspector, next testified that he had known Haynes for twelve or thirteen years because he was a colleague and friend of Haynes's father, and that he believed Haynes to be a "moral kid" and an "outstanding young man." 29.RR.36–46. Deloyd Parker, Jr., the executive director of the Shape Community Center (an institution designed to build and strengthen families) and also a family friend of Haynes for over eighteen years, then testified that Haynes was in a summer youth program when he was in late elementary to early middle school and was overall a good participant. 29.RR.47–50.

Both Haynes's paternal grandmother, Evelyn Haynes, and maternal grandmother, Myrtle Hinton, next testified that Haynes was respectful, intelligent, made good grades, and was a good student. 29.RR.50–74. Neither one of them knew that Haynes was involved in drugs until his parents placed

him in a drug program. 29.RR.56, 62, 73. Concluding, the defense called Haynes's father, Donald Haynes, a senior arson investigator with the Houston Fire Department, who testified about his son's childhood and that Haynes was generally a well-adjusted kid who did well in school and was active in the ROTC, band, and football while in high school. 29.RR.77–87. Mr. Haynes stated that his son was diagnosed with Attention Deficit Disorder in elementary school and took Ritalin for about a year or two. 29.RR.83. Mr. Haynes also testified generally about the decision to send his son to the West Oaks Hospital. 29.RR.90–92. The hospital treated his son for drug dependency, anger management, and a chemical imbalance, after which Mr. Haynes and his son had a conversation where Haynes told his father about using marijuana since he was 13 or 14 years old. 29.RR.91–93. Mr. Haynes also described how his son approached him after an argument, crying, and handed over his father's service pistol, stating, "Dad, something bad is happening. I have bad thoughts." 29.RR.93–95. Mr. Haynes then testified that his son completed high school and joined the Navy's "boost" program, and had maintained several jobs both before and after returning from the program. 29.RR.95–98. Mr. Haynes noted that his son had never demonstrated any hostility to any of his law enforcement coworkers. 29.RR.100–01.

Finally, the State called Sergeant Kincaid's widow, Nancy Kincaid, who testified briefly about the impact her husband's death had on herself and her

family. 29.RR.126–29. Mrs. Kincaid spoke of the close relationship she had with her husband and described the close relationship her husband had with their two daughters, Courtney and Jenna. Mrs. Kincaid explained how his death was hard to understand for Courtney, who was six years old at the time, and how it devastated their older daughter, Jenna, who cried herself to sleep every night for several months afterward. Finally, Mrs. Kincaid described how the family had depended on Sergeant Kincaid, how hard it had been to do everything without him, and how she missed her husband. 29.RR.126–29.

III. Conviction and Postconviction Proceedings

Haynes was convicted and sentenced to death for the capital murder of Officer Kincaid. I.CR.7 (indictment); II.CR.477–79 (judgment). On automatic direct appeal, the CCA affirmed Haynes's conviction and sentence in an unpublished opinion. *Haynes*, No. 73,685 slip op. Haynes then unsuccessfully petitioned this Court for a writ of certiorari. *Haynes v. Texas*, 535 U.S. 999 (2002).

While his direct appeal was still pending, Haynes filed a state application for a writ of habeas corpus raising four claims for relief. SHCR.6–63. The CCA denied relief, however, based upon the trial court's findings of fact and conclusions of law (with one exception) as well as their own review of the record. *Ex parte Haynes*, No. 59,929–01 (Tex. Crim. App. 2004) (per curiam); SHCR.147–62, cover.

Following the denial of state habeas relief, Haynes sought federal habeas corpus relief, filing a 456–page federal petition in October 2005. ROA.13–470. Haynes's lengthy petition was supported by seventy-two exhibits and raised a total of forty-six claims for relief, twenty-five of which alleged that trial counsel provided ineffective representation under *Strickland*. ROA.130–268. In response, the Director demonstrated that each claim lacked merit, and that most of the claims raised in Haynes's petition—including most of the IATC claims—were raised for the first time in federal court and were thus unexhausted and procedurally barred. ROA.1195–293. The district court agreed in its January 2007 Memorandum Opinion and Order denying relief, finding that federal law barred Haynes from receiving habeas relief on his unexhausted claims. ROA.1613, 1628–31, 1699. The district court also rejected each of the unexhausted claims alternatively on their merits, concluding that even if "the constraints of federal review did not command that Haynes first give the state courts an opportunity to adjudicate his claims of error, this court would still not issue a habeas writ." ROA.1631–34.

Haynes then appealed the district court's denial of relief, seeking a COA on his IATC claims as well as his allegation that the State used peremptory strikes in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The Fifth Circuit agreed that Haynes's IATC claims were unexhausted and procedurally defaulted, but granted a COA on the *Batson* allegation. *Haynes v. Quarterman*,

526 F.3d 189 (5th Cir. 2008). The Fifth Circuit eventually reversed the district court's denial of relief on the *Batson* issue. *Haynes v. Quarterman*, 561 F.3d 535 (5th Cir. 2009). Subsequent review by this Court, however, reinstated the district court's judgment. *Thaler v. Haynes*, 559 U.S. 43 (2010) (per curiam). Following the Court's decision, the Fifth Circuit affirmed. *Haynes v. Thaler*, 438 F. App'x 324 (5th Cir. 2011) (unpublished). This Court then denied certiorari review. *Haynes v. Thaler*, 132 S. Ct. 1969 (2012). Shortly thereafter, the state trial court issued an order setting Haynes's execution date for October 18, 2012.

On the eve of his execution date, Haynes filed a motion in district court asking for relief from the judgment and arguing that the Court's then-recent decision in *Martinez* constituted an extraordinary circumstance that warranted Rule 60(b)(6) relief. ROA.1920–2033. The lower court denied Haynes's motion for several reasons. ROA.2188–201. First, relying on the now-overturned circuit opinion in *Ibarra*, the district court concluded that Haynes was not entitled to the benefit of *Martinez* because, unlike capital habeas petitioners in Arizona, Texas inmates such as Haynes could raise IATC claims in a motion for new trial or on direct appeal. ROA.2193–95. Second, citing *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012), the court held that *Martinez* was simply a change in decisional law and did not constitute an extraordinary circumstance allowing for the reopening of a judgment under

Rule 60(b)(6). ROA.2195–96. Third, because Haynes had already received the relief he was requesting—an adjudication of his IATC claims on the merits—the court found Rule 60(b)(6) relief to be unnecessary. ROA.2196–97. Finally, the court observed that Haynes would not be able to overcome the procedural default even if he were entitled to the benefits of *Martinez* because he could not show "actual prejudice" resulted from his state habeas counsel not raising the claim. ROA.2197–200.

On appeal, the Fifth Circuit denied a COA and a stay of execution after determining that *Ibarra* was controlling precedent foreclosing relief. *Haynes v. Thaler*, 489 F. App'x 770 (5th Cir. 2012) (unpublished). The Fifth Circuit did not address the other reasons for denying relief discussed by the district court. *Id*. Haynes appealed to this Court, which issued a stay of execution just hours before Haynes's scheduled execution. *Haynes v. Thaler*, 569 U.S. 1015 (2012). Justice Sotomayor, with whom Justice Ginsberg joined, subsequently issued a statement explaining that the Court had granted certiorari in *Trevino* to address the sole ground relied upon by the Fifth Circuit in denying Haynes a COA—whether the Court's decision in *Martinez* applied to Texas habeas cases.[5] *Haynes v. Thaler*, 133 S. Ct. 639 (2012). The statement noted with particularity that the court of appeals had never addressed the district court's

[5] Justices Scalia, Thomas, and Alito would not have granted the stay. *Haynes*, 133 S. Ct. at 639.

merits ruling, and the *Trevino* certiorari grant had rendered the Fifth Circuit's procedural determination potentially unsound. *Id*. Because *Trevino* ultimately found that *Martinez* does apply to habeas cases arising from Texas courts, the Court granted Haynes's request for certiorari, vacated the Fifth Circuit's judgment, and remanded the case back to the Fifth Circuit for further consideration. *Haynes*, 569 U.S. at 1015. In turn, the Fifth Circuit remanded the case back to the district court "to reconsider its denial of Haynes's Rule 60(b)(6) motion in light of *Trevino*." *Haynes*, 576 F. App'x at 364.

On remand, the district court relied on the three other reasons besides *Ibarra* that it set forth its original denial of Rule 60(b) relief to again determine that post-judgment relief was unwarranted. ROA.2511–29. The court did, however, issue a COA. ROA.2528–29. The Fifth Circuit found that the district court did not abuse its discretion in denying Haynes's 60(b)(6) motion and noted that the merits of Haynes's IATC claims were not compelling. *Haynes*, 733 F. App'x at 767, 769–70. The instant petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

The question that Haynes presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." An example of such a compelling reason would be if the

court of appeals below entered a decision on an important question of federal law that conflicts with a decision of another court of appeals or with relevant decisions of this Court. Pursuant to Supreme Court Rule 10, Haynes provides no basis to grant his petition for a writ of certiorari.

I. The District Court Did Not Abuse Its Discretion By Holding That Haynes Failed to Demonstrate Extraordinary Circumstances.

In his petition, Haynes argues that the Fifth Circuit erred in finding that his case did not present extraordinary circumstances and that Haynes's IATC claims were not sufficiently "substantial" to warrant relief under Rule 60(b)(6). Pet.ii, 13–29. Pursuant to Rule 60(b)(6), a court may reopen a final judgment when a party shows "any [ ] reason that justifies relief." While considered a "grand reservoir of equitable power to do justice," Rule 60(b)(6) relief is available only if "extraordinary circumstances" are present. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)); *Rocha v. Thaler*, 619 F.3d. 387, 400 (5th Cir. 2010). The Court has stated that "[s]uch circumstances will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535. When evaluating extraordinary circumstances, a "very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved." *Id*. (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting)). Appellate review of Rule 60(b) determinations is thus highly limited and

deferential. *See id*. (citing *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 263 n.7 (1978)).

The Court has also noted "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final."[6] *Gonzalez*, 545 U.S. at 536. *Martinez* did not yield a new rule of constitutional law nor is it to be applied retroactively. 566 U.S. at 15–17. In fact, the Court discussed at length the consequences of a new rule of constitutional law and firmly indicated that *Martinez* was only a "qualification" of its previous rulings. *Id*. at 15–16. As a result, the Fifth Circuit has concluded that *Martinez* "does not constitute an 'extraordinary circumstance' [. . .] under Supreme Court and [Fifth Circuit] precedent to warrant Rule 60(b)(6) relief" because a "change in decisional law after entry of judgment does not constitute [extraordinary] circumstances and is not alone grounds for relief from a final judgment." *Adams*, 679 F.3d at 319–20 (internal quotation omitted). The Fifth Circuit has further determined that "*Trevino*'s recent application of *Martinez* to Texas cases does not change that conclusion in any way." *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013); *see also Raby*

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[6] Indeed, "if a change in law after a judgment was rendered was grounds to vacate a final judgment, final judgments would cease to exist." *Twist v. Ashcroft*, 329 F. Supp. 2d 50, 54 (D.D.C. 2004), *aff'd*, 171 F. App'x 855 (D.C. Cir. 2005); *see also Agostini v. Felton*, 521 U.S. 203, 239 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6). . . .").

v. Davis, 18–70018, 2018 WL 5629893, at *2 (5th Cir. Oct. 31, 2018); *In re Paredes*, 587 F. App'x 805, 825 (5th Cir. 2014); *Hall v. Stephens*, 579 F. App'x 282, 283 (5th Cir. 2014).

"Indeed, the law on this issue reflects an admirable consistency, as the decisions of other circuits attest." *Moses v. Joyner*, 815 F.3d 163, 169 (4th Cir. 2016), *cert. denied sub nom. Moses v. Thomas*, 137 S. Ct. 1202 (2017); *see also Cox v. Horn*, 757 F.3d 113, 115, 121–22 (3d Cir. 2014)[7]; *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) (declaring that "the change in the decisional law effected by the *Martinez* rule is not an 'extraordinary circumstance' sufficient to invoke Rule 60(b)(6)"); *Nash v. Hepp*, 740 F.3d 1075, 1078–79 (7th Cir. 2014) (affirming the denial of petitioner's Rule 60(b)(6) motion since he presented "the 'mundane' and 'hardly extraordinary' situation in which the district court applied the governing rule of procedural default at the time of its decision and the caselaw changed after judgment became final"); *Ramirez v. United States*, 799 F.3d 845, 850–51 (7th Cir. 2015).

As the Third Circuit has explained, for Rule 60(b)(6) relief to be granted, "more than the concededly important change of law wrought by *Martinez* is

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[7] Some cases, like *Cox*, have taken the position that the Fifth Circuit's *Adams* holding suggests that the Fifth Circuit will not consider additional factors that may constitute extraordinary circumstances when evaluated in conjunction with *Martinez*. While the Fifth Circuit has not actually decided that question one way or the other, it did consider additional factors in Haynes's case. *Haynes*, 733 F. App'x at 769; *Raby*, 18–70018, 2018 WL 5629893, at *3.

required—indeed, much more is required." *Cox*, 757 F.3d at 115 (quotation marks omitted). "A petitioner must present something more than just the availability of statutory relief from which he was previously barred." *Zagorski v. Mays*, 18–6052, 2018 WL 5318246, at *2 (6th Cir. Oct. 29, 2018), *cert. denied*, 18–6525, 2018 WL 5723202 (U.S. Nov. 1, 2018); *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013).

Haynes argues that—unlike in previous cases where Rule 60(b)(6) relief was denied—(1) the equities in his case are different and far more favorable; (2) he is not relying *solely* on the change in decisional law from *Martinez*/*Trevino* as an "extraordinary circumstance" allowing relief from judgment; and (3) no specific assessment of his IATC claims was undertaken by the district court. However, it is not apparent what Haynes's additional equities are. Pet.13–29. Rather, "[t]he gravamen of Haynes'[s] argument is that, because he has demonstrated that 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." *Haynes*, 733 F. App'x at 769. But, of course, a strong IATC claim and poor state habeas representation are simply the constituent elements of a *Martinez* claim. If *Martinez* itself does not establish an extraordinary circumstance, then surely its individual elements do not create one either. Similarly, if *Martinez* does not constitute an extraordinary circumstance, then the strength of the petitioner's

argument has no relevance. *See Diaz*, 731 F.3d at 377–78 (rejecting contention that Diaz's case was extraordinary because he pleaded "far more compelling Sixth Amendment violations" than other similarly situated capital petitioners).

Haynes also argues that neither the district court nor the Fifth Circuit was in a position to find no "extraordinary circumstances" because neither court examined the specific merits of the case. Pet.13. As support, he relies on the Fifth Circuit's dissent's claim that the district court failed to consider all relevant factors and misevaluated the factors it did consider. Pet.14 (citing *Haynes*, 733 F. App'x at 771). However, contrary to Haynes's argument, and as discussed in more detail in the following section, the district court has already considered the merits of Haynes's IATC claims and found no basis for federal habeas relief.

Haynes's petition further faults the Fifth Circuit's finding that his IATC claims were insubstantial, *see Haynes*, 733 F. App'x at 770, by arguing that the Fifth Circuit previously (and inconsistently) found his claims were "substantial." Pet.16. As evidence, he offers the fact that, following the Court's remand, the Fifth Circuit granted a COA and remanded the case to the district court to reconsider its denial of the Rule 60(b)(6) motion in light of *Trevino*. *Haynes*, 576 F. App'x at 365. But the Fifth Circuit did not explicitly find his claim "substantial" by remanding it to the district court—Haynes just

extrapolates that the court of appeals must have found the claim "substantial" based on the fact that a COA was granted. *Id*. Rather, it is far more likely that the Fifth Circuit granted COA because the district court had erroneously held that *Martinez* did not apply to Texas at all. *See also Butler v. Stephens*, 625 F. App'x 641, 659 (5th Cir. 2015) ("We have previously remanded cases for further proceedings when the district court or this court initially rejected IATC claims as procedurally defaulted before *Martinez* and *Trevino* were decided."). But even if there was previously confusion concerning whether the Fifth Circuit had, in its remanding opinion, deemed Haynes's IATC claims substantial, the subsequent Fifth Circuit opinion at issue in this appeal clarifies that it is the judgment of the Fifth Circuit that the claims are not "particularly compelling." *Haynes*, 733 F. App'x at 770–71. This is the clearest and most recent expression of the Fifth Circuit's view. Any inconsistency has now been resolved adversely to Haynes.

In sum, Haynes's IATC claims and related *Martinez* argument are routine and do not present the extraordinary circumstances that justify reopening a final judgment.[8] Accordingly, the Fifth Circuit correctly found that

[8] Even if the Court wanted to address the question of whether *Martinez* constitutes extraordinary circumstances, the sounder approach would be to wait for a case in which the question is outcome-determinative. Here, the court of appeals and the district court have made it very clear that, even if extraordinary circumstances existed, they do not believe that Haynes is entitled to *Martinez* relief, or, further, relief on the merits.

the district court did not abuse its discretion in denying Rule 60(b)(6) relief. Certiorari review should be denied.

II. The District Court Has Repeatedly Held That Haynes's IATC Claims Are Meritless, and the Fifth Circuit Has Agreed. Any Attempt to Contest That Merits Decision Constitutes an Impermissible Successive Habeas Petition.

Haynes asserts that the Fifth Circuit erred in holding that Haynes's IATC claims had been considered on the merits and contends that the district court's "facial review" was insufficient. Pet.10–11, 13, 29–30. Haynes argues that, when the Court remanded his case, the next step in the process was reconsideration of his IATC claims, which was never done. *Id*. However, the district court's merits determination was not implicated by either the remand order from this Court or the one from the Fifth Circuit. In fact, given the statutory strictures on successive federal habeas petitions, the Fifth Circuit observed that "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.

To begin, this Court only remanded for further consideration in light of *Trevino*. *Haynes*, 133 S. Ct. 2764. The statement respecting the stay of execution explained the Court's concern quite clearly: "the Court of Appeals has never addressed the District Court's merits ruling, and has instead relied

solely on procedural default" and therefore "a stay of execution is warranted to allow Haynes to pursue his claim on remand if this Court in *Trevino* rejects the single ground relied upon by the Fifth Circuit for denying Haynes'[s] application for a certificate of appealability." *Haynes*, 133 S. Ct. 639. There was no instruction to re-evaluate the merits of the case.[9] The Fifth Circuit also declined to order the district court to carry out a full reconsideration of Haynes's defaulted IATC claims and gave the district court no "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. The Court and Fifth Circuit thus asked the district court to determine whether Haynes could excuse the procedural

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[9] As ably explained by the district court, when this Court grants a certiorari petition, vacates the judgment below, and remands the case (a GVR), a case's merits are not necessarily implicated. Instead, this Court:

> [. . .] issues a GVR "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation . . . is . . . potentially appropriate." *Lawrence v. Chater*, 116 S. Ct. 604, 607 (1996). Yet, a GVR order is not a reversal on the merits, *see Tyler v. Cain*, 121 S. Ct. 2478, 2484 n.6 (2001), and "does not necessarily imply that the [ ] Court has in mind a different result in the case, nor does it suggest that [the circuit court's] prior decision was erroneous." *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 845 (6th Cir. 2013).

ROA.2517.

bar of his unexhausted claims—not to reevaluate whether his IATC claims had merit.

In any event, Haynes has already received any and all relief that he would be entitled to under *Trevino*—an adjudication by the district court of his IATC claims on their merits, regardless of their procedural default. ROA.2197 ("While Haynes may disagree with the earlier adjudication, the relief requested has already been granted."). In its original Memorandum Opinion and Order denying Haynes federal habeas relief, the district court addressed the claims standing "in a procedurally inadequate posture." ROA.1631–34. Concerning the IATC claims, the district court noted that "none of [Haynes's] arguments facially command habeas relief" and explained:

> [. . .] Haynes has taken great pains to develop evidence that he alleges trial counsel should have presented at trial. Yet, as noted by respondent, Haynes'[s] 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." (Docket Entry No. 10 at 29). The record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure that Haynes'[s] constitutional rights were protected and viable defenses pursued. Haynes'[s] 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." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

ROA.1632–34. The district court concluded that it would not issue a habeas writ even if "the constraints of federal review did not command that Haynes

first give the states courts an opportunity to adjudicate his claims of error." ROA.1633–34. And, just prior to Haynes's postponed execution date, the district court again explained, in denying Haynes's Rule 60(b)(6) motion, that it is unquestionable that Haynes already received the relief he would be entitled to if *Martinez* and *Trevino* were applicable to his case—federal habeas review of the merits of his IATC claims. ROA.2197 ("[T]he court already granted Haynes the relief he now requests: The court considered the merits of his barred claims."). Thus, the district court correctly concluded that Rule 60(b)(6) relief would be pointless.

Haynes appears to acknowledge the fact that the district court reviewed his claims on the merits when he argues that the merits determination was "flawed" and erroneous, as a merits determination that never occurred could not be flawed. Pet.5 n.4. Nevertheless, Haynes contends that no "real" merits review took place because the district court did not explicitly address each of the numerous arguments and evidence presented with his petition. *Id*. at ii, 6, 10. But Haynes provides little support for the proposition that he is entitled to a more robust discussion of the claims and evidence he presented, much less that a perceived lack of depth in a district court's merits discussion renders its opinion no merits review at all. Haynes offers a citation to *Cone v. Bell*, 556 U.S. 449, 475–76 (2009); however, *Cone* does not stand for the proposition that summary decisions are unacceptable. In that case, the Court believed that the

case should be remanded for additional reconsideration, but that remand was necessary due to a flaw in the lower court's legal analysis. *Id.* Certainly, *Cone* did not set forth page-length requirements for district court opinions, as if they were undergraduate writing assignments. District court opinions "need not indulge in exegetics, or parse or declaim every fact and each nuance and hypothesis." *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 516 (5th Cir. 1969).

Here, the district court's alternative holding was clearly based on a review of the record, Haynes's postconviction evidence, and the applicable law. ROA.2522–23. Simply placing the term "alternative merits review" in quotations and calling the court's disposition meaningless does not establish that Haynes was actually deprived of a review on the merits. Pet.5 n.4, 7–8, 10 n.5, 18 n.10, 31 n.24, 34. Rather, it merely shows that a determination on the merits was made with which Haynes disagrees, and disagreement with a merits determination is hardly an "extraordinary circumstance" that would warrant 60(b)(6) relief.

To be sure, attacking the district court's resolution of a claim on the merits is not only unextraordinary, it is an impermissible successive habeas petition. *Gonzalez*, 545 U.S. at 531–32. Indeed, while Haynes and the Fifth Circuit dissent disagree with the district court's analysis of Haynes's multifaceted IATC claim, the Fifth Circuit majority correctly concluded that Rule 60(b) "may not be used to attack 'the substance of the federal court's

resolution of a claim *on the merits*.'" *Haynes*, 733 F. App'x at 769 (citing *Gonzalez*, 545 U.S. at 532) (emphasis in original). As this Court has explained, a district court has jurisdiction to consider a Rule 60(b)(6) motion in habeas proceedings so long as the motion "attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. To avoid a Rule 60(b)(6) motion itself being a successive habeas petition, the litigant "must not be challenging a prior merits-based ruling." *Balentine v. Thaler*, 626 F.3d 842, 846 (5th Cir. 2010). Instead, he must be challenging a previous ruling, such as procedural default or a statute-of-limitations bar, which precluded a merits determination. *Id.* at 846–47. In other words, a motion which merely challenges the district court's ruling which precluded a ruling on the merits—here, the denial based on the procedural default—falls within the jurisdiction of the district court to consider. *Gonzalez*, 545 U.S. at 532 n.4; *Adams*, 679 F.3d at 319. However, a motion that seeks to add a new ground for relief or attack the previous resolution of a claim on the merits is, in fact, a successive petition subject to the standards of 28 U.S.C. § 2244(b). *Gonzalez*, 545 U.S. at 531–32. Here, Haynes's pleadings plainly assault not only the district court's default finding but its merits review as well. Such an attack on the district court's merits determination constitutes an unauthorized and impermissible successive habeas action—thus leading to the Fifth Circuit's observation that

the district court had likely given Haynes more review than he was entitled to. *Haynes*, 733 F. App'x at 770.

Despite his disagreement with the depth and result of the district court's merits determination, Haynes is not entitled to a do-over—the district court reviewed the entirety of his lengthy federal petition and exhibits and determined that, regardless of the procedural posture of the claims, they do not warrant federal habeas relief. Because Haynes had already received what he requested in his motion for relief from the judgment, granting his Rule 60(b)(6) motion would serve no purpose. Therefore, the district court did not abuse its discretion in denying relief. Moreover, the concerns expressed in the statement concerning the stay of execution have now been fully assuaged—the lower courts have determined that Haynes's procedural default is not called into question by *Martinez*/*Trevino*, and the Fifth Circuit has expressed its view on the merits of Haynes IATC claims—*i.e.*, that they are "not particularly compelling."

III. The Fifth Circuit's Decision Does Not Contravene *Gonzalez* or *Buck*.

Finally, Haynes argues that the Fifth Circuit 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." Pet.ii, 34–36 (citing *Gonzalez*, 545 U.S. at 529; *Buck*, 137 S. Ct. at 759, 779).

However, *Buck* is plainly distinguishable from Haynes's case. In *Buck*, the Court recently held that extraordinary circumstances existed where: (1) a petitioner may have been sentenced to death, in part, because of his race; and (2) the Texas Attorney General's office took "remarkable steps" in confessing error in the cases of six similarly-situated defendants, but not in Buck's case. 137 S. Ct. at 777–79. Having found extraordinary circumstances, the Court then held that *Martinez*/*Trevino* would govern Buck's case were it reopened and made no broader determination as to the application of those cases. *Id*. at 780.

Buck thus lends little support for Haynes's argument that *Martinez*/*Trevino*, coupled with a compelling IATC claim, could constitute extraordinary circumstances. First, the *Buck* Court addressed *Martinez*/*Trevino* only *after* finding that extraordinary circumstances existed and only as a precondition to habeas relief. *See Buck*, 137 S. Ct. at 779–80. Second, *Buck* relied on not simply a meritorious IATC claim, but one that was unique in its nature—one that was a "disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Id*. at 778. Third, the State's actions further "confirmed" the extraordinary nature of Buck's case. *Id*. Haynes's claims are not race-based, nor has the Respondent or her lawyers taken the "remarkable step" of confessing error in similar cases. *See Raby*, 18–70018, 2018 WL 5629893, at *2

(*Buck* inapplicable because IATC claim not race-based or similar); *see also Williams v. Kelley*, 854 F.3d 1002, 1008–09 (8th Cir. 2017) (mitigation-based claim "hardly comparable" to the race-based claim in *Buck*); *Lambrix v. Sec'y, Florida Dep't of Corr.*, 851 F.3d 1158, 1172 (11th Cir. 2017) (finding the extraordinary circumstances in *Buck* not present), *cert. denied sub nom. Lambrix v. Jones*, 138 S. Ct. 217 (2017).

And while *Gonzales* does indeed hold that the need for finality cannot be the sole consideration in denying Rule 60(b) relief, 545 U.S. at 529, the Fifth Circuit did not make finality the determinative factor in its analysis of the case-at-bar. While the court recognized that finality is a concern in reopening a long final judgment, the court nevertheless considered a range of factors, in particular, the weakness of Haynes's IATC claims and the fact that *Martinez/Trevino* are not sufficient in themselves to constitute extraordinary circumstances. *Haynes*, 733 F. App'x at 769–70.

Haynes argues that he could not be using his Rule 60(b)(6) as a "substitute for appeal" since IATC claims cannot be raised on direct appeal from a criminal conviction in Texas. Pet.35. However, the CCA appeal is likely not the appeal referenced by the Fifth Circuit. Instead, the Fifth Circuit is likely noting that the appropriate time for Haynes to challenge the *district court*'s initial merits resolution of his IATC claims was on direct appeal to the Fifth Circuit. And, indeed, that is exactly what Haynes did. Haynes sought a

COA as to the district court's procedural determination as well as the rejection of the IATC claims on their merits. *See Haynes v. Quarterman*, No. 07–70004, Petitioner's Motion for COA at 17–44 (arguing that the district court erred in finding the claims to be procedurally barred, in denying relief on the claims, and in denying a COA). As was its prerogative, the Fifth Circuit opted to find Haynes's claims procedurally defaulted rather than deny relief on the merits. Nevertheless, the court of appeals could have reached the merits at that time had Haynes identified any compelling issues in his briefing. Now, Haynes's "Rule 60(b)(6) motion is an improper vehicle for relitigating them." *Haynes*, 733 F. App'x at 770.

IV. In Any Event, Haynes Does Not Qualify for *Martinez*/*Trevino* Relief, and His IATC Claims Are Meritless.

A. To start, Haynes's state habeas counsel was not ineffective.

To demonstrate that *Martinez*'s equitable exception applies in this case, Haynes must first show that his state habeas counsel was actually ineffective under the *Strickland* standard in order to establish cause for his procedural default. *Martinez*, 566 U.S. at 17. But Haynes asserts a different type of grievance against his state habeas attorney than the complaint levied by Martinez. Martinez was convicted in Arizona state court of sexual conduct with a minor, and his conviction was affirmed on direct appeal. *Id.* at 4–8. During the pendency of his appeal, Martinez's appellate counsel initiated collateral

review in state court by filing a notice of post-conviction relief, but then filed a statement that she could find no colorable claim for post-conviction relief. *Id*. The state court gave Martinez the option of filing a pro se petition, but Martinez alleged that his counsel failed to inform him that he needed to do so. *Id*. After the time to file a petition expired, the trial court dismissed the collateral action. *Id*. Later, represented by new counsel, Martinez filed a new notice of post-conviction relief in state court and alleged that his trial counsel had been unconstitutionally ineffective, but this petition was dismissed because he did not present the claim in the first proceeding. *Id*. In federal habeas proceedings, the district court then denied Martinez's claims as procedurally barred. *Id*.

In contrast, Haynes's state habeas counsel filed a state habeas application—albeit not one containing the points of error that he now urges. As Haynes acknowledges, the record demonstrates that counsel filed a 57–page petition raising four points of error, including an IATC claim. SHCR.6–63; Pet.28–29. Haynes complains that this was not enough, and that counsel failed to conduct an extra-record investigation. Pet.28–29. But simply because habeas counsel did not raise the specific IATC allegations that Haynes, in hindsight, now contends he should have raised does not render counsel's investigation or performance ineffective under *Strickland*. 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client

in the same way."); *cf. Jones v. Barnes*, 463 U.S. 745, 751–53 (1983) (holding appellate counsel is only constitutionally obligated to raise and brief those issues that are believed to have the best chance of success); *Engle v. Isaac*, 456 U.S. 107, 134 (1982) ("[T]he constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim."). Unlike in the *Martinez* case, state habeas counsel did not fail to file or otherwise abandon his client—instead, he simply did not raise claims that Haynes now contends he should have. Counsel was thus not deficient.

Additionally, in the context of actual prejudice, the district court held 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."[10] ROA.2524. If the state court would not have granted relief on his claim, then it is difficult to see how Haynes could have been prejudiced by any omission by habeas counsel. Haynes's inability to demonstrate his habeas counsel's ineffectiveness under *Strickland* precludes the application of *Martinez*'s equitable exception in this case.

[10] The inability to show actual prejudice also provides another independent failure point for Haynes's claim, since *Martinez* only provides "cause" in the cause and prejudice analysis—Haynes must prove actual prejudice in order to circumvent his default.

B. Haynes's procedurally defaulted IATC claims are also plainly meritless.

Regardless of whether Haynes's claim of ineffective state habeas counsel constitutes "cause" under *Martinez*, he still would not be entitled to excuse the procedural bar because his defaulted IATC claims are also plainly meritless. The *Martinez* Court specifically noted that "[t]o overcome the default, a prisoner must also demonstrate that the underlying [] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). When faced with the question of whether there is cause for an apparent default, the Court found that "a State may answer that the [IATC] claim is insubstantial, *i.e.*, it does not have *any merit* or that it is wholly without factual support, *or* that the attorney in the initial-review collateral proceeding did not perform below constitutional standards." *Id.* at 15–16 (emphasis added).

In his federal petition, Haynes attempted to demonstrate that his trial counsel performed deficiently by presenting affidavits from numerous witnesses claiming they would have testified that Haynes was a "young man who made a tragically bad decision one night, but who never intended to kill anyone[.]" ROA.130–268, 1937, 2068–125. But, as discussed in the Director's response, much of this evidence was either cumulative of evidence already presented at trial or would have possibly undermined counsel's well-chosen

strategy to portray Haynes as a good kid who made a bad mistake. ROA.1222–30. Indeed, after an extensive investigation assisted by the help of an investigator and two psychiatrists, counsel settled on this defense and presented several family members and friends to testify on Haynes's behalf. ROA.1222–30. Haynes's evidence and claims merely demonstrate how he now, in hindsight, would have conducted the punishment investigation and the presentation of witnesses. But such backward-looking analysis does little to establish that counsels' thorough investigation and subsequent strategy was anything but sound, and flies in the face of *Strickland*'s mandate that counsels' performance must not be judged through the distorting lens of hindsight. *Strickland*, 466 U.S. at 689.

Moreover, even assuming that Haynes has succeeded in demonstrating that counsels' performance was deficient, the State's punishment evidence was simply too overwhelming for any alleged deficiency to have had any prejudicial effect on Haynes's defense. *Id*. at 695, 697, 700. Haynes confessed to murdering a police officer after a violent crime spree wherein he robbed three separate people at gunpoint. ROA.2198. Testimony was also presented concerning Haynes's explosive temper, drug dependence, and violent disposition, worries over his behavior towards his three-year-old sister, his violence towards the family dog, and his belligerent attitude towards the staff at the hospital where he was seeking help for his drug problem. ROA.2199. With such strong

evidence against him, the cumulative testimony concerning Haynes's personal history presented in his federal habeas proceedings would not have induced a member of the jury to vote for a life sentence.[11]

The district court has repeatedly determined that Haynes's underlying claims are meritless, noting that Haynes "overstates the effect of his [new] habeas evidence while understating both the evidence against him and trial counsel's efforts." ROA.2198. The Fifth Circuit has agreed that there is no merit to Haynes's IATC claims. *Haynes*, 733 F. App'x at 769–70. Consequently, even with the benefit of *Martinez*, Haynes cannot overcome his procedural default because his IATC claims fail to demonstrate any constitutional violation.

CONCLUSION

The district court did not abuse its discretion when it denied Haynes's Rule 60(b)(6) motion. Accordingly, this Court should refuse certiorari review.

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[11] Relying on a quotation in the Fifth Circuit majority's opinion, Haynes and the Fifth Circuit dissent assert that the majority applied a too-high standard when evaluating prejudice, requiring Haynes to show that, but for counsel's errors, there would have been a different result, rather than simply requiring Haynes to demonstrate a "reasonable probability" of a different result. Pet.33–34. However, the case quoted by the majority correctly sets forth the "reasonably probability" standard. *Coble v. Quarterman*, 496 F.3d 430, 435–36 (5th Cir. 2007). Besides, the majority found that Haynes fell "far short" of showing prejudice, which would preclude any "reasonable probability" of a different result as well.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Stephen M. Hoffman
STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1400
Fax: (512) 320–8132
stephen.hoffman@oag.texas.gov

Attorneys for Respondent