No. 18-8440

IN THE

Supreme Court of the United States

TRAVIS TREVINO RUNNELS,
Petitioner,

vs.

LORIE DAVIS, DIRECTOR TDCJ–CID,
Respondent.

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

RESPONDENT'S REDACTED BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF 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

JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711–2548
(512) 936–1400
jay.clendenin@oag.texas.gov

Counsel for Respondent

QUESTION PRESENTED

While serving a seventy-year sentence for aggravated robbery, Petitioner Travis Runnels murdered his supervisor in the Texas Department of Criminal Justice (TDCJ) Clements Unit boot factory. Runnels filed a federal habeas petition alleging he received ineffective assistance of trial counsel (IATC) because counsel failed to, *inter alia*, adequately investigate mitigating evidence by obtaining additional neuropsychological testing of Runnels. The district court found the claim to be exhausted and meritless. The Fifth Circuit denied a certificate of appealability (COA).

Runnels then obtained substitute counsel who filed a motion for relief from judgment in the district court in which he raised the same IATC claim the district court had denied on the merits. The district court rejected the motion as a successive petition because it sought a readjudication on the merits of his exhausted IATC claim. The Fifth Circuit concluded the district court's conclusion in that regard was "beyond debate." Runnels does not address the lower courts' decisions that his motion was a successive petition. These facts raise the following question:

> Should the Court grant certiorari where the lower courts' determination that Runnels's motion for relief from judgment was a successive petition is undebatable and, therefore, did not properly present the courts with an occasion to consider whether Runnels presented extraordinary circumstances that warranted relief from judgment?

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BRIEF IN OPPOSITION

Petitioner Travis Runnels was convicted and sentenced to death for the murder of Stanley Wiley, Runnels's supervisor in the TDCJ Clements Unit boot factory. Runnels filed a federal habeas petition in which he raised a claim alleging his trial counsel were ineffective for failing to adequately investigate and present mitigating evidence. As a part of his IATC claim, Runnels alleged that trial counsel failed to obtain additional neuropsychological testing after the defense expert was unable to complete his testing of Runnels. *Runnels v. Stephens*, 2016 WL 1274132, at *3, 18 (N.D. Tex. March 15, 2016). The district court denied the petition and the Fifth Circuit denied Runnels's application for a COA. *Runnels v. Stephens*, 2016 WL 1275654, at *1–2 (N.D. Tex. March 31, 2016). Runnels's appointed counsel, Donald Vernay, then withdrew from his representation of Runnels and resigned from the practice of law. Pet'r's App'x G, N. The Fifth Circuit permitted Mr. Vernay to withdraw and appointed substitute counsel. Pet'r's App'x H.

Runnels then obtained a six-month extension of time for filing in the Fifth Circuit a petition for rehearing. Six months later, rather than filing a petition for rehearing, Runnels requested a stay of the Fifth Circuit's proceedings to file in the district court a motion under Federal Rule of Civil Procedure 60(b)(6) for relief from judgment. The Fifth Circuit granted the request, and Runnels filed a Rule 60(b)(6) motion in the district court. Pet'r's

App'x I, J. In the motion, Runnels raised the very IATC claim Mr. Vernay raised in the federal habeas petition that had been found to be exhausted and without merit. Pet'r's App'x D; *see Runnels v. Davis*, 664 F. App'x 371, 376–78 (5th Cir. 2016). After briefing, the district court rejected Runnels's motion, construing it as a successive habeas petition over which it lacked jurisdiction. Pet'r's App'x B, D. The district court denied the motion in the alternative, concluding that Runnels failed to demonstrate extraordinary circumstances warranting relief from judgment. Pet'r's App'x B, D. The Fifth Circuit denied Runnels a COA because it was "beyond debate" that Runnels's Rule 60(b)(6) motion was a successive habeas petition. Pet'r's App'x A at 10.

Runnels now seeks certiorari review of the Fifth Circuit's denial of a COA. He argues the Fifth Circuit failed to adequately consider whether equity warranted relief from judgment. Pet. Cert. at 17–27. In so arguing, Runnels ignores that his Rule 60(b)(6) motion constituted a successive habeas petition and was rejected on that basis. The district court and Fifth Circuit were not required to consider whether Runnels established extraordinary circumstances or whether equity warranted relief from judgment under Rule 60(b)(6) because his motion was not, in fact, a Rule 60(b)(6) motion. Further, the Fifth Circuit applied an appropriate threshold analysis when it denied Runnels's request for a COA. And even assuming Runnels's Rule 60(b)(6) motion was not a successive habeas petition, he plainly failed to establish the

requisite extraordinary circumstances. Therefore, the Court should deny Runnels's petition because it does not raise an issue worthy of this Court's attention.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

The Court of Criminal Appeals (CCA) summarized the facts of the capital murder as follows:

> [Runnels] did not enjoy working as a janitor at the prison boot factory. On the morning of the day of the murder, he expressed anger at the fact that he had not been transferred to being a barber as he had requested. He told fellow inmate Bud Williams that he was going to be "shipped one way or another" and that "he was going to kill someone." [Runnels] said that he would kill [Stanley] Wiley if Wiley said anything to him that morning. [Runnels] told another inmate, William Gilchrist, that he planned to hold the boot-factory plant manager hostage in the office after the other correctional officers had left. Finally, after [Runnels] had arrived at the boot factory, he told fellow inmate Phillip Yow that he was going to do something.
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> During the first shift at the boot factory, [Runnels] approached Wiley, raised a knife, tilted Wiley's head back, and cut his throat. [Runnels] then wiped the knife with a white rag and walked back toward the trimming tables. When Yow later asked [Runnels] why he had attacked Wiley, [Runnels] said, "It could have been any offender or inmate, you know, as long as they was white." In response to Yow's explanation that [Runnels] could get the death

> penalty if Wiley died, [Runnels] responded, "[a] dead man can't talk."
>
> Wiley did die from the injury. It was later determined that the cut was a twenty-three centimeter long neck wound that transected the external carotid artery and the internal jugular vein and extended in depth to the spine. A medical examiner found that the force required to inflict the wound was "moderate to severe." [Runnels] was twenty–six years old when he committed the offense.

Runnels v. State, No. 75,318, slip op. at 1 (Tex. Crim. App. Sept. 12, 2007) (unpublished opinion).

B. The State's punishment case

The CCA summarized on direct appeal the State's case for future dangerousness:

> In addition to the crime before [the court], the record shows that [Runnels] has been convicted of three other felonies. In 1993, he was convicted of the second-degree felony of burglary of a building. He was placed on probation for that felony, but later that year he committed another burglary of a building. As a result, he received a second conviction and his probation on the first conviction was revoked. In 1997, [Runnels] was convicted of aggravated robbery, a first-degree felony. That conviction carried a deadly weapon finding, specifying the deadly weapon as a "firearm."
>
> [Runnels] also committed several acts of misconduct in prison. On January[ ] 19, 1999, he hit a guard in the jaw. On May 3, 2003, he threw urine at a guard. On November 18, 2003, he threw a light bulb at a guard. And on June 25, 2004, he threw feces at a guard.

Id. at 2.

C. The defense's case

The defense developed testimony showing that, prior to the murder, Runnels felt that Wiley had harassed him. William Gilchrist testified that Wiley had harassed Runnels the day prior to the murder. 15 RR 115.[1] Jimmy Jordan testified to the same effect. 15 RR 145. Jordan and Bud Williams, Jr., testified that Wiley had scolded Runnels for not working and Runnels said that he was tired of Wiley "messing with him." 15 RR 67, 146.

Witnesses who had known Runnels for a significant period of time in prison testified that they had not seen Runnels exhibit any violent behavior. 15 RR 78, 80, 113–14. Williams had known Runnels for eight years. He testified that he had never seen Runnels fight and that Runnels had walked away from trouble. 15 RR 78, 81–82. Gilchrist testified that Runnels never engaged in violence or threatened others. 15 RR 114. Jimmy Jordan and Phillip Yow also testified that they had not seen Runnels involved in any fights. 15 RR 157, 243.

Gilchrist testified that Runnels was in minimum custody and was a good prisoner. 15 RR 114. William Elkins testified that Runnels was good–natured.

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1 "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). "CR" refers to the "Clerk's Record," the transcript of pleadings and documents filed in the trial court, followed by the internal page number(s). "SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Runnels*, No. 46,226–02. "Supp. SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court following the CCA's June 8, 2011, remand to the trial court. The transcript of the state habeas court's evidentiary hearing is contained in Petitioner's Appendix K.

15 RR 183. The defense also showed that Runnels did not attempt escape or resist arrest when officers responded to the scene of the attack. 15 RR 213, 229–30.

D. Federal habeas proceedings

In his federal habeas petition, while represented by Mr. Vernay, Runnels claimed that his trial counsel were ineffective for failing to adequately investigate and present mitigating evidence. *Runnels v. Stephens*, 2016 WL 1274132, at *3–24. Specifically, Runnels argued that trial counsel failed to present evidence of Runnels's chaotic childhood and the failure of Runnels's family and various institutions to provide Runnels with guidance. *Id.* at 3. Runnels also argued that trial counsel should have arranged for the defense's mental health expert, Dr. Richard Fulbright, to complete the neuropsychological testing of Runnels he had begun but was unable to complete due to the testing conditions in jail.[2] *Id.*

Runnels also argued in his petition that his state habeas counsel was ineffective for failing to obtain expert assistance to complete the neuropsychological testing begun by Dr. Fulbright. *Id.* at 13–16. In support of that allegation, Runnels provided an affidavit of state habeas counsel's mitigation investigator, Alma Lagarda. *Id.* at 15. Ms. Lagarda asserted in that

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2 Dr. Fulbright's report is included in the excerpts from Runnels's state habeas proceedings located within Petitioner's Appendix L.

affidavit that she had urged state habeas counsel to obtain psychological testing of Runnels but such testing was not conducted. *Id.* Runnels also argued that state habeas counsel's failure to present live testimony at the state habeas court's evidentiary hearing constituted ineffective assistance for purposes of *Martinez v. Ryan*, 566 U.S. 1 (2012) (recognizing exception to the procedural default doctrine where state habeas counsel was ineffective for failing to raise a substantial IATC claim in the petitioner's initial state habeas proceedings).[3] *Runnels v. Stephens*, 2016 WL 1274132, at *13. Runnels argued that the district court should "excuse any potential default and allow the Petitioner the resources to develop his ineffective assistance claim in federal court and that this Court further set the claim for an evidentiary hearing." *Id.* at 2.

On the same day Runnels filed his petition, he filed a motion for leave seeking permission to file an amended petition in the event this Court held in *Trevino* that the exception recognized in *Martinez* applied to Texas habeas petitioners. *See* Pet'r's App'x A at 8; Pet'r's App'x B at 2; Pet'r's App'x D at 12. Runnels argued that state habeas counsel's failure to develop at the state habeas hearing the IATC claim raised in his federal habeas application constituted ineffective assistance for purposes of *Martinez*. Pet'r's App'x A at

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[3] Runnels's federal habeas petition was filed in December 2012, nine months after this Court issued *Martinez* and five months before this Court issued *Trevino v. Thaler*, 569 U.S. 413 (2013) (holding that the *Martinez* exception applies to cases arising from Texas).

8. The Director filed a response to Runnels's motion, noting that the *Martinez* exception had no applicability to Runnels's IATC claim because it was exhausted. The district court denied Runnels's motion because Runnels did not raise any unexhausted IATC claim. *Runnels v. Stephens*, 2016 WL 1274132, at *14.

The Director then filed an Answer to Runnels's petition. The district court provided Runnels the opportunity to reply to the Director's assertion in his Answer that one portion of Runnels's IATC claim was unexhausted. *Id.* at 3. Runnels filed a reply, arguing that the claim identified by the Director was unexhausted. Pet'r's App'x F. Mr. Vernay argued in the reply that the claim satisfied the *Martinez* standard because it was substantial and because state habeas counsel performed ineffectively by failing to develop that claim with evidence showing that trial counsel performed deficiently by not having Runnels re-tested to complete a neuropsychological evaluation. Pet'r's App'x F. Mr. Vernay also argued that the unexhausted portion of the IATC claim should be reviewed de novo. Pet'r's App'x F. Runnels relied on the affidavit obtained by Mr. Vernay from Alma Lagarda. Pet'r's App'x F. Mr. Vernay concluded by asserting

> the conduct of trial counsel in failing to present mitigation evidence that was readily available and state habeas counsel's failure either to do the follow[-]up testing recommended by Ms. Lagarda, or properly to present the claim of ineffective assistance of counsel in the initial state habeas proceeding brings the

> Petitioner's claim within the penumbra of those claims contemplated by *Martinez v. Ryan*, and . . . this Court should retain jurisdiction over Petitioner's ineffective assistance of counsel claim and provide the Petitioner with the resources to fully develop and present this claim to the Court.

Pet'r's App'x F.

Magistrate Judge Clinton Averitte later entered a Report and Recommendation concluding that Runnels's petition should be denied. *Runnels v. Stephens*, 2016 WL 1274132, at *27. Judge Averitte extensively discussed Runnels's claim that trial counsel was ineffective for failing to adequately investigate and present mitigating evidence, as well as Runnels's assertion that state habeas counsel was ineffective for failing to adequately raise that IATC claim. *Id.* at *3–24. Judge Averitte found that no portion of Runnels's IATC claim was unexhausted. *Id.* at *3 ("Claim one, alleging a failure to conduct an adequate mitigation investigation and a failure to present mitigation evidence, is exhausted."). Judge Averitte also found that the IATC claim lacked merit. *Id.* at *24. The district court adopted Judge Averitte's Report and Recommendation and denied Runnels's petition. *Runnels v. Stephens*, 2016 WL 1275654, at *1–2.

Runnels then filed an application for a COA. The Fifth Circuit denied Runnels's application. *Runnels v. Davis*, 664 F. App'x at 372–78. Mr. Vernay resigned from the practice of law and sought to withdraw from his representation of Runnels. Pet'r's App'x G. [redacted]

[redacted] The Fifth Circuit appointed substitute counsel who obtained a stay of the Fifth Circuit's proceedings and filed a motion for relief from judgment in the district court. Pet'r's App'x H, I.

II. Procedural History

Runnels pled guilty to, and was convicted and sentenced to death for, the murder of Stanley Wiley. CR 20, 334, 342–45, 390–94; 21 RR 3; 15 RR 8; 17 RR 41. The CCA upheld Runnels's conviction and death sentence on direct appeal. *Runnels v. State*, No. 75,318 (unpublished opinion). Following a remand to the trial court and an evidentiary hearing regarding Runnels's IATC claim, the CCA denied Runnels's state habeas application based on the trial court's findings of fact and conclusions of law and based on its own review. *Ex parte Runnels*, No. 46,226-02 (Tex. Crim. App. March 7, 2012) (unpublished order); SHCR–02 at 298–306; Supp. SHCR–02 at 7–14.

Runnels then filed a federal habeas petition. The district court denied habeas corpus relief and denied a COA. *Runnels v. Stephens*, 2016 WL 1275454, at *1–2 (order adopting Report and Recommendation); *Runnels v.*

Stephens, 2016 WL 1274132, at *1–28 (magistrate judge's Report and Recommendation). Runnels then filed an Application for a COA, which the Fifth Circuit denied. *Runnels v. Davis*, 664 F. App'x at 372–78. Runnels filed petitions for rehearing and for rehearing en banc following the Fifth Circuit's denial of a COA. The Fifth Circuit denied each petition. *Runnels v. Davis*, No. 16-70012, Order (5th Cir. Dec. 11, 2017). Runnels then filed a petition for a writ of certiorari, which this Court denied. *Runnels v. Davis*, 138 S. Ct. 2653 (2018).

During the proceedings in the Fifth Circuit, Runnels obtained a stay to file in the district court a motion for relief from judgment. *Runnels v. Davis*, No. 16-70012, Order (5th Cir. June 5, 2017). Runnels then filed a motion for relief from judgment, which the district court dismissed as a successive petition and denied in the alternative.[4] Pet'r's App'x B at 10; Pet'r's App'x D at 14–15. The Fifth Circuit denied a COA as to the district court's rejection of his motion for relief from judgment. Pet'r's App'x A at 14. The Fifth Circuit denied Runnels's petition for rehearing. Pet'r's App'x C. Runnels then filed a petition for a writ of certiorari. The instant Brief in Opposition follows Runnels's petition.

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[4] Runnels did not file in the Fifth Circuit a motion for authorization to file a successive habeas petition. Therefore, the Fifth Circuit dismissed such an action for failure to comply with the court's scheduling order. *In re Runnels*, 17-11294, Order (5th Cir. Dec. 5, 2017).

ARGUMENT

I. Runnels's Petition Does Not Present Any Issue Regarding the Appropriate Equitable Approach to Motions for Relief from Judgment Because His Motion Constituted a Successive Petition.

In his federal habeas petition, Runnels raised an IATC claim alleging that trial counsel were ineffective for failing to adequately investigate and present mitigating evidence. *See Runnels v. Stephens*, 2016 WL 1274132, at *2. Runnels alleged, *inter alia*, that trial counsel failed to obtain additional neuropsychological testing of Runnels to substantiate the defense's expert's opinion that Runnels may have had attention deficit hyperactivity disorder (ADHD). *Id.* at *18. The district court concluded that Runnels's IATC claim was *not* procedurally defaulted and was without merit. *Id.* at *3, 18, 23–24.

Represented by substitute counsel, Runnels later sought relief from the district court's judgment under Rule 60(b)(6). Pet'r's App'x I. In his motion, Runnels relied on a newly obtained affidavit to argue his trial counsel were ineffective for failing to present evidence he suffered from ADHD, post-traumatic stress disorder (PTSD), frontal lobe damage, and a learning disorder. Pet'r's App'x I at 8–13; Pet'r's App'x O. Runnels argued that his previously-appointed federal habeas counsel, Mr. Vernay, performed deficiently by not, in the wake of this Court's holding in *Martinez*, presenting such evidence to the district court during the initial federal habeas proceedings

to render unexhausted the IATC claim Mr. Vernay raised in the federal habeas petition. Pet'r's App'x I at 4–5, 13–15. Runnels argued that Mr. Vernay's deficient performance was tantamount to abandonment. Pet'r's App'x I at 13–15.

The district court concluded that Runnels's Rule 60(b)(6) motion was, in fact, a successive habeas petition. Pet'r's App'x B at 10. The Fifth Circuit denied Runnels a COA as to the district court's rejection of his Rule 60(b)(6) motion, concluding that it was "beyond debate" that the motion was a successive habeas petition. Pet'r's App'x A at 13.

Runnels argues the lower courts did not adequately consider whether he presented extraordinary circumstances and whether equity warranted relief from judgment. Pet. Cert. at 17–27. But because Runnels did not file a proper Rule 60(b)(6) motion—but rather a successive petition—the petition did not present an appropriate vehicle through which to consider whether Runnels presented extraordinary circumstances or whether equity favored granting him relief from judgment. As discussed below, the lower courts' conclusion that Runnels's motion was a successive habeas petition are indisputable. Consequently, Runnels's petition for a writ of certiorari is without foundation and should be denied.

A. The lower courts' conclusion that Runnels's Rule 60(b)(6) motion was a successive petition was compelled by this Court's opinion in *Gonzalez v. Crosby*.

Federal Rule of Civil Procedure 60(b)(6) allows a district court to grant relief "from a final judgment, order or proceeding" for "any . . . reason that justifies relief." To establish an entitlement to relief from judgment, a movant must show, *inter alia*, that extraordinary circumstances exist that warrant such relief. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). A proper Rule 60(b)(6) motion alleges a non-merits-based defect in the district court's adjudication of the federal habeas petition. *Id.* at 532. That is, Rule 60(b)(6) relief is directed towards rectifying defects that *prevent* a ruling on the merits. *Id.* at 532 n.4. Rule 60(b)(6) does *not* permit a movant to present a new claim or to attack the district court's prior resolution of a claim on the merits. *Id.* at 530.

This Court explained in *Gonzalez* the distinction between a decision on the merits and a defect in the proceedings:

> The term "on the merits" has multiple usages. [ ] We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.
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> . . .

> Fraud on the federal habeas court is one example of such a defect. [ ] We note that an attack based on the movant's own conduct, or his habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably.

Id. at 532 nn.4–5 (citations omitted).

The Court in *Gonzalez* provided an example of a Rule 60(b) motion that improperly raises a habeas claim. The Court stated that a motion alleging habeas counsel omitted a claim of constitutional error due to "excusable neglect" and seeking leave to present that claim would constitute a successive habeas petition. *Id.* at 531. Treating such a motion as a successive habeas petition is appropriate, even though the motion is not in substance a habeas corpus petition, because treating the motion otherwise would permit end-runs around AEDPA's limitation on successive petitions. *Id.*

The Fifth Circuit has adhered to the distinction this Court articulated in *Gonzalez*:

> Coleman argues that there was a defect in the integrity of her original habeas petition, namely that "the additional evidence from the four witnesses recently discovered and relevant to the 'kidnapping' issue was unavailable to this Court when it decided the claim previously, and the attached affidavits and the evidence contained therein are now available." Her counsel's failure to discover and present this evidence, she argues, indicated that they were constitutionally ineffective. This claim, however, is fundamentally substantive—she argues that the presence of new facts would have changed this court's original result. Moreover, Coleman does not allege that the court or prosecution prevented her from presenting such evidence, but rather argues that her own counsel was ineffective in failing to present such evidence. The

> Supreme Court has held that such an argument sounds in substance, not procedure. Nor is Coleman's alleged defect similar in kind to those highlighted by the Supreme Court as examples of procedural failures, such as statute-of-limitations or exhaustion rulings.

In re Coleman, 768 F.3d 367, 371–72 (5th Cir. 2014); *see Preyor v. Davis*, 704 F. App'x 331, 338–40 (5th Cir. 2017) ("Federal habeas counsel's allegedly marginal performance does not reflect a defect in the integrity of the federal court as it performs its habeas duties and is not a proper ground for reopening [the] federal habeas proceedings.").

Gonzalez compels the conclusion that Runnels's motion for relief from judgment was a successive petition. 545 U.S. at 532 n.5. Runnels sought relief from judgment based on new evidence to support an exhausted IATC claim that the district court had adjudicated on the merits. Pet'r's App'x A at 11–12. Runnels's Rule 60(b)(6) motion was based on the precise argument this Court has rejected: that "newly discovered evidence" and "his habeas counsel's omissions" warranted "a second chance to have the merits determined favorably." *Id.* at 531, 532 n.5. The Fifth Circuit faithfully applied *Gonzalez* and its own precedent to conclude that Runnels's motion was a successive petition. Pet'r's App'x A at 11–12.

Importantly, the district court did not reject Runnels's IATC claim during the initial federal habeas proceedings on procedural grounds—it found the claim to be exhausted and rejected it on the merits. *Runnels v. Stephens*,

2016 WL 1274132, at *3. Therefore, Runnels's attempt to relitigate the merits of his IATC claim through a Rule 60(b)(6) motion necessarily could not have been properly sought via a motion for relief from judgment. *See Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) ("In his Rule 60(b)(6) motion, Adams challenges the district court's determination that his claims were procedurally defaulted. Thus, Adams's Rule 60(b)(6) motion is not to be construed as an improper successive habeas petition and is properly before the district court."). Unlike the petitioner in *Adams*, Runnels did not seek to challenge a prior procedural determination regarding his IATC claim.

Thus, controlling precedent established that Mr. Vernay's purported "effective" abandonment did not constitute a defect in the integrity of the district court's proceedings, and the lower courts properly concluded Runnels's motion was a successive habeas petition. As discussed above, Runnels's Rule 60(b)(6) motion did not challenge a prior determination that his IATC claim was procedurally defaulted or barred. Indeed, his motion sought to obtain a second review *on the merits* of his IATC claim. Runnels's petition is founded upon the notion that the lower courts improperly applied Rule 60(b)(6) by failing to consider whether equity warranted relief from judgment. Pet. Cert. at 17–27. But because the lower courts properly construed Runnels's motion as a successive habeas petition, the courts were not presented with an appropriate vehicle through which to consider whether Runnels established

extraordinary circumstances or whether equity warranted relief from judgment under Rule 60(b)(6). Therefore, his petition is without foundation and it should be denied.

B. Runnels's effort to avoid the lower courts' holdings fail.

Runnels scarcely acknowledges that his Rule 60(b)(6) motion constituted a successive petition and was rejected on that basis. He only briefly argues that Mr. Vernay's "misconduct" amounted to a structural defect in the district court's proceedings.[5] Pet. Cert. at 20. But as discussed above, this Court in *Gonzalez* stated that allegations of omissions by federal habeas counsel—even when supported by new evidence—render a Rule 60(b)(6) motion a successive habeas petition.[6] 545 U.S. at 531, 532 n.5. Runnels does not identify any support for the argument that federal habeas counsel's performance constitutes a defect in the district court's proceedings. Indeed, precedent holds that Runnels's allegation that prior federal habeas counsel failed to obtain

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5 As discussed below, Runnels's allegation that Mr. Vernay committed "misconduct" during the district court's proceedings is based entirely on the argument that Mr. Vernay simply litigated the very same IATC claim pressed by Runnels's current counsel in a different manner in the aftermath of this Court's holding in *Martinez*.

6 Runnels asserts the Fifth Circuit concluded that "ordinary habeas counsel ineffectiveness is not sufficient to prevail on a Rule 60(b)[(6)] motion," and by so doing "ignored the equitable nature" of Rule 60(b)(6). Pet. Cert. at 20. The Fifth Circuit did not conclude that such an allegation is "not sufficient" for purposes of Rule 60(b)(6). The Fifth Circuit concluded, consistent with *Gonzalez*, that such an allegation does not even allege an appropriate basis for relief from judgment but instead renders the motion a successive habeas petition. Pet'r's App'x A at 11–12.

additional evidence to support his IATC claim that was denied on the merits does not constitute a defect in the integrity of the district court's proceedings. *Gonzalez*, 545 U.S. at 531; *In re Coleman*, 768 F.3d at 371–72; *Preyor*, 704 F. App'x at 338–40; *Williams v. Kelley*, 858 F.3d 464, 471 (8th Cir. 2017) ("Although an assertion of ineffective assistance of [federal] habeas counsel may be characterized as a defect in the integrity of the habeas proceeding, it ultimately seeks to assert or reassert substantive claims with the assistance of new counsel."). And Runnels's conclusory assertion that Mr. Vernay's performance precluded a merits review of his IATC claim fails for a plainly obvious reason—the claim was denied on the merits. Pet. Cert. at 20; *Runnels v. Stephens*, 2016 WL 1274132, at *16–24.

Runnels also argues that the lower courts erred in failing to consider whether equity warranted relief from judgment because he, like the petitioner in *Holland v. Florida*, 560 U.S. 631 (2010), sought equitable relief. Pet. Cert. at 18–22. The relevance of *Holland* to Runnels's Rule 60(b)(6) motion is difficult to discern. *Holland* did not involve a petitioner seeking relief from judgment under Rule 60(b)(6). The petitioner in *Holland* sought application of equitable tolling to excuse his failure to timely file a federal habeas petition in the first instance. 560 U.S. at 645. Nothing in *Holland* sheds light on whether a Rule 60(b)(6) motion based on new evidence and allegations of omissions by federal habeas counsel should be construed as a successive habeas petition,

much less does *Holland* cast doubt on this Court's opinion in *Gonzalez*. The lower courts properly followed this Court's controlling opinion in *Gonzalez* to conclude Runnels's motion was, in fact, a successive habeas petition.

The Fifth Circuit properly concluded that it was "beyond debate" that Runnels's Rule 60(b)(6) motion was a successive habeas petition because it sought to obtain a second chance to succeed on his previously-denied IATC claim. Pet'r's App'x A at 13. This Court's opinion in *Gonzalez* compelled that conclusion. Because his motion was a successive habeas petition, it did not provide the lower courts occasion to consider whether Runnels presented extraordinary circumstances or whether equity warranted relief from judgment. Runnels provides no reason warranting this Court's attention. Therefore, his petition should be denied.

II. Runnels's Rule 60(b)(6) Motion Sought an Inappropriate Application of *Martinez*.

Runnels argues that the Fifth Circuit's opinion was contrary to this Court's holdings in *Martinez* and *Cullen v. Pinholster*, 563 U.S. 170 (2011). Pet. Cert. at 24–26. He argues that his new evidence (i.e., Pet'r's App'x O) rendered the IATC claim he raised in his Rule 60(b)(6) motion unexhausted because it relied on evidence he did not present to the state habeas court.[7] Pet. Cert. at

[7] Runnels's argument essentially concedes that his Rule 60(b)(6) motion sought to raise a claim for relief, which renders his motion an impermissible successive habeas petition. Pet. Cert. at 24–26. Accepting his formulation, i.e., that the IATC

24–26. He argues that *Pinholster* allows a petitioner to render an exhausted claim unexhausted by presenting new evidence to support the claim in federal court and that *Martinez* permits a federal court to review the claim on the merits. Pet. Cert. at 26. Runnels's argument is as incorrect as it is untenable.

To start, the IATC claim Runnels raised in his Rule 60(b)(6) was the same exhausted claim he raised in his federal habeas petition. Pet'r's App'x A at 12–13. Because the claim was exhausted, the *Martinez* exception simply had no applicability. 566 U.S. at 17; *Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014). And because the state court denied the IATC claim on the merits, Runnels could not present new evidence in federal court to support the claim. *Pinholster*, 563 U.S. at 182.

Contrary to Runnels's assertion, *Pinholster* did not create an avenue through which petitioners could avoid the limitations of 28 U.S.C. § 2254(d) by presenting new evidence in federal court to obtain de novo review of exhausted claims. *Pinholster* held just the opposite. *Id.* at 181 ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *see Escamilla*, 749 F.3d at 395 ("[O]nce

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raised in his motion was not raised in his federal habeas petition, his Rule 60(b)(6) motion could not have sought to establish that the district court's previous rejection of his claim precluded a merits determination because he would be asserting a new claim that had not been presented to the district court during the initial habeas proceedings. *Gonzalez*, 545 U.S. at 532 n.4.

a claim is considered and denied on the merits by the state habeas court, *Martinez* is inapplicable, and may not function as an exception to *Pinholster*'s rule that bars a federal habeas court from considering evidence not presented to the state habeas court."). As in *Escamilla*, Runnels's new evidence "did not 'fundamentally alter' his [IATC] claim, but merely provided additional evidentiary support for his claim that was already presented and adjudicated in the state court proceedings." *Id.* (internal citation omitted).

In citing to this Court's holding in *Pinholster*, Runnels seems to misapprehend its meaning, and he does not provide support for his assertion that "*Pinholster* . . . establishes that significant new evidence presented for the first time in federal habeas will serve to 'unexhaust' a state court claim." Pet. Cert. at 24–25. And Runnels's unsupported assertion that the Fifth Circuit's application of *Pinholster* renders *Martinez* a dead letter ignores this Court's holdings in those cases and it ignores the fact that his Rule 60(b)(6) raised the very same exhausted IATC claim he raised in his federal habeas petition. Pet. Cert. at 26. *Martinez* did not mention *Pinholster* let alone overrule it.

Further, Runnels argues that the Fifth Circuit misapplied its own precedent by holding that his IATC claim was exhausted. Pet. Cert. at 25–26. He argues that the new evidence he submitted with his motion rendered the claim unexhausted because the claim was in a significantly stronger evidentiary posture than it was in state court. Pet. Cert. at 25 (citing *Brown v.*

Estelle, 701 F.2d 494, 495 (5th Cir. 1983)). But the lower courts appropriately rejected Runnels's attempt to misuse *Martinez* to seek de novo review of an exhausted IATC claim. Pet'r's App'x A at 13 n.2; Pet'r's App'x D at 12. As the Fifth Circuit has noted, it would be inappropriate to employ *Martinez* by "strategically" conceding an IATC claim was unexhausted "to bootstrap factual development in federal court in search for unexhausted claims." *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015) (quoting district court's opinion), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018); *see Dickens v. Ryan*, 740 F.3d 1302, 1328 (9th Cir. 2014) (en banc) (Callahan, J., concurring in part and dissenting in part).

Runnels's Rule 60(b)(6) motion sought just that kind of misapplication of *Martinez*. *Martinez* held only that ineffective assistance of state habeas counsel can, in some circumstances, constitute cause and prejudice for an IATC claim. *Martinez* did not create a standard under which federal habeas counsel must perform, and it did not create a right to strategically avoid the deference due under 28 U.S.C. § 2254(d) to a state court's adjudication of federal constitutional claims. Pet'r's App'x D at 6 (Magistrate Judge Averitte's observation that Runnels's motion for relief from judgment "goes beyond the scenario Justice Scalia outlined in that it seeks to reopen the proceedings on the ground that *federal habeas counsel* was ineffective when he failed to use *Martinez* to adequately pursue such tactics") (emphasis in original).

Perhaps most importantly, Runnels's argument that the Fifth Circuit's holding in this case misapplied *Martinez* and *Pinholster* ignores the basis of the Fifth Circuit's opinion—that Runnels's Rule 60(b)(6) motion was a successive habeas petition. Pet'r's App'x A at 11–13. Neither *Martinez* nor *Pinholster* have any bearing on whether Runnels's motion amounted to a successive habeas petition. As discussed above, the lower courts properly held that Runnels's motion was an impermissible successive habeas petition. Consequently, Runnels's petition does not raise an issue worthy of this Court's attention and it should be denied.

III. The Fifth Circuit Applied the Appropriate Standard When It Denied Runnels's Application for a COA.

Lastly, Runnels argues that the Fifth Circuit conducted a merits review of his Rule 60(b)(6) motion rather than a threshold COA review. Pet. Cert. at 27–28. Runnels is plainly incorrect. The Fifth Circuit appropriately framed the COA standard that governed its review of the district court's rejection of Runnels's Rule 60(b)(6) motion. Pet'r's App'x A at 9. The Fifth Circuit then considered whether the district court's conclusion that Runnels's motion constituted a successive habeas petition was debatable. Pet'r's App'x A at 10. The court concluded the district court's conclusion was "beyond debate." Pet'r's App'x A at 10. As discussed above, its conclusion was compelled by this Court's opinion in *Gonzalez* and by Fifth Circuit precedent. Pet'r's App'x A at 11. In

denying a COA, the Fifth Circuit did not "fault" Runnels "for failing to include a more detailed legal analysis." Pet. Cert. at 28. The Fifth Circuit faulted Runnels for failing to address the successiveness issue *at all*. Pet'r's App'x A at 11.

Contrary to Runnels's assertion, the Fifth Circuit's opinion in this case in no way resembles the circumstances of *Buck v. Davis*, 137 S. Ct. 759 (2017). Pet. Cert. at 27. The Fifth Circuit did not rest its denial on a coextensive merits analysis. Rather, the Fifth Circuit concluded at a threshold level that it was "beyond debate" that Runnels's Rule 60(b)(6) motion was a successive petition. Pet'r's App'x A at 13. And because Runnels did not even attempt to counter the district court's undebatable conclusion in that regard, the Fifth Circuit's task was an easy one. Runnels fails to identify any impropriety in the Fifth Circuit's rejection of his request for a COA.

Runnels also argues that the Fifth Circuit improperly conducted a merits analysis because it stated it "must determine" whether Runnels's Rule 60(b)(6) motion succeeded on the merits or else treat the motion as a successive petition. Pet. Cert. at 28. That is not what the Fifth Circuit stated. The Fifth Circuit stated (consistent with *Gonzalez*) that it must determine whether Runnels's Rule 60(b)(6) motion was a successive petition. Pet'r's App'x A at 10. That analysis requires a court to determine whether the motion seeks to raise a claim or attack a court's previous resolution of a claim on its merits. Pet'r's

App'x A at 10. The Fifth Circuit did *not* state that it must determine whether Runnels's motion was successive only after determining the motion failed on the merits. Pet'r's App'x A at 10. Runnels simply mischaracterizes the Fifth Circuit's opinion. Consequently, he does not raise an issue worthy of this Court's attention and his petition should be denied.

IV. Even Assuming Runnels's Rule 60(b)(6) Motion Was Not an Impermissible Successive Habeas Petition, Runnels Does Not Raise any Issue Worthy of This Court's Attention.

The district court denied Runnels's motion for relief from judgment in the alternative, holding that the motion failed to demonstrate an extraordinary circumstance. Pet'r's App'x B at 4–9. Runnels argued in the district court that Mr. Vernay "abandoned" him by failing to raise a defaulted IATC claim during the initial federal habeas proceedings, which he asserted constituted an extraordinary circumstance. Pet'r's App'x I at 5–7, 13–15. For the reasons discussed below, the district court's alternative rejection of his motion for relief from judgment for failing to demonstrate an extraordinary circumstance was not debatable. Consequently, Runnels's petition should be denied.

A. Mr. Vernay did not abandon Runnels.

As noted above, to establish an entitlement to relief under Rule 60(b)(6), Runnels was required to demonstrate to the district court the existence of extraordinary circumstances. *Gonzalez*, 545 U.S. at 535. Runnels failed to do

so. The record flatly belies Runnels's assertion that Mr. Vernay abandoned him during the proceedings in the district court.

Mr. Vernay continuously and ably represented Runnels during the proceedings in the district court. Mr. Vernay missed no deadline. Mr. Vernay alleged in Runnels's federal habeas petition an IATC claim alleging that trial counsel failed to adequately investigate and present mitigating evidence regarding Runnels's "chaotic childhood" and the failure of his family and various institutions in providing Runnels with the help he needed. *See Runnels v. Stephens*, 2016 WL 1274132, at *3. Mr. Vernay also alleged that trial counsel were ineffective for failing to arrange for their expert, Dr. Fulbright, to complete his neuropsychological testing of Runnels, the initial results of which indicated Runnels likely suffered from ADHD. *Id.* Mr. Vernay also argued that state habeas counsel performed ineffectively in pursuing an IATC claim. *See id.* at *13. Mr. Vernay obtained extra-record evidence (i.e., Alma Lagarda's affidavit) in support of his allegation that state habeas counsel was ineffective for failing to develop the IATC claim. *See id.* at 15. Consequently, Runnels's assertion that Mr. Vernay effectively abandoned him by failing to research or investigate the existence of a viable argument under *Martinez* is flatly refuted by the record. Pet. Cert. at 12.

Runnels's assertion that Mr. Vernay effectively abandoned him by failing to seek funding to develop an argument under *Martinez* is also contradicted by

the record, as Mr. Vernay requested more than once that the district court provide funding and the opportunity to develop the IATC claim. Pet. Cert. at 12, 19; *Runnels v. Stephens*, No. 2:12-CV-74, Petition at 23, 27 (N.D. Tex. Dec. 28, 2012) ("Counsel therefore respectfully requests that based upon the ruling in *Martinez v. Ryan, supra*, this Court excuse any potential default and allow the Petitioner the resources to develop his ineffective assistance claim in federal court and that this Court further set this claim for an evidentiary hearing."); *see* Pet'r's App'x B at 2–3. The record indicates that after thoroughly reviewing the records in this case, Mr. Vernay exercised his professional judgment as to the best manner in which to litigate the IATC claim. Mr. Vernay's litigation choices do not constitute abandonment or extraordinary circumstances. This is especially evident where Runnels's substitute counsel—years later—pressed the very same claim and asserted the same procedural default that Mr. Vernay did.

[redacted]. To establish an

entitlement to relief from judgment, Runnels could not rely on federal habeas counsel's actions or inactions that occurred several months after the district court entered judgment and several *years* after Mr. Vernay litigated the IATC claim in district court. Pet'r's App'x B at 9 [redacted] Absent direct reference to any deficiency on Mr. Vernay's part, Runnels's allegation of abandonment was conclusory. As discussed above, Mr. Vernay pursued the very same (exhausted) claim substitute counsel raised several years later after receiving the benefit of a lengthy stay of the Fifth Circuit's proceedings before filing a Rule 60(b)(6) motion. Mr. Vernay presented the district court with new evidence to support the allegation that state habeas counsel was ineffective for failing to raise the IATC claim, he sought funding and evidentiary development of that claim, and he sought to establish cause and prejudice under *Martinez* for any default regarding that IATC claim. That Mr. Vernay chose to litigate the claim in a manner different than that posed by substitute counsel does not demonstrate abandonment.

For the reasons discussed above, Runnels's allegations do not demonstrate that he was abandoned by Mr. Vernay and do not demonstrate an extraordinary circumstance. The district court's alternative conclusion that Runnels's motion for relief from judgment failed to demonstrate extraordinary circumstances is not debatable. Consequently, Runnels does not present an issue worthy of this Court's attention and his petition should be denied.

B. Runnels's "new" evidence did not render his IATC claim extraordinary.

Along with his Rule 60(b)(6) motion, Runnels filed an affidavit from Dr. John Fabian, who conducted a neuropsychological evaluation of Runnels in 2017. Pet'r's App'x O. Dr. Fabian concluded Runnels suffers from ADHD, PTSD, and a learning disorder. Pet'r's App'x O. As the district court observed, however, the historical information Dr. Fabian relied upon was the same information obtained by Mr. Vernay and Runnels's trial counsel. Pet'r's App'x B at 4. Notably, trial counsel obtained a 1993 psychological report of Runnels when he was juvenile that stated he was uncooperative and had inflexible thinking, which made "him a difficult candidate for therapeutic change." Pet'r's App'x B at 5. Trial counsel had Runnels evaluated by a psychiatrist, Lisa Clayton, who did not provide information helpful to the defense and was, consequently, not called to testify at trial. Pet'r's App'x B at 5. And as discussed

above, neuropsychologist Dr. Fulbright evaluated Runnels but was unable to complete his testing. Pet'r's App'x B at 5.

Nonetheless, Dr. Fulbright assumed Runnels had ADHD and related executive-functioning deficits. Pet'r's App'x B at 6. Dr. Fulbright's opinion was by-and-large consistent with Dr. Fabian's opinion. Pet'r's App'x B at 6. But Runnels's IATC claim depended on cherry-picking favorable mental-health evidence while ignoring that evidence's aggravating value. As summarized by the district court, Dr. Fulbright's findings showed that Runnels was angry regarding his treatment in prison, he planned to kill Mr. Wiley, and he stated that he would not go back to jail alive. Pet'r's App'x B at 7–8. That evidence plainly rebutted Runnels's assertion that he could not control his impulses. Pet'r's App'x B at 8.

Moreover, it is axiomatic that trial counsel is not ineffective for choosing not to present testimony that would be "double-edged." *Burger v. Kemp*, 483 U.S. 776, 795 (1987). In this case, trial counsel made the reasonable strategic decision not to present testimony from the experts who examined Runnels but who could not offer helpful information. Pet'r's App'x B at 5. While Dr. Fulbright noted in his report that Runnels experienced a disrupted childhood, had not received appropriate psychological treatment, and likely had ADHD, Dr. Fulbright concluded that "[o]ne cannot assume Mr. Runnels would not have attacked [Wiley] if he had been given appropriate psychological services."

Runnels v. Stephens, 2016 WL 1274132, at *18. Runnels cannot show that trial counsel were deficient for choosing not to present such double-edged expert testimony.

Considering the paucity of purportedly new mitigating evidence that was unknown to either trial counsel, state habeas counsel, or federal habeas counsel, Runnels's Rule 60(b)(6) motion made a "poor showing of equitable factors necessary to reopen his judgment." *Diaz v. Stephens*, 731 F.3d 370, 377 (5th Cir. 2013); *see Raby v. Davis*, 907 F.3d 880, 884–85 (5th Cir. 2018); *Haynes v. Davis*, 733 F. App'x 766, 769 (5th Cir. 2018) (affirming denial of the petitioner's Rule 60(b)(6) motion where, *inter alia*, the merits of the petitioner's claim were "not particularly compelling"). Therefore, the district court's alternative conclusion that Runnels's Rule 60(b)(6) motion failed to show extraordinary circumstances was not debatable. Consequently, his petition does not raise an issue worthy of this Court's attention and it should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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

JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1800
Fax: (512) 320–8132
e-mail: jay.clendenin@oag.texas.gov

Counsel for Respondent