IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2016

TERRY EDWARDS

Petitioner,

v.

LORIE DAVIS, DIRECTOR,

Respondent.

ON
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Can the abandonment of 18 U.S.C. § 3599 appointed counsel during the pendency of the federal habeas petition cause a "defect" sufficient to warrant reopening of the federal habeas proceedings under Fed. R. Civ. P. 60(b)?

Can the "extraordinary circumstances" inquiry to reopen a habeas case under Fed. R. Civ. P. 60(b) include the equitable rule established in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Terry D. Edwards, respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, (App.1a), is unreported and as of this writing, is not available in the official or unofficial reports. The order of the Northern District of Texas, (App.144a-155a), is reported and is available at 2017 WL 253065.

JURISDICTION

On January 10, 2017, Petitioner moved to reopen the case pursuant to FRCP, Rule 60(b). On January 19, the District Court held it lacked jurisdiction to consider such a motion. On January 25, 2017, the Fifth Circuit affirmed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

FRCP, Rule 60(b)(6): "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons . . . any other reason that justifies relief."

STATEMENT OF THE CASE

I. INTRODUCTION

Since Terry Edwards's 2003 Dallas County trial, there have been no hearings or arguments of any kind in his case. His direct appeal counsel, after obtaining five-months of extensions filed his brief only after being threatened with contempt and after, nonetheless, missing the final deadline and receiving postcard notification regarding his failure. The brief was almost entirely taken from other, unrelated cases. Mr. Edwards's state habeas counsel also

copied verbatim from other briefs – penning just ten unique sentences and submitting no case-specific evidence on Mr. Edwards's behalf. He nonetheless billed the state courts for over $24,000 in fees. Mr. Edwards's federal counsel, whom the Texas Bar had disciplined and suspended five times, accepted a full-time position in March 2011 and ceased all work on thes case during the pendency of Mr. Edwards's petition, abandoning him just days before this Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and conducting no advocacy related to that case or *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). Prior to filling for certiorari in 2015, the district court appointed another lawyer, who never obtained the file, and has now resigned his bar license under suspicion involving his billing in the Fifth Circuit.

Seven months ago, undersigned counsel were appointed by the District Court to replace that attorney after Mr. Edwards wrote the court from prison stating that he had received notice of his execution date from corrections personnel, but he and his mother had been unable to reach any of his prior lawyers. Upon assignment, counsel immediately undertook the first and only post-conviction investigation to date. They discovered the following:

> The prosecutors maintained a strike list, apparently identifying with an encircled "B" each African-American venire member poised for individual voir dire. The defense agreed to the excusal of all but two African-Americans from the entire venire; the prosecution did not expend one peremptory strike on a Black juror yet not a single African-American was seated on his jury derived from an initial jury pool of approximately 3,000 Dallas County citizens.
>
> The prosecution elicited false expert testimony and then further misstated the false testimony in support of highly aggravating arguments that Mr. Edwards was the triggerperson. The prosecutor presented unreliable evidence in support of an uncharged prior crime that the defendant did not commit.
>
> Members of the victim's family wanted to testify in support of Petitioner, because he was a friend of their father, attended the trial in order to do so, and even called the defense counsel at home, as evidenced by trial counsel's request for a continuance on the last day of trial. Yet trial counsel never interviewed them, the trial court denied the continuance, and appellate counsel failed to raise the issue

This case involves both a grave procedural defect and egregious, unaddressed constitutional violations. The district court was "deeply troubled" by the abandonment of federal counsel, but deemed the filing a successor petition and held that she did not have jurisdiction. She granted a COA on the issue of whether effective abandonment could constitute a defect in the proceedings. The Fifth Circuit side stepped that question, and, though it held that it did not have jurisdiction, nonetheless found allegations of abandonment to be meritless.

II. THE ABYSMAL POST-TRIAL REPRESENTATION OF MR. EDWARDS HAS, TO DATE, CLOSED THE COURTHOUSE DOORS TO CLAIMS FUNDAMENTALLY CHALLENGING THE FAIRNESS AND RELIABILITY OF HIS CONVICTION AND SENTENCE

A. Federal Habeas Counsel Abandoned Mr. Edwards During His Federal Proceedings.

Richard Wardroup timely filed Mr. Edwards's habeas corpus petition on December 10, 2010 (App.972a-1022a). One the same day, counsel requested a stay and abeyance to litigate unexhausted claims in state court. (*Edwards v. Davis*, 3:10-cv-6-M, Doc. 9). On August 11, 2011, a magistrate issued recommendations that the stay be denied. (*Edwards v. Davis*, 3:10-cv-6-M, Doc. 21).

As the district court noted, federal appointed counsel never objected to the Magistrate Report. As detailed in Mr. Edwards' Application, Mr. Wardroup accepted full-time employment in early 2011 with the Texas Criminal Defense Lawyers Association (TCDLA)—where he remains employed today—yet failed to withdraw from this case or otherwise notify the Court of his disengagement from the obligations under his appointment.

Indeed, after the filing of the petition years elapsed with no activity because of his total disengagement in the case and occupation in his fulltime job. Prompted by the Court's ordered response to Respondent's answer to the petition, Mr. Wardroup filed only a threadbare

eight-page response in order to perpetuate the veneer of representation that, in actuality, had ended years earlier. (App.963a-971a). Upon the Court's judgment on August 6, 2014, he filed notice of appeal. (App.931a-932a). On November 14, 2014, Mr. Wardroup presented two issues in a 17-page application for certificate of appealability in this Court. *Edwards v. Stephens*, No. 14-70026. The State responded. Mr. Wardroup filed nothing further and, on May 19, 2015, the Fifth Circuit denied an application for COA.[1]

B. State Habeas Counsel Committed Fraud on the Court

Mr. C. Wayne Huff represented Mr. Edwards in state habeas proceedings. On July 5, 2005, Huff requested a three-month extension for his petition on the grounds that "counsel's investigation of this case will involve the review of many documents not contained in the record, and the interview of witnesses not called at trial." *State v. Edwards*, F02-15086 (August 5, 2005). However, by the time of the November 3, 2005 filing of the petition, the pleading reflected that Huff had completed no investigation and offered not a single meaningful claim for Mr. Edwards. The state habeas petition contained just six boilerplate claims. Line-by-line review of the 58-page petition Huff filed for Mr. Edwards – compared to filings he had made for other clients and an appendix prepared by Mr. Edwards's appellate counsel – has determined that *the entire pleading contains only ten original sentences*. (App.500a-556a). (Five days after he filed this petition, Huff invoiced the state $24,611.81 for its preparation, which raises facial questions of fraud.) (App.912a).

[1] Because he was not admitted to practice before the United States Supreme Court, Mr. Wardroup moved successfully to substitute counsel and, on June 23, 2015, Mr. Don Vernay was so appointed. Mr. Vernay filed a petition for a writ of certiorari on August 14, 2015, which was denied on November 2, 2015. *Edwards v. Stephens*, No. 15-5682. Mr. Wardroup never conveyed the file to Mr. Vernay, who has since resigned his bar license after the Fifth Circuit issued show cause orders against him for improper billing practices.

Less than a month before he filed the state petition for Mr. Edwards, the Western District of Texas published an opinion concerning Huff's performance in a prior state habeas case. That federal court found that his capital habeas work for Mr. Rolando Ruiz was "appallingly" and "egregiously inept", "egregiously deficient", and "wholly incompetent." *Ruiz v. Dretke*, No. Civ SA-03-cv-303-OG, 2005 WL 2620193, at *2-3 (W.D. Tex. Oct. 13, 2005). In a description that easily applies to Mr. Huff's performance in the present case, the district court described his failure to investigate, develop and preserve meritorious extra-record claims surrounding constitutional violations stemming from Mr. Ruiz's capital prosecution. As he did in *Ruiz*, Huff "made no apparent effort to investigate and present a host of potentially meritorious and readily available claims for relief." *Id.* at *2. Here, as in *Ruiz*, Huff made "virtually no effort to present the state habeas court with any evidence supporting the vast majority of the claims for state habeas relief." *Id.*

A national expert on state and federal post-conviction litigation in capital cases described Huff's work in similar terms:

> In the few other cases I am aware of where no additional evidence was presented [in state habeas corpus], the reason was not the lack of new evidence but post-conviction counsel's failure to do a competent, adequate investigation. This, standing alone, is strong evidence of counsel's failure to function as counsel for Mr. Edwards. . . . Competent post-conviction representation in a capital case requires more than copying and pasting language from past work. It requires an individualized assessment of the case facts and investigation in response to facts suggestive of potential claims.

(App.901a). Significantly, Huff did not raise either an ineffective assistance of trial counsel claim or a claim that the prosecution suppressed exculpatory evidence, "[t]he most common claims that arise is state post-conviction proceedings." (*Id.*).

The State filed its 20-page Reply on April 6, 2006. The Dallas County District Court entered an order finding that there were no issues warranting a hearing and directed the parties to

file Proposed Findings of Fact and Conclusions of Law within 30 days. The State filed its Proposed Findings ten days later on April 17, 2006. Eight days later, on April 25, 2006, without waiting for the 30 days to expire, the Dallas County district judge signed the State's Proposed Findings and Conclusions of Law, with the word "State's" still in the title. Huff failed to object to this or any other aspect of the order or file his own Proposed Findings and Conclusions. The CCA affirmed the trial court on December 16, 2009.

C. Appellate Counsel Missed His Deadline, Filed A Borrowed Cribbed Brief and Waived Oral Argument

Mr. Edwards' appeal raised only two case-specific claims and the appellate briefing appears to be largely copied and pasted by his lawyer from other briefs prepared for other cases. After granting a five-month extension of time, the court on direct appeal entered an order that counsel for Mr. Edwards would receive "NO FURTHER EXTENSIONS" and threatened him with contempt if he failed to file a brief. (App.228a). Unmoved, the counsel filed nothing on Mr. Edwards's behalf on the due date. On December 16, 2004, the clerk sent appellate counsel in this capital appeal notice that he had failed to file. On December 22, appellate counsel mailed a brief and request for an extension "until December 30, 2004, or the date the Court receives this brief, whichever is earlier." (App.228a). In light of the hasty preparation, it is no surprise that, like state habeas counsel's effort, the filing was largely copied and pasted from prior briefs. Having done little to prepare the briefing, appellate counsel then compounded his dereliction by waiving oral argument. (App.918a).

Despite significant preserved issues that struck at the heart of the State's case, appellate counsel failed to raise the claims. Appellate counsel did not raise a claim that the trial court should have provided defense counsel with a short continuance to talk with one of the victims' children and their mother, witnesses who counsel had never spoken to prior to the last

day of the penalty phase. Appellate counsel also failed to raise preserved issue of the improper argument by the prosecutor, an argument that went to the heart of the State's (false) case for Mr. Edwards as the shooter. In light of appellate counsel's non-advocacy, the Court of Criminal Appeals reached the predictable result, affirming on March 1, 2006.

III. NEWLY APPOINTED SUBSTITUTE COUNSEL UNCOVERED MERITORIOUS CONSTITUTIONAL VIOLATIONS, WHICH WOULD RELATE BACK TO EXTANT CLAIMS IF HIS JUDGMENT WERE REOPENED

Upon appointment, undersigned counsel immediately undertook the first extra-record investigation of their client's case. Compelling evidence of serious constitutional violations emerged. Petitioner has a colorable argument that these claims would relate back, *if* his judgment were reopened. As discussed below, federally appointment counsel's abandonment in combination with the significant change in law in *Martinez/Trevino* constitute extraordinary circumstances which warranted the reopening of his case. The existence of potential claims that could be raised upon a reopening of the case, are relevant to the discussion, insofar as they relate both to the extraordinary circumstances analysis and his potential opportunity for success once the case is reopened.

Significant issues emerged which undermine reliability in his sentence and proceedings. Importantly, these issues relate back to his timely filed petition, and, as such, would not be time barred were his petition to be reopened.

A. Systemic Racist Practices Infected Mr. Edwards's Jury Selection.

Mr. Edwards's jury selection was tainted by the Dallas County DA's racially motivated practices, to which defense counsel readily and unreasonably acquiesced. In the end, unqualified jurors actually sat on his jury.[2]

Mr. Walker and Ms. Goodwin were white. Terry Edwards is black. From an initial pool of approximately 3,000 county residents, the parties individually questioned 143 venire members to select Edwards's jury that, in the end, initially seated only white people. (An alternate of Hispanic ethnicity later replaced one of the initially seated jurors). All African-American jurors were removed from his venire.

The historical context and timing of Mr. Edwards's trial cannot be disregarded. Petitioner's jury was empaneled months after the first Supreme Court opinion addressing the Dallas County DA's racially discriminatory practices in the case of Mr. Thomas Miller-El. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).[3] In Miller-El's Dallas County trial in 1986, the DA's Office used peremptory strikes to eliminate 10 out of the 11 black venire members individually questioned. Months after that trial, the Dallas Morning News published its first investigative journalism on that office's institutionalized practices in capital jury selection.[4] As displayed in the *Miller-El* litigation, the DA's Office under Bill Hill and his predecessors had an entrenched

[2] The jury foreman lied on his questionnaire. Five jurors, including the foreman, admit to engaging in premature deliberations in the case. Three of them discussed the case, prior to the beginning of the sentencing phase and, separately, consulted the same Bible passage in order to sentence Mr. Edwards to death.

[3] *See also Miller-El v Dretke*, 545 U.S. 231 (2005), decided shortly after Edwards's case.

[4] The Dallas Morning News extensively chronicled this era, publishing two separate series of stories, one in 1986 and another in 2005, on the actual practices in that office. *See, e.g.*, Steve McGonigle & Ed Timms, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, Dallas Morning News, Dec. 21, 1986 (1986 WLNR 1716765).

practice of striking prospective African-American jurors that manifested a consistent pattern encompassing the period of the trial at bar.[5]

Current counsel for Appellant have obtained a strike list apparently maintained by the prosecutor that includes, next to 32 of the venire members, a handwritten, encircled "B."[6] (App.227a). Especially in light of the troubled history of this District Attorney's Office,[7] there is obvious reason for "concern[] that these markings strongly suggest racial indications." (App.227a). These present deeply concerning markers of potentially odious prosecutorial misconduct and constitutional violations and, further, strongly reflects the profound consequences of defense counsel's appeasement of the State's trading practice to strip away diversity and representativeness from Edwards's jury.

The jury selection record at bar (consisting of 47 transcript volumes), reflects the District Attorney's use of its practice of trading strikes by mutual agreement based upon juror questionnaires. In Appellant's case, this dictated the removal, off the record and without individual questioning, of swaths of the venire. This trading practice is known to have specially "impacted prospective black jurors far more than others, and kept many of those jurors from ever graduating to individual voir dire." (App.254a). As reflected in Edwards's case, in combination with systemic infirmities in the venire, the agreement method "stripped" away "the general demographic representativeness of" Dallas County and enabled the empanelment of a white jury

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[5] *See* Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors*, Dallas Morning News, Aug. 21-23 (2005).

[6] This marking system may reflect race-based jury selection tactics historically used in the county and encountered elsewhere. *See Foster v. Chatman*, 136 S.Ct. 290 (2016). The strike sheets were filed under seal. Counsel can produce them for the court as soon as practicable.

[7] In *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003), published months before Edwards's trial, the Supreme Court noted that the fact that Dallas County ADAs marked race on the prospective juror's cards "reinforced" the supposition of racial discrimination established in the record in that case.

without, apparently, the use of a single peremptory strike exercised against a black venire member.

The ostensible basis for this comprehensive striking by agreement of the entire black venire, apart from the two African-American prospective jurors struck for cause, would have been the individual member's answers to the questionnaire form. However, the DA has provided Appellant's current counsel with copies of what that office has represented is the entirety of the questionnaires in its possession. These copies number only 35 of the 143 questioned venirepersons. Among those 35 is a single questionnaire completed by an African-American. It lacks any material that would supply a creditable basis for a cause strike of that venire member, yet the DA and defense agreed – off the record – to strike her, just as the State and defense had done with every other Black venire member.

Additional attempts to obtain the questionnaires (and other evidence about the venire) from other sources have been repeatedly frustrated. It appears that no prior counsel collected the underlying record of jury selection in this case. Additionally, the Dallas County DA did not disclose the strike list to any prior counsel. The DA's Office has continued to act in bad faith, ignoring requests for information from counsel. In one response to Petitioner's Public Information Act Request, the DA claimed it would send the relevant documents on January 27—the day after Mr. Edwards is to be executed. As noted by the Fifth Circuit, Mr. Edwards obtained a three-month reprieve in September 2016, after current counsel joined the case. The basis for the stay was ongoing negotiations with the Conviction Integrity Unit of the Dallas County DA's Office, which the DA abruptly and inexplicably halted as the execution date approached. Significantly, neither the DA nor the AG have denied Mr. Edwards's claim regarding the strike list nor offered any explanation for the "B" notations.

If Mr. Edwards were permitted to reopen his judgment, these claims would relate back to his petition, which raised only juror claims, and would thus be timely.

B. The Dallas County DA Suppressed Material Exculpatory Evidence and Continues to Frustrate Counsel's Investigative Efforts.

In addition to, and intrinsically connected with, the Dallas County's DA history institutionalized racism, is its history of wrongful conviction. To date that Office is responsible for a staggering 54 wrongful convictions, including 52 full exonerations. Since coming into the case, counsel for Mr. Edwards have obtained several pieces of key evidence that were previously withheld from prior counsel and that undermine reliability in Mr. Edwards's death sentence.

The Dallas County DA withheld material exculpatory forensic evidence of gunshot residue testing. The author of the report, forensic technician Vickie Hall, was the only witness defense counsel called at trial. She omitted the existence of the suppressed report from her testimony.[8] The report showed that the victim tested positive for gunshot residue, whereas defendant, in comparison, did not. The report makes it more likely that defendant would have had gunshot residue on him and also further impeaches Ms. Hall's testimony on cross, to the effect that Mr. Edwards could have been positive for GSR (he could not have).

The Dallas County DA withheld the identity of a potential eye-witness who saw Kirk Edwards inside of the Subway. One witness at trial told police that she saw Mr. Edwards's co-defendant in the Subway, however she changed her testimony at trial,

[8] The same prosecutor and state forensic examiner from Mr. Edwards's case provided the critical, and false, evidence that resulted in the wrongful conviction of Richard Miles. In that case, strikingly similar testimony was offered, and the argued, as the basis for concluding Mr. Miles was the perpetrator. DNA evidence would later clear Miles, but only after he spent over two decades incarcerated for a crime he did not commit. *See Ex parte Miles*, 359 S.W.3d 647 (2012). In fact the prosecutor, Mr. D'Amore, has an extensive and well documented history of misconduct from his tenure at the Dallas County D.A.'s Office and is responsible for at least three wrongful convictions resulting in exonerations.

leaving the prosecutor to argue incorrectly that Mr. Edwards was not only the shooter, but that he was the only one in the restaurant at the time of the shootings.

The Dallas County DA withheld material evidence about an alleged prior crime introduced in aggravation. During the trial's penalty phase, the State introduced evidence that Appellant had been involved in a robbery of a Subway in Fort Worth that had taken place months before the Balch Springs robbery. He was charged with the prior alleged crime after his arrest on the present crime; but then the State dropped the charges once his trial was over. The Dallas County DA failed to disclose conflicting police and prosecutor narratives from Forth Worth County, which called into question the detectives narrative, and exculpatory statements from eye-witnesses (Tr.53 at 87-118, 125-129).

If Mr. Edwards were permitted to reopen his judgment, these claims would warrant an exception to §2244I(b).

IV. THE PROCEEDINGS BELOW

A. The District Court Dismissed the Rule 60(b) Motion as a Successor But Granted a COA on the issue of Whether Abandonment Constitutes a Defect In the Proceedings.

On January 10, 2017, counsel for Mr. Edwards filed a Motion to Reopen Judgment Pursuant to Rule 60(b) of the Rules of Federal Procedure. (App.216a-918a). The Motion was premised on two fundamental defects that, in light of all the circumstances (*supra*), warranted reopening the case. Specifically, the Motion relied on Wardroup's abandonment of Mr. Edwards and his related failure to undertake any advocacy on his behalf in light of the sea change in the law wrought by *Martinez v. Ryan* and *Trevino v. Thaler*. On January 17, 2017, the State filed its

Response. (App.156a-215a).[9] On Thursday, January 19, the court entered an order transferring the Motion to Reopen to this Court.[10] (App.155a).

In its order, the district court noted that it was "deeply troubled by the allegations of abandonment" by federal §3599 counsel but held that abandonment by federal counsel was insufficient to reopen the case. (App.14a-154a). In order to reopen the case, the court would require Mr. Edwards to show at the outset "how [the abandonment] could have impacted anything that was, or could have been, presented during the limitations period that had expired months before such employment began." (App.155a). The court categorically held that "any newly asserted claims would . . . have been subject to a time bar." (App.152a).

The court further concluded that because, upon reopening, counsel may allege new claims (in addition to claims that relate back to those alleged in his petition), the Motion to Reopen constituted a successive habeas petition. (*Id.*). As such, the court reasoned, it lacked jurisdiction to consider the pleading and transferred it to this Court. (App.155a). The court issued a certificate of appealability on a single issue: "whether the effective abandonment of Petitioner by his federally appointed habeas counsel constitutes a defect in the integrity of the original habeas proceedings that may authorize Rule 60(b) relief in this Court." (App.154a (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court did not reach the merits of the Motion to Reopen.

B. The Fifth Circuit Did Not Address Whether Federal Counsel's Abandonment Constituted A Defect In the Integrity of the Proceedings and Refused to Consider a Motion to Reopen that Would Raise Claims Premised on *Martinez/Trevino*.

[9] Counsel for Mr. Edwards did not file a Reply after the Clerk informed counsel that the Court would rule without considering the Reply.

[10] The district court also transferred Mr. Edwards's Application for Stay of Execution and Amended Application for Stay of Execution. (App.154a).

Yesterday, the Fifth Circuit denied relief without addressing the question certified: "whether the abandonment by counsel could be the sort of defect in the integrity of the federal habeas proceedings that could warrant Rule 60(b) relief." (App.152a). The District Court had engaged in no fact findings on abandonment, and yet the Fifth Circuit declined to answer the legal question, instead finding Mr. Edwards's offer of proof insufficient. Declining to rule on whether abandonment was a non-merits, defect, the Fifth Circuit then concluded that Mr. Edwards had merely presented a successive petition.

V. REASONS THE WRIT SHOULD BE GRANTED

As recognized by Fifth Circuit precedent, abandonment by federal counsel is a defect in the proceedings that is, both on its own and in light of other circumstances, sufficient to reopen the proceedings. Instead of addressing this threshold inquiry, the courts below engaged in speculation about whether, upon reopening, Mr. Edwards would successfully allege meritorious claims for relief. This Court should grant review and summarily reverse with instructions for the Fifth Circuit to remand to the trial court to determine, in the first instance, whether federal counsel abandoned Mr. Edwards.

Alternatively, this Court should hold the case pending resolution of *Buck v. Davis* and *Davila v. Davis*, cases that will address the scope of equitable relief available pursuant to *Martinez v. Ryan.* Mr. Edwards's case presents substantial issues of trial and appellate counsel ineffectiveness, the merits of which have never been reviewed because of state habeas counsel's abysmal representation.

A. Abandonment of Counsel Is A Defect in the Proceedings

Rule 60(b) is available to correct a "defect" in the proceedings where "extraordinary circumstances" warrant reopening the case. The Fifth Circuit has generally held that

abandonment constitutes such a defect. But the Court of Appeals' decision below appears to depart from its own precedent and, in these circumstances – where Texas intends to execute the petitioner this evening, hours from now – this Court should reverse and remand that case accordingly. Alternatively, the decision below diverges from at least one other circuit and warrants this Court's grant of certiorari.

1. Defective Counsel Under 18 U.S.C. §3599 May Cause Defect in Petitioner's Habeas Proceedings

The abandonment perpetuated by federal counsel caused a fatal defect in these proceedings. Coupled with the misconduct of state habeas counsel, which apparently rose to the level of fraud, these problems warrant invocation of Rule 60(b)'s equitable powers. This way forward is clear in the light of recent jurisprudence from the Supreme Court and the Fifth Circuit. A Rule 60(b) motion cannot serve to attack "the substance of the federal court's resolution of a claim on the merits," *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005), rather, it must challenge "some defect in the integrity of the federal habeas proceedings." *Id.*; *see Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010) ("[t]o open the Rule 60(b) door . . . there must be a showing of a non-merits-based defect in the district court's earlier decision on the federal habeas petition"). Such a defect will concern "procedural failures, such as statute-of-limitations or exhaustion rulings." *In re Coleman*, 768 F.3d 367, 372 (5th Cir. 2014), citing *Gonzalez*, 545 U.S. at 532 (denying relief where "argument sounds in substance, not procedure.").

Mr. Edwards's federal attorney of record had abandoned him, leaving him, for the majority of his time in this Court, with federal habeas counsel in a "technical" sense only. *See Battaglia v. Stephens*, 824 F.3d 470, 473 (5th Cir. 2016). In *Clark v. Stephens*, the defect in the federal proceedings concerned "a conflict of interest" of the petitioner's §3599 counsel because the same attorney had acted for the petitioner in state habeas proceedings. *Clark*, 627 Fed.Appx.

305, 307-08 (5th Cir. 2015). In granting a certificate of appealability, the Fifth Circuit determined

> that reasonable jurists could debate whether Clark's federal habeas proceeding was defective, either because the counsel the federal district court appointed to represent Clark labored under a conflict of interest, or because [the conflicted attorney's] failure to argue his own ineffectiveness as state habeas counsel is sufficient to satisfy Rule 60(b) even though it is an omission.

Id. at 309.

During the pendency in the Fifth Circuit of *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015) (mem.) (per curiam) (remanding pursuant to *Trevino*, which had been decided years prior but during case's pendency in circuit court), this Court decided *Christeson v. Roper*, 135 S.Ct. 891 (2015) (*per curiam*). *Christeson* held that §3599 entitles a habeas petitioner saddled with counsel laboring under a conflict of interest to new counsel and a remand in order to explore bases under Rule 60(b) for reopening his habeas case closed as a consequence of attorney misconduct. *Id.* at 895. Specifically, *Mendoza* remanded the case "to determine whether there are any ineffective-assistance-of-trial-counsel claims that should have been, but were not, raised in the state habeas proceedings," recognizing that those initial proceedings had been filed many years prior. *Mendoza*, 783 F.3d at 205 (Owens, J., concurring).

Christeson recognized that the entitlement to federal habeas counsel safeguards the client from harm that would otherwise result from his appointed counsel's conflict of interest in the representation. In *Christeson*, the issue causing the conflict had been the federal attorneys' own misconduct that resulted in their failure to timely file his habeas petition. 135 S. Ct. at 892. In *Mendoza*, the conflict is more like the problem at the center of Mr. Edwards's federal habeas proceedings in that it concerned the incapacity to properly litigate the federal case based on the evolution of the jurisprudence marked by *Trevino*. Specifically, Mendoza's state habeas attorney brought his case into federal habeas court and thus could not be relied on to "conduct a review to

determine whether there are any ineffective-assistance-of-trial-counsel claims that should have been, but were not, raised in the state habeas proceedings." *Mendoza*, 783 F.3d at 205. The Court of Appeals explained that it was "not deciding any other issues at this time, including whether any new matters that additional counsel might identify are barred by any provisions of AEDPA." *Id.* at 211.

In contrast, Mr. Edwards was saddled with counsel who admits that he "stopped working on the case" after March 2011 and "then did not consider the case, in any meaningful way that I can recall, until it was denied over two years later." (App.292a). During this time period, *Trevino v. Thaler* came down. Thus, during the pendency between 2010 and 2014 of Mr. Edward's case, new grounds for cause and prejudice to excuse claims defaulted due to state habeas counsel's fraudulent conduct emerged, yet were left unused due to federal habeas counsel's conflict of interest and effective abandonment.

The Court of Appeals had repeatedly found attorney abandonment to be a defect in the proceeding that provides the basis for Rule 60(b) relief. *See Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 398 (1981) (holding mid-case abandonment warranted vacatur of default judgment);[11] *see Associated Marine Equipment LLC v. Jones*, 301 Fed.Appx. 346, 284 (2008) (finding petitioner's "scenario seems to resemble more closely that of the parties in *Seven Elves*, where counsel's abandonment of his clients warranted relief from the judgment," remanding for further fact finding about abandonment); *Hester Intern. Corp. v. Federal Republic of Nigeria*, 879 F.2d

[11] In *Seven Elves*, 635 F.2d at 398, two defendants were represented by an attorney in a malicious prosecution and slander suit. Unbeknownst to two of the defendants, their counsel withdrew from the case, and the defendants were thus absent from and unrepresented at trial. *Id.* at 399. The district court struck their pleadings, entering judgment against them. *Id.* After defendants learned of the judgment, they retained new counsel and filed a Rule 60(b) Motion in the district court *Id.* That court denied their Rule 60(b) motion. *Id.* Based on counsel's abandonment, this Court reversed the district court, granting the Rule 60(b) Motion and remanding for a full trial.

170 (1989) (upholding grant of Rule 60(b) and new trial based on abandonment); *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1083 (1984) (circuit's "cases liberally construing Rule 60(b) focus upon the abandonment of clients by their lawyers."); *see also Perez v. Stephens*, 745 F.3d 174 (2014) (Dennis, J., dissent) ("abandonment, the Supreme Court has indicated, is sufficient to constitute the 'extraordinary circumstances' necessary to trigger relief from judgment under Federal Rule of Civil Procedure 60(b)(6),"); *Diaz v. Stephens*, 731 F.3d 370, 376-77 (5th Cir. 2013) (applying multi-factor Rule 60(b) analysis set forth in *Seven Elves*, 635 F.2d at 402).

Thus, the Court of Appeals in this case has departed from its own and, critically, this Court's jurisprudence. This tack diverges markedly with the Second Circuit's recognition that §3599 counsel's abandonment during federal habeas proceedings may rise to the level, for Rule 60(b) purposes, of a defect in those proceedings. *Harris v. United States*, 367 F.3d 74, 82 (2d Cir. 2004) (2255 habeas proceedings).

Generally, Rule 60(b) allows a party to seek relief from "a final judgment, order, or proceeding" and reopen the case for "any . . . reason that justifies relief." Fed. R. Civ. P. 60(b)(6). It thus empowers courts to "vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995) (Rule 60(b)(6) reflects court's inherent power "to set aside a judgment whose enforcement would work inequity."). To satisfy Rule 60(b)(6), a petitioner must demonstrate "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

This Court, in determining whether to excuse a procedural default, will do so if "extraordinary circumstances" warrant it. *Maples v. Thomas*, 132 S.Ct. 912, 924 (2012). In considering the abandonment of counsel that caused failure to timely take appeal from the denial

of a state habeas petition, *Maples* held that such abandonment excuses the resulting procedural default. *Id* at 924-26. Under Rule 60(b), the extraordinary circumstances analysis should entertain, in their "totality," the given case's key equitable factors. The totality of circumstances surrounding the deprivation of "substantial justice" in Petitioner's case are extraordinary. As set forth in the proceedings below, the substance of the many and grave constitutional infirmities besetting his state court judgment have obtained no presentation, let alone review, due to the prior absence of *any* investigation of his case in both his state and his federal habeas corpus proceedings. The foregoing defect of his initial §3599 counsel's conflict of interest and resulting disengagement from the case at a juncture when appointed counsel was obligated to undertake meaningful investigation pursuant to the tectonic change in the law wrought by *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), has warrants vacatur of the denial of his habeas application and for Petitioner to be afforded actual process. *See Ruiz v. Quarterman*, 504 F.3d 523, 528-32 (5th Cir. 2007) (engaging in fact-specific analysis of a Rule 60(b)(6) motion). Thus, during the case's pendency between 2010 and 2014, new grounds emerged for cause and prejudice to excuse claims defaulted due to state habeas counsel's fraudulent conduct, yet were left unused due to federal habeas counsel's conflict of interest.

2. Section 3599 Counsel Abandoned Mr. Edwards in the Midst of His Habeas Corpus Proceedings

The Petitioner's federal habeas proceedings were defective due to his appointed attorney's misconduct during a critical period of his case. As set forth below, appoint counsel, Mr. Wardroup, accepted full-time employment in early 2011 with the Texas Criminal Defense Lawyers Association (TCDLA)—where he remains employed today—yet failed to withdraw from this case or otherwise notify the appointing district court of his disengagement from the obligations under his appointment.

On January 11, 2010, the Court granted the January 4, 2010 motion to appoint Mr. Richard Wardroup pursuant to 18 U.S.C. §3599. (App.1023a). Mr. Wardroup was Petitioner's only counsel of record in the federal courts until the Fifth Circuit replaced him on June 25, 2015 with the substitution of Mr. Donald Vernay (*infra*).

Nearly eleven months after his appointment, Mr. Wardroup timely filed Mr. Edwards's habeas corpus petition on December 10, 2010 (App.972a-1022a),[12] which the Court ultimately denied on August 6, 2014 (App.933a-962a). Devoid of investigation-based claims, the Court denied each of the petition's "six grounds," all of which sought "relief pertaining to jury selection issues" based on the record. (App.935a). Comparison with the state habeas petition Mr. Huff assembled (*supra*) reflects that the federal petition's first five grounds presented augmented versions of the claims Mr. Huff had exhausted in state proceedings. The sixth and final "jury selection" claim concerned appellate counsel ineffectiveness (and consisted of two paragraphs, Doc. 6 at 50). (App.993a).

These claims are record based (with the exception of a representative cross-section claim focused on Hispanics that is adapted, nearly verbatim, from a wholly different case that state habeas counsel, Mr. Huff, had litigated—*Ex Parte Ochoa*, Dallas County, No. F02-53582-JM—shortly before he filed for Petitioner the wholesale re-purposing of the *Ochoa* state petition.

[12] Mr. Wardroup simultaneously filed on December 15, 2010 a motion to stay proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), in order to return to state court to exhaust unspecified "unexhausted" and "potentially meritorious" claims. (Doc. 9 at 2). Several months earlier, Messrs. Vernay and Wardoup, acting for Mr. Braziel in his capital petition before this Court, had filed this same generic motion. *Braziel v. Stephens*, No. 3:09-cv-1591-M, Doc. 17, (N.D. Tex. Aug. 17, 2010). In *Braziel*, the Court later characterized the motion as submitted "to abate [Braziel's] proceedings to exhaust a claim of ineffective assistance of trial counsel because that claim was procedurally barred due to the ineffective assistance of state habeas counsel in failing to raise the claim earlier." (Doc. 27, Feb. 28, 2011). Then, during the pendency of *Trevino v. Thaler* in the Supreme Court, this Court *sua sponte* stayed the *Braziel* proceedings. (Doc. 30, discussed *infra*).

After his December 15, 2010 filings (*supra*), Mr. Wardroup filed only an eight-page response to Respondent's answer on March 9, 2012 (App.963a-971a), and, upon the Court's judgment on August 6, 2014, a notice of appeal (App.931a). On November 14, 2014, Mr. Wardroup presented two issues in a 17-page application for certificate of appealability in the Fifth Circuit. *Edwards v. Stephens*, No. 14-70026 (5th Cir. 2014). The State responded on December 12, 2014. Mr. Wardroup filed nothing further and, on May 19, 2015, the Fifth Circuit denied the application for COA.

Because he was not admitted to practice before this Court, Mr. Wardroup moved successfully to substitute counsel and, on June 23, 2015, Mr. Vernay was so appointed. Mr. Vernay filed a petition for a writ of certiorari on August 14, 2015, which this Court denied on November 2, 2015. *Edwards v. Stephens*, No. 15-5682.

3. Abandoned After Conclusion Of Federal Proceedings, Mr. Edwards Wrote The District Court To Obtain Counsel

On March 2, Mr. Edwards mailed a handwritten letter to the district court addressing his abandonment by his last counsel, Mr. Vernay. (App.927a). Upon the Supreme Court's denial of the certiorari petition filed by Mr. Vernay, the attorney attempted to give his case back to prior federal habeas counsel, Mr. Wardroup. Mr. Edwards reported that he had sent two letters to Mr. Wardroup and Mr. Vernay in the attempt to identify which attorney, between the two of them, was acting for him. He received no response. He asked his mother to call Mr. Wardroup, but she received no return call.

By March 6, Mr. Edwards wrote again to the district court, further explaining that he had no lawyer. (App.927a). Since learning of his execution date from TDCJ personnel, he had still neither received the motion nor order setting his date, let alone the actual death warrant. The last correspondence he had received from an attorney was on November 10, 2015, whereby Mr.

Vernay informed him of the denial of his petition for certiorari. As reflected in the prison's legal correspondence log, Mr. Edwards had written to Mr. Vernay in December, January, and February, and received no response to any of his inquiries about the status of his representation. In light of that abandonment, Mr. Edwards respectfully requested appointment of an attorney.

In response to Mr. Edwards's letter motion for the appointment of counsel, Don Vernay submitted a pleading defending his conduct and reputation. (App.922a-926a). He explained that Richard Wardroup had approached him "for the sole purpose of preparing a petition for certiorari, since Wardroup was not admitted before the United States Supreme Court." (*Id.*).

Mr. Vernay went on to explain that despite having been appointed to represent Mr. Edwards for eleven months, he had been "provided with no file or documents other than this Court's denial of the petition of habeas corpus and the opinion of the Fifth Circuit Court of Appeals denying the Petitioner's request for a COA, and had never met or spoken with Mr. Edwards." (*Id.*). Mr. Vernay further explained that while apprising Mr. Edwards of his cert. petition's denial, he stated that he was returning the case to Mr. Wardroup. (App.923a).

On March 18, 2016, the Court denied Mr. Edwards's pro se motion for substitution of counsel. The Court referred to the Fifth Circuit's June 25, 2015 appointment of Mr. Vernay and thus "directed [Vernay] to continue his representation under [18 U.S.C. §3599]." (App.919a-921a).

After the April 6, 2016 order by Judge Tinsley vacating the original execution date and re-setting it for October 19, Mr. Vernay filed a motion on June 2, 2016 to substitute counsel wherein undersigned lead counsel, Ms. Merrigan and Mr. Perkovich, were specified as available to take over Mr. Edwards's representation. (App.1025a). By the above-mentioned June 14, 2016

order (App.1036a), this Court appointed Merrigan and Perkovich as lead counsel along with Carl David Medders, of Burleson, Pate & Gibson, as local counsel.

4. Federal Counsel's Abandonment Is Particularly Problematic Where State Habeas Counsel Is "Appallingly" and "Egregiously Inept"

State habeas counsel copied and pasted claims from another case instead of investigating Mr. Edwards's case. Instead of drafting facts related to the claims he raised, he copied and pasted those from the appellate briefing. Despite his apparent total lack of efforts on behalf of Mr. Edwards, state habeas counsel billed the state courts for over $24,000 for his work.

This non-effort was, tragically, in keeping with his documented practice in other state habeas death penalty cases. Less than a month before Mr. Huff filed the state petition for Mr. Edwards, the Western District of Texas issued an opinion concerning Huff's performance in a prior state habeas case. That federal court found that his capital habeas work had been "appallingly" and "egregiously inept", "egregiously deficient", and "wholly incompetent." *Ruiz v. Dretke*, No. Civ SA-03-cv-303-OG, 2005 WL 2620193, at *2-3 (W.D. Tex. Oct. 13, 2005). The District Court catalogued his failure to investigate, develop, and preserve meritorious extra-record claims surrounding constitutional violations stemming from Mr. Ruiz's capital prosecution. As he did in *Ruiz*, Huff "made no apparent effort to investigate and present a host of potentially meritorious and readily available claims for relief." *Id.* at *2.

This practice is particularly troubling in light of the importance of state post-conviction. It is the first, and often the only, opportunity to present evidence that a defendant's trial is constitutionally infirm. *Cullen v. Pinholster*, 131 S.Ct. 1388 (2010). The purposes of limitations set forth in AEDPA are to promote "further the principles of comity, finality, and federalism," principles which make little sense where the state process is marred by stunningly deficient

performance of counsel, resulting in significant questions of reliability and fairness going unraised. *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007).

B. Claims Premised on the Sea Change Wrought by *Martinez* and *Trevino* Are Properly Considered to Determine if Extraordinary Circumstances Warrant Reopening a Case

In 2012, the high Court held that, as an equitable matter, ineffective assistance of state habeas corpus counsel could serve as cause to excuse procedurally defaulted ineffective assistance of trial counsel claims. *See Martinez*, 132 S. Ct. at 1318-19. The default may be excused in jurisdictions, including Texas, where, as a legal or practical matter, there is no meaningful opportunity to bring ineffective assistance of trial counsel claims until the state habeas corpus stage. *See Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014) (quoting *Trevino*, 133 S. Ct. at 1921).

The Court explained that the default would be overcome upon a "substantial" showing on the claim of ineffective assistance of counsel, "which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S.Ct. at 1318 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). That standard, a "substantial" showing, explicitly adopted the standard for issuing a certificate of appealability (COA). *Id.* It requires a COA to issue upon a "substantial showing of denial of a constitutional right." *Miller-El*, 537 U.S. at 336 (quoting 28 U.S.C. §2253).

To meet that standard, "a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). That standard is a "threshold inquiry" that forbids "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336. Instead, the court should simply

require the prisoner to show "something more than the absence of frivolity." *Barefoot*, 463 U.S. at 893. A claim can meet this standard "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 at 338. The clam must simply be "debatable." *Slack*, 529 U.S. at 484.

Thus, ineffective assistance of state habeas corpus counsel will excuse a substantial procedurally defaulted ineffective of trial counsel claim. *Martinez*, 132 S.Ct. at 1318.

On October 5, 2016, this Court heard argument in *Buck v. Davis*, No.15-8049 (U.S.) *sub nom. Buck v. Stephens*, 630 Fed. Appx. 251 (5th Cir. 2015). The narrow question before the Court is how to construe the standard for assessing whether to issue a certificate of appealability. The underlying question related to the certificate of appealability – question the Court must address to resolve the narrower question – turn on whether claims premised on *Martinez/Trevino* may be categorically excluded as an extraordinary circumstance under Rule 60(b). At the moment, the Fifth Circuit, together with the Fourth, Sixth, and Eleventh Circuits, take that categorical position. *See Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012); *Moses v. Joyner*, 815 F.3d 163, 168-69 (4th Cir. 2016); *Arthur v. Thomas*, 793 F.3d 611, 633 (11th Cir. 2014); *Hamilton v. Sec'y, Florida Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015); *Abdur' Raham v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015). Three other circuits have taken the opposite approach, considering such equitable claims, along with other extraordinary circumstances, on a case-by-case basis. *See Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015); *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014); *Lopez v. Ryan*, 678 F.3d 1131, 1135-37 (9th Cir. 2012).

Here, the Fifth Circuit again took its categorical position, refusing to even consider whether claims premised on *Martinez* and *Trevino* as part of the totality of the circumstances warranting reopening a case. (App.14a ("'*Martinez* is simply a change in decisional law' and is

'not the kind of extraordinary circumstance that warrants relief under Rule 60(b)(6).'). Judging in part from the four cert. petitions it has held for *Buck*,[13] the Supreme Court could hardly demonstrate a greater interest in this integral element of that case. The sound inference from the Court's activity is that it is highly concerned about this issue and very likely to establish the Rule 60(b) extraordinary circumstances analysis for *Martinez/Trevino* claims.[14]

Davila, in addition to clarifying the availability of federal court review of procedurally defaulted ineffective-assistance-of-appellate-counsel claims, may further clarify the application of *Martinez*. When the Court decided *Martinez*, the dissent criticized the opinion as opening the federal courthouse doors too widely. The dissent posited that all manner of defaulted state habeas corpus claims could be excused by employing the very logic adopted by the *Martinez* Court. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) ("[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. . . . [M]any other cases in which initial state habeas will be the first opportunity for a particular claim to be raised" are no different.). Leading habeas corpus scholars have also suggested that the logic of *Martinez* suggests broad application. Randy Hertz & James S. Liebman, *Federal Practice and Procedure* §26.3 (6th ed. Supp. 2013) ("the [*Martinez*] Court's reasoning logically

[13] *See Moses v. Thomas*, No. 16-5507 (petition filed Aug. 5, 2016, last distributed for conference of Nov. 10, 2016); *Abdur'Rahman v. Westbrooks*, No. 16-144 (petition filed July 29, 2016, last distributed for conference of Oct. 7, 2016); *Johnson v. Carpenter*, No. 15-1193 (petition filed Mar. 22, 2016, last distributed for conference of June 2, 2016); *Wright v. Westbrooks*, No. 15-7828 (petition filed Jan. 19, 2016, last distributed for conference of Sept. 26, 2016).

[14] The Court's treatment of two other cases emanating from Texas and the Fifth Circuit suggests as much. While *Trevino* was pending, the Court stayed two executions presenting questions regarding the application of *Martinez* to Rule 60(b) proceedings. Both of those cases "explicitly relied on [Fifth Circuit precedent] that *Martinez* did not amount to an extraordinary circumstance within the meaning of Rule 60(b)(6)" and had their petitions for writ of certiorari granted, judgments vacated, and cases remanded for further consideration after *Trevino* was decided. *Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013). In light of the Court's accepting *Buck* for review, it is exceedingly likely that the Court will squarely address the issue it left unaddressed in those cases: the availability of Rule 60(b)(6) premised on *Martinez* and *Trevino.*

extends to other types of claims that, as a matter of state law or factual or procedural circumstances, could not be raised before the postconviction stage.").

In *Buck* the underlying *Martinez* claims relate to racialized predictions about Mr. Buck's penchant for violence and future dangerousness. The Court was doubtlessly troubled by the state and Circuit's willingness to hide behind procedural defenses in stead of addressing the troubling constitutional questions at issue. Here, too, a Texas death sentence is marred by the specter of racial bias. From a juror pool of 3,000, the prosecution succeeded in removing all African American jurors. And in an apparently troublingly familiar move, wrote a "B" next to jurors' names it wished to remove. Yet the circuit and state have avoided merits review because prior counsel failed to conduct any meaningful advocacy.

Davila is likely to provide insight into both the scope of available claims under *Martinez* and the procedure for addressing them in state and federal court. *Buck* is likely to upend the troubling lack of access to the courts to raise important constitutional claims premised on *Martinez* and *Trevino*.

VI. CONCLUSION

For the foregoing reasons, this Court should grant this petition, summarily reverse and remand, or hold pending its decisions in *Buck v. Thaler* and *Davila v. Davila v. Davis*. The lower courts erred in determining that Mr. Edwards's Rule 60(b) Motion was a successor petition and failed to apply the existing legal theory that . Appellant did not assert claims, but plead that the undisputed abandonment of his federal appointed counsel, in accepting fulltime employment without notifying the court, resulted in a conflict of interest and created a fatal defect in the proceedings. Counsel's conduct, disengaging from and ceasing work on Appellant's case further compounded the "egregiously inept" and fraudulent performance of state habeas counsel.

Because of the seriousness of these issues – Mr. Edwards could be executed without any court ever hearing critical evidence involving gross prosecutorial misconduct and appallingly deficient performance by trial counsel – this Court must intervene.

Respectfully Submitted,

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January 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2017, the foregoing was electronically served on Ellen Stewart-Klein, counsel for the State, via electronic mail at the following address: ellen.stewart-klein@oag.teax.gov.