No. _____

In the Supreme Court of the United States

JOHN E. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *et al.*,
Petitioners,

v.

JERMONT COX,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Martinez v. Ryan*, this Court recognized a limited exception to the usual procedural rules governing federal habeas corpus claims filed by state prisoners. The Court held that, if state law requires a defendant to wait until state post-conviction review to raise claims of trial counsel ineffectiveness, then the defendant can use federal habeas review to challenge the effectiveness of the attorney who represented him during the state post-conviction proceedings.

The Third Circuit has now ruled that the exception goes much further: the court holds that *Martinez* can give rise to "extraordinary circumstances" that may allow a defendant to reopen even a long-disposed habeas case, under Fed. R. Civ. P. 60(b)(6), in order to raise previously unreviewable ineffectiveness claims. The court of appeals explicitly acknowledges that its ruling creates a circuit split; four circuit courts – the 5th, the 6th, the 7th, and the 11th – have held to the contrary. The question presented is this:

Does this Court's decision in Martinez v. Ryan *provide a basis to allow a federal habeas petitioner to reopen the judgment, years after finality, under Fed. R. Civ. P. 60(b)?*

LIST OF PARTIES

Petitioners

John E. Wetzel, Secretary, Pennsylvania Department of Corrections

Robert Gilmore, Superintendent of the State Correctional Institution at Greene

The District Attorney of the County of Philadelphia

The Attorney General of the Commonwealth of Pennsylvania

Respondent

Jermont Cox

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The 2014 opinion of the United States Court of Appeals for the Third Circuit reversed the district court's denial of Cox's petition under Fed. R. Civ. P. 60(b)(6), and remanded with instructions to entertain the petition in light of this Court's decision in *Martinez v. Ryan*. The Third Circuit opinion is reported at 757 F.3d 113 (3rd Cir. 2014), and is reprinted in the Appendix at App. 1.

The 2013 opinion and order of the United States District Court for the Eastern District of Pennsylvania denied Cox's petition under Fed. R. Civ. P. 60(b)(6), which sought to lift the habeas judgment entered by the district court in 2004 and affirmed by the court of appeals in 2006. The district court opinion is unreported but is reprinted in the Appendix at App. 28.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

RULE PROVISION INVOLVED

Federal Rule of Civil Procedure 60(b) provides in relevant part:

> 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:
>
> * * * *
>
> (6) any other reason that justifies relief.

STATEMENT OF THE CASE

Jermont Cox was a drug-gang hit man who stands convicted of three separate murders in the first degree. His conviction for the murder in this case was upheld on direct appeal in 1996, on state collateral review in 1999, and on federal habeas corpus review in 2006. The issue here is whether Cox should be allowed to reopen that judgment, eight years later, because of this Court's refinement of habeas procedural rules in *Martinez v. Ryan*.

The crime goes back 22 years, to July 1992. Cox was part of a drug-selling operation in the Germantown section of Philadelphia. At about 2:00 in the morning, he took a break to buy a six-pack of beer in a bar. When he came out, he saw one of his cohorts engaged in a fist fight with a drug customer.

Cox walked over to a nearby car, put down his beer, and retrieved a .38 caliber gun. He then took aim at the victim – a man named Lawrence Davis – from a distance of four feet, and fired several times. Davis was hit by three bullets and collapsed to the ground.

Cox picked up one of his beer cans and enjoyed a drink as he stood over the body with his cohort. The two then drove off in the car.

Several bystanders were in the area, but no one would give police any information. Eventually, investigators developed evidence identifying the gunman, and secured a warrant for Cox's arrest. But it took half a year to track him down.

In the meantime, Cox remained busy. In August 1992, he carried out a second murder, and in November a third. Both were drug executions ordered by the head of his gang.

When Cox was finally captured in January 1993, he had a completely innocent explanation for the killing of Lawrence Davis. He admitted that he was present at the scene that July – and he admitted that he shot Davis. But he claimed that during the fist fight his cohort had handed him the gun, that the gun was already cocked, and that it went off accidentally. Twice.

In fact, however, the victim was shot three times. And the murder weapon would have had to be re-cocked after each shot. A jury convicted Cox of first

degree murder in October 1993. Cox received a sentence of life imprisonment.[1]

The intermediate state appellate court affirmed the judgment of sentence in June 1995. Cox was appointed new counsel to complete the direct appeal process by filing a petition for discretionary review with the Pennsylvania Supreme Court. The new lawyer alleged that trial counsel had provided ineffective assistance. The supreme court denied the petition in April 1996.

Cox filed a petition under Pennsylvania's Post-Conviction Relief Act in May 1996. His previous lawyer, who had represented him in the state supreme court, advised that Cox should get a new lawyer (this would be number three) so that he could claim the ineffectiveness of both lawyer number one and lawyer number two. But Cox insisted that he did not want to challenge the previous lawyer's ineffectiveness, and agreed to be represented by him again. The lawyer then raised additional claims of trial counsel ineffectiveness, but Cox chose to pursue only one at an evidentiary hearing. The post-conviction court denied relief on all claims in February 1998, and the intermediate appellate court affirmed in 1999.

Cox filed a federal habeas corpus petition. The magistrate judge recommended that the petition be

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[1] Cox was subsequently convicted in the other two cases. He received a life sentence for one and a death sentence for the other. The state courts affirmed the judgments. *Commonwealth v. Cox*, 983 A.2d 666 (Pa. 2009). Post-conviction petitions are pending in both state and federal court.

denied, 2003 WL 22238986, and the district court adopted the magistrate's report in 2004, ruling that one claim was meritless and that the remainder were procedurally defaulted. The court of appeals affirmed. *Cox v. Horn*, 174 Fed. Appx. 84 (3rd Cir. 2006) (non-precedential).

Six years later, this Court issued its opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Cox filed a petition under Fed. R. Civ. P. 60(b)(6), asking to lift the six-year-old judgment. He argued that, had it existed at the time, *Martinez* would have relieved him of the procedural defaults previously found.

The district court denied the 60(b) motion, holding that a change in procedural law such as *Martinez* does not constitute the kind of extraordinary circumstance that this Court has required for relief under Rule 60(b)(6). App. 28-32.

The Third Circuit reversed. The court held that *Martinez* does indeed create a gateway through which a former habeas petitioner may seek Rule 60(b) relief that would be otherwise unavailable. The court openly acknowledged that its ruling put it in conflict with other circuit authority. App. 15-16.

At the same time, the court attempted to minimize the conflict. The court asserted that "there is not much daylight" between its approach and other circuits, App. 17, because other circuits would never allow *Martinez* to be used as a basis for a Rule 60(b) motion, while the Third Circuit would always allow *Martinez* to be used as a basis for a Rule 60(b)

motion, except that the defendant would also have to show other things. App. 3, 15, 17, 22-26.

Primary among these other things are the merits of the new claims that the defendant wants to raise upon setting aside the judgment. In other words, in order to decide whether to grant a 60(b) motion and allow the defendant to present new claims, the district court must examine the claims to see if they are any good – or, as the Third Circuit put it, "particularly substantial." App. 23. If they are – and if it hasn't been too long, and if the defendant is serving a very serious sentence because he committed a very serious crime, App. 26 – then the new *Martinez* decision will justify Rule 60(b)(6) relief that would otherwise be denied.

Because the Third Circuit ruling creates or expands a circuit split, contradicts related precedent of this Court, and breeds a litigation mess that will enfeeble the notion of finality, this Court should grant review.

REASONS FOR GRANTING THE WRIT

A federal habeas petitioner cannot use this Court's new procedural ruling in *Martinez* to reopen a long-final judgment under Rule 60(b).

For many criminal defendants, the direct appeal is the first but far from the last stop in a sentence-long effort to overturn the conviction. Appeal is followed by at least one round of state post-conviction review, which is followed by at least one round of federal habeas corpus review.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court issued one of many procedural rulings governing this extended process. *Coleman* held that a criminal has no federal right to challenge the effectiveness of his state post-conviction lawyer when he gets to federal habeas court. If the defendant did not properly present a claim on state post-conviction review, then the doctrine of procedural default precludes review of the claim in federal court, despite any complaints the defendant may have about his last lawyer.

Twenty-one years later, in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), this Court recognized an exception to the *Coleman* procedural default doctrine. The exception applies to defendants whose state laws do not allow them to challenge the competence of their trial lawyer until after they have completed direct appeal. If post-conviction review is the first place

where trial ineffectiveness can be raised, then state procedural defaults regarding such claims may be disregarded in federal court, on the ground that they were post-conviction counsel's fault. *See also Trevino v. Thaler*, 133 S. Ct. 1911 (2014).

Like all procedural rules, this new exception applies to any pending habeas case, and those that will arise in the future. That would not include the defendant in this case, Jermont Cox, because he lost his federal habeas case a decade ago, long before *Martinez*.

Once *Martinez* came out, however, Cox came to the conclusion that he too should get its benefit. Normally, there would be no way to do that. But Cox invoked a federal rule of civil procedure, Rule 60(b)(6), designed as a narrow escape hatch for reopening judgments in civil lawsuits under "extraordinary circumstances."

The Third Circuit has now held that Rule 60(b)(6) is available to state criminals when new developments in habeas procedures occur after their cases are over. That ruling is wrong – and dangerous – and requires review.

A. The Third Circuit's ruling directly conflicts with four other circuits.

The Third Circuit itself announced that its holding in this case is in conflict with other circuit authority, notably the Fifth Circuit. *See Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) ("the *Martinez* decision is simply a change in decisional

law and is not the kind of extraordinary circumstance that warrants relief under Rule 60(b)(6)"). "*Adams*," proclaimed the Third Circuit, "does not square with our approach to Rule 60(b)(6)." App. 16.

But the Third Circuit ruling conflicts with the Sixth Circuit as well. *See McGuire v. Warden, Chillicothe Correctional Inst.*, 738 F.3d 741, 750 (6th Cir. 2013) ("intervening law does not generally permit the re-opening of finally decided cases, and even if it does in some truly extraordinary cases, this is not such a case"), *cert. denied*, 134 S. Ct. 998 (2014).[2]

The ruling below also created a conflict with the Seventh Circuit. *See Nash v. Hepp*, 740 F.3d 1075, 1078-79 (7th Cir. 2014) (Nash's *Martinez*-based 60(b) "argument is foreclosed by precedent; a change in law showing that a previous judgment may have been incorrect is not an 'extraordinary circumstance' justifying relief under Rule 60(b)(6)…. Nash's case involves the 'mundane' and 'hardly extraordinary' situation in which the district court applied the governing rule of procedural default at the time of its

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[2] The Third Circuit attempted to characterize *McGuire* as applying a multi-factor balancing test that did not entirely repudiate the *Martinez* exception as a basis for Rule 60(b)(6) relief. App. 21. But in fact *McGuire* simply rejected the 60(b)(6) claim on a number of alternative grounds, any of which could have been sufficient for the result. The primary holding was that the change in law initiated by *Martinez* does not warrant the reopening of a final habeas judgment under Rule 60(b). 738 F.3d at 750-52, 758-59.

decision and the caselaw changed after judgment became final").[3]

Finally, the court of appeals decision here put it in conflict with the Eleventh Circuit. *See Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) ("we hold that the change in the decisional law affected by the *Martinez* rule is not an 'extraordinary circumstance' sufficient to invoke Rule 60(b)(6)"), *cert. denied*, 2014 WL 2532012 (U.S. 2014). As it did with the Fifth, the court of appeals here flatly rejected the Eleventh Circuit precedent: "We are not persuaded." App. 20.

Arguably, there is one circuit that is not in complete conflict with the Third Circuit's approach to *Martinez*/60(b) claims. That would be the Ninth. *See Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012) (noting that *Martinez* legal developments "weigh slightly in favor of reopening Lopez's habeas case," but ultimately denying Rule 60(b) relief). As a result, there are at least six circuits that have addressed the current question, and they are split.

Not only is the circuit conflict wider than the Third Circuit admitted, however; it is also deeper. The court of appeals attempted to downplay the

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[3] Once again, the Third Circuit attempted to soften the conflict, portraying the Seventh Circuit authority as establishing a balancing test that would allow for *Martinez*-based Rule 60(b) relief in appropriate cases. App. 21. As with the Sixth Circuit, however, the *Nash* court was simply noting an alternative, independent basis for its ruling. After rejecting *Martinez*-based 60(b) motions, the court additionally observed that Nash's claim would have failed even if *Martinez* had been the law before his habeas case became final. 740 F.3d at 1079.

dispute as merely the difference "between the 'never' position of the Fifth Circuit and the 'rarely' position that we have staked out." App. 21.

Rule 60(b) relief will supposedly be rare under the latter view because of a whole slew of case-sensitive circumstances that the court must consider, beyond the change in procedural law wrought by *Martinez*. But the Third Circuit identified only four such limiting factors, and in fact they do no limiting.

First, the court considering a Rule 60(b) motion must assess the potential merit of the claims that the petitioner wishes to litigate upon reopening an already final judgment. App. 22-24. But this is a completely circular, result-oriented inquiry. The concept of finality is not worth much if it applies only in cases where the litigant would lose again anyway.

Next, the court must consider the age of the judgment. App. 25-26. But Cox's case was eight years over when *Martinez* was decided, and that was obviously not too old as far as the court of appeals was concerned. Why would ten years be too long, or twenty, if that is how long Cox had had to wait for this Court to correct course after *Coleman*? It wasn't his fault.

In addition, the 60(b) court must consider whether the defendant has been diligent in "exhaust[ing] available avenues of review." App. 26. But an exhaustion requirement is simply tautological in the Rule 60(b) context. If other avenues of review are still open, then the judgment is not really final and Rule 60(b) would not apply. And if the rule really is

the only remaining "avenue of review," then the defendant meets the "exhaustion" requirement simply by filing a Rule 60(b) motion.

Finally, the court must consider whether the defendant is challenging a capital sentence. App. 26. Cox is *not* challenging a capital sentence here – yet that was not a problem for the court of appeals, apparently because he received a capital sentence in a *different* case. Thus the "capital" factor was diluted even in its very first application. What will happen in the next case? Will the court really dismiss the 60(b) claims of a prisoner serving "only" a sentence of life? Or a very long sentence that may effectively be for life? These are exactly the defendants who will be the biggest takers for the circuit's new offer of potentially endless review.

The Third Circuit's "multi-factor" test is meaningless because it masks reality. Cox's merits claims are no more "substantial" than when the habeas judgment became final. His case is no younger. His sentence is no longer. Nothing in the "balance" of "equities" has moved except that *Martinez* was decided. *Nothing else has happened.* If Cox and defendants like him receive relief under Rule 60(b)(6), it will only be because habeas procedures changed. As they always do.

B. The Third Circuit's ruling is inconsistent with this Court's habeas/60(b) holding in Gonzalez v. Crosby.

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court addressed a Rule 60(b) claim in a habeas context that cannot be distinguished from this case.

Gonzalez lost his chance for federal habeas review when the district court dismissed his petition as untimely under the then-new AEDPA statute of limitations, 28 U.S.C. § 2244(d). A crucial feature of the statute was its tolling provision, which delayed the running of the federal filing deadline as long as the defendant was pursuing a "properly filed" post-conviction petition in state court. Gonzalez had a state post-conviction petition, but it was dismissed as procedurally barred. The federal court held that the state petition was therefore not "properly filed," and that he therefore wasn't entitled to any tolling.

The "properly filed" question had arisen in hundreds of habeas cases around the country, and had divided the circuits. Shortly after Gonzalez was kicked out of court, this Court addressed the question – ruling in favor of defendants like Gonzalez. *Artuz v. Bennett*, 531 U.S. 4 (2000) (state post-conviction petition may be "properly filed" even if claims are procedurally barred).

But that was too late to help Gonzalez, whose habeas case was already final. So, some months after the *Artuz* decision, Gonzalez filed a Rule 60(b)(6) motion, arguing that the federal habeas court should

reopen his case to give him the benefit of the new procedural ruling.

On review, this Court held that defendants like Gonzalez could not establish the "extraordinary circumstances" required for relief under Rule 60(b)(6), and that "[s]uch circumstances will rarely occur in the habeas context.... The District Court's interpretation was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation of 28 U.S.C. § 2244(d)(2). It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." 545 U.S. at 535-36.

That, of course, is exactly what happened here. The district court's interpretation of *Coleman* procedural default was entirely correct under then-prevailing law, until this Court arrived at a different interpretation eight years later in *Martinez*.

To be sure, the Third Circuit was aware of the *Gonzalez* decision, and spent several pages discussing it. App. 19-21. But the one thing the court of appeals did not do with *Gonzalez* was distinguish it. The court never even attempted to explain why a "different interpretation" of habeas procedure was enough for 60(b)(6) standing in one case, but not in the other.

The lack of effort is understandable, since there is no good explanation. The Ninth Circuit gave it at least a tepid try, in the *Lopez v. Ryan* case. The court suggested that *Martinez* was different than *Artuz* because *Martinez* "qualified *Coleman* by recognizing

a narrow exception," while *Artuz* "resolv[ed] an existing circuit split." 678 F.3d at 1136. True, but which way is that supposed to cut? If anything, the equities weigh more in Gonzalez's favor: he had the bad luck to live in one of the few circuits that had come to the wrong conclusion on the "properly filed" issue; Cox, on the other hand, was treated exactly the same as every other habeas petitioner in the two decades between *Coleman* and *Martinez*.

The fact is that habeas law is ever evolving. There is nothing "extraordinary" about that, and nothing that separates this case from *Gonzalez*.

C. The Third Circuit's ruling undermines every final federal habeas case.

Even aside from its contravention of existing authority, the ruling below will disrupt every aspect of federal habeas corpus practice. The problem with the court of appeals rationale is that there is no confining it. It is a habeas sinkhole.

Martinez may be a narrow exception to *Coleman*, but there is nothing narrow about the number of cases that will be in play if it provides a basis for Rule 60(b) relief. From 1991 to 2012 there were thousands and thousands of federal habeas corpus decisions. Many of those, probably most, included rulings on procedural default. *See Martinez*, 132 S. Ct. at 1323 n.4 (Scalia, dissenting) (in non-capital state-prisoner habeas cases, procedural default accounts for largest percentage of procedural dispositions; citing King, Cheesman, & Ostrom AOUSC habeas study). And most of those rulings

would be subject to reopening if the Third Circuit's position prevails.[4]

But that's only the beginning; there would be no way to restrict the new 60(b) regime to *Martinez* issues. This Court takes an active role in supervising federal habeas procedures. Just in recent years there have been numerous significant decisions that altered prior practice on a variety of habeas issues. To name just a few:

- *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013) (recognizing actual innocence exception to AEDPA statute of limitations)
- *Maples v. Thomas*, 132 S. Ct. 912 (2012) (holding that counsel "abandonment" constitutes cause to excuse default)
- *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012) (recognizing right of appeal despite improper COA)
- *Wall v. Kholi*, 131 S. Ct. 1278 (2011) (adopting expansive definition of "collateral review" for tolling purposes under § 2244(d))

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[4] In Philadelphia County alone, there have been dozens of Rule 60(b) motions filed seeking reopening of final judgments on the basis of *Martinez*. Until the court of appeals ruling in this matter, those motions were routinely denied. *See, e.g., Edwards v. Vaughn*, 91-cv-0914, 2014 WL 2115228, at *3 (M.D. Pa. May 21, 2014), *citing Stroll v. Johnson,* 2013 WL 6074160, at *1 (3rd Cir. 2013) (nonprecedential denial of a certificate of appealability in light of *Adams v. Thaler,* 679 F.3d 312, 320 (5th Cir. 2012)); *Johnson v. Vaughn*, 00-cv-2334, 2013 WL 6077354, at *8 (E.D. Pa. Nov. 19, 2013) (collecting cases); *Ford v. Wenerowicz*, 09-cv-3537, 2013 WL 460107, at *4 (E.D. Pa. Feb. 7, 2013) (same). That will no longer be the case.

- *Holland v. Florida*, 560 U.S. 631 (2010) (defining extraordinary circumstances for equitable tolling of federal habeas filing deadline)
- *Jimenez v. Quarterman*, 555 U.S. 113 (2009) (defining date of final state court judgment)
- *House v. Bell*, 547 U.S. 518 (2006) (expanding actual innocence exception for procedural default)

All of these decisions would give rise to Rule 60(b) motions under the view taken by the Third Circuit here.[5] And of course this Court will continue to issue additional habeas procedural rulings in the future.

Nor would it be possible to limit the Third Circuit doctrine to 60(b) motions that are based on rulings of this Court alone. The courts of appeal are constantly establishing new circuit precedent on procedural issues that this Court has not addressed. What conceivable equities would prevent defendants from seeking to reopen district court judgments that later turned out to be "wrong," on the basis of circuit court rulings resolving questions that this Court may never even reach? Why wouldn't defense counsel feel ethically bound to try, every time a significant new appellate opinion appears?

As a final caution, this Court has noted that Rule 60(b) is not party-specific. *Gonzalez*, 545 U.S. at 536-

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[5] Indeed they already have. In the wake of the ruling below, former habeas petitioners in the Third Circuit have already begun to seek Rule 60(b) relief in order to present actual innocence tolling claims pursuant to *McQuiggen v. Perkins*. *See, e.g., Clayton v. Varner*, No. CIV. A. 02-9509, 2014 WL 4744513, at *4 (E.D. Pa. Sept. 24, 2014); *Woodard v. Vaughn*, No. CIV. A. 02-8543, 2014 WL 4494954, at *1 (E.D. Pa. Sept. 11, 2014).

37. It's not just unsuccessful habeas petitioners who may avail themselves of a motion to lift the judgment. The state can do so as well. And in serious cases, where serious criminals may have been put at liberty, it will be highly motivated to do so. What will happen with defendants who have been released, or retried, as the result of an old habeas decision that has now become invalid? The complications will be considerable.

The Third Circuit ruling, if permitted to prevail, will erode the finality of the law. This Court should grant review.

CONCLUSION

For these reasons, petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-2982

JERMONT COX,
Appellant
v.

MARTIN HORN; CONNOR BLAINE; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 2-00-cv-05188)
District Judge: Honorable Anita B. Brody

Argued: June 12, 2014

Before: AMBRO and BARRY, *Circuit Judges*, and RESTANI,[*] *Judge*

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[*]Honorable Jane A. Restani, Judge, United States Court of
(continued...)

(Opinion Filed: August 7, 2014)

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OPINION OF THE COURT

BARRY, *Circuit Judge*

More than twenty years ago, Jermont Cox was convicted in the Court of Common Pleas of Philadelphia County of first-degree murder and related

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[*](...continued)
International Trade, sitting by designation.

charges. In 2000, he filed a petition in the U.S. District Court for a writ of habeas corpus. The District Court dismissed the petition in 2004, finding that all but one of Cox's claims were procedurally defaulted due to counsel's failure to pursue them in Cox's initial-review post-conviction proceeding in state court and that the one preserved claim lacked merit. We affirmed. In 2012, the Supreme Court of the United States decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which announced an exception to longstanding precedent and found that, under certain circumstances, and for purposes of habeas review, post-conviction counsel's failure to raise ineffective assistance of trial counsel claims could excuse a procedural default of those claims. Within three months of that decision, Cox filed a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure for relief from the 2004 order dismissing his habeas petition. The District Court denied the motion, finding that the intervening change in law occasioned by *Martinez*, "without more," did not provide cause for relief.

We agree that, for relief to be granted under Rule 60(b)(6), "more" than the concededly important change of law wrought by *Martinez* is required—indeed, much "more" is required. Ultimately, as with any motion for 60(b)(6) relief, what must be shown are "extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir. 1993); *accord Budget Blinds, Inc. v. White*, 536 F.3d 244, 255 (3d Cir. 2008). But what those extraordinary circumstances would—or could—be in the context of *Martinez* was neither offered to the District Court by the parties nor discussed by the Court, although, to be sure, at

that point there had been little post-*Martinez* case law to inform any such discussion.

We will vacate the order of the District Court and remand to provide the Court the opportunity to consider Cox's Rule 60(b)(6) motion with the benefit of whatever guidance it may glean from this Opinion and from any additional briefing it may order. We note at the outset that one of the critical factors in the equitable and case-dependent nature of the 60(b)(6) analysis on which we now embark is whether the 60(b)(6) motion under review was brought within a reasonable time of the *Martinez* decision. *See* Fed. R. Civ. P. 60(c)(1). It is not disputed that the timing of the 60(b)(6) motion before us—filed, as it was, roughly ninety days after *Martinez*—is close enough to that decision to be deemed reasonable. Still, though not an issue before us, it is important that we acknowledge—and, indeed, we warn—that, unless a petitioner's motion for 60(b)(6) relief based on *Martinez* was brought within a reasonable time of that decision, the motion will fail.

I. *PROCEDURAL HISTORY*

Recognizing that more than twenty years of procedural history has brought us to this point, it is, nonetheless, important that that history be recounted. We will attempt to be succinct, if not laserlike, in our recitation.

On October 28, 1993, following a bench trial before the Hon. Carolyn Engel Temin of the Court of Common Pleas of Philadelphia County, Cox was convicted of first-degree murder, criminal conspiracy, and

possession of an instrument of crime in connection with the July 19, 1992 shooting death of Lawrence Davis, and was sentenced to life imprisonment.

In a statement he gave to the police at the time of his arrest, Cox confessed to shooting Davis, but said that the shooting had been accidental. He and a friend, Larry Lee, he said, had gone to a drug house operated by Lee. While they were outside drinking, Lee got into a dispute with Davis that escalated into a physical altercation. At some point, Lee handed Cox a gun that was already cocked. Cox shot twice, hitting Davis, and then handed the gun back to Lee. According to Cox, he later told family members that the shooting had been an accident.

To prove at trial that Cox had the requisite intent for first-degree murder, the Commonwealth presented the testimony of Kimberly Little, an eyewitness. Little testified that Cox and Lee worked for a drug organization that was run out of an apartment in her building: Cox was a "lookout" and Lee supplied the operation's drugs. (A. 31.) On the night of Davis' death, Little saw from her window an argument erupt between Davis and Lee. According to Little, Cox then exited a local bar with a six-pack of beer, approached the two men, placed the six-pack on the hood of Lee's nearby car, retrieved a gun from the car, walked to within four feet of Davis, and shot him three times. Cox stopped to drink a beer, and he and Lee left in Lee's car.

The Commonwealth's other witnesses were Kimberly Little's sister, Mary Little; the medical examiner; and a ballistics expert. Mary Little confirmed that Cox

and Lee were neighborhood drug dealers and that she saw them drive off together after the shooting. The medical examiner asserted that Davis had four wounds caused by at least three bullets, and the ballistics expert explained that it was unlikely the shooting was accidental given the number of shots fired.

Trial counsel filed post-verdict motions on Cox's behalf. Cox also filed a motion pro se alleging trial counsel's ineffectiveness and requesting the appointment of new counsel. In February of 1994, Judge Temin held a hearing on the post-verdict motions. At the hearing, Cox testified in support of his pro se motion and outlined trial counsel's alleged failings: trial counsel (1) failed to present testimony from various character witnesses; (2) failed to find a witness, identified by Cox, who would have testified that "guys from the neighborhood" forced Kimberly Little to give a false statement to the police, (S.A. 47); (3) failed to review paperwork that Cox provided him; and (4) dissuaded Cox from taking the stand in his own defense. In response, trial counsel stated that he found himself in "a very untenable position" and asked that he be permitted to withdraw. (S.A. 59.) Judge Temin denied the request as well as the pro se motion, finding Cox's claims of ineffectiveness to lack merit. She later denied the counseled post-verdict motions.

Cox, still represented by trial counsel, appealed his conviction, challenging the sufficiency of the evidence and the admission of evidence relating to uncharged drug activity. In June of 1995, the Pennsylvania Superior Court affirmed the judgment of sentence. Cox then filed a pro se petition for allocatur in the Pennsylvania Supreme Court, raising claims of trial counsel's

ineffective assistance at the trial and on appeal. New counsel was appointed for Cox and submitted a supplemental allocatur petition. The Supreme Court denied allocatur in April of 1996.[1]

The following month, Cox filed a pro se petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-9546. The attorney who had represented Cox in his petition to the Pennsylvania Supreme Court was again appointed to represent Cox in his collateral review proceeding under PCRA. Counsel filed an amended PCRA petition asserting claims of ineffective assistance of trial counsel.[2] Judge Temin, sitting as the PCRA court, held

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[1]By that time, Cox had also been convicted of the 1992 first-degree murders of Roosevelt Watson and Terence Stewart, both of whom he aided Lee in killing. Cox was sentenced to life imprisonment for the murder of Watson and death for the murder of Stewart. His conviction for murdering Davis was found to be an aggravating factor in support of his capital sentence. *See Commonwealth v. Cox*, 983 A.2d 666, 673-75 (Pa. 2009). Those convictions have spawned federal habeas proceedings that are before the District Court, and Cox has filed new PCRA petitions challenging his convictions on all three murders on the basis of new ballistics evidence. His habeas petitions relating to the Watson and Stewart cases have been stayed pending those PCRA proceedings.

[2]The counseled PCRA petition claimed that trial counsel had provided constitutionally deficient representation when he failed to impeach the Little sisters with (1) the fact that they had charges pending against them when they first gave statements to the police, were eventually convicted of lesser charges, and were on probation at the time of trial; (2) their alleged familial relationship to the murder victim, Davis; and (3) a prior inconsistent statement by Kimberly Little. Trial counsel was also allegedly deficient for

(continued...)

a hearing at which PCRA counsel chose to proceed on only one of the multiple claims of trial counsel's ineffectiveness: failure to impeach the Littles with their criminal records and motive to curry favor with the Commonwealth to gain leniency in their own cases.

On August 28, 1998, Judge Temin denied post-conviction relief, finding that Cox had not been prejudiced by trial counsel's failure to impeach Kimberly and Mary Little with their criminal records because evidence aside from their testimony established his guilt. The Superior Court affirmed in July of 1999 and the Supreme Court denied allocatur in December of that year. Cox filed a second PCRA petition pro se, alleging ineffective assistance claims against trial and PCRA counsel. Judge Temin dismissed the petition as untimely, and the Superior Court affirmed after Cox failed to file a brief.

In October of 2000, Cox, now represented by the Federal Defender, filed a petition for a writ of habeas corpus in the U.S. District Court. The petition raised eight grounds for relief: (1) six claims of ineffective assistance of trial counsel; (2) one violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) a claim of cumulative error. In July of 2003, a magistrate judge issued a report and recommendation ("R&R") in which he determined that the ineffective assistance claims abandoned by PCRA counsel before the PCRA court, as well as the *Brady* and cumulative error claims, were procedurally defaulted. He reviewed the remaining

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[2](...continued)
failing to present evidence of Cox's lawful employment.

claim of ineffective assistance—trial counsel's failure to impeach the Littles with their criminal records—and concluded that the Superior Court's decision rejecting that claim was neither "contrary to" nor an "unreasonable application" of established federal law. (A. 44-47 (quoting 28 U.S.C. § 2254(d)(1)).) Cox filed objections to the R&R, arguing that PCRA counsel's unilateral decision to abandon claims constituted cause to overcome the procedural default bar. In August of 2004, the District Court rejected Cox's objections, adopted the R&R, and dismissed the habeas petition.[3] We affirmed on appeal. *Cox v. Horn*, 174 F. App'x 84 (3d Cir. 2006).

Six years later, on June 20, 2012, Cox filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6) seeking relief from the District Court's order of dismissal due to the intervening change in procedural law occasioned by the March 20, 2012 decision of the Supreme Court of the United States in *Martinez v. Ryan*. The Court held in *Martinez* that, under certain circumstances, error by post-conviction counsel can constitute cause to overcome the procedural default of

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[3]The District Court granted a certificate of appealability on two issues: (1) whether the Superior Court's resolution of Cox's ineffective assistance of counsel claim, based on trial counsel's failure to impeach Kimberly Little with evidence of her criminal record, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law" and (2) "whether the Superior Court's failure to remand to the trial court to conduct a hearing to determine whether [Cox] wanted to proceed pro se or with counsel establishe[d] cause to overcome a procedural default" of his other claims. *Cox v. Horn*, No. 00-5188 (E.D. Pa. Aug. 11, 2004) (order granting certificate of appealability).

claims alleging trial counsel's ineffective assistance. Cox argued that it was only due to PCRA counsel's ineffective assistance at the initial PCRA proceeding that his claims of ineffectiveness against trial counsel had been abandoned and were now procedurally defaulted.

On May 23, 2013, the District Court denied Cox's motion, finding that "*Martinez*'s change of law, without more," was not cause for relief. (A. 5.) In a separate July 2, 2013 order, the District Court issued a certificate of appealability on the "legal question" of "whether the change in law resulting from *Martinez* constitutes extraordinary circumstances that would warrant relief" under Rule 60(b)(6). (A. 6.)

II. *JURISDICTION AND STANDARD OF REVIEW*

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. We have appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

We review for abuse of discretion a district court's denial of a motion under Rule 60(b)(6). *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 342 (3d Cir. 2003). A district court abuses its discretion when it bases its decision upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of law to fact. *Morris v. Horn*, 187 F.3d 333, 341 (3d Cir. 1999).

III. *ANALYSIS*

A. The *Martinez* Rule

When reviewing a state prisoner's petition for a writ of habeas corpus, a federal court normally cannot review a federal claim for post-conviction relief that has already been rejected by a state court on the basis of an independent and adequate state procedural rule. *Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A petitioner may obtain federal review of a procedurally defaulted claim, however, if he demonstrates cause for the default and prejudice arising from the violation of federal law. *Martinez*, 132 S. Ct. at 1316 (citing *Coleman*, 501 U.S. at 750).

When Cox's habeas petition was initially under review by the District Court, the governing rule, as recognized in *Coleman*, was that error by counsel in state post-conviction proceedings could not serve as "cause" sufficient to excuse procedural default of a petitioner's claim. *See Coleman*, 501 U.S. at 752-54; *Sweger v. Chesney*, 294 F.3d 506, 522 & n.16 (3d Cir. 2002). The Supreme Court carved out a significant exception to that rule nearly eight years after Cox's petition was denied when, in 2012, it decided *Martinez*.

In *Martinez*, the Supreme Court held that, where state law requires a prisoner to raise claims of ineffective assistance of trial counsel in a collateral proceeding, rather than on direct review, a procedural default of those claims will not bar their review by a federal habeas court if three conditions are met: (a) the default was caused by ineffective assistance of

post-conviction counsel or the absence of counsel (b) in the initial-review collateral proceeding (i.e., the first collateral proceeding in which the claim could be heard) and (c) the underlying claim of trial counsel ineffectiveness is "substantial," meaning "the claim has some merit," analogous to the substantiality requirement for a certificate of appealability. *Martinez*, 132 S. Ct. at 1318-20. The Court adopted this "equitable ruling" for several reasons. *Id*. at 1319. First, "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system" vital to ensuring the fairness of an adversarial trial. *Id*. at 1317. Second, a prisoner cannot realistically vindicate that right through a claim of ineffective assistance of trial counsel without "an effective attorney" to aid in the investigation and presentation of the claim. *Id*. Finally, if the lack of effective counsel in an initial-review collateral proceeding could not excuse the federal procedural default bar, no court—state or federal—would ever review the defendant's ineffective assistance claims, given that they were first brought in that collateral proceeding. *Id*. at 1316.

The majority in *Martinez* noted that it was propounding a "narrow," *id*. at 1315, "limited qualification" to *Coleman*, *id*. at 1319. Even so, what the Court did was significant. *See*, *e.g.*, *id.* at 1327 (Scalia, J., dissenting) (criticizing *Martinez* as "a radical alteration of . . . habeas jurisprudence"); *Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012) ("*Martinez* constitutes a remarkable—if 'limited,'—development in the Court's equitable jurisprudence." (citation omitted)).

In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), issued the following Term, the Supreme Court clarified that

the *Martinez* rule applied not only to states that expressly denied permission to raise ineffective assistance claims on direct appeal (such as Arizona, which *Martinez* addressed), but also to states in which it was "virtually impossible," as a practical matter, to assert an ineffective assistance claim before collateral review. *Id*. at 1915 (quotation marks omitted). Texas law, at issue in *Trevino*, ostensibly permitted (though it did not require) criminal defendants to raise ineffective assistance of trial counsel claims on direct appeal. In practice, however, Texas' criminal justice system "[did] not offer most defendants a meaningful opportunity" to do so. *Id*. at 1921. As the Texas courts themselves had observed, trial records often lacked information necessary to substantiate ineffective assistance of trial counsel claims, and motion filing deadlines, coupled with the lack of readily available transcripts, generally precluded raising an ineffective assistance claim in a post-trial motion. Moreover, the Texas courts had invited, and even directed, defendants to wait to pursue such claims until collateral review. The Court "conclude[d] that where, as [in Texas], state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, [the] holding in *Martinez* applies." *Id*.

B. Cox's Rule 60(b)(6) Motion

Rule 60(b)(6) is a catch-all provision that authorizes a court to grant relief from a final judgment for "any . . . reason" other than those listed elsewhere in the Rule. Fed. R. Civ. P. 60(b)(6). As we noted at the outset, courts are to dispense their broad powers under

60(b)(6) only in "extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Sawka*, 989 F.2d at 140.

Ninety-two days after the Supreme Court issued its decision in *Martinez*, Cox filed a motion under Rule 60(b)(6), seeking to reopen his federal habeas proceeding based on the "significant change in procedural law" caused by the decision. (A. 74.) In ruling on Cox's motion, the District Court noted that neither the Supreme Court nor our Court had decided whether the rule announced in *Martinez* constituted an "extraordinary circumstance" sufficient in and of itself to support a 60(b)(6) motion and observed a divide among the courts of appeals that had addressed the issue. The Court explained that the Fifth Circuit, in *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012), held that "a change in law, including the change announced in *Martinez*, can never be the basis of 60(b) relief." (A. 4.) In contrast, it said, the Ninth Circuit had left open the possibility that *Martinez*, assessed together with other factors on a case-by-case basis, could justify 60(b) relief. (A. 4 (citing *Lopez*, 678 F.3d 1131).)[4] Joining what it viewed to be the position of every other district court in our Circuit to have opined on the impact of *Martinez*, the Court "adopt[ed] the reasoning of the Fifth Circuit to hold that *Martinez*'s change of law, without more, [was] insufficient to warrant relief under 60(b)(6)." (A. 4-5.)

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[4]In *Lopez*, the Ninth Circuit also denied Rule 60(b)(6) relief. 678 F.3d at 1137.

Although we agree with the District Court's ultimate conclusion that *Martinez*, without more, is an insufficient basis for reopening a long-since-dismissed habeas petition, such as Cox's, we cannot endorse the path it took to arrive at that conclusion. For one thing, *Adams* is not concordant with our precedent applying Rule 60(b)(6). For another, we cannot determine from what it wrote whether the Court considered factors—if any there be—beyond *Martinez*'s jurisprudential change in assessing Cox's request for relief. To the extent the Court "adopt[ed] the reasoning" of *Adams* and there stopped its inquiry, it did not employ the full, case-specific analysis we require when faced with a 60(b)(6) motion, although, as we have already noted, little was offered by the parties in that regard.

1. Whether *Martinez* Is Itself an Extraordinary Circumstance

Because it was a focal point of the District Court's reasoning, we begin with a discussion of the Fifth Circuit's decision in *Adams v. Thaler*. In *Adams*, as in this case, the district court dismissed a habeas petitioner's ineffective assistance of counsel claims as procedurally defaulted under state law, finding that errors by state post-conviction counsel could not excuse the default. Following the Supreme Court's decision in *Martinez*, the petitioner, who had been sentenced to death in Texas state court, filed a Rule 60(b)(6) motion seeking relief from the order dismissing his habeas petition. The petitioner pointed to several factors that, in combination, established "extraordinary circumstances" and entitled him to 60(b)(6) relief: (1) the "'jurisprudential sea change' in federal habeas corpus law" occasioned by *Martinez*; (2) the fact that his case had

resulted in a death sentence; and (3) "the equitable imperative that the true merit" of his claims be heard. *Adams*, 679 F.3d at 319. He also filed a motion for a stay of execution pending the district court's resolution of his 60(b)(6) motion. The district court granted the stay of execution.

The Fifth Circuit vacated that order as an abuse of the district court's discretion, given that the petitioner had not shown a likelihood of success on his Rule 60(b)(6) motion. The court determined that the 60(b)(6) motion would not succeed because, under Fifth Circuit precedent, "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment." *Id*. (alteration in original) (internal quotation marks omitted). That proposition flowed from prior Fifth Circuit cases, which stated that "changes in decisional law . . . do not constitute the 'extraordinary circumstances' required for granting Rule 60(b)(6) relief." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002); *accord Hernandez v. Thaler*, 630 F.3d 420, 430 (5th Cir. 2011) (per curiam). Concluding that *Martinez* was "simply a change in decisional law" and its development of procedural default principles was "hardly extraordinary," the *Adams* court denied 60(b)(6) relief without examining any of the petitioner's individual circumstances. *Adams*, 679 F.3d at 320 (internal quotation marks omitted).

Adams does not square with our approach to Rule 60(b)(6).

As an initial matter, we have not embraced any categorical rule that a change in decisional law is never

an adequate basis for Rule 60(b)(6) relief. Rather, we have consistently articulated a more qualified position: that intervening changes in the law *rarely* justify relief from final judgments under 60(b)(6). *See*, *e.g.*, *Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 311 (3d Cir. 1999) (en banc) ("'[I]ntervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6).'" (quoting *Agostini v. Felton*, 521 U.S. 203, 239 (1997)) (emphasis added)); *Morris*, 187 F.3d at 341 (same). Stated somewhat differently, we have not foreclosed the possibility that a change in controlling precedent, even standing alone, might give reason for 60(b)(6) relief. *See Wilson v. Fenton*, 684 F.2d 249, 251 (3d Cir. 1982) (per curiam) ("A decision of the Supreme Court of the United States or a Court of Appeals may provide the extraordinary circumstances for granting a Rule 60(b)(6) motion. . . .").

Even if there is not much daylight between the "never" position of the Fifth Circuit and the "rarely" position that we have staked out, *Adams* differs from our precedent in yet another significant respect: its failure to consider the full set of facts and circumstances attendant to the Rule 60(b)(6) motion under review. The Fifth Circuit in *Adams* ended its analysis after determining that *Martinez*'s change in the law was an insufficient basis for 60(b)(6) relief and did not consider whether the capital nature of the petitioner's case or any other factor might counsel that *Martinez* be accorded heightened significance in his case or provide a reason or reasons for granting 60(b)(6) relief. Indeed, the court did not address in any meaningful way the petitioner's claim that he was not offering *Martinez*

"alone" as a basis for relief. In *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013), the Fifth Circuit later acknowledged that *Adams* and its other precedent had not cited additional equitable factors "as bearing on the analysis of extraordinary circumstances under Rule 60(b)(6)."[5] *See also id.* at 376 n.1. The fact that the petitioner's 60(b)(6) motion was predicated chiefly on a post-judgment change in the law was the singular, dispositive issue for the *Adams* court.

We have not taken that route. Instead, we have long employed a flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law, that takes into account all the particulars of a movant's case. *See Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 274 (3d Cir. 2002) (noting, in the context of a 60(b)(6) analysis, the propriety of "explicit[ly]" considering "equitable factors" in addition to a change in law); *Lasky v. Cont'l Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986) (citing multiple factors a district court may consider in assessing a motion under 60(b)(6)).[6] The fundamental point of 60(b) is that it provides "a grand reservoir of equitable power to do justice in a particular case." *Hall v. Cmty. Mental Health Ctr.*, 772 F.2d 42, 46 (3d Cir. 1985) (internal

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[5]The court in *Diaz* assumed, for the sake of argument, that a district court may consider several equitable factors in the Rule 60(b)(6) context, but found that consideration of those factors in Diaz's case did not entitle him to 60(b)(6) relief. 731 F.3d at 377-78.

[6]Notably, the factors outlined in *Lasky* parallel the equitable factors cited by the Fifth Circuit in *Diaz* as being of questionable relevance to Rule 60(b)(6) motions.

quotation marks omitted). A movant, of course, bears the burden of establishing entitlement to such equitable relief, which, again, will be granted only under extraordinary circumstances. *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977). But a district court must consider the full measure of any properly presented facts and circumstances attendant to the movant's request.

The Commonwealth appellees contend that *Gonzalez v. Crosby*, 545 U.S. 524 (2005), effectively displaced our flexible approach in the habeas context and precludes Rule 60(b)(6) relief based on a change in law, including *Martinez*. In *Gonzalez*, the district court dismissed a petitioner's habeas petition as barred by the statute of limitations of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d). It found that the limitations period was not tolled while his second state post-conviction motion was pending because the motion was untimely and successive and, therefore, had not been "properly filed." *Id*. at 527. The Eleventh Circuit denied a certificate of appealability and the petitioner did not seek subsequent review of that decision. Several months later, the Supreme Court rejected the district court's reasoning in *Artuz v. Bennett*, 531 U.S. 4 (2000), and held that an application for state post-conviction relief can be "properly filed" even if it was dismissed by the state as procedurally barred. The petitioner then filed a 60(b)(6) motion citing *Artuz* as an extraordinary circumstance. The Supreme Court rejected his argument. Noting that the circumstances warranting 60(b) relief would "rarely occur in the habeas context," *Gonzalez*, 545 U.S. at 535, the Court opined that "not every interpretation of the federal statutes setting forth the requirements for

habeas provides cause for reopening cases long since final," *id*. at 536. It was "hardly extraordinary" that the district court's interpretation of AEDPA, which was correct under the Eleventh Circuit's then-governing precedent, was subsequently rejected in a different case. *Id*. at 536.

The Eleventh Circuit, describing *Gonzalez*, has observed that, in that opinion, "the U.S. Supreme Court . . . told us that a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)." *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) (citing *Gonzalez*, 545 U.S. at 535-38). Relying on *Gonzalez*, the Eleventh Circuit in *Arthur*, just as the Fifth Circuit in *Adams*, went on to hold that "the change in the decisional law affected by the *Martinez* rule is not an 'extraordinary circumstance' sufficient to invoke Rule 60(b)(6)." *Id*. The Commonwealth appellees cite the Eleventh Circuit's decision in an effort to persuade us that, in light of *Gonzalez*, we should abandon our case-by-case approach to 60(b)(6) motions.

We are not persuaded. We believe that the Eleventh Circuit extracts too broad a principle from *Gonzalez*, which does not answer the question before us. *Gonzalez* did not say that a new interpretation of the federal habeas statutes—much less, the equitable principles invoked to aid their enforcement—is *always* insufficient to sustain a Rule 60(b)(6) motion. *Gonzalez* merely highlights, in action, the position of both the Supreme Court and this Court that "[i]ntervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini*, 521 U.S. at 239

(emphasis added); *Morris*, 187 F.3d at 341. And, to be clear, the *Gonzalez* Court examined the individual circumstances of the petitioner's case to see whether relief was appropriate, concluding that relief was not warranted given the petitioner's "lack of diligence in pursuing review [in his own case] of the statute-of-limitations issue" eventually addressed in *Artuz*. *Gonzalez*, 545 U.S. at 537. For that matter, even after categorically pronouncing that *Martinez*'s change in the law could not sustain a 60(b)(6) motion, the Eleventh Circuit in *Arthur* briefly considered (and rejected) "other factors" cited by the movant, including the capital nature of his case, as justification for 60(b)(6) relief in the wake of *Martinez*.[7] *Arthur*, 739 F.3d at 633.

We, therefore, believe that our case-dependent analysis, fully in line with Rule 60(b)(6)'s equitable moorings, retains vitality post-*Gonzalez*, and we do not

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[7]At least three other courts of appeals have similarly assessed a variety of factors on a case-by-case basis when deciding whether to grant a habeas petitioner's Rule 60(b)(6) motion based on *Martinez* and *Trevino*. *See Nash v. Hepp*, 740 F.3d 1075, 1078-79 (7th Cir. 2014) (noting that, per *Gonzalez* and prior Seventh Circuit precedent, *Martinez*'s change in law could not justify 60(b)(6) relief, but analyzing the specific circumstances of the petitioner's case, including his lack of diligence and his prior opportunity to raise the defaulted claims); *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750-52 (6th Cir. 2013) (denying 60(b)(6) motion after concluding that *Trevino* did not impart new constitutional rights, *Trevino*'s change of the law was the sole basis for the motion, and its rule arguably did not apply to the petitioner's claims); *Lopez*, 678 F.3d at 1135-37 (applying a non-exhaustive, six-factor test to determine whether to grant 60(b)(6) motion predicated on *Martinez*).

adopt a per se rule that a change in decisional law, even in the habeas context, is inadequate, either standing alone or in tandem with other factors, to invoke relief from a final judgment under 60(b)(6). The District Court abused its discretion when it based its decision solely on the reasoning of *Adams* and failed to consider how, if at all, the capital aspect of this case or any other factor highlighted by the parties would figure into its 60(b)(6) analysis. We will remand to give it the opportunity to conduct that equitable evaluation now.

2. Rule 60(b)(6) Analysis

The grant or denial of a Rule 60(b)(6) motion is an equitable matter left, in the first instance, to the discretion of a district court. We offer, however, the following thoughts to aid the District Court in its further review of Cox's motion.

First, and importantly, we agree with the District Court that the jurisprudential change rendered by *Martinez*, without more, does not entitle a habeas petitioner to Rule 60(b)(6) relief. To be sure, *Martinez*'s change to the federal rules of procedural default, though "limited," was "remarkable." *Lopez*, 678 F.3d at 1136 (internal quotation marks omitted). *Martinez* sharply altered *Coleman*'s well-settled application of the procedural default bar and altered the law of every circuit. The rule adopted in *Martinez* was also important, crafted, as it was, to ensure that fundamental constitutional claims receive review by at least one court.

Even so, *Martinez* did not announce a new constitutional rule or right for criminal defendants, but rather

an equitable rule prescribing and expanding the opportunity for review of their Sixth Amendment claims. *See Martinez*, 132 S. Ct. at 1319; *Arthur*, 739 F.3d at 629; *McGuire*, 738 F.3d at 750-51; *Buenrostro v. United States*, 697 F.3d 1137, 1139-40 (9th Cir. 2012) (published order). A post-judgment change in the law on constitutional grounds is not, perforce, a reason to reopen a final judgment. *See Coltec Indus.*, 280 F.3d at 276 (affirming denial of Rule 60(b)(6) motion even though law on which judgment based declared unconstitutional); *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefits Fund*, 249 F.3d 519, 524 (6th Cir. 2001). Much less does an *equitable* change in procedural law, even one in service of vindicating a constitutional right, demand a grant of 60(b)(6) relief.

We also hasten to point out that the merits of a petitioner's underlying ineffective assistance of counsel claim can affect whether relief based on *Martinez* is warranted. It is appropriate for a district court, when ruling on a Rule 60(b)(6) motion where the merits of the ineffective assistance claim were never considered prior to judgment, to assess the merits of that claim. *See Lasky*, 804 F.2d at 256 n.10. After all, the *Martinez* exception to procedural default applies only where the petitioner demonstrates ineffective assistance by post-conviction counsel, as well as a "substantial" claim of ineffective assistance at trial. *Martinez*, 132 S. Ct. at 1318. When 60(b)(6) is the vehicle through which *Martinez* is to be given effect, the claim may well need be particularly substantial to militate in favor of equitable

relief.[8] A court need not provide a remedy under

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[8]Of course, the procedural default exception announced in *Martinez* applies only in states where ineffective assistance claims, either expressly or as a matter of practicality, could not have been raised on direct appeal. *Trevino*, 133 S. Ct. at 1914-15. In *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002), Pennsylvania decided to defer consideration of ineffective assistance of counsel claims to collateral review, making *Martinez* applicable to its criminal procedural system. At the time Cox's direct appeal and PCRA proceeding were being adjudicated by the Pennsylvania courts, however, Pennsylvania required a criminal defendant to raise ineffective assistance claims at the earliest stage of proceedings during which he was no longer represented by the allegedly ineffective lawyer, for example, the post-trial motions phase or direct appeal. *Id*. at 729; *Commonwealth v. Hubbard*, 372 A.2d 687, 695 & n.6 (Pa. 1977). The District Court determined that, because Cox was represented by the same attorney at trial and on direct appeal to the Superior Court, his PCRA proceeding presented the first opportunity to raise an ineffective assistance of trial counsel claim and *Martinez*, therefore, applied.

The Commonwealth appellees argue that *Martinez* does not apply to pre-*Grant* Pennsylvania and that, in any event, Cox availed himself of the opportunity to raise ineffective assistance claims before the trial court and the Pennsylvania Supreme Court. We do not decide whether, as a general matter, Pennsylvania's pre-*Grant* legal landscape falls within the ambit of the *Martinez* rule. We note simply that appellees have not established why the District Court erred in concluding that, under the pre-*Grant* procedural paradigm, defendants who, like Cox, were represented by the same counsel at trial and on direct appeal did not have a realistic opportunity to raise an ineffective assistance of trial counsel claim until collateral review. Extant Pennsylvania precedent made clear that Cox was not obligated to assert such a claim until trial counsel had been relieved of his representation. Cox was entitled to rely on that guidance, and, therefore, did not have to raise his ineffective assistance claims until PCRA review. *See*

(continued...)

60(b)(6) for claims of dubious merit that only weakly establish ineffective assistance by trial or post-conviction counsel.

Furthermore, courts must heed the Supreme Court's observation—whether descriptive or prescriptive—that Rule 60(b)(6) relief in the habeas context, especially based on a change in federal procedural law, will be rare. *Gonzalez*, 545 U.S. at 535-36 & n.9. Principles of finality and comity, as expressed through AEDPA and habeas jurisprudence, dictate that federal courts pay ample respect to states' criminal judgments and weigh against disturbing those judgments via 60(b) motions. In that vein, a district court reviewing a habeas petitioner's 60(b)(6) motion may consider whether the conviction and initial federal habeas proceeding were only recently completed or ended years

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[8](...continued)
Trevino, 133 S. Ct. at 1919-20; *Sutton v. Carpenter*, 745 F.3d 787, 793-94 (6th Cir. 2014).

It is true that trial counsel no longer represented Cox in his petition for allocatur to the Pennsylvania Supreme Court. Given the "unlikely and unpredictable" manner in which allocatur is granted by that court, however, a petition for allocatur had never been seen as the first opportunity to raise a claim of ineffective assistance. *Commonwealth v. Moore*, 805 A.2d 1212, 1223 (Pa. 2002) (Castille, J., concurring in part and dissenting in part). In addition, a party may not present new claims in a petition for allocatur. Pa. R. App. P. 302(a). Cox's trial counsel did not raise claims of his own ineffective assistance before the Superior Court—something he could not do, in any event, *see Commonwealth v. Green*, 709 A.2d 382, 384 (Pa. 1998); *Commonwealth v. Dancer*, 331 A.2d 435, 438 (Pa. 1975)—likely barring Cox from raising those claims in his allocatur petition.

ago. Considerations of repose and finality become stronger the longer a decision has been settled. *See id.* at 536-37 (cautioning against 60(b)(6) relief in "cases long since final" and "long-ago dismissals"); *id.* at 542 n.4 (Stevens, J., dissenting) ("In cases where significant time has elapsed between a habeas judgment and the relevant change in procedural law, it would be within a district court's discretion to leave such a judgment in repose."). Here, Cox's direct appeal was decided in 1996 and his initial habeas petition, in which his claims were deemed defaulted, was dismissed in 2004, eight years before *Martinez*.

A movant's diligence in pursuing review of his ineffective assistance claims is also an important factor. Where a movant has not exhausted available avenues of review, a court may deny relief under Rule 60(b)(6). *See id.* at 537 (majority opinion); *Lopez*, 678 F.3d at 1136 & n.1; *In re Fine Paper Antitrust Litig.*, 840 F.2d 188, 194-95 (3d Cir. 1988).

A special consideration arises in this case, as well. Courts must treat with particular care claims raised in capital cases. *Burger v. Kemp*, 483 U.S. 776, 785 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Although Cox did not receive a capital sentence for the murder of Davis, that murder conviction was used as an aggravating factor in arriving at a death sentence in a separate case, albeit one that is still under habeas review. That fact is significant.

Finally, we offer no opinion on the substantiality or lack thereof of Cox's claims or how the District Court should weigh the various factors that may be pertinent

to his Rule 60(b)(6) motion. Nor do we intimate that the Court is precluded from reaching the same conclusion on remand following a more comprehensive analysis. We conclude only that, perhaps with additional briefing by the parties, a more explicit consideration of the facts and circumstances relevant to the concededly timely filed underlying motion would have been, and is now, appropriate.

IV. *CONCLUSION*

We will vacate the order of the District Court denying Cox's Rule 60(b)(6) motion and remand for further proceedings consistent with this Opinion. If, following the proceedings on remand, an appeal is filed, that appeal shall be forwarded to this panel for decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JERMONT COX,	:	CIVIL ACTION
Petitioner	:	No. 00-5188
v.	:	
	:	
MARTIN HORN, et al.	:	
Respondents	:	

FILED
MAY 23 2013
Anita B. Brody, Judge
By */s/ MO* Dep. Clerk

EXPLANATION AND ORDER

Petitioner Jermont Cox was convicted in 1993 of the first degree murder of Lawrence Davis, criminal conspiracy, and possession of an instrument of crime. He was sentenced to life imprisonment. He was represented on at trial, post-verdict motions, and direct appeal by David McLaughlin. A new lawyer, David Silverman, was appointed to represent Cox during his Pennsylvania Post Conviction Relief Act ("PCRA") proceedings. Although Cox, through Silverman, raised multiple claims relating to the ineffective assistance of his trial counsel in his PCRA petition, Silverman dropped every claim but one during the PCRA evidentiary hearing. The PCRA court denied Cox's PCRA petition, and the Pennsylvania Superior Court affirmed.

In 2000, Cox filed a timely federal habeas petition, raising eight claims of ineffective assistance of counsel,

among other claims. On August 9, 2004, I adopted Magistrate Judge Hart's Report and Recommendation to deny Cox's petition. I found that only one claim from his petition had been fairly presented and exhausted in state court: that his trial counsel had provided ineffective assistance when he failed to impeach key witnesses Kimberly and Mary Little with their criminal records. I denied that claim on the merits. The petition presented five other ineffective assistance claims that I determined were procedurally defaulted. Because Cox had failed to show cause and prejudice for the default, I denied those claims without a review of the merits, as required by *Coleman v. Thompson*, 501 U.S. 722 (1991).

Before me now is Cox's Motion for Relief from Final Judgment Pursuant to Fed. R. Civ. P. 60(b)(6). Cox requests that I reopen his habeas petition to examine the ineffective assistance claims that I had previously determined were procedurally defaulted. He relies on the Supreme Court's recent decision of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that

> a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, . . . counsel in that proceeding was ineffective.

Martinez, 132 S. Ct. at 1320. In other words, *Martinez* allows a federal court to examine on the merits ineffective assistance of trial counsel claims that had been defaulted as a result of ineffective assistance of

post-conviction counsel.[1] It held that post-conviction counsel's failure to raise such claims can constitute cause that would excuse a procedural default and allow a court to examine the underlying ineffective assistance claim on the merits.

Here, Cox argues that his lawyer during his PCRA proceedings was ineffective for waiving five claims of ineffective assistance of trial counsel, which became Claims 3, 4, 5, 6, and 8 of his habeas petition. As his PCRA proceedings were his first opportunity to raise these ineffectiveness claims, Cox argues that his PCRA counsel's ineffectiveness provides cause, under *Martinez*, for his default of those claims. As a result, he asks me to reopen his habeas proceedings and examine these claims, which have never been examined on the merits by any court.

Relief from judgment under Rule 60(b)(6) is available only where the petitioner has demonstrated "extraordinary circumstances." *Gonzales v. Crosby*, 545 U.S. 524, 535 (2005). Such circumstances "will rarely

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[1]This relief is available assuming that the ineffective assistance at trial claims could not have been raised earlier, before post-conviction proceedings (such as on direct appeal). Pennsylvania used to require criminal defendants to raise ineffective assistance claims at the earliest state of the proceedings during which the allegedly ineffective lawyer no longer represented them. *See Com. v. Hubbard*, 372 A.2d 687, 695 & n.6 (Pa. 1977). This rule was in effect at the time of Cox's direct appeal and PCRA proceedings. Because Cox was represented by David McLaughlin at both trial and on direct appeal, his first opportunity to raise claims relating to ineffective assistance at trial came during PCRA proceedings. Accordingly, Cox is potentially eligible for relief under *Martinez*.

occur in the habeas context." *Id*. at 535. Neither the Supreme Court nor the Third Circuit has yet ruled whether the new rule announced in *Martinez* constitutes extraordinary circumstances, but the Third Circuit has stated that "intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Morris v. Horn*, 187 F.3d 333, 341 (3d Cir. 1999) (quotations omitted). Only two circuit courts have squarely addressed whether *Martinez* provides a basis for 60(b) relief. The Fifth Circuit ruled that a change in law, including the change announced in *Martinez*, can never be the basis of 60(b) relief. *See Hernandez v. Thaler*, 630 F.3d 420, 430 (5th Cir. 2011); *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) ("The *Martinez* Court's crafting of a narrow, equitable exception to *Coleman*'s holding is hardly extraordinary."). The Ninth Circuit, by contrast, leaves open the possibility that *Martinez* could provide a basis for 60(b) relief. In interpreting *Martinez* in the 60(b) context, the court applied a multi-factor test, developed in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), that examines the nature of the change in law, the petitioner's diligence, the interest in finality, any delay in requesting relief, the connection between the new law and the judgment in question, and principles of comity. *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012).

In this circuit, every district court that has examined the issue has either not ruled squarely on the question or agreed with the Fifth Circuit that *Martinez*'s change of law is not, by itself, an "extraordinary circumstance" justifying relief. *Bender v. Wynder*, No. 05-998, 2012 WL 6737840 (W.D. Pa. Dec. 28, 2012); *Brown v. Wenerowicz*, No. 07-1098, 2012 WL 6151191

(E.D. Pa. Dec. 11, 2012); *Vogt v. Coleman*, No. 08-530, 2012 WL 2930871 (W.D. Pa. July 18, 2012); *Allen v. Walsh*, No. 06-4299, 2013 WL 1389752 (E.D. Pa. Mar. 15, 2013) report and recommendation adopted, No. 06-4299, 2013 WL 1389749 (E.D. Pa. Apr. 4, 2013); *Ford v. Wenerowicz*, No. 09-3537, 2013 WL 460107 (E.D. Pa. Feb. 7, 2013); *House v. Warden, SCI-Mahanoy*, No. 08-0331, 2013 WL 297838 (M.D. Pa. Jan. 24, 2013); *Fitzgerald v. Klopotoski*, No. 09-1379, 2012 WL 5463677 (W.D. Pa. Nov. 8, 2012); *United States v. Correa*, No. 89-163, 2013 WL 203558 (W.D. Pa. Jan. 17, 2013).

Because the Third Circuit has not yet ruled on this issue, I join the other district courts of this circuit in adopting the reasoning of the Fifth Circuit to hold that *Martinez*'s change of law, without more, is insufficient to warrant relief under 60(b)(6).

AND NOW, this 23rd day of May, 2013, it is **ORDERED** that Petitioner's Motion for Relief of Judgment (ECF No. 56) is **DENIED**.

/s/
ANITA B. BRODY, J.