

NO. 14-531  
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

---

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

---

STUART B. LEV  
Assistant Federal Defender  
*Counsel of Record*  
LEIGH SKIPPER  
Chief Federal Defender  
Federal Community Defender Office  
Eastern District of Pennsylvania  
Curtis Building, Suite 545 West  
601 Walnut Street  
Philadelphia, PA 19106  
(215) 928-0520

**COUNTER-STATEMENT OF THE QUESTION PRESENTED**

Should this Court review the interlocutory opinion of the Court of Appeals remanding a Rule 60(b)(6) motion to the District Court for further review, when that opinion does not address the merits of the motion, does not substantially affect the rights of any party, sets extremely stringent standards that must be met before any such motion can be granted, and provides no final judgment for this Court to review?

## **TABLE OF CONTENTS**

COUNTER-STATEMENT OF THE QUESTION PRESENTED .....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE.....	1
A.    The Decision of the Court of Appeals .....	1
B.    Procedural History Leading to the Court of Appeals Opinion. ....	3
C.    Statement of Facts .....	6
REASONS FOR DENYING CERTIORARI .....	9
I.    This Court Should Decline to Review An Interlocutory Order that Contains No Final Judgment and Did Not Resolve Mr. Cox’s Rule 60(b)(6) Motion. ....	9
II.   The Commonwealth Exaggerates the Nature and Scope of a Circuit Split. ....	10
III.  The Court of Appeals Opinion is Consistent with <i>Gonzalez v. Crosby</i> .....	13
CONCLUSION.....	17

## **TABLE OF AUTHORITIES**

### **Federal Cases**

<i>Adams v. Thaler</i> , 679 F.3d 312 (5th Cir. 2012) .....	6, 10, 11
<i>Arthur v. Thomas</i> , 739 F.3d 611 (11th Cir. 2014) .....	12, 13
<i>Artuz v. Bennett</i> , 531 U.S. 4 (2000) .....	13, 14, 15
<i>Boughner v. Sec’y of Health, Educ. &amp; Welfare</i> , 572 F.2d 976 (3d Cir. 1978) .....	15, 16
<i>Camreta v. Greene</i> , 131 S. Ct. 2020 (2011) .....	10
<i>Conway v. Cal. Adult Auth.</i> , 396 U.S. 107 (1969) (per curiam) .....	10
<i>Cox v. Horn</i> , 757 F.3d 113 (3d Cir. 2014) .....	<i>passim</i>
<i>Cox v. Horn</i> , 174 F. App’x 84 (3d Cir. 2006) .....	5
<i>Diaz v. Stephens</i> , 731 F.3d 370 (5th Cir.) .....	11
<i>Goldstein v. Cox</i> , 396 U.S. 471 (1970) .....	9
<i>Gonzalez v. Crosby</i> , 545 U.S. 524 (2005) .....	13, 14, 15, 16
<i>Hamilton-Brown Shoe Co. v. Wolf Bros. &amp; Co.</i> , 240 U.S. 251 (1916) .....	9
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945) .....	9
<i>Jennings v. Stephens</i> , 135 S. Ct. 793 (2015) .....	9, 10
<i>Klapprott v. United States</i> , 335 U.S. 601 (1949) .....	16
<i>Locomotive Firemen v. Bangor &amp; Aroostook R.R.</i> , 389 U.S. 327 (1967) (per curiam) .....	9
<i>Martinez v. Ryan</i> , 132 S. Ct. 1309 (2012) .....	<i>passim</i>
<i>McGuire v. Warden, Chillicothe Corr. Inst.</i> , 738 F.3d 741 (6th Cir. 2013) .....	11, 13
<i>Mount Soledad Mem’l Ass’n v. Trunk</i> , 132 S. Ct. 2535 (2012) .....	9
<i>Nash v. Hepp</i> , 740 F.3d 1075 (7th Cir. 2014) .....	12, 13
<i>Radack v. Norwegian Am. Line Agency</i> , 318 F.2d 538 (2d Cir. 1963) .....	15
<i>Sawka v. HealthEast, Inc.</i> , 989 F.2d 138 (3d Cir. 1993) .....	16
<i>Thompson v. Bell</i> , 580 F.3d 423 (6th Cir. 2009) .....	11
<i>Trevino v. Thaler</i> , 133 S. Ct. 1911 (2013) .....	12
<i>Va. Mil. Inst. v. United States</i> , 508 U.S. 946 (1993) .....	9

### **Federal Statutes & Rules**

28 U.S.C. § 2244(d)(2) .....	14
Fed. R. Civ. P. 60(b)(6) .....	<i>passim</i>

**Other**

Eugene Gressman et al., <i>Supreme Court Practice</i> (9th ed.) .....	9, 10
7 Moore, <i>Federal Practice</i> (1950 ed.) .....	15
11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, <i>Federal Practice and Procedure</i> , §§ 2857, 2864 (3d ed. 1995) .....	16

## STATEMENT OF THE CASE

### **A. The Decision of the Court of Appeals**

At the beginning of its Opinion, the Court of Appeals explained the background of the case:

More than twenty years ago, Jermont Cox was convicted in the Court of Common Pleas of Philadelphia County of first-degree murder and related 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*, —U.S. —, 132 S. Ct. 1309, 182 L.Ed.2d 272 (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.

*Cox v. Horn*, 757 F.3d 113, 115 (3d Cir. 2014). The Court then summarized its ruling that remanded the case to the District Court for further review:

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. . . . 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.

*Id.*

Throughout the body of its Opinion, the Court described the high standards that must be met before any habeas petitioner can obtain relief under Rule 60(b)(6). Reviewing precedent

from this Court and the Third Circuit, the Court explained that, although Rule 60(b)(6) provides a court with broad equitable powers, relief can only be granted when a movant shows truly “extraordinary circumstances” to avoid an extreme hardship. *Id.* at 120, 122. The Third Circuit agreed that *Martinez*, without more, does not satisfy that standard, and that a change of law will “rarely” be an appropriate basis for relief. However, relying on long established Circuit precedent, the Court held that a court reviewing a Rule 60(b)(6) motion must take into account all of the equitable factors suggested by the parties in light of the facts and circumstances of the case. *Id.* at 122 (“a district court must consider the full measure of any properly presented facts and circumstances attendant to the movant’s request”); *id.* at 124.

The Court of Appeals further emphasized that one of the critical factors in the analysis of a Rule 60 motion that is based in part on this Court’s decision *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), is whether the motion was filed within a reasonable time after *Martinez* was decided, and it warned that an untimely motion would fail. *Id.* at 115-16 (one “critical factor” is whether the motion was brought within a reasonable time of the decision in *Martinez*). Other factors would depend on the specific circumstances of the case, but could include the diligence exhibited by the movant, the impact of the proceeding on any capital proceeding, whether the merits of the underlying claims for which the movant seeks review were “particularly substantial,” and “[p]rinciples of finality and comity, as expressed through AEDPA and habeas jurisprudence.” *Id.* at 124-26.

The Court of Appeals decision to remand this matter to the District Court for a multi-factor review explicitly left the merits of the Rule 60(b)(6) motion to the District Court. *Id.* at 126 (“[W]e 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.

. . . 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.”). There is no need for certiorari review of this interlocutory opinion. The opinion did not address the merits of Mr. Cox’s<sup>1</sup> motion and did not issue any final judgment significantly affecting the rights of the parties. Indeed, The Commonwealth may still prevail on remand, rendering their request for review at this time premature and advisory.

**B. Procedural History Leading to the Court of Appeals Opinion.**

On January 14, 1993, Mr. Cox was arrested and charged with the July 19, 1992, murder of Lawrence Davis.

On October 28, 1993, after a non-jury capital trial before the Honorable Carolyn Engel Temin of the Philadelphia Court of Common Pleas, Mr. Cox was convicted of first degree murder, conspiracy, and possession of an instrument of crime. On October 29, 1993, Judge Temin sustained a demurrer to the aggravating circumstance and Mr. Cox was sentenced to life imprisonment. On June 2, 1995, the Pennsylvania Superior Court, in an unpublished memorandum opinion, affirmed Mr. Cox’s conviction and sentence.

Mr. Cox filed a *pro se* Petition for Allowance of Appeal to the Pennsylvania Supreme Court that raised multiple claims of ineffective assistance of trial and appellate counsel. Counsel was appointed to submit a supplemental Petition for Allowance of Appeal. On April 30, 1996, the Pennsylvania Supreme Court denied further review.

On May 28, 1996, Mr. Cox filed a *pro se* petition under the Pennsylvania Post-Conviction Relief Act (PCRA) that again raised multiple claims of trial counsel’s

---

<sup>1</sup> For purposes of clarity in this Brief in Opposition, undersigned counsel will refer to Respondent Jermont Cox as “Mr. Cox,” and Petitioner the Commonwealth of Pennsylvania as “the Commonwealth.”



ineffectiveness. Counsel was appointed. On May 18, 1997, Mr. Cox filed a counseled PCRA petition that also adopted the claims raised in Mr. Cox's *pro se* petition. The PCRA Court subsequently conducted a hearing on the petition. During that hearing, PCRA counsel proceeded on only one of the multiple assertions of trial counsel's ineffective assistance. NT 2/4/98 at 22-24. On July 21, 1998, the PCRA Court denied relief. The Court found that trial counsel's performance had been deficient but concluded that the error would not have changed the verdict and, therefore, denied relief.

Mr. Cox appealed, and counsel filed a brief that raised only the ineffectiveness claim that counsel had pursued at the hearing. On July 15, 1999, the Pennsylvania Superior Court affirmed. The Pennsylvania Supreme Court denied allocatur on December 6, 1999. On August 17, 1999, Mr. Cox filed a second *pro se* PCRA petition, which was subsequently dismissed as untimely.

On October 12, 2000, Mr. Cox filed a Habeas Corpus Petition raising eight claims for relief. The District Court referred the matter to a Magistrate Judge. On July 24, 2003, the Magistrate Judge issued his Report and Recommendation ("R&R"), finding that all but one of Mr. Cox's claims had been procedurally defaulted when PCRA counsel abandoned them before the PCRA Court. The Magistrate Judge addressed the merits of the one claim that PCRA counsel had pursued – whether trial counsel was ineffective when he failed to properly investigate and obtain the criminal records of two Commonwealth witnesses and failed to impeach the witnesses with their motive and bias to lie. The Magistrate Judge concluded that the Superior Court's opinion was neither contrary to, nor an unreasonable application of, established federal law. Thus, he recommended that the petition be denied. R&R at 17, 19.

Mr. Cox timely filed objections to the R&R. The District Court adopted the R&R and denied the habeas petition. The District Court rejected Mr. Cox's contention that state post-

conviction counsel's unjustified abandonment of many of Mr. Cox's meritorious claims served as cause to overcome the procedural default. *See* Objections to R&R at 28-29 (counsel's refusal to raise and pursue meritorious claims that Mr. Cox asked him to pursue). In a separate order issued the same day, the District Court granted a Certificate of Appealability on two issues: (1) whether the state court's resolution of Mr. Cox's ineffective assistance of counsel claim for failing 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 Pennsylvania Supreme Court's failure to remand to the trial court to conduct a hearing to determine whether Mr. Cox wished to proceed *pro se* or with counsel establishes cause to overcome a procedural default.

The Third Circuit affirmed, finding that the state court's determination that Mr. Cox had not been prejudiced by counsel's error in failing to cross examine the key Commonwealth witnesses was not unreasonable because other evidence, including the testimony of the ballistics expert, supported the conviction and refuted the claim of accidental shooting. In addition, the Court found that other claims of ineffective assistance were defaulted and that Mr. Cox had failed to show cause for his default of those claims. *Cox v. Horn*, 174 F. App'x 84 (3d Cir. 2006). A petition for certiorari was subsequently denied.

On June 20, 2012, Mr. Cox filed a Motion for Relief from Final Judgment pursuant to Fed. R. Civ. P. 60(b)(6), arguing that there had been a significant change in procedural law as a result of this Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that, under some limited circumstances, a showing of ineffective assistance of state post-conviction counsel can serve as cause to excuse the procedural default of claims alleging the ineffective

assistance of trial counsel. Mr. Cox argued that extraordinary circumstances justified the grant of Rule 60(b)(6) relief based upon this change in law, coupled with all of the facts of his case.

On May 23, 2013, the District Court issued an Order and Explanation denying Mr. Cox's Rule 60 Motion. In that Order, the District Court noted that the Third Circuit had not yet decided whether there could be circumstances in which *Martinez* would constitute an extraordinary circumstance justifying Rule 60 relief. Recognizing that there appeared to be some differences in other Circuits over the application of *Martinez* to Rule 60, the District Court chose to follow *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012), which, in the District Court's view, held that the change of law announced in *Martinez* can never constitute extraordinary circumstances to allow relief under Rule 60(b)(6).

The Court of Appeals vacated the District Court's ruling and, as discussed above, remanded the matter to the District Court for further review.

### **C. Statement of Facts**

Mr. Cox never denied shooting Lawrence Davis but has always contended that he did not have the intent to kill and was not guilty of first degree murder.

The Third Circuit described the evidence at trial as follows:

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. 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.

*Cox*, 757 F.3d at 116.

Post-conviction proceedings have raised substantial questions about the reliability and accuracy of the Commonwealth's evidence at trial. On habeas review, the Court of Appeals held that trial counsel had performed deficiently in failing to cross examine the Little sisters about their criminal histories and their motivations to shape their testimony to curry favor with the prosecution. The Court found that there was no prejudice, however, because, even without consideration of that testimony, the ballistics expert's testimony substantially refuted Mr. Cox's claim of accident.

New evidence, however, has raised questions about the accuracy of the ballistics expert's testimony. In April 2013, the Philadelphia police department conducted a new evaluation of the forensic evidence in this case. The new report determined that the prior ballistics report was in error and that there were, in fact, two different guns that fired the shots that killed Davis. The new report states that, that, "when compared against each other, [the bullets] were NOT fired from the same firearm." *See* Philadelphia Police Department, Firearms Identification Unit Report 4/11/13 ("New Ballistics Report") at 3. This report not only refutes the ballistics expert's testimony and his conclusion that Mr. Cox could not have fired three times accidentally (since it is now unknown how many shots he fired), but also conflicts with Kimberly Little's testimony about the circumstances of the shooting. This after-discovered evidence undermines the

reliability of the verdict and is the subject of new post-conviction proceedings now pending in the Philadelphia Court of Common Pleas.

## **REASONS FOR DENYING CERTIORARI**

### **I. This Court Should Decline to Review An Interlocutory Order that Contains No Final Judgment and Did Not Resolve Mr. Cox’s Rule 60(b)(6) Motion.**

The Commonwealth seeks review of an interlocutory order of the Court of Appeals that only instructed the District Court on how to analyze Mr. Cox’s Rule 60(b)(6) motion. The Court did not grant Mr. Cox any relief; nor did it direct the District Court to grant relief. The Court’s Order causes little if any harm to the Commonwealth, who may still prevail in their opposition to re-opening the judgment in this case.

This Court should decline review of this non-final order that has not resulted in any judgment on the merits of Mr. Cox’s 60(b) motion. This Court generally denies certiorari petitions, like the petition in this case, that are made after a circuit court’s remand but before a case’s “final judgment has been rendered.” *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S. Ct. 2535, 2536 (2012); *Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *see also* Eugene Gressman et al., *Supreme Court Practice* 280 (9th ed.) (hereinafter “Gressman”). A case’s interlocutory posture is “of itself alone” a “sufficient ground for the denial of the [writ],” *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). This Court prefers to “await final judgment in the lower courts before exercising our certiorari jurisdiction.” *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (“[T]his Court above all others must limit its review of interlocutory orders.”).

This Court’s “power is to correct wrong judgments, not to revise opinions.” *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). Last month, in *Jennings v. Stephens*, 135 S. Ct. 793 (2015), Justice Scalia, writing for the majority, reiterated this Court’s duty to review judgments, not opinions:

Courts reduce their opinions and verdicts to judgments precisely to define the rights and liabilities of the parties. Parties seeking to enforce a foreign court's decree do not attempt to domesticate an opinion; they domesticate a *judgment*. Restatement (Third) of Foreign Relations Law of the United States §§ 481–482 (1987). A prevailing party seeks to enforce not a district court's reasoning, but the court's *judgment*. *Rogers v. Hill*, 289 U.S. 582, 587, 53 S. Ct. 731, 77 L.Ed. 1385 (1933). This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

*Id.* at 799 (emphasis in original).

Here, there is simply no judgment to review. The Court of Appeals did not define the rights and liabilities of any party and did not opine on whether or not Mr. Cox's habeas case can or should be reopened. The Third Circuit simply required the District Court to conduct a more thorough review of the question, one in which all of the considerations both in favor of, and against, the motion will be considered. The Commonwealth's Petition effectively asks this Court to provide the lower courts with an advisory opinion on the factors that should be considered when ruling on a Rule 60(b)(6) motion. This Court disfavors advisory opinions. *Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969) (per curiam); *Camreta v. Greene*, 131 S. Ct. 2020, 2037-38 (2011) (Kennedy, J., dissenting); *see also* Gressman at 248.

Under these circumstances, certiorari should be denied.

## **II. The Commonwealth Exaggerates the Nature and Scope of a Circuit Split.**

The Third Circuit noted some differences in its multi-factored approach to Rule 60(b)(6) and the categorical rule (that a change in law can never be the basis of relief under 60(b)(6)) applied by the Fifth Circuit in *Adams*. *See Cox*, 757 F.3d at 121. Yet the Third Circuit explained that any difference between the Circuits was relatively minor. *Id.* (noting that there may not be “much daylight” between the “never” position taken in *Adams* and the “rarely” position adopted below).

In fact, subsequent Fifth Circuit case law suggests that there may be no actual conflict between the Fifth Circuit’s decision in *Adams* and the Third Circuit decision below. In *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 48 (2013), the Fifth Circuit, though purporting to rely on *Adams*, actually applied a test much like the Third Circuit, as it examined numerous equitable factors before affirming the denial of Rule 60(b)(6) relief. *Id.* at 376-79 (“Diaz has failed to show that the remaining ‘equities’ of his case constitute extraordinary circumstances within the meaning of Rule 60(b)(6).”). In light of *Diaz*, the supposed split between the Third and Fifth Circuits appears inconsequential at best. The *Cox* court noted this clarification of the Fifth Circuit’s approach, *see* 757 F.3d at 122 n.5, yet the Commonwealth’s Petition contains no discussion of, or even citation to, *Diaz*.

The Commonwealth insists that the split is much larger, asserting that the Third Circuit’s opinion also conflicts with rulings from the Sixth, Seventh, and Eleventh Circuits. Petition at 8-10. The Commonwealth is wrong. They misread the decisions and exaggerate the existence of a Circuit split.

In *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741 (6th Cir. 2013), the court addressed the petition of a prisoner who, like Mr. Cox, sought to reopen his habeas proceedings after *Martinez*. The court denied McGuire’s request, but for case-specific reasons. The court did not preclude the possibility that, in some cases, an intervening change of law could constitute an extraordinary circumstance, but held that “this is not such a case.” *Id.* at 750. The court also reaffirmed its long-standing rule, as expressed in *Thompson v. Bell*, 580 F.3d 423, 432 (6th Cir. 2009), that the decision to grant Rule 60(b)(6) relief depends on “a *case-by-case inquiry* that requires the trial court to intensively balance numerous factors . . . .” *McGuire*, 738 F.3d at 750. The court then went on to balance several factors, including the nature of the *Martinez* decision,



its concern about whether *Martinez* or *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), is applicable to Ohio’s appellate system, that similar claims of ineffective assistance were raised and decided on the merits in direct appeal proceedings, and the weakness of McGuire’s underlying claim of ineffective assistance. *Id.* at 750-52; *see id.* at 752 (“McGuire’s claim for ineffective assistance of trial counsel is not particularly compelling”). In short, contrary to the Commonwealth’s assertions, the Sixth Circuit conducted the same type of multi-factor case-by-case analysis that was applied by the Third Circuit.

The Commonwealth’s characterization of *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014), is similarly inapposite. In *Arthur*, the petitioner argued in a Rule 60(b) motion that the rules announced in *Martinez* “excuse” his failure to file his habeas petition within AEDPA’s one-year statute of limitations period. *Arthur*, 739 F.3d at 628. The Eleventh Circuit refused to interpret *Martinez* in that way. *Id.* at 630-31 (“[T]he Martinez rule does not apply at all to Arthur’s case”). In *dicta*, the court went on to opine that, in any event, Arthur had not shown any extraordinary circumstances, and that something more than a mere change in the law is necessary to provide grounds for Rule 60(b)(6) relief. *Id.* at 633. *Arthur* left open what additional circumstances might justify relief. This *dicta* does not differ from the Third Circuit’s opinion here. The Third Circuit agreed that the change in law alone did not establish extraordinary circumstances. Unlike *Arthur*, however, the Third Circuit went on to identify some of the circumstances the District Court should consider in addition to the change in law before determining whether a petitioner has established extraordinary circumstances. Again, there is no significant difference between *Arthur* and *Cox*.

*Nash v. Hepp*, 740 F.3d 1075 (7th Cir. 2014), likewise does not show a significant difference of opinion between the Circuits. *Nash* held that the District Court did not abuse its

discretion in denying the request for Rule 60(b)(6) relief because the state court had specifically advised Nash how to cure his counsel's procedural error but "he did not take advantage of the opportunity to do so." *Id.* at 1077. Moreover, Nash had "absconded from extended supervision and has yet to be found." *Id.* Relying heavily on the fact that Wisconsin provided a procedure that would have allowed the petitioner to correct the state court default, but the prisoner did not avail himself of that remedy, the Seventh Circuit held that Rule 60 relief was not justified.

As with *McGuire* and *Arthur*, *Nash* focused on the specific circumstances underlying the individual case. Such a ruling is consistent with the Third Circuit's opinion. Indeed, the Third Circuit specifically noted that its ruling was consistent with the case-by-case approach of *McGuire* and *Nash*. *Cox*, 757 F.3d at 123 n.7. Whatever differences in approach there may be between the categorical rule of *Adams* and the case-by-case, multi-factor approach adopted by the Third Circuit and the other Circuits have not led to different results and are not significant enough to merit certiorari review.

### **III. The Court of Appeals Opinion is Consistent with *Gonzalez v. Crosby*.**

The Commonwealth argues that this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), adopted a categorical rule that a change of law can never be the basis of Rule 60(b)(6) relief and, thus, forecloses any multi-factorial analysis. *Petition* at 13-15. The Commonwealth reads *Gonzalez* too broadly.

In *Gonzalez*, this Court considered whether its interpretation of the AEDPA statute of limitations in *Artuz v. Bennett*, 531 U.S. 4 (2000), constituted an "extraordinary circumstance" so as to allow relief under Rule 60(b)(6). *Gonzalez*, 545 U.S. at 536. This Court held that it was not. *Gonzalez*, 545 U.S. at 537. *Artuz* addressed a question of statutory interpretation upon

which the Courts of Appeals had been divided.<sup>2</sup> The *Gonzalez* Court found that *Artuz*'s resolution of a disputed statutory question was "hardly extraordinary." *Id.* at 536.

*Artuz* was an ordinary case of statutory interpretation reviewed in order to resolve differences among the Circuits. It is hardly unusual for this Court to intervene in such a situation.

*Martinez* was far different. This Court partially overruled established precedent that had been guiding the lower courts for over twenty years. Indeed, Justice Scalia opined that *Martinez* was "a repudiation of the longstanding principle governing procedural default, which *Coleman* and other cases consistently applied." *Martinez*, 132 S. Ct. at 1324 (Scalia, J., dissenting). This Court's creation of a limited exception to established and routinely followed precedent was extraordinary in a way that *Artuz* was not.

Moreover, *Martinez* differs from *Artuz* in that *Martinez* seeks to protect core constitutional values. "A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Id.* at 1317. *Artuz*, by contrast, interpreted the provisions of a tolling section of the habeas statute of limitations. The fact that *Martinez* seeks to protect and preserve "bedrock" principles makes it different from *Artuz*.

In any event, the Court's *Gonzalez* decision was not based solely on the ordinary nature of its decision in *Artuz*. Rather, this Court also considered the particular circumstances of the petitioner's case, especially the petitioner's lack of diligence in pursuing review of the disputed

---

<sup>2</sup> *Artuz* explained, "This case presents the question whether an application for state postconviction relief containing claims that are procedurally barred is 'properly filed' within the meaning of [28 U.S.C. § 2244(d)(2)]." *Artuz*, 531 U.S. at 5.

statute of limitations issue. *Gonzalez*, 545 U.S. at 537. Certiorari was granted in *Artuz* just after Gonzalez had been denied relief in the Eleventh Circuit. Thus, Gonzalez could have sought Supreme Court review while *Artuz* was pending, but he failed to do so. *Id.*

Mr. Cox, by contrast, had no opportunity to seek relief while *Martinez* was pending, but he acted diligently by seeking review soon after *Martinez* was decided. The Commonwealth does not challenge his diligence.

More importantly, this Court's concern about diligence shows that *Gonzalez* did not set out a blanket rule precluding 60(b) relief because of a change in the law. Rather, this Court performed a case-specific analysis of the equities in the circumstances, including the nature of the decision asserted to be a change in law and Gonzalez's diligence. There was no categorical rule. Indeed, this Court's conclusion in *Gonzalez* made clear that its ruling was case specific: "*In this case*, however, petitioner's Rule 60(b)(6) motion fails to set forth an 'extraordinary circumstance' justifying relief." *Gonzalez*, 545 U.S. at 538 (emphasis added).

The multi-factor approach adopted by the Court of Appeals was not only faithful to *Gonzalez*, but was also consistent with the fundamental purpose of Rule 60(b)(6). The Court of Appeals, consistent with its long standing case law, appropriately balanced the extraordinary circumstances required before relief under 60(b)(6) can be granted with the equitable nature of the remedy. Rule 60(b)(6) allows the court, "upon such terms as are just," to grant relief from a final judgment for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) is a catch-all provision that gives the Court "a grand reservoir of equitable power to do justice in a particular case." *Radack v. Norwegian Am. Line Agency*, 318 F.2d 538, 542 (2d Cir. 1963) (quoting 7 Moore, *Federal Practice* at 308 (1950 ed.)). The purpose of Rule 60 is "to strike a proper balance between the conflicting principles that litigation must be brought to an

end and that justice must be done.” *Boughner v. Sec’y of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978); accord *Klapprott v. United States*, 335 U.S. 601, 615 (1949) (Rule 60(b)(6) “vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice”); see also 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure*. §§ 2857, 2864 (3d ed. 1995)

Yet the Court of Appeals properly understood that Rule 60(b)(6) relief should only be granted in extraordinary circumstances. “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.’” *Cox*, 757 F.3d at 120 (quoting *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir. 1993); *id.* at 122 (movant bears the burden of showing extraordinary circumstances; district court must consider the full measure of any presented facts and circumstances). Moreover, the Court made clear that a change of law, such as that in *Martinez*, standing alone, will not constitute extraordinary circumstances to justify re-opening a habeas proceeding. *Id.*; see also *id.* at 124. The Court further noted that consistent with this Court’s admonition, Rule 60(b)(6) “relief in the habeas context, especially based on a change in federal procedural law, will be rare.” *Id.* at 125. However, even with these limitations, the Court held that, in light of the equitable nature of the Rule, the District Court must consider all of circumstances of the case, something that the District Court had not done. As the Third Circuit explained:

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.

*Id.* at 126. There is simply nothing in the Court of Appeals’ ruling that is inconsistent with *Gonzalez* or otherwise worthy of an interlocutory certiorari review.

**CONCLUSION**

WHEREFORE, this Court should deny the Commonwealth's petition for writ of certiorari.

Respectfully submitted,

---

STUART B. LEV  
Assistant Federal Defender  
*Counsel of Record*  
LEIGH SKIPPER  
Chief Federal Defender  
Federal Community Defender Office  
Eastern District of Pennsylvania  
Curtis Building, Suite 545 West  
601 Walnut Street  
Philadelphia, PA 19106  
(215) 928-0520

Dated: February 6, 2015