No. 15-1193

In the Supreme Court of the United States

DONNIE E. JOHNSON,
Petitioner,

v.

WAYNE CARPENTER, WARDEN,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

HERBERT H. SLATERY III
Attorney General & Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

NICHOLAS W. SPANGLER
Assistant Attorney General
Counsel of Record

P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-3486
Fax: (615) 532-7791
Nick.Spangler@ag.tn.gov

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether a court must categorically deny a Rule 60(b)(6) motion premised on the change in decisional law produced by *Martinez v. Ryan*.

II. Whether the decision of the court of appeals to deny a certificate of appealability should be reversed.

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The order of the court of appeals denying a certificate of appealability is unreported. (Pet. App. at 1a-3a.) The order denying rehearing en banc is also unreported. (Pet. App. at 13a.)

JURISDICTIONAL STATEMENT

The order denying a certificate of appealability was filed August 10, 2015. (Pet. App. at 1a-3a.) The order denying rehearing en banc was filed October 28, 2015. (Pet. App. at 13a.) Justice Kagan extended the time for filing the petition for writ of certiorari first until February 25, 2016, and then until March 25, 2016. The petition was filed March 22, 2016. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel in his defence."

Federal habeas corpus proceedings for petitioners in state custody are governed by 28 U.S.C. § 2254, which provides that the writ "shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A).

STATEMENT OF THE CASE

More than 25 years ago, petitioner murdered his wife by forcing a large garbage bag into her mouth. *State v. Johnson*, 743 S.W.2d 154, 156 (Tenn. 1987).

During trial, the State presented testimony from Ronnie McCoy to establish the following:

> McCoy was a prisoner on work release at the place where appellant was employed. Appellant transported McCoy to and from work each day, checking him in and out at the Shelby County Penal Farm near Memphis. Appellant did so on the date of the homicide. McCoy and two employees of the penal farm testified that appellant transported McCoy to the penal farm after work on that date and checked him in at about 7:17 p.m.
>
> McCoy testified that he left appellant and Mrs. Johnson alone in the office of the camping center while McCoy attended to some chores preparatory to leaving the place of business for the day. He was gone for some ten to fifteen minutes, and when he returned to the office, he testified that he found Mrs. Johnson strangled or suffocated to death.

Id. at 156. A Tennessee jury convicted petitioner of first-degree murder and imposed a death sentence based on the circumstances of the murder and petitioner's prior convictions for armed robbery and aggravated assault. *Id*. at 155, 157. The conviction and sentence were affirmed by the Supreme Court of Tennessee in 1987. *Id*. at 160. This Court denied further review on direct appeal. *Johnson v. Tennessee*, 485 U.S. 994 (1988).

On June 17, 1988, petitioner filed his first application for post-conviction relief in state court. *Johnson v. State*, No. 02C01-9111-CR-00237, 1994

Tenn. Crim. App. LEXIS 162, at *2 (Tenn. Crim. App. Mar. 23, 1994). Among other claims, petitioner asserted that counsel rendered ineffective assistance during sentencing. *Johnson v. State*, No. 61, 1991 Tenn. Crim. App. LEXIS 520, at *2 (Tenn. Crim. App. June 26, 1991). During the post-conviction hearing, trial counsel was asked whether his firm had represented McCoy on a criminal charge, and counsel testified that he was unaware of any such representation. *Johnson v. Bell*, No. 97-3052-DO, 2001 U.S. Dist. LEXIS 25420, at *85 n.36 (W.D. Tenn. Feb. 28, 2001). After hearing from nearly 30 witnesses, the post-conviction court denied relief. *Johnson*, 1994 Tenn. Crim. App. LEXIS 162, at *5. The Tennessee Court of Criminal Appeals affirmed the judgment on June 26, 1991. *Johnson*, 1991 Tenn. Crim. App. LEXIS 520, at *5. The Supreme Court of Tennessee denied further review on March 8, 1993.

Petitioner filed a second application for post-conviction relief while his first was still pending. *Johnson*, 1994 Tenn. Crim. App. LEXIS 162, at *8. The post-conviction court denied relief, and the Tennessee Court of Criminal Appeals initially reversed that judgment. *Id*. at *61. But the Supreme Court of Tennessee granted the State's application for permission to appeal and ordered the Court of Criminal Appeals to reconsider under *House v. State*, 911 S.W.2d 705 (Tenn. 1995), which clarified application of the waiver provision in Tennessee's Post-Conviction Procedure Act. *Johnson v. State*, No. 02C01-9111-CR-00237, 1995 Tenn. LEXIS 597 (Tenn. 1995). On remand, the Court of Criminal Appeals affirmed the judgment of the post-conviction court. *Johnson v. State*, No. 02C01-9111-CR-00237, 1997 Tenn. Crim.

App. LEXIS 297, at *14 (Tenn. Crim. App. Mar. 27, 1997). The Supreme Court of Tennessee denied further review on September 8, 1997.

On November 14, 1997, petitioner filed a petition for a federal writ of habeas corpus in the United States District Court for the Western District of Tennessee. The district court dismissed the petition on March 1, 2001, but granted a certificate of appealability on the non-defaulted portions of the claims that counsel was ineffective in failing to investigate and present mitigating evidence during sentencing. *Johnson v. Bell*, No. 97-3052-DO, 2001 U.S. Dist. LEXIS 25420, at *336 (W.D. Tenn. Feb. 28, 2001). The district court distinguished those portions of the ineffective-sentencing-counsel claims that were properly exhausted in state court from those that were not, as follows:

> Claims that were exhausted in state court. The following claims were exhausted in state court and are, therefore, properly before this Court:
>
> (a) Trial counsel failed to investigate petitioner's background for mitigating circumstances. Trial counsel did not contact petitioner's family members or friends respecting potential mitigating circumstances, nor did they obtain records respecting petitioner's childhood. See Petition at 37.
>
> (b) Petitioner maintained family and friends who cared for him and considered him a good man who worked hard and provided for his family. See Petition at 38.

(c) Trial counsel failed to prepare petitioner for his sentencing hearing testimony. As a result, Mr. Johnson's testimony at the sentencing hearing did not present mitigating circumstances. See Petition at 38-39.

(d) Trial counsel did not have a mental health expert review petitioner's background. See Petition at 39.

Claims that were not raised in state court. The Petition contains a large number of factual assertions that are not supported by any evidence in the record:

(a) Mr. Johnson was born with congenital myopia and, due to this condition, he was unable to see his surroundings until receiving glasses when he was two years old. See Petition at 37.

(b) Because he could not see his surroundings, as a child Mr. Johnson regularly fell down a flight of concrete stairs leading to his home's basement. See Petition at 37.

(c) Mr. Johnson's parents regularly beat him with their fists, their feet, belts, tree limbs, and other objects.

(d) When Mr. Johnson was in the second or third grade, he was hit in the forehead with a baseball bat. See Petition at 37.

(e) From the time he was six years old until he was eight, Mr. Johnson was sexually assaulted by an uncle, a truck driver, when he visited the Johnson family. See Petition at 38.

> (f) To escape the misery of his home, Mr. Johnson ran away. After doing so a number of times, Mr. Johnson's parents placed him in the Jordania Youth Center. See Petition at 38.
>
> (g) At Jordania, Mr. Johnson was sexually assaulted by an inmate, beaten by inmates, and beaten by guards. See Petition at 38.
>
> (h) After being released from Jordania, Mr. Johnson was sent to Pikeville Reform School. See Petition at 38.
>
> (i) At Pikeville, Mr. Johnson was sexually assaulted by an inmate, beaten by inmates, and beaten by guards. See Petition at 38.
>
> (j) After being released from Pikeville, Mr. Johnson was held in the Tipton County Jail for vandalism. Trustees stoned Mr. Johnson with glass bottles. See Petition at 38.

Id. at *266-69. The court noted that petitioner presented no evidence to support the defaulted portions of his ineffective-sentencing-counsel claim and refused to speculate about whether petitioner was prejudiced by the failure to develop such evidence in state court. *Id*. at *269, 271 n.142.

Rejecting the claim that sentencing counsel was ineffective in failing to investigate and present mitigating evidence, the court of appeals carefully balanced the equities:

> We note that the present case contains elements similar to those of previous cases in which this court has been sufficiently troubled by

allegations of ineffective assistance that we either granted the writ or remanded for an evidentiary hearing. Among other factors, this court has found it telling that "trial counsel did not begin preparing for the mitigation phase of the trial until after conviction." *Greer*, 264 F.3d at 676-77; *see also Williams*, 529 U.S. at 395 (finding it significant that counsel began preparation for mitigation only a week before trial). Despite *Greer* and other Sixth Circuit cases that have reached a similar result, *see, e.g., Mason*, 320 F.3d at 624-26 (remanding for evidentiary hearing concerning failure to develop mitigating evidence of petitioner's troubled childhood); *Coleman v. Mitchell*, 268 F.3d 417, 450-52 (6th Cir. 2001) (ineffective assistance during mitigation for failure to investigate or present evidence of troubled background); *Skaggs v. Parker*, 235 F.3d 261, 269-70 (6th Cir. 2001); *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997); *Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir. 1995), we are hard-pressed to reconcile *Cone* with a conclusion that counsel rendered constitutionally ineffective assistance by not vigorously interviewing family members and pressing them to testify during the sentencing phase of the trial. While counsel in *Wiggins* had sufficient information about their client's horrific childhood to render their failure to pursue further investigation professionally unreasonable, there is nothing to suggest that counsel in the instant case ignored known leads that might have helped them to prepare their case in mitigation. As the Court has reminded us, "*Strickland* does not require counsel to

investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 123 S. Ct. at 2541.

Even if we assume, however, that trial counsel performed ineffectively during the mitigation phase of the trial, we find that the deficiency did not prejudice petitioner's case. As already explained, to show prejudice a defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Also, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. Our inquiry is limited to asking whether the testimony of the eight potential character witnesses described above, which include five family members, would have created a reasonable probability that, had the jury heard from them, its verdict would have been different.

Undoubtedly, testimony from these family members would have helped to humanize petitioner by showing the jury that they loved and valued him, that he had been a good son, brother, and parent. On the other hand, we cannot say that this testimony would likely have led to a different result because it is entirely possible, as the Tennessee Court of Criminal Appeals pointed out, that the jury could have

concluded that petitioner was even more culpable because he had enjoyed a loving family but had brutally murdered a wife who loved him. Also, as the district court noted, testimony from family members would have opened the door to rebuttal evidence about petitioner's extramarital affairs, undercutting the positive image presented by his family.

The mitigating evidence proffered by petitioner falls short of the quantum required by *Wiggins*, *Cone*, and *Williams*. In *Williams*, for example, the Court found it unreasonable for the Virginia Supreme Court to conclude that petitioner had not been prejudiced by counsel's failure to investigate and present readily available evidence "graphically describing Williams' nightmarish childhood." 529 U.S. at 395, 397-98. Likewise in *Wiggins*, the Court concluded, "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." 123 S. Ct. at 2543. This court's cases do not particularly strengthen petitioner's position either. *See, e.g., Coleman*, 268 F.3d at 451-53 (finding prejudice where counsel failed to present evidence of petitioner's horrific childhood, his numerous mental and emotional disorders, and his low IQ); *Carter v. Bell*, 218 F.3d 581, 600 (6th Cir. 2000) (finding prejudice where counsel failed to present evidence "of a childhood in which abuse, neglect and hunger were normal"); *Skaggs*, 235 F.3d at 271-72 (finding prejudice for failure to present evidence

> of defendant's mild mental retardation and diminished capacity, "the one topic which may have convinced the jury that a death sentence was not justified"). Given the precedents that inform our decision, we conclude that, even if we assume that trial counsel were professionally deficient under the Sixth Amendment for failing to present mitigating testimony in the form of character witnesses, petitioner has not shown that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Johnson v. Bell, 344 F.3d 567, 573-75 (6th Cir. Tenn. 2003). The court of appeals affirmed the judgment of the district court on September 10, 2003. *Id*. at 575. This Court denied certiorari on April 26, 2004. *Johnson v. Bell*, 541 U.S. 1010 (2004).

On March 8, 2013, petitioner filed a motion for relief from judgment under Fed. R. Civ. P. 60(b). (Pet. App. at 4a-12a.) Citing *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), he alleged a "defect in the integrity" of the district court's procedural default finding as to his claims that trial counsel was conflicted by having previously represented McCoy and ineffective in investigating and presenting mitigation evidence for sentencing. (Pet. App. at 5a-7a.) The district court concluded that petitioner had not shown any "extraordinary circumstance" justifying relief under Rule 60(b) and denied a certificate of appealability. (Pet. App. at 10a-12a.) The court of appeals agreed, finding that petitioner "ha[d] not made a substantial showing of the denial of a federal constitutional right." (Pet. App. at

3a.) The court of appeals also found that that "*Martinez* . . . do[es] not sufficiently change the balance of the factors for consideration under Rule 60(b)(6) to warrant relief." (Pet. App. at 3a.) Petitioner filed a petition for rehearing en banc, which the court of appeals denied on October 28, 2015. (Pet. App. at 13a.)

REASONS FOR DENYING THE WRIT

CERTIORARI IS NOT WARRANTED TO REVIEW THE APPLICATION OF ESTABLISHED PRINCIPLES OF LAW TO DENY A MOTION FOR RELIEF FROM JUDGMENT BECAUSE THE DECISION BELOW DOES NOT CONFLICT WITH ANY OPINION OF THIS COURT, WITHSTANDS THE APPROACH OF ANY CIRCUIT, AND PRESENTS NO IMPORTANT FEDERAL ISSUE.

As an initial matter, petitioner misconstrues the decision below as a categorical rejection of any Rule 60 motion premised on *Martinez*. (Pet. at 16.) In doing so, he relegates the decision to the wrong side of an alleged circuit conflict. (Pet. at 12-21.) The court of appeals did not categorically reject any pairing of Rule 60 and *Martinez*. Rather, the court recognized that deciding a motion under Rule 60(b)(6) calls for a "balance[ing] of factors." (Pet. App. 3a.) The court cited *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013), which affirmed the denial of a Rule 60/*Martinez* motion by acknowledging that "[t]he decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant

command of the court's conscience that justice be done in light of all the facts." (Pet. App. at 3a.) The application for certiorari rests on petitioner's refusal to acknowledge the actual bases for the decision below. Because that decision does not conflict with any opinion of this Court, withstands the approach of any circuit, and presents no important federal issue, certiorari is not warranted.

As he did in his argument for rehearing, petitioner implies that the decision below conflicts with *Haynes v. Thaler*, 569 U.S. ___, 133 S. Ct. 2764 (2013) and *Balentine v. Thaler*, 569 U.S. ___, 133 S. Ct. 2763 (2013), which "apparently rejected [the] argument that Rule 60(b)(6) is categorically unavailable when premised on *Martinez*." (Pet. at 32.) But again, the court of appeals did not categorically reject the pairing of Rule 60 and *Martinez*. (Pet. App. at 3a.) And the remand orders in *Balentine* and *Haynes* do not speak to the categorical viability of a Rule 60 motion premised on *Martinez*. Both cases involved the same Texas court system at issue in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the decision that extended the equitable holding in *Martinez* to Texas. In both cases, the district court rejected Rule 60/*Martinez* motions by holding, as a threshold matter, that *Martinez* was not applicable to Texas convictions under Fifth Circuit precedent. *Balentine v. Thaler*, No. 2:03-CV-039-J, 2012 U.S. Dist. LEXIS 113095, at *3-4 (N.D. Tex. Aug. 10, 2012); *Haynes v. Thaler*, No. H-05-3424, 2012 U.S. Dist. LEXIS 143123, at *8 (S.D. Tex. Oct. 3, 2012). The Fifth Circuit affirmed in both cases before the decision in *Trevino*. *Balentine v. Thaler*, No. 12-70023, 2012 U.S. App. LEXIS 17370, at *9 (5th Cir. 2012); *Haynes v. Thaler*, No. 12-70030, 2012 U.S. App. LEXIS 21354, at

*5 (5th Cir. 2012). Thus, the remand orders simply allowed the lower court to reconsider its erroneous threshold conclusion about *Martinez*'s applicability to the Texas system. *Balentine* and *Haynes* do not conflict with the decision or result here.

Moreover, the decision below does not conflict with any opinion from another circuit. Petitioner overstates a circuit conflict by focusing on whether the circuits categorically reject Rule 60 motions premised on *Martinez*.[1] (Pet. at 12-21.) But petitioner ignores that his motion was denied under the "holistic review of the equities" that he espouses. (Pet. at 18.) Again, the court of appeals denied a certificate of appealability on petitioner's Rule 60/*Martinez* motion with reference to a balance of factors and a prior decision emphasizing the case-by-case nature of the analysis. (Pet. App. at 3a.) To the extent that some circuits may categorically reject Rule 60 motions premised on *Martinez*, petitioner's motion would obviously fare no better

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[1] Petitioner places the Fifth Circuit into the group that categorically rejects Rule 60/*Martinez* motions. (Pet. at 14-15.) But in *Diaz v. Stephens*, 731 F.3d 370, 377 (5th Cir. 2013), the court assumed that case-specific factors applied to the inquiry. Petitioner also claims that the Fourth Circuit has "acknowledged the circuit split." (Pet. at 17.) But in the case he cites, *Moses v. Joyner*, No. 15-2, 2016 U.S. App. LEXIS 4321, at *13 (4th Cir. Mar. 8, 2016), the court observed that "the law on this issue reflects an admirable consistency, as the decisions of other circuits attest." These decisions seriously undermine petitioner's attempt to show a circuit conflict, much less one of exceptional importance. This point is underscored by petitioner's inability to show any significant conflict among the actual results in the cases he cites. *Cf. Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015) (ordering district court to grant relief on Rule 60(b)(6)/*Martinez* motion).

under that approach. Even if the Court perceives the same conflict asserted by petitioner and desires to unify the approaches, this case is a poor vehicle because the resulting decision would not alter the outcome in petitioner's case.

Finally, this case does not present any important federal question. Petitioner challenges the lower courts' application of the well-settled standard for issuance of a certificate of appealability. (Pet. at 33-35.) But this is simply an argument that the court misapplied an otherwise properly stated rule of law, which does not merit review by this Court. *See* Sup. Ct. R. 10. Notably, this Court very recently declined to review the denial of a certificate of appealability on another Tennessee capital inmate's Rule 60/*Martinez* motion. *Irick v. Carpenter*, 136 S. Ct. 894 (2016). The Court should deny petitioner's identically situated certiorari bid in turn.

Like the appellant in *McGuire*, petitioner offered no new developments beyond the decision in *Martinez* to advance his motion. *McGuire*, 738 F.3d at 750. And even if *Martinez* applies to his defaulted conflict-of-interest and ineffective-sentencing-counsel claims, those claims are insubstantial, as evinced by the denial of a certificate of appealability by both the district court and court of appeals.

Trial counsel was asked during the state post-conviction hearing whether his firm had represented McCoy on a criminal charge, but counsel had no knowledge of any such representation. *Johnson*, 2001 U.S. Dist. LEXIS 25420, at *85 n.36. And in any event, McCoy was "subjected to a vigorous cross-examination" and a "scathing" summation by trial counsel. *Johnson*,

2001 U.S. Dist. LEXIS 25420, at *103-05. Thus, the allegation that counsel was conflicted by representing McCoy is without record support, and the claim is dubious even if the prior representation is assumed.

The ineffective-sentencing-counsel claim does not weigh on any issue of extraordinary importance such as innocence of the offense. And *Martinez* only applies to claims that were defaulted during initial-review collateral proceedings. *See Atkins v. Holloway*, 792 F.3d 654, 2015 U.S. App. LEXIS 11730, at *16-17 (6th Cir. 2015) (citing *West v. Carpenter*, 790 F.3d 693, 2015 U.S. App. LEXIS 10732, *11 (6th Cir. 2015), *cert. denied* 2016 U.S. LEXIS 2056 (Mar. 21, 2016)). Relying on language from the *Martinez* opinion, the Sixth Circuit has declined review of defaulted claims that were raised in initial-review collateral pleadings or hearings. *See Atkins*, 792 F.3d at 661. Here, post-conviction counsel presented a claim that sentencing counsel failed to investigate petitioner's background, including social and physiological history, for mitigating circumstances. *Johnson*, 2001 U.S. Dist. LEXIS 25420, at *265-67. The failure to prove certain defaulted allegations during the initial review collateral hearing does not erase that the encompassing mitigation claim was raised during initial review collateral proceedings. Thus, it is not a given that the defaulted allegations of ineffective sentencing counsel would even qualify for consideration under *Martinez*, which only casts further doubt on the importance of the issues and claims underlying the certiorari petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General & Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

NICHOLAS W. SPANGLER
Assistant Attorney General
Counsel of Record

P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-3486
Fax: (615) 532-7791
Nick.Spangler@ag.tn.gov

Counsel for Respondent