No. 15-1193

IN THE

# Supreme Court of the United States

DONNIE E. JOHNSON,

*Petitioner*,

v.

WAYNE CARPENTER, WARDEN

*Respondent.*

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

## PETITIONER'S REPLY BRIEF


Paul R. Bottei
Christopher M. Minton
OFFICE OF THE FEDERAL PUBLIC DEFENDER, MIDDLE DISTRICT OF TENNESSEE
810 Broadway
Suite 200
Nashville, TN 37203
(615) 736-5047

Eric F. Citron
*Counsel of Record*
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
*ec@goldsteinrussell.com*

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

REPLY BRIEF FOR THE PETITIONER ..... 1

I. The Sixth Circuit (Like the Fifth And Eleventh) Has Plainly Adopted A Categorical Bar On *Martinez*-Based Rule 60 Claims. ..... 2

II. The Sixth Circuit Is In Manifest Conflict With Multiple Other Courts. ..... 6

III. The Question Presented Is Of Paramount Importance. ..... 9

IV. This Case Presents An Excellent Vehicle For Resolving The Circuit Conflict. ..... 10

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

### Cases

*Abdur'Rahman v. Carpenter*,
805 F.3d 710 (6th Cir. 2015)..... 5

*Barnett v. Roper*,
941 F. Supp. 2d 1099 (E.D. Mo. 2013)..... 6, 9

*Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefits Fund*,
249 F.3d 519 (6th Cir. 2001)..... 4

*Coleman v. Thompson,*
501 U.S. 722 (1991)..... 11, 12

*Cox v. Horn*,
757 F.3d 113 (3d Cir. 2014) ..... passim

*Lopez v. Ryan*,
678 F.3d 1131 (9th Cir. 2012)..... 6

*Martinez v. Ryan,*
132 S. Ct. 1309 (2012)..... passim

*McGuire v. Warden*,
738 F.3d 741 (6th Cir. 2013)..... 4, 5, 6, 7

*Moses v. Joyner*,
815 F.3d 163 (4th Cir. 2016)..... 6

*Porter v. McCullom*,
558 U.S. 30 (2009)..... 11

*Ramirez v. United States*,
799 F.3d 845 (7th Cir. 2015)..... 6, 7

*Thompson v. Bell*,
580 F.3d 423 (6th Cir. 2009)..... 4

*Trevino v. Thale*,
133 S. Ct. 1911 (2013)..... passim

**Rules**

Fed. R. Civ. P. 60 ..... passim
Fed. R. Civ. P. 60(b)..... 4, 5
Fed. R. Civ. P. 60(b)(6) ..... passim

## REPLY BRIEF FOR THE PETITIONER

The Question Presented is whether a petitioner seeking Rule 60(b)(6) relief, pointing to the change in law wrought by *Martinez*/*Trevino* along with other equitable factors in his case, can ever prevail.[1] The Courts of Appeals have themselves identified a 4-3 split on that precise question, the answer to which will affect a huge number of cases—and capital cases in particular. *See* Pet. 23-25. Respondent concedes that this split not only exists, but leads to petitioners getting relief in some circuits that would be denied in others. BIO 13 & n.1 (acknowledging that the Seventh Circuit reached a "significant conflict" with the Fourth, Fifth, and Sixth Circuits by "ordering [a] district court to grant relief on a Rule 60(b)(6)/*Martinez* claim."). That concession makes this a straightforward case for certiorari review.

Respondent tries to disclaim that the Sixth Circuit actually follows the categorical rule against allowing Rule 60(b)(6) relief premised on *Martinez*/*Trevino*, but that effort plainly fails. Notably, respondent's brief does not even *mention* two of the three cases on the opposite side of the split, and relegates the third to a *cf.* cite at the end of a footnote. Those opinions very clearly describe the precise difference between the position the Sixth Circuit has adopted (following the Fifth and Eleventh Circuits, and recently joined by the Fourth), and the contrary position of those circuits that "do not adopt a *per se* rule that a change in decisional law … [like

[1] A similar question is presented in No. 15-8049, *Buck v. Stephens*, distributed for the April 29 conference.

*Martinez*] is inadequate, either standing alone or in tandem with other factors, to invoke relief from a final judgment under 60(b)(6)." *Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014). These opinions—like the amicus briefs respondent refuses to address—clearly demonstrate that this petition presents a clear circuit split on a question of the greatest possible importance, *see* Br. of NACDL at 7-11; Br. of Former Federal Judges at 7-10—one that can hardly benefit from percolation because many circuits (including the Sixth below) are now denying even a certificate of appealability (COA) to capital petitioners like Johnson. At this point, only a grant of certiorari can resolve a split leading to different outcomes in different jurisdictions in life-or-death circumstances, and this case is an ideal vehicle for that resolution. Certiorari should be granted.

## I. The Sixth Circuit (Like the Fifth And Eleventh) Has Plainly Adopted A Categorical Bar On *Martinez*-Based Rule 60 Claims.

Respondent's only substantial argument is to deny that the Sixth Circuit has actually adopted a categorical rule against Rule 60 relief premised on *Martinez*/*Trevino*. But this argument is either entirely semantic, or entirely false. Even respondent himself eventually concedes that, under now-settled Sixth Circuit precedent, a petitioner whose Rule 60 motion "offer[s] no new developments beyond the decision in *Martinez*" must be denied relief—indeed, can be denied even a COA. BIO 14. That is the very categorical rule that three other circuits have adopted, and three others reject.

As an initial matter, respondent does not contend that either the district court or the Sixth Circuit below actually addressed or balanced the equitable factors in petitioner's case. They quite obviously did not. *See* Pet. App. 10a (district court denying relief exclusively because *Martinez* "does not embody the type of extraordinary or special circumstance that warrants relief under Rule 60(b)(6)"); Pet. App. 3a (Sixth Circuit denying relief, and COA, exclusively because "[t]his court has determined that *Martinez* and *Trevino* do not sufficiently change the balance of the factors for consideration under Rule 60(b)(6) to warrant relief"). Respondent also fails to contest that the Sixth Circuit now routinely denies COAs or merits briefing to Rule 60 movants in Johnson's position. Pet. 16-17. Indeed, respondent does not identify a single factor that Johnson or any other petitioner could point to, in conjunction with *Martinez*, that might entitle him to Rule 60(b)(6) relief. Nor does he say that Johnson's petition did fail—or even should have failed—for lack of such equitable considerations. That's because the basic reality is plain: The Sixth Circuit holds that, if the only *change* a petitioner points to in a Rule 60 motion is *Martinez* or *Trevino*, that petitioner cannot prevail, period.

Respondent can only suggest otherwise by severely misquoting the decision below. For example, he suggests that the Sixth Circuit's decision "recognized that deciding a motion under Rule 60(b)(6) calls for a 'balanc[ing] of factors.'" BIO 11 (quoting Pet. App. 3a) (alteration in BIO). But the Sixth Circuit's actual sentence reads: "This court has determined that *Martinez* and *Trevino* do not

sufficiently *change* the balance of the factors for consideration under Rule 60(b)(6) to warrant relief." Pet. App. 3a (emphasis added). This does not "call for a balancing." Just the opposite: It *denies that there is any need for balancing* when the only change identified is *Martinez* or *Trevino*. As further explained below, this is exactly the view that other circuits have rejected. *See infra* p.XX.

Respondent attempts to undermine this plain holding by noting that the court below cited to *McGuire v. Warden*, 738 F.3d 741, 750 (6th Cir. 2013), which in turn contains a single sentence to the effect that "Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors." BIO 11 (quoting *McGuire*, 738 F.3d at 750). Notably, this quote from *McGuire* is drawn entirely from a previous case unrelated to the Question Presented, which drew it in turn from another, unrelated Rule 60(b)(6) case. *See id.* (quoting *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009)) (quoting *Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefits Fund*, 249 F.3d 519, 529 (6th Cir. 2001)). This is, accordingly, just a generic recitation of broad Rule 60(b)(6) principles, having no particular relationship to the holding in *McGuire* or the actual rule the Sixth Circuit follows in cases like the one presented here.

Instead, as the decision below makes utterly clear, the real action in *McGuire* happens in the very next sentence, which respondent omits. There, the Sixth Circuit held that "[t]he single fact that *Trevino* has been decided does not change the balance of these factors sufficiently to require Rule 60(b) relief." *McGuire*, 738 F.3d at 750; *see* Pet. App. 3a

(identifying this holding as dispositive). The Sixth Circuit has since taken that holding and run with it, denying relief in case after case without balancing any equities because *Martinez* "was a change in decisional law and does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief." *See, e.g.*, Pet. 16-17; *Abdur'Rahman v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015); *see also id.* (approving Rule 60 denial because "there are no newly developed facts since the denial of [petitioner's] habeas petition" apart from *Martinez*).

Ultimately, even respondent must concede that the Sixth Circuit does in fact follow the relevant categorical rule, because this is the only possible way to defend its denial of a COA to a capital petitioner like Johnson. Respondent says that result was appropriate because "[l]ike the appellant in *McGuire*, petitioner offered no *new developments* beyond the decision in *Martinez* to advance his motion." BIO 14 (emphasis added). That, however, is the Question Presented: Can a petitioner prevail under Rule 60(b)(6) by pointing to the new development of *Martinez/Trevino* in addition to other, pre-existing equitable considerations in his case? Respondent ultimately agrees that the Sixth Circuit's answer is no, and it is that answer that needs review here, because three other circuits have already said yes.

Indeed, petitioner is hardly alone in suggesting that the Sixth Circuit has adopted the categorical rule. For example, when the Third Circuit in *Cox* adopted the opposite rule that a petitioner in Johnson's position could potentially receive Rule 60(b) relief, *see Cox*, 757 F.3d at 124, the government sought certiorari asking this Court to resolve the

disagreement between that court *and the Sixth Circuit*. *See* Petition at 9, *Wetzel v. Cox*, No. 14-531 (Nov. 5, 2014). Likewise, when the Fourth Circuit recently joined the split and adopted the same categorical bar, it cited the Fifth, *Sixth*, and Eleventh Circuits for support, while distinguishing their view from the Third Circuit's in *Cox*. *See Moses v. Joyner*, 815 F.3d 163, 169 (4th Cir. 2016); *compare* Pet. 13-17 (identifying identical "consistency" among same three circuits). Finally, the district court in *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1117 (E.D. Mo. 2013), likewise grouped the Sixth Circuit's decision in *McGuire* with others (like the Fifth) that deny the possibility of Rule 60 relief premised on *Martinez*, before it adopted the contrary view of the Ninth Circuit in *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012), and granted relief.

## II. The Sixth Circuit Is In Manifest Conflict With Multiple Other Courts.

Apart from equivocating about the Sixth Circuit's categorical position, BIO 13-14, respondent essentially concedes the existence of a substantial circuit split. Indeed, although it asserts in a cryptic footnote that petitioner did not "show any significant conflict among the actual results in the cases he cites," BIO 13 n.1, respondent then immediately concedes that the Seventh Circuit's decision in *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015)—cited *passim* in the petition—ordered a "district court to grant relief on a Rule 60(b)(6)/*Martinez* motion." BIO 13 n.1. Beyond that, respondent engages in no analysis whatsoever of *Ramirez, Cox*, or *Lopez* —the latter two of which do

not even appear in the table of authorities. This is a telling omission because these cases distill the very precise split respondent attempts to deny: In each of these cases, petitioner's *Martinez*-based Rule 60 motion received consideration (to the point of full relief on the merits) that the Sixth Circuit would clearly deny.

Take the Seventh Circuit's decision in *Ramirez*. There, as here, the only *change* that the petitioner identified between the denial of his habeas petition and his Rule 60 motion was *Martinez*, which permitted him to attempt to excuse his default of claims the court refused to consider before. *See* 799 F.3d at 849. The Seventh Circuit noted that while all circuits seemed to require something beyond *Martinez* itself to justify Rule 60 relief, some (like the Fifth Circuit) would not consider the broader equities and simply deemed *Martinez* insufficient. *See id.* at 851. It then sided with the more "flexible, multifactor approach." *Id.* (adopting Third Circuit's position from *Cox*). Having done so, the court identified the "[p]ertinent considerations," as including "the diligence of the petitioner; whether alternative remedies were available but bypassed; and whether the underlying claim is one on which relief could be granted." *Id.* at 851. Once again, not one of these is a "new development beyond the decision in *Martinez*," BIO 14 (citing *McGuire*), but the court balanced these equitable considerations and ordered habeas relief. Thus, Ramirez was able to obtain relief where it would certainly have been denied in the Sixth Circuit—even on respondent's understanding of the Sixth Circuit's rule.

The same point applies to *Cox*, a decision whose absence from the BIO is particularly baffling. There, as here, the only *change* the petitioner identified was the intervening decision in *Martinez*. But after very carefully explaining that a court cannot stop its Rule 60(b)(6) analysis by discussing only the applicable change in law, the Third Circuit rejected the contrary views of the Fifth and Eleventh Circuits, reversed the district court, and went on to identify a series of other factors for the district court to consider on remand in support of Cox's request for Rule 60 relief. *See Cox*, 757 F.3d at 121-26. Once again, those factors were not "new developments," BIO 14; they included the merits of the underlying claims, the petitioner's diligence, and the capital nature of the case. *Id.* at 124-26. Cox's request for Rule 60 relief remains pending and could well be granted; once again, it would already have been denied in the Sixth Circuit.

*Cox* also precisely isolates the disagreement between the two sets of circuits regarding the Question Presented. *Cox* expressly disagreed with the decision of the Fifth and Eleventh circuits to "end[] [their] analysis after determining that *Martinez*'s change in the law was an insufficient basis for 60(b)(6) relief and … not consider whether the capital nature of the petitioner's case or any other factor might counsel that Martinez be accorded heightened significance … or provide a reason or reasons for granting 60(b)(6) relief." *Cox*, 757 F.3d at 122. That is *exactly* what the Sixth Circuit did here, considering nothing more than whether *Martinez* and *Trevino* were sufficient, in isolation, to "change the

balance" for Rule 60 relief, and holding that they would never be so. Pet. App. 3a.[2]

These cases that the BIO refuses to discuss thus unambiguously demonstrate an outcome-determinative difference in how the circuits currently address *Martinez*-based Rule 60 motions. Relief granted in other courts would be denied in the Sixth Circuit and, conversely, cases like this one in which the Sixth Circuit refused to even consider relief would be eligible for a holistic consideration of the equities in circuits like the Third, Seventh, and Ninth. That circumstance, which the BIO fails to even contest, necessitates this Court's immediate review.

## III. The Question Presented Is Of Paramount Importance.

Respondent makes no effort to contest that the question present is recurring, particularly in capital cases. *See* Pet. 23-25. Nor does the BIO attempt to rebut multiple *amici*'s demonstration of the

[2] Likewise, the only *change* the capital petitioner in *Barnett* pointed to was *Martinez*. Nonetheless, after rejecting the views of the Fifth and Sixth Circuits, the court went on to consider *preexisting* aspects of Barnett's case that recommended in favor of Rule 60 relief, because "a consideration of extraordinary circumstances under Rule 60(b)(6) relies on several factors, not just a determination as to whether the nature of the intervening law in *Martinez* is extraordinary." *Barnett*, 941 F. Supp. 2d at 1118. These factors ultimately led the court to vacate Barnett's death sentence; if he were located in Tennessee, he would still be on death row.

importance of preserving district court discretion in the Rule 60 context in both capital cases and beyond. His brief suggestion that this issue "does not weigh on any issue of extraordinary importance such as innocence of the offense," BIO 15, is inexplicable. As this case illustrates, the availability of Rule 60 relief may well make the difference between life and death.

## IV. This Case Presents An Excellent Vehicle For Resolving The Circuit Conflict.

Respondent likewise makes little effort to deny that this case presents an especially ideal vehicle for addressing the question that has split the circuits. *See* Pet. 27-30. What efforts he makes are entirely unconvincing.

This case presents the circuit conflict in stark relief. Because the only *change* petitioner can point to is this Court's decisions in *Martinez* and *Trevino*, he was denied any possibility of relief (or even a chance to argue for it on appeal) under the rule applied in the Fourth, Fifth, Sixth, and Eleventh Circuits. Because that fact does not preclude relief in the Third, Seventh, and Ninth Circuits, he would have been entitled to an equitable balancing of factors.

Moreover, there is every reason to believe that Johnson would obtain relief in a circuit that weighed the equities. Pet. 28-30. Respondent does not contest, for example, that Johnson pursued Rule 60 relief with great diligence after *Martinez* and *Trevino* were decided, or that these decisions importantly changed the law. *Id*. And he does not deny that the capital nature of Johnson's sentence weighs in favor of relief. *Id*.

Nor does respondent credibly rebut Johnson's showing that he has a strong case for habeas relief on the merits. Pet. 29. Respondent ventures in passing that Johnson's claims might not "qualify for consideration under *Martinez*," because they were "raised in initial-review collateral proceedings," even though they were in fact deemed "defaulted." BIO 15. But this argument is incomprehensible. The BIO itself contains a long list of "claims" that "were not raised in state court," and so deemed defaulted—including the critical points regarding Johnson's years of physical and sexual abuse as a child. BIO 5-6. The district court declined to let petitioner develop more evidence for these claims on initial federal habeas precisely "because the negligence of post-conviction counsel would not excuse a procedural default" so that "no useful purpose would be served by such an inquiry." Pet. App. 93 n.142. Respondent successfully asked the federal courts to deem these claims defaulted under *Coleman* and prevailed. It is far too late to change his tune.

By simple *ipse dixit*, respondent says that Johnson's ineffective-assistance claim regarding his sentencing is "insubstantial." BIO 14. But the conduct of his sentencing counsel is materially indistinguishable from what was found ineffective by this Court in *Porter v. McCullom*, 558 U.S. 30 (2009). *See* Pet. 5-6. Moreover, respondent's own extended citation to the Sixth Circuit's decision on Johnson's first petition shows that the court very nearly granted Johnson relief even considering only the very narrow set of claims that it deemed preserved, *see* BIO 6-10, admitting that Johnson's case "contains elements similar to those of previous cases in which

this court has been sufficiently troubled … that we either granted the writ or remanded for an evidentiary hearing." *Id.* 6-7. Adding the defaulted claims regarding Johnson's brutal childhood abuse—claims the district court was "deeply troubled by its inability to consider," Pet. App. 93a n.142—could easily have made the difference.

Johnson's defaulted ineffective-assistance claims are precisely the kinds of claims that *Martinez* and *Trevino* should be able to resuscitate—claims of serious potential merit, diligently asserted, in a capital context, where even the courts that initially deemed them defaulted under *Coleman* found that result "deeply trouble[ing]." *Id.* Indeed, the BIO does not argue otherwise, leaving unrebutted petitioner's argument that the rule in the Fourth, Fifth, Sixth, and Eleventh Circuits is incorrect. Pet. 30-33.

## CONCLUSION

Certiorari should be granted.

Respectfully submitted,

Paul R. Bottei
Christopher M. Minton
OFFICE OF THE FEDERAL PUBLIC DEFENDER, MIDDLE DISTRICT OF TENNESSEE
810 Broadway
Suite 200
Nashville, TN 37203
(615) 736-5047

Eric F. Citron
*Counsel of Record*
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
*ec@goldsteinrussell.com*

April 26, 2015