CAPITAL CASE
NO EXECUTION DATE SET

No. 15-____

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

DAVID BRUCE WESTBROOKS, WARDEN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Paul R. Bottei
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
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ecitron@goldsteinrussell.com

CAPITAL CASE

QUESTIONS PRESENTED

In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), this Court held that ineffective assistance of trial counsel claims defaulted by absent or ineffective state post-conviction counsel can be revived on federal habeas. This exception to *Coleman v. Thompson*, 501 U.S. 722 (1991), was rooted in the idea that petitioners should have the chance to press critical constitutional claims—like the right to effective representation itself—at least once through competent counsel. *See Martinez*, 132 S. Ct. at 1316.

In response, many petitioners facing capital sentences have used Federal Rule of Civil Procedure 60(b)(6) to try to reopen habeas judgments against them in which *Coleman* stood as a barrier to their claims. The circuits are divided on whether such motions can ever prevail: Some believe they can if the case-specific equities favor extraordinary relief; others believe that no such petition can be granted. The circuits are also divided as to whether *Martinez* embraces only defaulted claims of ineffective assistance at *trial*, or whether claims of ineffective assistance on *appeal* qualify as well. This Court has already granted and held cases presenting the first issue, *see Buck v. Stephens*, No. 15-8049; *Johnson v. Carpenter*, No. 15-1193. The questions presented are:

1. Is a Rule 60(b)(6) motion premised on *Martinez*/*Trevino* categorically ineligible for relief?

2. Do *Martinez* and *Trevino* apply to claims of ineffective assistance of appellate counsel which—like the claims in *Martinez* and *Trevino*—could not be brought before state post-conviction review?

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are named in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court held that attorney negligence in state post-conviction review was generally not cause to excuse the default of claims during state proceedings for purposes of federal habeas. In two recent cases, however, this Court carved out an important exception. Under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the procedural default of a claim of ineffective assistance of trial counsel (IATC) may be excused in federal habeas proceedings if state post-conviction counsel was itself absent or ineffective in failing to press that claim. *See Trevino*, 133 S. Ct. at 1918. The fundamental rationale of these two cases was that, where bedrock constitutional rights like those that undergird the adversary system are concerned, defendants should have at least one chance to raise their claims through competent counsel. Otherwise, a serious claim that petitioner was deprived of a core constitutional right could be erased without any court properly considering it at all. *See Martinez*, 132 S. Ct. at 1317 ("[I]f the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims.").

Two questions have followed in the immediate wake of those decisions, both of which have resulted in open and acknowledged disagreements in the lower courts, and both of which are presented here. The former is also presented in a case this Court has already granted, *see Buck v. Stephens*, No. 15-8049, and this petition should at the very least be held

pending that case's resolution. But the latter question is also certworthy, and if this case is not remanded following the resolution of *Buck*, the Court should then grant plenary review on the second question as well.

The first question—presented in *Buck* and another case the Court appears to be holding for *Buck*, *see Johnson v. Carpenter*, No. 15-1193—is whether *Martinez* and *Trevino* can serve as adequate premises for a motion for relief from judgment under Rule 60(b)(6). The Third, Seventh, and Ninth Circuits have correctly said yes: If (and only if) the case otherwise presents equitable factors favoring extraordinary relief under Rule 60(b)(6), then *Martinez* and *Trevino* could allow courts to reopen judgments in which valid claims that would have been deemed defaulted under *Coleman* were not decided on the merits. In contrast, the Fourth, Fifth, Sixth, and Eleventh Circuits have adopted a *per se* rule that, if the Rule 60 movant relies on the change in law created by *Martinez* and *Trevino*, his motion is categorically ineligible for relief, no matter how serious the underlying IATC claim or how heavily balanced the equities are in the movant's favor. Both *Buck* and *Johnson* arise from circuits—the Fifth and Sixth, respectively—in which their petitions, (and others like them) have been deemed necessarily ineligible for relief. Because this case comes from the same circuit as *Johnson* (the Sixth) and presents the same issue—and is, in fact, discussed in the *Johnson* petition itself, *see* Petition, *Johnson v. Carpenter*, No. 15-1193 at 16-17; Reply, *Johnson*, No. 15-1193 at 5—this petition should clearly be held for the resolution of the question presented in *Johnson* and *Buck*.

If, on the other hand, this case is not ultimately remanded following *Buck*'s resolution, certiorari

should be granted on the second question presented. The circuits are also in open disagreement about whether a petitioner can use *Martinez* and *Trevino* to revive a claim of ineffective assistance of *appellate* counsel (IAAC) defaulted by ineffective state habeas counsel, or whether only trial ineffectiveness claims qualify for relief. Three circuits (the Sixth, Eighth, and Tenth) have adopted an illogical reading of this Court's decision in *Martinez*, limiting it exclusively to claims of IATC and nothing more. Meanwhile, the Ninth Circuit has correctly recognized that the "centerpiece of the Court's analysis in *Martinez* is the fundamental importance of effective assistance of counsel guaranteed by the Sixth Amendment," whether at the trial or appellate stage, and so has extended *Martinez* to IAAC claims as well. *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1292 (9th Cir. 2013). The Ninth Circuit clearly has the better of the legal argument; the unassailable logic of extending *Martinez* to IAAC claims was recognized even by the dissenters in *Martinez* itself. *See Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) ("There is not a dime's worth of difference in principle between those [ineffective-assistance-of-trial-counsel cases] and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised.").

This second question is also ripe for plenary review: The circuits are avowedly divided, and even those that have sided against petitioner's view (including the Sixth Circuit below) have identified little to no logical basis for that decision. Instead, they feel bound not to extend any exception to *Coleman* unless and until this Court provides an explicit directive to do so—even if *Martinez* has already explained why allowances are

appropriate when a petitioner has never had occasion to properly present a claim before the courts. Under those conditions, it is necessary for this Court to intervene because further clarity will not arise from percolation, and the circuits are in fact waiting for this Court to act.

This case also shows why this issue should not wait. In the Ninth Circuit, petitioner Abdur'Rahman would almost certainly have been relieved of his capital sentence already, while in the others, his claim cannot even be heard. The holding of *Martinez* quite obviously extends to claims of ineffective assistance on appeal—contested appeals, just like trials, are also a "bedrock principle in our justice system." *Martinez*, 132 S. Ct. at 1317. This case is a perfect vehicle through which to resolve this split and rationalize this area of the law.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Abu-Ali Abdur'Rahman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a) is reported at 805 F.3d 710. The district court's underlying decision (Pet. App. 31a) is unreported, but available at 2013 WL 3865071. The Sixth Circuit's order denying rehearing en banc (Pet. App. 46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2015. Pet App. 1a. The court of appeals denied a timely petition for rehearing en banc on March 2, 2016. Pet App. 46a. Justice Kagan extended the time for this petition to July 29, 2016, *see* No. 15A1190. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case has an extended procedural history that is both byzantine and dispiriting. In brief, petitioner Abdur'Rahman has plainly meritorious claims of both ineffective assistance of counsel and *Brady* violations, but fulsome review of those claims has been either prevented entirely or severely hamstrung by a series of procedural rulings by the same divided panel of the Sixth Circuit that has repeatedly denied him relief. Those procedural decisions, in turn, have been reversed repeatedly by either this Court or the *en banc* Sixth Circuit. If petitioner Abdur'Rahman can now, finally, obtain that fulsome review, he will almost certainly prevail in obtaining relief from his capital sentence.

That is because his state counsel failed—among other things—to preserve a claim of cumulative error, which has allowed the many serious deficiencies in petitioner's trial to be considered and rejected one by one for lack of prejudice. Even some of those one-by-one decisions are now clearly wrong: For example, the complete failure of petitioner's counsel to put on a mitigation case of horrific childhood abuse, *see infra* p.10-11, would now be regarded as prejudicial ineffective assistance of counsel, contrary to the Sixth

Circuit's previous holding in this case. *See Abdur'Rahman v. Colson*, 649 F.3d 468, 478 (6th Cir. 2011) (Cole, C.J., dissenting) (explaining that, in light of subsequent decisions in *Porter v. McCollum*, 558 U.S. 30, 31 (2009) (per curiam), and *Rompilla v. Beard*, 545 U.S. 374 (2005), the Sixth Circuit's previous decision "was wrong then and it has aged poorly"). Accordingly, if *Martinez/Trevino* now allows petitioner to raise the ineffectiveness of his trial or appellate counsel in failing to preserve his cumulative error claim, he will prevail in getting his death sentence vacated. Indeed, just one of those errors alone should be enough for him to prevail—although the aggregation of that error with the particular *Brady* violations at issue makes his entitlement to relief far more vivid still.

Because this case's history is so extended, the recitation below is limited to only the most pertinent details. To the extent that more procedural history is necessary, it is further summarized in two previous Sixth Circuit decisions: *In re Abdur'Rahman*, 392 F.3d 174, 177 (6th Cir. 2004)*, cert. granted, judgment vacated sub nom. Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005), and *Abdur'Rahman,* 649 F.3d at 478.

I. Initial Trial Proceedings

In 1986, Nashville drug dealer Patrick Daniels was found dead after two men forcibly entered his apartment. Petitioner (previously known as James Lee Jones, Jr.) was ultimately tried for the murder; his co-defendant, Harold Devalle Miller, was the principal witness against him.

At the jury trial, Miller testified that they had intended to rob Daniels by brandishing unloaded guns,

but that petitioner had gone further and fatally stabbed Daniels. *Abdur'Rahman*, 649 F.3d at 471. Petitioner denied this account. He instead explained that they had entered the apartment on behalf of the Southeastern Gospel Ministry (SEGM), a paramilitary religious group, as part of an effort to fight drug dealing in the community. Petitioner testified that he had not intended for Daniels to be harmed—that they had only meant to scare Daniels so that he would stop dealing marijuana and cocaine in their neighborhood. *Id.* at 473. While the State knew that Miller had made pre-trial statements supporting petitioner's account, the prosecution withheld that exculpatory evidence. *Abdur'Rahman v. Bell*, No. 3:96-0380, 2009 WL 211133, at *7 (M.D. Tenn. Jan. 26, 2009).

As Chief Judge Cole described it, "Miller sold the lie that sent Abdur'Rahman down the river … recit[ing] a motive that dovetailed with the prosecution's case for death." *Abdur'Rahman*, 649 F.3d at 481. In fact, Miller's co-conspirator testimony was critical because it supplied one of the aggravating factors for the jury's consideration of the death penalty—whether the death occurred in the course of a robbery. Without Miller's (secretly contradictory) testimony, the case for robbery was thin; the Tennessee Supreme Court would later determine that the remaining evidence was only "circumstantial." *State v. Jones,* 789 S.W.2d 545, 550 (Tenn. 1990). But petitioner was deprived of the chance to effectively cross-examine the key witness against him by the State's suppression of evidence. *See Abdur'Rahman*, 649 F.3d at 482 (Cole, C.J., dissenting) ("Had defense counsel known that Miller had told the prosecution something entirely different, the defense would have

nullified Miller's testimony."). And petitioner's counsel gravely exacerbated that same harm when he failed even to ask the Court for the critical jury instruction that accomplice testimony cannot be accepted in the absence of corroboration. Pet. App. 34a-35a.

Another key aggravating factor in the consideration of petitioner's penalty, likewise skewed by suppression of exculpatory evidence, was the State's representation to the jury that petitioner had been previously convicted of second-degree murder in a drug-turf war in a federal reformatory. This, the State knew, was categorically false: While petitioner had killed fellow inmate Michael Stein, the motive had nothing to do with drugs. On top of a childhood of horrifying abuse, *see infra* p.10-11, petitioner was repeatedly raped at his detention center, and (according to the facility's own correctional director), Stein was a "sexual 'predator' who 'preyed on … younger, weaker inmates[, like Abdur'Rahman,] for sex.'" *Abdur'Rahman*, 649 F.3d at 481 (Cole, J. dissenting) (citations omitted). The prosecution suppressed these facts, however, and petitioner's incompetent counsel never sought them out. If counsel had, he would have learned that even the "government [had taken] the position, based on an FBI investigation, that Stein 'was a member of a group of inmates who were attempting to apply extortionate pressures on [Abdur'Rahman] to submit to Stein's demands for homosexual activities.'" *Id*. Thus, the jury was told that petitioner had a history of drug-related violence, rather than a history of grotesque abuse from which the state itself did not protect him.

Indeed, counsel's most striking error at the trial was the absolute failure to put on any evidence of mitigating circumstances that could have humanized

his client at sentencing. No effort was put into investigating petitioner's extreme victimization in childhood or resulting psychosis, *see infra* p.10-11, and counsel put on essentially no mitigation case as a result. Without anything to weigh against the State's aggravating factors—themselves inflated by the prosecution's suppressions—the jury recommended capital punishment over life imprisonment. Petitioner was ultimately sentenced to death, while Miller reached a plea agreement for his role in the attack, and was ultimately released on parole.

II. State Post-Conviction Review

The Supreme Court of Tennessee upheld the capital sentence on direct appeal. Although it chided the prosecution for "improper" conduct "border[ing] on deception" in yet another trial abuse not even discussed above, it found no prejudice, and affirmed. *Jones,* 789 S.W.2d at 550.

The Tennessee Court of Criminal Appeals considered petitioner's state post-conviction challenge in 1995. Petitioner's counsel in those proceedings included his direct appeal counsel, who apparently accused himself—under oath—of ineffective assistance on appeal, owing to his complete lack of experience in such cases. *See Jones v. State*, 1995 WL 75427, at *2 (Tenn. Crim. App. Feb. 23, 1995). The Court rejected all of petitioner's arguments in summary fashion, concluding that the jury might have counted petitioner's history of mental instability against him, *id.* at *2, and that information suppressed by the state would not have helped the defense, *id.* at *3. No claim even generally relating to jury instructions about accomplice testimony was raised or decided. *Id.*

III. Initial Federal Habeas Proceedings

Petitioner then sought federal habeas corpus relief shortly before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), so that his case is governed by the less stringent standards that previously applied to the writ. In 1998, the district court granted relief with respect to petitioner's capital sentence, concluding that his constitutional rights had been violated by the "utterly ineffective assistance" of his trial counsel in failing to investigate or put on a mitigation case. *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1077 (M.D. Tenn. 1998).

Trial counsel's callous disregard for petitioner was both documented (he referred to his client in one memo as a "dumb motherf---er") and reflected in his performance. *See* Mot. for Certificate of Commutation at 9 n.5, *Abdur'Rahman v. Tennessee*, No. M1988-00026-SC-DPE-PD (Tenn. Dec. 21, 2001). The district court found that counsel had committed a "serious failure" by neglecting to investigate or even request petitioner's "extensive mental health records, or his educational, prison, or military records." *Abdur'Rahman*, 999 F. Supp. at 1094. It found that the jury should have heard mitigating evidence about petitioner's dysfunctional upbringing, about the childhood sexual abuse committed against him by his father, about the further sexual violence he suffered as an adult, about his family history of mental illness, about his own history of mental illness, about his efforts to contribute to society despite this hardship, about the circumstances of the crime itself, and about the real circumstances of the 1972 murder conviction. *Id.* at 1092-93.

The district court made factual findings concerning the extensive evidence the jury never heard, and which state post-conviction counsel had incompetently failed to develop. It found that petitioner "received regular beatings with a leather strap from his father," that his father "hog-tied" him naked "in a locked closet[] and tethered him to a hook with a piece of leather tied around the head of his penis," that his "father struck Petitioner's penis with a baseball bat," and that his father once "required him to eat a pack of cigarettes" as punishment for smoking only to make petitioner eat his own vomit when he could not keep the tobacco down. *Id.* at 1097-98. Other members of petitioner's family were found to have suicidal tendencies, and petitioner himself attempted suicide on multiple occasions. *Id.* at 1098. Petitioner also suffered from "Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior." *Id*. at 1099.

Reflecting on this "abundance" of mitigating evidence, the court acknowledged that "[p]eople with bad childhoods can be sentenced to death[,] [b]ut[] the Constitution requires that these significant facts should have been presented to the jury at sentencing by counsel." *Id.* at 1098. It concluded there was "more than a reasonable probability that, had trial counsel introduced the mitigation evidence … the result of the sentencing would have been different" and "that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome." *Id.* at 1096.[1]

[1] The district court also found that the prosecution had indeed suppressed the transcript of the 1972 homicide trial and

The state appealed the district court's judgment, but did not contest the finding that petitioner's constitutional rights had been violated by ineffective assistance of counsel. Instead, the state's challenge was limited to the propriety of the district court's evidentiary hearing. The Sixth Circuit rejected this narrow claim, finding that the district court acted within its authority in compiling its record. *Abdur'Rahman v. Bell*, 226 F.3d 696, 704 (6th Cir. 2000). Nonetheless, two members of the panel decided *sua sponte* to reverse the district court's judgment on the merits of the IATC claim, without briefing or argument on the question. The majority allowed that there was "mitigating evidence that a sentencer might find to be compelling," but held that the omission did not prejudice petitioner because the evidence was not unequivocally good for his case—the jury might have treated evidence of his mental instability as a double-edged sword and used it against him. *Id.* at 708-09.

Shortly thereafter, this Court would hold that prejudice necessarily exists when trial counsel fails to conduct a meaningful investigation or put on any meaningful mitigation case. *See Rompilla*, 545 U.S. at 393; *Porter*, 558 U.S. at 31 (finding assumption that comparable mitigation evidence would have no probability of persuading sentencer was "objectively unreasonable"). Chief Judge Cole later commented on the parallels, noting that "Abdur'Rahman's trial was constitutionally deficient for the same reasons,"

---

mischaracterized the act as the product of a "drug turf war" rather than as a response to petitioner's sexual victimization, but it did not grant relief on a misconduct theory. *Id*. at 1095.

Abdur'Rahman, 649 F.3d at 479, and that, accordingly, the panel's initial decision, in addition to being procedurally irregular, "was wrong then and … has aged poorly." *Id.* at 478.

IV. Rule 60(b)(6) Proceedings

Petitioner filed his first Rule 60(b) motion in 2001, seeking relief on the ground that a new Tennessee Supreme Court rule meant that his *Brady* and prosecutorial misconduct claims had new vitality. The district court rejected this motion as a precluded attempt at a successive habeas application. Petitioner's appeal went to the same Sixth Circuit panel that rejected his initial habeas claim. That panel, by the same 2-1 majority, again ruled against him.

The panel's decision was reversed *en banc*, *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004), with the Court finding that the motion was proper under Rule 60(b). After this Court ultimately affirmed the *en banc* rationale in a related case, *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the 2-1 majority of the panel *sua sponte* reinstated the panel's previous decision on alternative grounds, adopting the rationale of the authoring judge's own previous *dissent* in the *en banc* rehearing proceeding. The Sixth Circuit again granted *en banc* review, but the panel relented and the case was remanded to the district court before the full court could hear it again.[2]

[2] While indicative of his treatment before the always-identical panel, these and several other procedural quirks are not

Now reviewing the *Brady* and misconduct claims on the merits, the district court acknowledged that prosecutorial misbehavior clearly occurred, including (among many other things) the wanton redaction of the exculpatory portions of a police report before that report was turned over to the defense. *See Abdur'Rahman*, 2009 WL 211133 at *9. The court reviewed each allegation of misconduct separately for prejudice, however, and found that no particular instance of prosecutorial misconduct, standing on its own, was sufficient to grant relief under *Brady*. *See id.* at *4-6.

The same 2-1 panel found against petitioner again. *See Abdur'Rahman*, 649 F.3d at 472-73. It reasoned that, because cumulative error is a separate claim that had to be preserved in the state courts, it was proper for the district court to assess each instance of trial error or misconduct on its own. *Id.* The panel majority thus prohibited petitioner from "mak[ing] cumulative-effect arguments regarding claims based on distinct legal theories" because neither trial nor appellate counsel had ever packaged the sub-claims together or sought to preserve such an aggregated claim in the state proceedings. *Id*.

In dissent, Chief Judge Cole noted the obvious, interlocking effect of these many "discrete but mutually-reinforcing acts of malfeasance," and clarified that petitioner would clearly have prevailed if those errors could properly be cumulated. *Id.* at 482. He stressed that, once again, petitioner's plainly

---

critical to the present petition. Further background is available in Petition for Certiorari, *Abdur'Rahman v. Bell*, No. 11-1215.

meritorious claims were being denied a real accounting: "The sum of these parts invalidates the verdict. At least one juror could reasonably be predicted to see the case in a different light and vote for life after considering all the withheld evidence in mitigation and the detrimental effect that evidence would have had on the prosecution's case for death." *Id*. This Court denied certiorari. *Abdur'Rahman v. Colson*, 133 S. Ct. 30 (2012).

After this Court's decision in *Martinez*, petitioner sought to reopen his federal habeas judgment, pressing claims of ineffective assistance that were previously unavailable under *Coleman*. These included the failure of his trial counsel to ask for the key instruction on uncorroborated accomplice testimony and, most importantly, the failure of both his trial and appellate counsel to preserve the critical claim of cumulative error that would have allowed him to obtain relief in the previous proceeding. The district court did not reach the merits of these claims, instead deciding that *Martinez* did not extend to Tennessee because IATC claims could technically be brought in Tennessee on direct review. Pet. App. 43a.

Petitioner appealed, arguing that *Trevino* extended *Martinez* to Tennessee. Petitioner also preserved a claim that, insofar as any of his claims sounded in ineffective assistance of *appellate* counsel, *Martinez* and *Trevino* should be extended to those claims as well—although that claim was already foreclosed by circuit precedent for purposes of panel-stage review, *see Hodges v. Colson*, 727 F.3d 517 (6th Cir. 2013); Petitioner's Brief, *Abdur'Rahman v. Colson*, No. 13-6126, at 15-16.

Once again, the same 2-1 majority of the Sixth Circuit found that petitioner was right about the issue actually presented on appeal, but nonetheless ruled against him for other reasons not argued or briefed. In this instance, after the briefing had been completed, another Sixth Circuit panel had ruled (correctly) that *Martinez* and *Trevino* did apply to Tennessee, *see Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), and so petitioner requested a simple remand. The court, however, affirmed the district court's denial of relief on two additional grounds the district court had never considered, once more denying petitioner even the opportunity for briefing or oral argument.

First, the panel held that the change in law wrought by *Martinez* and *Trevino* was an insufficient basis on which to premise any request for relief under Rule 60(b)(6), regardless of the equities of petitioner's case. The panel majority interpreted its precedent to hold that, unless a petitioner identified some *change* beyond *Martinez* and *Trevino* themselves, his Rule 60 motion was categorically ineligible for relief. Pet. App. 7a ("[E]ven if *Martinez* did apply, that case was a change in decisional law and does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief. Nor does Abdur'Rahman point to any other extraordinary circumstances; there are no newly developed facts since the denial of his habeas petition and previous Rule 60(b)(6) motion." (citation omitted)). Again in dissent, Chief Judge Cole emphasized that this *per se* rule was an abandonment of the traditional view that Rule 60 relief must be flexible and always available in the interests of justice, though actual grants of relief must of course remain limited to extraordinary circumstances. Pet. App. 17a.

Second, the panel held that, insofar as any of petitioner's arguments sounded in ineffective assistance of *appellate* counsel, those claims were not resuscitated by *Martinez* and *Trevino*. In this regard, the panel simply adhered to circuit precedent that had limited *Martinez* to IATC claims shortly after it was decided, and before *Trevino* expanded its scope. *See* Pet. App. 6a (citing *Hodges*, 727 F.3d at 531).

Petitioner sought rehearing *en banc*, stressing that the categorical denial of his Rule 60(b)(6) claim was improper, particularly given that he had never even had the chance to brief the merits and equities of his case to the panel. He also asked the full Sixth Circuit to reconsider its position on IAAC claims under *Martinez*, in light of a disagreement with the Ninth Circuit. The court denied rehearing. *See* Pet. App. 46a. This petition followed.

REASONS FOR GRANTING THE WRIT

This petition should be held pending the resolution of *Buck v. Stephens*, which presents an identical question regarding the availability of *Martinez* relief through Rule 60(b). Alternatively, this Court should grant plenary review in this case to consider the separate question of whether *Martinez* and *Trevino* extend to IAAC claims along with IATC claims. Both questions are the subject of recognized and important disagreements in the lower courts. And as this case shows, both are critical disagreements for this Court to resolve, because they make death sentences like petitioner's turn on the happenstance of the circuit in which their claims are brought.

I. The Court Should Hold This Petition For *Buck*.

The Question Presented in *Buck* asks whether the Fifth Circuit erred by imposing an "improper and unduly burdensome" standard when it denied a certificate of appealability regarding the rejection of petitioner's *Martinez*-based Rule 60(b)(6) motion—thereby concluding that "reasonable jurists" could not possibly find sufficiently extraordinary circumstances to justify Rule 60 relief. *See* Petition, *Buck v. Stephens*, No. 15-8049 at i (Question Presented). A similar question is presented in *Johnson v. Carpenter*, a case that—like this one—arose from the Sixth Circuit, and which affirmatively discussed the holding in this case as an example of the Sixth Circuit's *per se* rejection of Rule 60 motions premised on *Martinez*. *See* Petition, *Johnson v. Carpenter*, No. 15-1193 at 16-17; Reply, *Johnson v. Carpenter*, No. 15-1193 at 5.[3] In each of those cases—as here, and as in several other cases identified by the *Buck* and *Johnson* petitions—the lower court essentially held that petitioners are categorically ineligible for Rule 60(b)(6) relief if the only changed circumstance their motions rely upon is the new exception to *Coleman* created by *Martinez* and *Trevino*. *See, e.g.*, Reply, *Johnson v. Carpenter*, No. 15-1193 at 5; Petition, *Johnson v. Carpenter*, No. 15-1193 at 16-17 (discussing *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016); *Moreland v. Robinson*, 813 F.3d 315

[3] Both Johnson and petitioner Abdur'Rahman were represented in the lower courts by the Office of the Federal Public Defender for the Middle District of Tennessee, and both are represented by the same Supreme Court counsel here.

(6th Cir. 2016)). If the Court rejects that proposition in *Buck* (as it should), that could clearly affect the way the Sixth Circuit would consider this case following a grant, vacatur, and remand, making a hold for *Buck* appropriate here.

Indeed, there is a striking similarity between *Buck*, *Johnson*, and this case as a matter of the procedural postures involved. In *Buck* and *Johnson*, the courts were apparently so convinced that petitioners could not prevail on their Rule 60 motions that they refused to grant certificates of appealability, thereby denying petitioners the chance to even brief the unique equities of their cases that might call for Rule 60 relief. *See Buck v. Stephens*, 623 Fed. Appx. 668, 670-71 (5th Cir. 2015); Petition, *Johnson v. Carpenter*, No. 15-1193 at 1a-3a. Here, the Sixth Circuit reached a quite similar result: It denied petitioner relief on the theory that Rule 60(b)(6) relief was categorically unavailable, after *agreeing* with petitioner that the district court had erred on the sole matter actually addressed below and briefed by the parties. *See supra* p.14-15. To be sure, if these courts were correct in adopting a categorical rule against Rule 60(b) motions premised on *Martinez* and *Trevino*—whatever extraordinary equities might be presented by individual cases—this approach would be reasonable: There is, in fact, no reason to grant a COA, or take supplemental briefing, if the petitioner cannot possibly prevail. But if the petitioners in Buck and Johnson are correct, and Rule 60(b) relief premised on *Martinez* remains appropriate in extraordinary cases, then cases like this one would need to be remanded so that the district court could consider in the first instance whether such

extraordinary circumstances were presented by the unique facts of the case.

As explained in the *Buck* and *Johnson* petitions, this is exactly the approach that has been adopted in several other circuits. The Third, Seventh, and Ninth Circuits all have held that Rule 60(b)(6) motions premised on *Martinez* can be granted if the motion presents extraordinary equitable considerations. *See Ramirez v. United States,* 799 F.3d 845, 850 (7th Cir. 2015) (rejecting "the absolute position that … intervening changes in the law *never* can support relief under rule 60(b)(6).") (emphasis in original); *Cox v. Horn,* 757 F.3d 113, 121 (3d Cir. 2014) ("[W]e have not embraced any categorical rule that a change in decisional law is never an adequate basis for Rule 60(b)(6) relief."); *Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012) (examining the "degree of connection" between the petitioner's case and *Martinez*, among other equitable factors to be balanced). Many of those considerations are presented here, including the obvious underlying merit of petitioner's claims of ineffective assistance, the capital nature of his sentence, and his many years of diligence in pursuing relief. *Abdur'Rahman*, 649 F.3d at 478 (Cole, C.J., dissenting) (describing the "saga" of inequities petitioner has faced from his deficient trial to his repeated encounters with an appeals panel with a "ceaseless commitment to privileg[ing] formalism over every other legal value"). The different approaches in the circuits clearly make a difference: The Seventh Circuit has ordered a district court not only to consider the equities of an individual case when it initially failed to do so (as the Third Circuit has, *see Cox*, 757 F.3d at 124), but to affirmatively grant relief on a Rule

60(b)(6)/*Martinez* motion. *See Ramirez*, 799 F.3d at 856. Petitioner only seeks the fair and fulsome consideration from the district court that he would have received in these other circuits.

The petitions in *Buck* and *Johnson* adequately explain why, on the merits, these circuits have taken the correct view of Rule 60(b)(6), while the circuits adopting the *per se* bar—including the Sixth Circuit below—have not. *See* Petition, *Buck v. Stephens*, No. 15-8049 at 27-29; Petition, *Johnson v. Carpenter*, No. 15-1193 at 17-21. *Johnson* itself relies heavily on the decision in this case as one stark example of the Sixth Circuit's inappropriate refusal to consider the equities in any Rule 60(b) case premised on *Martinez* and *Trevino*. *See* Reply, *Johnson v. Carpenter*, No. 15-1193 at 5 (quoting Pet. App. 7a). Because the outcome of *Buck* could thus clearly affect the reasoning of the Sixth Circuit in this case and others presenting the same issue, the Court should at a minimum hold this petition so that it can be granted, vacated, and remanded in the event that *Buck* prevails.

In fact, a hold is particularly appropriate here because of the unique strength of petitioner's claims. Petitioner's trial counsel was manifestly ineffective, and that ineffectiveness extended to failing to request key instructions and defaulting an absolutely critical claim of cumulative error that could hardly have been easier to press and preserve. Petitioner's admittedly inexperienced counsel failed to mention that default on appeal, and then *that same attorney* was assigned as post-conviction counsel and again failed to mention cumulative error or trial counsel's ineffective failure to preserve it. The prejudice of failing to preserve that claim is manifest: As explained above, individualizing

petitioner's claims was the only way to avoid a finding of prejudice, and at this point, the non-investigation claim alone would merit relief. *See supra* p.8-9. Accordingly, if *Martinez* does allow petitioner to now use Rule 60(b)(6) to bring a claim that trial counsel was ineffective in failing to preserve a claim of cumulative error, his capital sentence is very likely to be vacated.[4]

II. The Question Whether *Martinez* and *Trevino* Apply To Ineffective Assistance Of Appellate Counsel Separately Merits Plenary Review.

If this Court does not ultimately vacate the judgment below and remand after answering the first question presented in *Buck*, it should grant the second question presented, on whether the holdings of *Martinez* and *Trevino* regarding IATC claims should be extended to IAAC claims as well. The Sixth, Eighth, and Tenth Circuits have unambiguously adopted a categorical bar that prevents federal habeas petitioners from relying upon *Martinez* to resuscitate IAAC claims defaulted by ineffective post-conviction counsel. The Ninth Circuit, meanwhile, has squarely held that IAAC claims may be revived in that posture. The Ninth Circuit's view is correct and this case is a good vehicle for the resolution of this disagreement,

---

[4] The panel below suggested that it would not grant relief if the cumulated errors were "dissect[ed]," Pet. App. 8a-10a, but this discussion is irrelevant. The claim petitioner seeks to resuscitate is precisely the claim of counsel's ineffectiveness in not preserving *cumulative* error—the very claim the panel refused to consider before as defaulted under *Coleman*.

which is both vitally important in capital cases and ripe for this Court's review.

A. The Circuits Are Divided At Least Three-To-One On Whether *Martinez* and *Trevino* Extend To IAAC Claims.

The lower courts are in disagreement over how to apply *Martinez* and *Trevino* to claims involving deficient performance by appellate counsel. To be sure, *Martinez* and *Trevino* concerned defaulted allegations of errors by *trial* counsel, and the opinions thus made specific reference to IATC claims. Even the dissent in *Martinez* acknowledged, however, that its logic necessarily extends to IAAC claims because—like IATC claims—their default by ineffective post-conviction counsel will prevent a petitioner from ever developing them through competent counsel. *See Martinez*, 132 S. Ct. at 1317 ("[I]f the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."); *id.* at 1321 (Scalia, J., dissenting) (expressing extreme doubt that *Martinez*'s reasoning can be logically "limited to ineffective-assistance-of-trial-counsel cases"). Nonetheless, the circuits have clearly disagreed on whether *Martinez*'s language limiting its scope to deficient trial counsel performance was intended to prevent the lower courts from extending the holding to IAAC claims as well.

The Sixth Circuit is steadfast in its categorical rule that IAAC claims cannot qualify for relief under *Martinez* and *Trevino*. In *Hodges v. Colson*, a federal habeas petitioner sought to revive a claim of juror

misconduct, on the ground that one juror "vot[ed] for the death penalty only because he was in pain due to arthritis and wanted to end deliberations." 727 F.3d 517, 529 (6th Cir. 2013). The claim had been procedurally defaulted in the state courts by Hodges's appellate counsel, but Hodges attempted to excuse that default by alleging that his state appellate counsel and post-conviction counsel were ineffective in failing to press the claim or locate the juror for a hearing. The Sixth Circuit took a literalist reading of *Martinez*, making the "assum[ption] that the Supreme Court meant exactly what it wrote" and interpreting the use of the word "trial" as the limiting factor, so that no claim of IAAC could be eligible for *Martinez* relief. *Id.* at 531. At the same time, the panel paused to note that *Martinez*'s exception to *Coleman*'s categorical rule would be "difficult to cabin" because "the logic of the new rule, like water, finds its own level, and it's hard to keep it from covering far more than anticipated." *Id.* at 531 n.3 (quoting *United States v. Alvarez*, 638 F.3d 666, 667 (9th Cir. 2011) (Kozinski, C.J., concurring)) (internal quotation marks omitted). Put otherwise, in limiting *Martinez* to IATC claims, the Sixth Circuit avowedly relied on its interpretation of this Court's intent in carving out an exception to *Coleman*, rather than the logic of *Martinez* itself. The Sixth Circuit then dismissed the claim without any inquiry into whether cause might have existed to excuse the procedural default.

The Sixth Circuit has since committed to this rigid interpretation of *Martinez* and *Trevino*. In petitioner's case below, the Sixth Circuit reiterated: "*Martinez* does not apply to claims of ineffective assistance of appellate counsel." Pet. App. 8a. The Sixth Circuit has

also "stressed" that this is "binding precedent," blocking off excusal of even the most meritorious of IAAC claims. *McClain v. Kelly*, 631 F. App'x 422, 432 (6th Cir. 2015) (voicing dismay over being prohibited from applying *Martinez*, though "much of the rationale underlying the Supreme Court's decision in *Martinez* seems to apply with equal force to the … issue here"). And it refused to reconsider the question when this issue was presented in petitioner's *en banc* rehearing petition below. *See* Pet. App. 46a.

The Eighth Circuit and Tenth Circuits have also adopted this reading of *Martinez* and *Trevino*. *See, e.g.*, *Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014); *Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012). But, like the Sixth Circuit, each of these courts has adopted the rule not through any sort of exhaustive reasoning, but rather because this Court's decision only mentioned IATC claims, and these courts do not feel free to extend an exception to *Coleman* beyond the point that this Court has explicitly required.[5] For example, the Eighth Circuit's inquiry started and ended with the statement that *Martinez* only made mention of "'claim[s] of ineffective assistance at *trial*,' not to claims of deficient performance by appellate counsel." *Banks*, 692 F.3d at 1148. The Tenth Circuit likewise found it "[m]ost important" that "in announcing the equitable

[5] Other circuits, including the Eleventh, have indicated that they too are likely to limit *Martinez* and *Trevino* to IATC claims, but have yet to do so in a dispositive, published opinion. *See, e.g.*, *Planas v. Sec'y, Dep't of Corrections, Fla. State Attny General*, No. 15-10691, 2016 WL 3230686 (11th Cir. June 13, 2016); *Fults v. GDCP Warden*, 764 F.3d 1311, 1314 (11th Cir. 2014).

exception in *Martinez* for claims of ineffective assistance of counsel at trial, the Court was clear that the 'rule of *Coleman*'—that ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse procedural default—'governs in all but the limited circumstances recognized here.'" *Dansby*, 766 F.3d at 833 (quoting *Martinez*, 132 S. Ct. at 1320). Notably, each of these cases was decided before this Court itself, in *Trevino*, expanded *Martinez* beyond "the limited circumstances recognized [t]here."

In contrast, the Ninth Circuit has properly held that IAAC claims can provide cause to excuse procedural defaults under the logic of *Martinez*. It has "conclude[d] that the *Martinez* standard for 'cause' applies to all Sixth Amendment ineffective-assistance claims, both trial and appellate, that have been procedurally defaulted by ineffective counsel in the initial-review state-court collateral proceeding," while acknowledging that "several … sister circuits have held otherwise." *Nguyen*, 736 F.3d at 1295. It has reaffirmed this position when presented with subsequent habeas petitions. *See Pizzuto v. Ramirez,* 783 F.3d 1171 (9th Cir. 2015); *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014). Accordingly, it is beyond dispute that there is an acknowledged and persistent disagreement among the circuits, in which a petitioner can use *Martinez* to revive a claim of IAAC on federal habeas in the Ninth Circuit, but not the Sixth, Eighth, or Tenth.

B. The Ninth Circuit's Approach Is Correct.

This split should be immediately resolved in favor of the Ninth Circuit's rule because it is clearly correct.

As the Ninth Circuit put it, the "central point in *Martinez* is that a 'substantial' IAC claim deserves one chance to be heard on initial review in a state post-conviction proceeding." *Nguyen*, 736 F.3d at 1294. With respect to every factor that *Martinez* emphasizes, IAAC and IATC are identical, and there is no reason to treat them differently. *See id.* at 1294-95.

In *Nguyen*, the Ninth Circuit considered a prisoner's habeas challenge to felony convictions involving a forged driver's license and cocaine possession. For the first count involving the fake identification, Nguyen received a three-strikes sentence of 25 years to life. For the second, he was given a concurrent sentence of three years. Nguyen successfully appealed the lengthy forgery charge, but the trial court responded by resentencing him and applying the three-strikes term to his drug charge, even though he had already served the entirety of his original cocaine sentence. Again, Nguyen appealed, but his counsel failed to raise and preserve a double jeopardy claim, and the sentence was affirmed. Nguyen's appellate counsel then terminated her representation of him without advising him to file a state habeas petition. In his federal habeas challenge, Nguyen thus presented a new (and so defaulted) IAAC claim based on counsel's failure to raise the double jeopardy claim on appeal, and argued that the procedural default should be excused under *Martinez* because, just like in *Martinez*, he lacked effective state post-conviction counsel and so was presenting this claim through competent counsel at the first and only available moment. The court found that *Martinez* applied to this situation, allowing Nguyen's claim to be

considered on the merits. *See Nguyen*, 736 F.3d at 1290-95.

The Ninth Circuit's decision in *Nguyen* embodies the correct application of *Martinez*. As the decision points out, every aspect of IATC claims emphasized in *Martinez* is just as true of IAAC claims as well. *See id.* at 1294-95 ("What the Court wrote [in *Martinez*] with respect to procedural default of a claim of trial-counsel IAC is equally true of appellate-counsel IAC.")

As an initial matter, the very question presented in *Martinez* was "whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim [i]s not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding," *Martinez*, 132 S. Ct. at 1313, a framing that—as the Ninth Circuit pointed out—does not distinguish between trial and appellate counsel. *Nguyen*, 736 F.3d at 1292. Moreover, as the Ninth Circuit correctly recognized, "[t]here is nothing in our jurisprudence to suggest that the Sixth Amendment right to effective counsel is weaker or less important for appellate counsel than for trial counsel." *Id.* at 1294. Thus, to the extent that *Martinez*'s holding turns upon the importance of the Sixth Amendment right to competent counsel, it should embrace IAAC claims no less than IATC claims.

Furthermore, IAAC and IATC equally interfere with the adversary system, a point *Martinez* particularly emphasized. *See Martinez*, 132 S. Ct. at 1317-18 (grounding decision in fact that "the right to counsel is the foundation for our adversary system," in part because it is counsel's job to "preserve[] claims to be considered on appeal and in federal habeas

proceedings"). As with IATC, when a state fails to provide competent counsel for the initial appeal proceeding, the adversary nature of one of the most critical stages of the case is fundamentally undermined, and many claims that arise for the first time at that stage can be lost from the record or procedurally defaulted by counsel's incompetence. Accordingly, as with IATC, the fact that claims of IAAC may not be presented even once through competent counsel threatens to radically undermine the overall fairness and adequacy of the procedures through which a criminal conviction is rendered and affirmed, and through which meritorious constitutional claims are "preserve[d] … in federal habeas." *Id.*; *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first appeal as of right ... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.")

Most fundamentally, the Ninth Circuit recognized that the key distinction in *Martinez* was not *who* committed the error, but *when* the error was made. For default of an ineffective-assistance claim to be excused, that default must occur at an "initial-review" proceeding. In other words, the underlying claim of ineffective assistance needs to be one that was defaulted *for the first time* by ineffective or absent state post-conviction counsel, and not available as a matter of state procedural law on direct review. *Martinez*, 132 S. Ct. at 1315. But while that is *sometimes* true of IATC claims—depending on state procedural rules, *see Trevino*, 133 S. Ct. at 1921 (extending *Martinez* to cases where IATC claims must practically be brought on post-conviction review)—it is *always* true of IAAC claims: Because the claim is that

counsel was inadequate at the direct appeal, state habeas is always the first time such a claim can be raised. The core principle of *Martinez* and *Trevino* is that federal habeas petitioners should be guaranteed one opportunity to develop a serious constitutional claim through competent counsel, especially where that claim itself goes to the heart of the adversary system. Thus, as the Ninth Circuit recognized, IAAC claims should necessarily qualify for the kind of relief *Martinez* and *Trevino* make available where they are defaulted by absent or inadequate counsel on state post-conviction review. *See Nguyen*, 736 F.3d at 1296 ("The *Martinez* rule is limited to an underlying Sixth Amendment ineffective-assistance claim, and to a procedural default by ineffective counsel in an initial-review collateral proceeding. But, as the Court held in *Trevino*, it is not limited to cases in which a state statute categorically prohibits raising a Sixth Amendment IAC claim on direct review. Similarly, as we hold here, it is not limited to Sixth Amendment claims of trial-counsel IAC. It also extends to Sixth Amendment claims of appellate-counsel IAC.")

The conclusion that coverage for IAAC claims naturally follows from the logic of *Martinez* and *Trevino* is hardly novel. Dissenting in *Martinez* itself, Justice Scalia noted that there is "not a dime's worth of difference in principle" between IATC claims and "many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised … for example … claims asserting ineffective assistance of appellate counsel." *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting). That observation was correct. Given that the circuits are in open disagreement about whether to follow it, the Court

should take this opportunity to endorse the logic embraced by both the Ninth Circuit and the *Martinez* dissenters themselves.

C. This Question Is Important And Merits The Court's Immediate Intervention.

There are four key reasons why this question merits this Court's immediate intervention. In brief, this issue is: (1) of the highest stakes; (2) frequently recurring; (3) unlikely to benefit from further percolation; and (4) in a unique posture where the lower courts are affirmatively waiting for this Court to act. Particularly in the capital setting, these factors together call for this Court's immediate intervention.

First, this issue is vitally important because of the obvious, life-or-death stakes. It is not tenable to maintain a circuit split in which the same petitioner with the same, meritorious claim of IAAC, will be spared the death penalty in California, but not in Tennessee. *See Abdur'Rahman*, 649 F.3d at 483 (Cole, C.J., dissenting) ("Perhaps if Abdur'Rahman could have pursued his petition in another circuit his life might be spared[.]"). Given that, as explained below, the question is already as ripe for review as it ever will be, a delay only means that some petitioners will be denied a hearing—and potentially executed—under a rule the Court could well change the next Term. In light of the effects of unnecessary delay, this factor uniquely counsels immediate review.

Second, this issue arises frequently and so merits the Court's intervention. Many IAAC challenges, alleging very serious errors, have already been filed in the lower courts seeking the benefit of *Martinez* and *Trevino*. *See, e.g.*, *Davila v. Davis*, No. 15-70013, 2016

WL 3171870 (5th Cir. May 26, 2016) (failure of appellate counsel to raise an erroneous jury instruction claim); *Fults*, 764 F.3d 1311 (11th Cir. 2014) (failure of appellate counsel to assert an IATC claim over inadequate presentation of evidence related petitioner's mental retardation); *Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014) (failure of appellate counsel to raise claims of improper capital sentencing instructions); *Hodges*, 727 F.3d 517 (6th Cir. 2013) (failure of appellate counsel to raise a juror misconduct claim in response to rushed capital sentencing deliberations); *Moody v. Thomas*, 89 F. Supp. 3d 1167 (N.D. Ala. 2015) *appeal docketed*, No. 15-11809 (11th Cir. Apr. 24, 2015) (failure of appellate counsel to argue a Sixth Amendment right to trial counsel claim). Accordingly, resolving this split will either make a difference for petitioners in a meaningful number of cases, or—if the state prevails—relieve states in the extensive jurisdiction of the Ninth Circuit from contesting claims that are not a proper basis for relief.

Third, this split is quite unlikely to ripen further. While other courts may join one side or the other, the contours of the disagreement are clear, with limited prospect for future refinement. That is because, as explained above, the Ninth Circuit's reasoning clearly follows the *logic* of *Martinez*, while the circuits on the other side have bound themselves to a mechanical reading of the bare text. The disagreement is not over how *Martinez* should apply to IAAC claims. Rather, it is about whether this Court *intended* to allow *Martinez* and *Trevino* to be extended to the point where their logic necessarily leads, or instead intended a kind of *ad hoc* equitable rule for IATC claims alone. That is a question only this Court can answer, and its

assessment will not benefit from additional circuits trying to divine the Court's own aim.

Fourth, and relatedly, this is a circumstance where this Court's own precedent regarding lower court decisional rules should itself compel it to intervene. This Court has repeatedly stressed to the circuits that, when "a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Lower courts will, accordingly, feel bound to follow *Coleman* unless and until this Court explicitly extends the exception created by *Martinez* and *Trevino* to its rational endpoint. Indeed, that is why this Court had to grant certiorari in *Trevino*, almost immediately after *Martinez* was decided, to provide guidance about whether *Martinez* extended even beyond the extraordinarily limited context of states that legally prohibit IATC claims on direct review.

Simply put, the language of *Martinez* has signaled to many circuits that they should stay their hands—whatever the logic of its holding might require—and wait for this Court to extend it any further. With the circuits awaiting guidance and the stakes so high, the Court should not wait to resolve this question any longer.

D. This Is An Ideal Vehicle.

This case is an excellent vehicle for the question presented because, as explained above, petitioner's underlying claim on the merits is extraordinarily

strong. Petitioner's IAAC claim, like his IATC claim, involves the failure of his *admittedly* unprepared appellate counsel to preserve the critical claim of cumulative error that would have saved petitioner from his capital sentence in his previous appeal, and which was previously deemed defaulted under *Coleman*. Accordingly, if petitioner's Rule 60(b)(6) motion had been filed in the Ninth Circuit instead of the Sixth, his Rule 60(b)(6) motion would very likely have been granted. *See* Pet. App. 24a-30a (Cole, C.J., dissenting). His IAAC claim regarding the failure to preserve cumulative error is clearly substantial, he had no prior opportunity to raise it, and—unlike the Sixth Circuit—the Ninth Circuit neither denies that Rule 60(b) petitions are an appropriate pathway to *Martinez/Trevino* relief, nor that those cases embrace claims of IAAC. It is increasingly clear that Chief Judge Cole was right that petitioner's "life might be spared" if he "could have pursued his petition in another circuit." *Abdur'Rahman*, 649 F.3d at 483 (Cole, C.J., dissenting). Cases that isolate such unfairness are the ideal vehicles for resolving critical circuit splits.

CONCLUSION

The Court should hold this petition for a possible grant, vacatur, and remand in light of *Buck v. Stephens*. Alternatively, the Court should grant plenary review on the second question presented.

Respectfully submitted,

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ecitron@goldsteinrussell.com

July 29, 2015

APPENDIX

APPENDIX A

United States Court of Appeals
for the Sixth Circuit.

ABU-ALI ABDUR'RAHMAN,
Petitioner-Appellant
v.
WAYNE CARPENTER, Warden,
Respondent-Appellee

No. 13–6126

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:96-cv-00380—Todd J. Campbell,
Chief District Judge.

Decided and Filed: November 4, 2015

Before: COLE, *Chief Judge*; SILER and
BATCHELDER, *Circuit Judges.*

COUNSEL

ON BRIEF: Thomas C. Goldstein, Eric F. Citron, GOLDSTEIN & RUSSELL, P.C., Washington, D.C., for Appellant. Andrew C. Coulam, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

SILER, J., delivered the opinion of the court in which BATCHELDER, J., joined, and COLE, C.J., joined in part. COLE, C.J. (pp. 10–20), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SILER, *Circuit Judge*. Abu-Ali Abdur'Rahman (formerly known as James Lee Jones), a Tennessee death-row prisoner, appeals the district court's judgment denying his Fed. R. Civ. P. 60(b) motion for relief from the 1998 judgment denying his 28 U.S.C. § 2254 habeas corpus petition. Abdur'Rahman has also filed a motion to remand. For the reasons stated below, we **AFFIRM** the district court's judgment and **DENY** the motion to remand.

FACTUAL AND PROCEDURAL BACKGROUND

In 1987, Abdur'Rahman was convicted of first-degree murder, assault with intent to commit first-degree murder, and armed robbery. He was sentenced to death for the murder charge and to life imprisonment for the other charges. The Tennessee Supreme Court affirmed the convictions and sentences. *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990). Abdur'Rahman petitioned for post-conviction relief in state court. He alleged, *inter alia*, ineffective assistance of counsel at sentencing and prosecutorial misconduct for failing to turn over exculpatory evidence. The trial and appellate courts denied him relief. *See Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. Feb. 23,

1995). Abdur'Rahman filed his § 2254 petition in 1996. In 1998, the district court granted Abdur'Rahman relief on his claim that trial counsel performed ineffectively by failing to investigate and present mitigating evidence. *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1091-1102 (M.D. Tenn. 1998). This court vacated the district court's decision, concluding that Abdur'Rahman was not prejudiced by his counsel's performance at sentencing. *Abdur'Rahman v. Bell*, 226 F.3d 696, 708-09, 715 (6th Cir. 2000).

Abdur'Rahman filed a Rule 60(b) motion in 2001. After procedural rulings by the district court, this court, and the Supreme Court, we granted Abdur'Rahman a certificate of appealability with respect to two claims: whether the prosecution violated Abdur'Rahman's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding his codefendant's pretrial statements, and whether the prosecution violated *Brady* by withholding a police report which indicated that Abdur'Rahman was mentally disturbed at the time of his arrest. We held that the prosecution did not violate *Brady* with respect to the codefendant's pretrial statements because Abdur'Rahman knew the content of the statements and knew that the codefendant had met with the prosecution before trial. *Abdur'Rahman v. Colson*, 649 F.3d 468, 474-75 (6th Cir. 2011). Regarding Abdur'Rahman's behavior after he was arrested, we found that trial counsel knew something happened after his arrest, interviewed the police officer about what happened, and could have obtained a separate report on the incident. Therefore, the suppression of the report did not undermine our confidence in Abdur'Rahman's sentence. *Id.* at 475-76. Abdur'Rahman also argued that the two *Brady* claims

certified for appeal should have been cumulated with prosecutorial misconduct or ineffective assistance of counsel claims from his habeas petition. We concluded that because Abdur'Rahman had failed to raise a cumulative error claim in state court he could not raise one for the first time in habeas. *Id.* at 473. Moreover, review of the cumulative error arguments was foreclosed because they were not certified for appeal. *Id.*

The subject of this appeal is the Rule 60(b) motion Abdur'Rahman filed in March 2013. He asked the district court to reopen claims he alleged had been found procedurally defaulted, arguing that in the wake of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), "the federal courts have no interest in enforcing a judgment now shown to be predicated on non-existent procedural defaults." The district court directed Abdur'Rahman to state each claim for which he sought relief from judgment, cite where that claim appears in the Amended Petition, and cite where the district court dismissed the claim on procedural grounds. Abdur'Rahman responded by stating that he was presenting two claims: (1) cumulative error affecting his sentencing arising from prosecutorial misconduct and ineffective assistance of counsel; and (2) an improper jury instruction regarding accomplice testimony and trial counsel's and appellate counsel's failure to challenge the instruction. The district court concluded that *Martinez* and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), did not apply to cases arising in Tennessee because Tennessee courts offer a meaningful opportunity to raise claims of ineffective assistance of trial counsel on direct appeal. However, the district court subsequently granted a certificate of appealability on "the issue of whether the Respondent's procedural

defenses to certain claims are still viable in light of the Supreme Court's decisions in *Martinez* . . . and *Trevino*."

After the district court issued its certificate of applicability, this court ruled that *Martinez* and *Trevino* are applicable to criminal convictions in Tennessee. *See Sutton v. Carpenter*, 745 F.3d 787, 789 (6th Cir. 2014). In response to that decision, Abdur'Rahman filed a motion for remand back to the district court. The motion was subsequently referred to this panel for consideration along with the merits.

STANDARD OF REVIEW

This court reviews the denial of a Rule 60(b) motion for an abuse of discretion. *See McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 998 (2014). A movant seeking relief under Rule 60(b)(6) must show "extraordinary circumstances" justifying the reopening of a final judgment, and such circumstances rarely occur in habeas cases. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005); *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009). "[I]t 'is well established that a change in decisional law is usually not, by itself, an "extraordinary circumstance" meriting Rule 60(b)(6) relief.'" *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014), *cert denied*, 135 S. Ct. 1708 (2015) (quoting *McGuire*, 738 F.3d at 750; *see also Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007); *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001).

APPLICABLE LAW

In *Martinez*, the Supreme Court held that ineffective assistance or lack of collateral counsel may constitute cause to excuse the procedural default of an ineffective assistance of trial counsel claim. *Martinez*, 132 S. Ct. at 1320. "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, 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, there was no counsel or counsel in that proceeding was ineffective." *Id.* A substantial claim is one that has some merit and is debatable among jurists of reason. *Id.* at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). *Martinez* only permits ineffective assistance of post-conviction counsel to excuse the default of ineffective assistance of trial counsel claims, and does not extend to "appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." *Martinez*, 132 S. Ct. at 1320. Moreover, *Martinez* does not apply to excuse the default of a claim of ineffective assistance of appellate counsel. *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 1545 (2015).

Trevino applied the *Martinez* exception to Texas "where . . . 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." 133 S. Ct. at 1921. Because *Martinez* and *Trevino* apply in Tennessee, "ineffective assistance of post-conviction counsel can

establish cause to excuse a Tennessee defendant's procedural default of a substantial claim of ineffective assistance at trial." *Sutton*, 745 F.3d at 795-96 (citing *Martinez*, 132 S. Ct. at 1320). Tennessee's procedural law makes it almost impossible for a defendant to present an ineffective assistance of trial counsel claim on direct appeal, and Tennessee courts have directed defendants to raise such claims on collateral review. *Id.* at 792-93.

DISCUSSION

In light of our decision in *Sutton*, it is clear that the district court erred when it ruled that *Martinez* and *Trevino* did not apply to a case arising in Tennessee. However, the issue certified for appeal was whether *Martinez* and *Trevino* had an impact on the specific claims raised by Abdur'Rahman, and we may affirm a district court's ruling on any ground supported by the record. *United States v. Phillips*, 752 F.3d 1047, 1049 (6th Cir. 2014), *cert denied*, 135 S. Ct. 464 (2014).

Although *Martinez* applies to cases arising in Tennessee, it does not apply to the claims in Abdur'Rahman's motion. The first claim is not one of ineffective assistance of trial counsel. The second claim, to the extent it includes a claim of ineffective assistance of trial counsel, was not defaulted. And even if *Martinez* did apply, that case was a change in decisional law and does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief. *See Henness*, 766 F.3d at 557. Nor does Abdur'Rahman point to any other extraordinary circumstances; there are no newly developed facts since the denial of his habeas petition and previous Rule 60(b)(6) motion and the *Martinez* exception is not a change in the constitutional rights of criminal defendants, *see Martinez*, 132 S. Ct. at 1318.

I. Cumulative Error

In earlier litigation, Abdur'Rahman asserted that he was not making a separate claim of cumulative error. *Abdur'Rahman*, 999 F. Supp. at 1083 n.10. In his most recent appeal, Abdur'Rahman argued as he does now that his individual *Brady* claims should be cumulated with prosecutorial misconduct or ineffective assistance of counsel claims from his § 2254 petition. This court held that he had procedurally defaulted his cumulative error claim by failing to raise it on direct appeal or in post-conviction proceedings and that it was not certified for appeal. *Abdur'Rahman*, 649 F.3d at 472-73. *Martinez* does not provide grounds for Abdur'Rahman to excuse the default of his cumulative error claim because the Supreme Court limited its ruling to the default of substantial claims of ineffective assistance of trial counsel. *See Trevino*, 133 S. Ct. at 1918; *Martinez*, 132 S. Ct. at 1320. Abdur'Rahman argues that his direct appeal counsel were ineffective for failing to preserve his cumulative error claim. But *Martinez* does not apply to claims of ineffective assistance of appellate counsel. *See Martinez*, 132 S. Ct. at 1320; *Hodges*, 727 F.3d at 531.

Even if we were to dissect the cumulative error claim and separately analyze Abdur'Rahman's underlying claims of *Brady* violations and prosecutorial misconduct, *Martinez* would not apply to those claims because the Court limited *Martinez* to claims of ineffective assistance of trial counsel that were procedurally defaulted by lack of or ineffective assistance of post-conviction counsel. *Martinez*, 132 S. Ct. at 1320; *see also Hunton v. Sinclair*, 732 F.3d 1124, 1126-27 (9th Cir. 2013) (refusing to extend *Martinez* to a *Brady* claim defaulted by state post-conviction

counsel), *cert. denied*, 134 S. Ct. 1771 (2014). Moreover, even if *Martinez* applied to these types of claims, it would not apply here because, as we explain below, Abdur'Rahman did not default them.

In his Rule 60(b) motion, Abdur'Rahman listed seven instances of prosecutorial misconduct that he claimed contributed to his cumulative error claim. First, he alleged that the prosecution withheld the transcript of Abdur'Rahman's 1972 murder trial, which he claimed could have established that he had been mentally ill since that time and that he killed the victim in that case because of the victim's homosexual advances rather than a drug turf war. We reviewed the claim on its merits and found no *Brady* violation. *Abdur'Rahman*, 649 F.3d at 478. Second, Abdur'Rahman charged that the prosecutor withheld a report by Detective Mark Garafola about Abdur'Rahman's behavior on the day of his arrest, which Abdur'Rahman claimed would have shown he was mentally disturbed. We again found no *Brady* violation. *Id.* at 476-78.

Third, Abdur'Rahman alleged that the prosecution withheld evidence from a pre-trial statement by a co-defendant that the murder was orchestrated by the South East Gospel Ministry (SEGM). We found no *Brady* violation because Abdur'Rahman knew that the co-defendant had talked to the prosecutor about the SEGM and Abdur'Rahman testified similarly at trial. *Id.* At 473-75. Fourth, Abdur'Rahman claimed that the prosecutor lied to the trial court about Abdur'Rahman's mental illness. After a series of appeals and remands, the district court reviewed the claim on the merits and denied it. *Abdur'Rahman v. Bell*, No. 3:96-0380, 2009 WL 211133, at *16 (M.D. Tenn. Jan. 26, 2009).

Fifth, Abdur'Rahman alleged that the prosecutor lied to defense counsel about the 1972 conviction. According to Abdur'Rahman, the prosecutor told defense counsel that an FBI agent could testify that Abdur'Rahman killed the other prisoner as part of a drug turf war and defense counsel was too intimidated to put on evidence about the crime. The district court addressed the merits and found that there was no prosecutorial misconduct. *Id.* at *17. Sixth, Abdur'Rahman claimed that the prosecutor lied to the jury about Abdur'Rahman's culpability by arguing that the defense's theory that the SEGM orchestrated the killing was "bunk." The district court rejected the claim on the merits. *Id.* at *6-9. Seventh, Abdur'Rahman charged that the prosecutor showed the jury an indictment against Abdur'Rahman for robbery in violation of a trial court order. The district court also addressed the merits of this claim. *Id.* at *18. *Martinez* does not apply to claims that were fully adjudicated on the merits in state court because those claims are, by definition, not procedurally defaulted. *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 2662 (2014); *see also Dansby v. Hobbs*, 766 F.3d 809, 840 (8th Cir. 2014) (holding that *Martinez* did not apply to ineffective assistance of counsel sub-claims that were not defaulted by post-conviction counsel), *cert. denied*, __ S. Ct. (2015); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1260-61 (11th Cir.) (holding that *Martinez* did not apply to case where ineffective assistance of trial counsel claims were reviewed on the merits in a § 2254 proceeding), *cert. denied*, 135 S. Ct. 64 (2014); *Schad v. Ryan*, 732 F.3d 963, 966-67 (9th Cir.) (affirming denial of Rule 60(b) relief because petitioner's "new" claim of

ineffective assistance of trial counsel involved the same allegation as his original ineffectiveness claim), *cert. denied*, 134 S. Ct. 417 (2013). Because the prosecutorial misconduct and *Brady* claims were decided on the merits and not procedurally defaulted, *Martinez* does not apply.

Abdur'Rahman also argues that his trial counsel failed to investigate and present mitigating evidence. The state court found that Abdur'Rahman's counsel's performance was deficient but that he had not shown prejudice. *Jones*, 1995 WL 75427, at *2. We agreed. *Abdur'Rahman*, 226 F.3d at 708. *Martinez* does not apply to claims that were fully adjudicated on the merits in state court. *See Martinez*, 132 S. Ct. at 1320; *Dansby*, 766 F.3d at 840; *Lambrix*, 756 F.3d at 1260-61; *Detrich*, 740 F.3d at 1246; *Schad*, 732 F.3d at 966-67. Accordingly, Abdur'Rahman cannot relitigate this claim, and the viability of the Warden's procedural defenses is unaffected by *Martinez* and *Trevino*.

II. Improper Jury Instruction Regarding Accomplice Testimony

Martinez is also inapplicable to Abdur'Rahman's claims that the trial court failed to instruct the jury that it could not convict Abdur'Rahman unless there was evidence to corroborate his accomplice's testimony, and that trial and appellate counsel were ineffective for failing to raise this issue. *Martinez* applies only to claims of ineffective assistance of trial counsel, not trial errors or claims of ineffective assistance of appellate counsel. *See Martinez*, 132 S. Ct. at 1320; *Dansby*, 766 F.3d at 833; *Hodges*, 727 F.3d at 531; *Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012); *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). This

disposes of the first and third components of Abdur'Rahman's argument. Abdur'Rahman does not show, nor do the district court decisions reflect, whether he procedurally defaulted the ineffective assistance of trial counsel component of this claim. If he did not, *Martinez* would not apply because the claim is not defaulted. *See Martinez*, 132 S. Ct. at 1320; *Dansby*, 766 F.3d at 840; *Lambrix*, 756 F.3d at 1260-61; *Detrich*, 740 F.3d at 1246; *Schad*, 732 F.3d at 966-67.

If, however, he did default the claim, the *Martinez* exception would not apply because the underlying claim is not substantial. *See Martinez*, 132 S. Ct. at 1320. Under Tennessee law, a conviction cannot be based upon the uncorroborated testimony of an accomplice. *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994), *superseded by statute on other grounds as stated in State v. Odom*, 137 S.W.3d 572, 580-81 (Tenn. 2004). There must be independent evidence, however slight, from which the jury can infer that the defendant committed the crime. *State v. Gaylor*, 862 S.W.2d 546, 552 (Tenn. Crim. App. 1992). A trial court's failure to give an accomplice instruction can be harmless error if the accomplice's testimony is corroborated sufficiently. *See State v. Ballinger*, 93 S.W.3d 881, 888 (Tenn. Crim. App. 2001), *overruled on other grounds by State v. Collier*, 411 S.W.3d 886, 899-900 (Tenn. 2013). Abdur'Rahman's codefendant was an accomplice as a matter of law, so the trial court should have instructed the jury that his testimony had to be corroborated. *See State v. Robinson*, 239 S.W.3d 211, 227-28 (Tenn. Crim. App. 2006); *State v. Perkinson*, 867 S.W.2d 1, 7-8 (Tenn. Crim. App. 1992).

On direct appeal, Abdur'Rahman challenged the sufficiency of the evidence to support his conviction for

first-degree murder. The Tennessee Supreme Court concluded that, although there was some conflict between the co-defendant's testimony and that of other prosecution witnesses, the evidence was sufficient to uphold the conviction. The surviving victim of Abdur'Rahman's attack testified, and there was physical evidence tying him to the crimes. *Jones*, 789 S.W.2d at 550. Because there was sufficient evidence to corroborate the accomplice's testimony, any error by the trial court in its jury instructions was harmless. *See Ballinger*, 93 S.W.3d at 888. Because Abdur'Rahman was not prejudiced by his trial counsel's failure to request a jury instruction about the need for evidence to corroborate his accomplice's testimony, the claim he seeks to reopen is not substantial. *See Martinez*, 132 S. Ct. at 1318-19. Therefore, the Warden's procedural defenses to this ineffective-assistance-of-counsel claim are unaffected by *Martinez* and *Trevino*.

As a change in decisional law, *Martinez* does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief. *Henness*, 766 F.3d at 557. Moreover, none of Abdur'Rahman's claims involve substantial claims of ineffective assistance of trial counsel that were procedurally defaulted by inadequate post-conviction counsel. Therefore, *Martinez* does not apply to the claims in Abdur'Rahman's Rule 60(b) motion.

CONCLUSION

For the foregoing reasons, the district court's judgment is **AFFIRMED**, and the motion to remand is **DENIED**.

CONCURRING IN PART AND DISSENTING IN PART

COLE, *Chief Judge*, concurring in part and dissenting in part. As an initial matter, I concur with the majority in its conclusion that the district court clearly erred in dismissing Abdur'Rahman's Rule 60(b) motion on the basis that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), do not apply to cases arising in Tennessee. Maj. Op. at 5. Our decision in *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), squarely determines this issue. As this is the only question before us, I would remand on that issue alone, without reaching the merits of Abdur'Rahman's claims.

However, the majority goes on to consider the merits of Abdur'Rahman's Rule 60(b) motion, including (1) whether that motion should be granted, (2) whether Abdur'Rahman's claims qualify under the *Martinez/Trevino* exceptions, and (3) whether Abdur'Rahman could be successful on his claims. These issues are not properly before this court, nor were they actually presented to this court.[1] Because I disagree with the majority's conclusions on each of these issues, I dissent.

[1] To the extent the Warden raises these issues in opposition to Abdur'Rahman's motion for remand, they are not proper and cannot be considered in this context. *See* Dkt. 38; *see also* Abdur'Rahman's Reply, Dkt. 39.

I. Limited Issue on Appeal

In response to Abdur'Rahman's initial habeas petition, the Warden "argue[d] that the Court should not reach the merits of several of [Abdur'Rahman's] claims because [Abdur'Rahman] failed to raise those claims in state court, and has, therefore, procedurally defaulted those claims." *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1079 (M.D. Tenn. 1998) *aff'd in part, vacated in part on other grounds*, 226 F.3d 696 (6th Cir. 2000). In 2013, Abdur'Rahman filed a Rule 60(b) motion arguing that, in light of *Martinez/Trevino*, certain of his claims were no longer procedurally defaulted. The district court dismissed, finding that Abdur'Rahman's "request to reconsider his claims, under Rule 60 or otherwise, should be denied because the *Martinez/Trevino* decisions do not apply to reverse the findings of procedural default." *Rahman v. Carpenter*, No. 3:96-0380, 2013 WL 3865071, at *3 (M.D. Tenn. July 25, 2013). This decision was based *solely* on the fact that the district court did not believe *Martinez* and *Trevino* applied to the Tennessee courts:

> Unlike defendants in Texas, defendants in Tennessee are not faced with a system in which it is "highly unlikely" they will have "a meaningful opportunity" to raise a claim of ineffective assistance of trial counsel during the direct appeal process. As the cases cited above indicate, procedural rules allow Tennessee defendants such a meaningful opportunity through the motion for new trial and evidentiary hearing mechanism. That most defendants choose to defer raising such a claim until the post-

> conviction process does not mean that raising the claim on direct appeal is "virtually impossible" as was the case in *Trevino*.

Id. at *6. The district court did not consider the merits of Abdur'Rahman's claims or even whether the particular claims asserted would be sufficient if *Martinez/Trevino* applied. *See id.* At *3–6. Neither should we decide these issues.

We may not conduct appellate review of an order unless there exists a "certificate of appealability [to] indicate which *specific issue or issues* satisfy" a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2)–(3) (emphasis added). Our review is thus limited to that issue. While we may "affirm a district court's ruling on any ground supported by the record," we may not review issues not properly before us on appeal. *See, e.g., id.*; 28 U.S.C. §§ 1291, 1331.

Here, the certificate of appealability is limited to "the issue of whether *the Respondent's procedural defenses* to certain claims are still viable in light of the Supreme Court's decisions in *Martinez* and *Trevino*." (R. 377 (emphasis added).) Based on our decision in *Sutton*, the answer to this question is a simple "no." Respondent cannot continue to assert the defense that Abdur'Rahman's claims are procedurally barred for failure to present them in state court. *See* Maj. Op. at 5 (citing *Sutton*, 745 F.3d at 795–96) (acknowledging "it is clear that the district court erred when it ruled that *Martinez* and *Trevino* did not apply to a case arising in Tennessee."). I would end our inquiry here and remand to the district court for further proceedings.

II. Whether Petitioner's Rule 60(b) Motion Should Be Granted

We have previously held that "*Martinez* was a change in decisional law and does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief." Maj. Op. at 5. However, Abdur'Rahman did not limit his motion to relief under subsection (6). (*See* Mot., R. 351, PageID 383.) Instead, the district court should review Abdur'Rahman's motion to determine whether it meets the requirements under any of the permissible grounds for relief. Fed. R. Civ. P. 60(b). For example, the court's refusal to decide Abdur'Rahman's claims on the merits, despite their procedural default, could be considered a "mistake" under Rule 60(b)(1). *See Bell*, 493 F. 3d at 741 (holding the motion was more appropriately analyzed under Rule 60(b)(1), because the district court made a mistake when it determined that Abdur'Rahman's claim was not exhausted in state court) (opinion vacated by en banc).

Even if Abdur'Rahman's motion did rest on subsection (6), "[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." *E.g.*, *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013) (citations omitted) (emphasis added); *accord* Order, R. 312, PageID 15 (6th Cir. Jan. 18, 2008) (finding Abdur'Rahman's 2001 Rule 60(b) motion was timely and remanding to district court "for a determination of whether the motion should be granted.") (Siler, J.). As we have previously held, this decision is best left in the hands of the district court.

III. Whether the Motion Raises *Martinez/Trevino* Claims

A. The District Court should determine this question

Similarly, the district court should determine, in the first instance, whether Abdur'Rahman's claims qualify under *Martinez/Trevino*. Notably, the two principal Supreme Court cases at issue were remanded to the district court. *See Martinez*, 132 S. Ct. at 1321, *on remand*, 680 F.3d 1160, 1160 (9th Cir. 2012) ("The district court properly applied the law as it stood at the time of Martinez's petition. However . . . the Supreme Court changed the law. Therefore, the district court's denial of Martinez's petition for habeas corpus on the basis that his claim was procedurally defaulted is REVERSED, and the matter is REMANDED for proceedings consistent with the Supreme Court's opinion."); *Trevino*, 133 S. Ct. at 1921*, on remand*, 740 F.3d 378, 378 (5th Cir. 2014) ("[W]e remand to the district court for full reconsideration of the Petitioner's ineffective assistance of counsel claim in accordance with both *Trevino* and *Martinez*."). These courts recognized that the district court is best suited to conduct an initial review of the merits of previously procedurally defaulted ineffective-assistance-of-trial and post-conviction counsel claims.

In a similar case, our court recognized that the district court is best suited to make these kinds of determinations under *Martinez/Trevino*.

> [Petitioner] maintains that, by granting a COA, we have already determined that [Petitioner's] IATC claims are "substantial," and therefore, we

> should remand with direction for the district court to determine solely whether prejudice exists so as to excuse his procedural default. . . . We disagree. First, *Sutton* held that: "ineffective assistance of post-conviction counsel *can*"—but does not by the mere fact of being raised—"establish cause to excuse a Tennessee defendant's procedural default of a substantial claim of ineffective assistance at trial." 745 F.3d at 795–96 (emphasis added). Moreover, in *Martinez,* the Supreme Court] remanded the case, directing the lower court to determine: (1) "whether [the petitioner's] attorney in his first collateral proceeding was ineffective"; (2) whether his claim of IATC was "substantial"; and (3) whether the petitioner was prejudiced. 132 S. Ct. at 1321; *Schriro,* 2012 WL 5936566, at *1–2 (noting the requirements on remand). The Court in *Trevino* provided similar guidance, indicating: "we do not decide here whether Trevino's claim of ineffective assistance of trial counsel is substantial or whether Trevino's initial state habeas attorney was ineffective." 133 S. Ct. at 1921. The Court left those issues and merit issues "to be determined on remand." *Id.* We follow suit.

Atkins v. Holloway, 792 F.3d 654, 660–61 (6th Cir. 2015) (Siler, J.). We reached a similar conclusion in another case:

In *Trevino* itself, the district court had alternatively ruled that the IATC claims failed to demonstrate the necessary prejudice. This merits ruling did not deter the Supreme Court from using *Trevino* as a vehicle for promulgating an expansion of the procedural default exception created by *Martinez*. And on remand from the Supreme Court, the Fifth Circuit did not reaffirm the district court based on the alternative merits ruling, but instead remanded the whole matter back to the district court for "full reconsideration of the Petitioner's ineffective assistance of counsel claim." [Petitioner] has thus far been unable to obtain an evidentiary hearing on his IATC claims in either state post-conviction proceedings or federal habeas proceedings. This absence of factual development (which nullifies a key advantage of bringing such IATC claims in collateral proceedings) hamstrings this court's ability to determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." We therefore remand this matter back to the district court for a "full reconsideration" of the four IATC claims that were not previously presented to the Kentucky courts in collateral proceedings and consideration of whether to conduct an evidentiary hearing. This reconsideration would first address

> whether [Petitioner] can demonstrate (1) the absence or ineffective assistance of his postconviction counsel and (2) the "substantial" nature of his underlying IATC claims. If Woolbright can demonstrate these two elements and therefore establish cause to excuse his procedural default, the district court can then reconsider whether Woolbright can establish prejudice from the alleged ineffective assistance of trial counsel.

Woolbright v. Crews, 791 F.3d 628, 637 (6th Cir. 2015) (Siler, J.). Likewise, other cases have recognized that the district court is best suited to determine, in the first instance, whether a petitioner has established cause to excuse a procedural default. *See, e.g.*, *Leberry v. Howerton*, 583 F. App'x 497, 498 (6th Cir. 2014), *as corrected* (Nov. 6, 2014) (Cole, C.J.) (unpub.) ("[Petitioner] can establish cause, but the district court did not determine if [petitioner] could demonstrate prejudice to overcome his procedural default. Therefore, we reverse and remand this issue to the district court to consider whether [petitioner] can establish prejudice."); *Grimes v. Superintendent Graterford SCI*, No. 14-1146, 2015 WL 4461824, at *2 (3d Cir. July 22, 2015) (reversing district court's dismissal of ineffective-assistance-of-trial-counsel claims as procedurally defaulted and remanding for an evidentiary hearing); *Butler v. Stephens*, No. 09- 70003, 2015 WL 5235206, at *17 (5th Cir. Sept. 9, 2015) ("[W]e conclude that the trial court should, in the first instance, be allowed to apply *Martinez* in accordance with *Trevino* to determine whether [petitioner] can demonstrate cause for his procedural default and whether his claims have some

merit under *Martinez*.").

Further, the question at this stage should be limited to whether there is *cause* to excuse the procedural default of certain claims, not whether Abdur'Rahman can *ultimately succeed* on his claim that trial counsel was ineffective:

> "Cause," however, is not synonymous with "a ground for relief." A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted.

Martinez, 132 S. Ct. at 1320. Whether Abdur'Rahman can succeed on the merits of his claims is best left to the trial court in the first instance, in light of all relevant evidence. As we have done before, we should "remand[] the whole matter back to the district court for 'full reconsideration of the Petitioner's ineffective assistance of counsel claim.'" *See Woolbright*, 791 F.3d at 637.

B. Petitioner's claims are *Martinez/Trevino* claims

Having chosen not to remand, we must apply *Martinez/Trevino* to Abdur'Rahman's claims. In *Martinez*, the Supreme Court determined that "[i]nadequate assistance of counsel at initial-review-collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1315. The Supreme Court distinguished between a habeas argument that solely relies on post-conviction counsel's ineffectiveness versus a habeas argument that post-conviction counsel was ineffective and defaulted a claim that trial counsel was ineffective:

> In this case, for example, Martinez's "ground for relief" is his ineffectiveassistance- of-trial-counsel claim, a claim that AEDPA does not bar. Martinez relies on the ineffectiveness of his post-conviction attorney to excuse his failure to comply with Arizona's procedural rules, not as an independent basis for overturning his conviction. In short, while § 2254(i) precludes Martinez from relying on the ineffectiveness of his post-conviction attorney as a "ground for relief," it does not stop Martinez from using it to establish "cause."

Id. at 320 (citing *Holland v. Florida*, 560 U.S. 631, 649–50 (2010) (finding that post-conviction counsel's "egregious" and "extraordinary" conduct that time-barred a prisoner's habeas claims may equitably toll the statute of limitations for filing a petition for a writ of habeas corpus)).

In *Trevino*, the Supreme Court extended its *Martinez* holding to apply to states in which a defendant is permitted to raise claims of ineffective assistance of counsel on direct review, but the structure and design of the state system "make it 'virtually impossible' for an ineffective assistance claim to be presented on direct review." *Trevino*, 133 S. Ct. at 1915.

Thus, to raise a claim for ineffective-assistance-of-trial-counsel in habeas proceedings under the exceptions set forth in *Martinez/Trevino*, a petitioner must allege that (1) trial counsel was ineffective; (2) counsel in the initial-review-collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v.*

Washington, 466 U.S. 668 (1984); (3) the claim of ineffective-assistance-of-trial-counsel was procedurally defaulted; and (4) the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit—*not* that the prisoner will ultimately prevail on his claim. *See Martinez*, 132 S. Ct. at 1318–19 (citations omitted). Here, Abdur'Rahman met these requirements.

1. Petitioner alleges trial counsel was ineffective

Abdur'Rahman argues that his trial counsel was ineffective in failing to address cumulative errors[2] and

---

[2] It *Brady* and prosecutorial misconduct claims are also claims for ineffective-assistance-of-trial-counsel. The motion states "to secure relief under *Martinez*, Abdur'Rahman must establish . . . post-conviction counsel was ineffective . . . for failing to otherwise allege that trial or appellate counsel were ineffective for failing to raise the cumulative error claim." (Mot., R. 351, PageID 392.) Under *Martinez/Trevino*, this could be sufficient cause to excuse the default. However, the motion also states "Abdur'Rahman's cumulative error claim is not defaulted because . . . post-conviction counsel was ineffective for failing to present this winning claim during the state postconviction process." (*Id.* at 392–93.) This would not be sufficient cause under *Martinez/Trevino* because it relies solely on errors in post-conviction proceedings. The motion goes on to argue "the totality of the prejudice flowing both from counsel's ineffectiveness at sentencing and the prosecution's misconduct . . . presents not just a substantial cumulative error claim, but a meritorious one on which he is entitled to habeas relief." (*Id.* at 393.) This statement appears to again equate the prosecutorial misconduct claims and ineffective-assistance-of-counsel claims, which would suffice under *Martinez/Trevino.* Further development of the record is required to determine whether the cumulative error claim is a claim for ineffective-assistance-of-trial-counsel. In considering this very question

correct the accomplice jury instruction. (*See* Pet'r Statement, R. 367, PageID 520–23.) This is sufficient to meet the first prong of the *Martinez/Trevino* test.

2. Petitioner alleges post-conviction counsel was ineffective.

Martinez does not apply to claims of ineffective assistance of appellate counsel. *See Atkins*, 792 F.3d at 661 (holding that ineffectiveness of post-conviction counsel could establish cause to reopen judgment, but ineffectiveness of post-conviction appellate counsel could not). However, as evidenced by the briefs in this court and in the filings below, Abdur'Rahman does not simply claim that his appellate counsel was ineffective—he claims that post-conviction counsel was ineffective in failing to assert that (1) trial counsel was ineffective and (2) direct appeal counsel was ineffective. The applicability of *Martinez/Trevino* to Abdur'Rahman's motion is further augmented by the fact that Abdur'Rahman's direct appeal counsel was the same as his post-conviction counsel. (*See, e.g.*, Supplemental Auth., R. 353, PageID 455.)

Recognizing this, Abdur'Rahman interchangeably refers to appellate counsel's and postconviction counsel's ineffectiveness as the basis for this motion. (*See generally*, *id.*; Mot., R. 351.) Thus, Abdur'Rahman's arguments regarding "appellate counsel's ineffectiveness" are one and the same with his arguments regarding "post-conviction counsel's

---

before, I concluded these claims were linked: "The *Brady* violations and *Strickland* ineffective assistance fed off each other at trial in a perverse symbiosis that infected the verdict with constitutional error." *Abdur'Rahman v. Colson*, 649 F.3d 468, 483 (6th Cir. 2011) (Cole, J., dissenting).

ineffectiveness." These are the very types of claims to which *Martinez* and *Trevino* do apply. This is sufficient to meet the second prong of the *Martinez/Trevino* test.

3. Petitioner's claims were procedurally defaulted

Abdur'Rahman alleges the claims in his present motion were procedurally defaulted because his ineffective post-conviction counsel failed to raise these issues. (*Id.*) Assuming the cumulative error claim is a claim for ineffectiveness of trial counsel, it was clearly procedurally defaulted. This court noted:

> Because Abdur'Rahman raised these cumulative error arguments for the first time on habeas review, we may not consider them here. . . . Under our own circuit's precedent, however, cumulative error arguments must be raised separately in the state court and are subject to procedural default on habeas review. Abdur'Rahman failed to raise these cumulative error claims on direct appeal or during post-conviction relief in state court. Instead, he only raised a generalized cumulative error argument for the first time in his habeas petition. Because we are bound by this circuit's prior precedents, Abdur'Rahman cannot raise either cumulative error argument here.

Abdur'Rahman v. Colson, 649 F.3d 468, 472–73 (6th Cir. 2011) (citations omitted).

Abdur'Rahman's claim that trial counsel was ineffective for failing to challenge the accomplice jury instruction was also procedurally defaulted

> Petitioner next argues that he has exhausted his claim that the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence. . . . [T]his claim was not fairly presented to the state courts, and has not been exhausted. . . . Petitioner has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. . . . Thus, because Petitioner has no remedy currently available in state court, these claims are procedurally defaulted.

Bell, 999 F. Supp. at 1081, 1083.[3] This is sufficient to meet the third prong of the *Martinez/Trevino* test.

4. Petitioner's claims are substantial

a. Cumulative Error

Abdur'Rahman seeks to litigate whether the decision in his case would have been different "given the *cumulative error* arising from counsel's ineffective assistance at sentencing and prosecutorial misconduct." (*E.g.*, Mot., R. 351, PageID 383 (emphasis added).) The district court and this court considered the merits of Abdur'Rahman's individual prosecutorial misconduct

---

[3] It is unclear if Abdur'Rahman actually raised this claim in the state court. However, this is irrelevant because the *Martinez/Trevino* exception relies on a claim *not* being presented in state post-conviction proceedings because post-conviction counsel was ineffective. At the very least, this merits remand for further development of the record to determine whether this claim was in fact raised and whether it was procedurally defaulted. If postconviction counsel was ineffective and failed to bring or exhaust the claim, it is viable under *Martinez/Trevino*.

claims and trial counsel's failure to investigate and present mitigating evidence at sentencing. However, Abdur'Rahman's *separate claim* of cumulative error was *never* adjudicated on the merits and was *specifically* procedurally defaulted. *See Colson*, 649 F.3d at 472–73.

It is important to look closely at the decisions on these individual claims and the significance of those findings to a cumulative error argument. The decisions on most of Abdur'Rahman's claimed errors held there was no *Brady* violation or prosecutorial misconduct because there was no *prejudice*—the court did not find in each instance that there was no *error*. *See, e.g.*, *Rahman v. Bell*, No. 3:96-0380, 2009 WL 211133, at *4–6 (M.D. Tenn. Jan. 26, 2009), *aff'd sub nom. Colson*, 649 F.3d 468 (6th Cir. 2011) (finding, among other issues, Abdur'Rahman "failed to establish materiality resulting from the delay in providing the statement to the defense" and "Petitioner has failed to show that any failure to disclose was prejudicial to the Petitioner.") Further, the court specifically found that sentencing counsel was ineffective, but Abdur'Rahman was not prejudiced. *See Abdur'Rahman v. Bell*, 226 F.3d 696, 708 (6th Cir. 2000). These findings are critical to a cumulative error argument because "[t]he *cumulative* effect of errors that are harmless *by themselves* can be so prejudicial as to warrant a new trial." *E.g.*, *United States v. Adams*, 722 F.3d 788, 832 (6th Cir. 2013) (emphasis added) (citations omitted). Here, where Abdur'Rahman cited several different claims of error which were decided separately, in several different opinions, by several different courts, it is important to finally consider these errors *together*. *See, e.g.*, *id.* ("Although no one of the six identified errors may

warrant reversal on its own, the cumulative effect of these errors rendered defendants' trial fundamentally unfair in violation of their rights to due process.") (quoting *Walker v. Engle*, 703 F.2d 959, 968 (6th Cir. 1983) ("We need not determine whether each of the alleged errors would, alone, require that we find a deprivation of due process. It is clear that the cumulative effect of the conduct of the state was to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness."); *United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993) ("After examining [the errors] together, however, we are left with the distinct impression that . . . due process was not satisfied in this case.")).

This court previously found that the prosecution withheld several pieces of evidence, but they were not individually material or prejudicial, and that Abdur'Rahman's trial counsel's performance at sentencing was deficient, but not prejudicial. *See, e.g.*, *Bell*, 226 F.3d at 707–09. It is possible, upon further development of the legal arguments, in considering this question for the first time, that the court could find the cumulative nature of trial counsel's deficient performance was in fact prejudicial. This claim has merit under the fourth prong of the *Martinez/Trevino* test.

b. Accomplice Jury Instruction

Abdur'Rahman also argues the accomplice jury instruction provides cause to excuse the procedural default of his ineffectiveness-of-trial-counsel claim. While *Martinez* does not broadly apply to trial errors, it does apply if those errors were the result of ineffective-assistance-of-trial counsel. Abdur'Rahman argues that trial counsel failed to challenge the jury instruction and

was thus ineffective. (Mot., R. 351, PageID 422.) He further argues that post-conviction counsel, interchangeable with appellate counsel, failed to raise trial counsel's ineffectiveness in failing to challenge the improper jury instruction.

The court has never considered Abdur'Rahman's argument regarding the accomplice jury instruction. While the inquiry into whether sufficient evidence existed to support Abdur'Rahman's conviction may have some overlap with the inquiry into whether trial counsel was ineffective in failing to challenge the accomplice jury instruction, it is not the same and requires a separate analysis. It is possible, upon further development of the legal arguments, that the failure to raise this issue at trial was prejudicial to Abdur'Rahman, particularly when viewed in light of other cumulative errors. It is further possible that post-conviction counsel was ineffective in failing to raise this deficiency of the trial counsel. Consequently, this claim also has merit under the fourth prong of the *Martinez/Trevino* test.

IV. CONCLUSION

For the foregoing reasons, I respectfully concur in part and dissent in part.

APPENDIX B

United States District Court
Middle District of Tennessee
Nashville Division

ABU-ALI ABDUR'RAHMAN	)	
	)	No. 3:96-0380
v.	)	JUDGE CAMPBELL
	)	DEATH PENALTY
WAYNE CARPENTER,	)	
Warden[1]	)	

MEMORANDUM AND ORDER

Pending before the Court are Petitioner's Motion For Relief From Judgment (Docket No. 351); Supplemental Authority In Support Of Motion For Relief From Judgment (Docket No. 353); Second Supplemental Authority In Support Of Motion For Relief From Judgment (Docket No. 354); Third Supplemental Authority In Support Of Motion For Relief From Judgment (Docket Nos. 357, 359); Reply To Response To Supplemental Authorities In Support Of Motion For Relief From Judgment (Docket No. 366); and Statement Regarding Claims (Docket No. 367); as well as the Respondent's Responses thereto (Docket Nos. 352, 364).

---

[1] The parties appear to agree that the Warden of the facility currently housing the Petitioner is Wayne Carpenter.

Through the Motion For Relief, Petitioner requests that the Court reopen its judgment denying habeas corpus relief on claims previously found procedurally defaulted, pursuant to Fed. R. Civ. Rule 60(b), 60(b)(6) and 60(d)(1), 28 U.S.C. § 2243, Article I §9, Article III and the Fifth and Fourteenth Amendments to the Constitution. Relying on the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2011) and *Trevino v. Thaler*, 569 U.S. ___, 133 S.Ct. 1911, 185 L. Ed. 2d 1044 (2013), Petitioner specifically seeks to have the Court consider certain claims on the merits: the "cumulative error" claim, and the claim that the jury was not instructed about the need for independent corroboration of DeValle Miller's accomplice testimony and that counsel was ineffective for failing to raise this challenge. (Docket No. 367, at 1).

The cumulative error claim appeared in the Amended Petition as follows:

> B. GENERAL DUE PROCESS VIOLATION; CUMULATIVE EFFECT OF VIOLATIONS
>
> Petitioner alleges that all violations of his rights set forth in this Petition are direct violations of his federal constitutional rights. Further, to the extent the State or the State Court violated Petitioner's State-created rights, such a violation also amounts to an unlawful infringement upon Petitioner's liberty interests in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

> Petitioner further alleges that each violation of his constitutional rights set forth in this petition provides a sufficient ground for habeas relief. Moreover, the cumulative effect of the violations set forth in this petition mandate habeas relief. The entire criminal proceeding against Petitioner was infected with constitutional error from the outset through the final outcome.

(Docket No. 42, at 27(¶ B)). In ruling on Respondent's procedural defenses to certain of Petitioner's claims, this Court considered this claim and explained in a footnote:

> Respondent has asserted a procedural default defense as to Petitioner's claim that the cumulative effect of all errors at trial violated Petitioner's due process rights. (Amended Petition, ¶ B). In his brief, Petitioner indicates that this is not a separate claim for habeas relief, but is an argument to be considered in determining whether the state court's alleged errors should be considered harmless. Therefore, the Court will not consider this argument as a separate claim.

Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1083 n. 10 (M.D. Tenn. 1998). In a later appeal, however, the Sixth Circuit considered the "cumulative error" claim, through which the Petitioner argued that the court should cumulate his individual *Brady* claims with his prosecutorial misconduct or *Strickland* claims and

determine that the resulting prejudice makes his death sentence unfair and violative of due process. *Abdur'Rahman v. Colson*, 649 F.3d 468, 472 (6th Cir. 2011). The appeals court ruled that because the Petitioner failed to raise this cumulative error claim in state court, the claim was procedurally defaulted. *Id.*, at 472-73.

The accomplice jury instruction claim appeared in the Amended Petition as follows:

> (4) The trial court erred by failing to instruct the jury that testimony of accomplices must be corroborated by independent evidence. The erroneous jury instruction on this point was:
>
> > 'An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury.' (Tr. 1717-8).

(Docket No. 42, at 39-40(¶ C4(4)). The Petitioner argues that the following claims that appeared in the Amended Petition are related and should also be reopened:

> Trial counsel failed to exercise Petitioner's fundamental rights during the course of the trial. Among other things, during the trial counsel failed to: . . . (3) object to erroneous jury instructions at both the guilt and sentencing stages which

> have been outlined in this Petition above;
>
> * * *
>
> Petitioner's appellate counsel was ineffective in his representation of Petitioner on the direct appeal of Petitioner's conviction and death sentence to the Tennessee Supreme Court in failing to raise on appeal and/or properly brief the issues which Petitioner has been compelled to raise in this habeas proceeding. Such ineffective assistance of appellate counsel, in addition to denying Petitioner substantive rights, deprived Petitioner of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

(Docket No. 42, at 82 (¶¶ E2g, F)). In considering the Respondent's procedural defenses to these claims, the Court ruled that the Petitioner had procedurally defaulted the accomplice jury instruction claim and the ineffective assistance of appellate counsel claim, ¶ C4(4) and ¶ F. 999 F.Supp. at 1079 n. 5, 1081-83; 1080 & n. 7. The Court also ruled that the ineffective assistance of appellate counsel claim could not provide "cause" for the procedural default of the accomplice jury instruction claim because such a claim had not been presented to the state court. *Id.*, at 1084 & n. 13.

In response to Petitioner's pending motion, the Respondent argues that the Court should deny Petitioner's request to revive these claims because he has not shown the "exceptional circumstances" required for Rule 60 relief; and the *Martinez/Trevino* decisions do not apply to Tennessee criminal court proceedings.

For the reasons set forth herein, the Court concludes that Petitioner's request to reconsider his claims, under Rule 60 or otherwise, should be denied because the *Martinez/Trevino* decisions do not apply to reverse the findings of procedural default.

The *Martinez* decision centered on the procedures applied in the Arizona courts in direct appeals of criminal cases and post-conviction proceedings. The district court in *Martinez* held that the petitioner had procedurally defaulted his claim that his trial counsel was ineffective by failing to raise that claim in the Arizona state courts either on direct appeal or in post-conviction proceedings. 132 S.Ct. at 1314-15. Relying on *Coleman v. Thompson*, 501 U.S. 722, 753-54, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), the district court rejected the petitioner's argument that the default should be excused because his post-conviction counsel was ineffective for failing to raise the claim, pointing out that an attorney's errors in a post-conviction proceeding do not qualify as cause for a procedural default. 132 S.Ct. at 1314-15. The Ninth Circuit affirmed the district court's decision based on *Coleman*, concluding that there is no constitutional right to effective counsel in post-conviction proceedings even where the state court, like Arizona, does not permit ineffective assistance of trial counsel claims to be raised until the post-conviction proceeding. *Id.*, at 1315.

In reviewing the Ninth Circuit decision, the Supreme Court initially determined that it need not decide whether there is a constitutional right to effective counsel in post-conviction proceedings. The "precise question," according to the Court, "is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial

may provide cause for a procedural default in a federal habeas proceeding." *Id.* The Court then expressed its holding as follows: "This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* The Court explained that "initial-review collateral proceedings" are "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id.* In other words, where state procedure makes the post-conviction proceeding the first and only opportunity for a petitioner to raise an ineffective assistance of trial counsel claim, post-conviction counsel's failure to raise the claim provides cause for the procedural default.

In a more recent decision, the Supreme Court expanded the *Martinez* exception to cases originating in Texas, finding that even though the Texas courts do not prohibit a defendant from raising an ineffective assistance claim on direct review, the "structure and design of the Texas system in actual operation. . . make it 'virtually impossible' for an ineffective assistance claim to be presented on direct review." *Trevino v. Thaler*, 133 S. Ct. at 1915. In reaching its decision, the Court pointed out the difficulties in raising the claim in a motion for new trial because a motion for new trial must be made within 30 days of sentencing, and must be disposed of by the trial court within 75 days of sentencing. 133 S.Ct. at 1918. On the other hand, the transcript of the trial and sentencing are not required to be prepared until 120 days after sentencing, and this deadline may be extended. *Id.* Thus, the opportunity to present an ineffective assistance of counsel claim in a

motion for new trial is often inadequate due to the lack of an adequate record and the time constraints involved. In Trevino's case, the Court pointed out, new counsel was appointed eight days after sentencing, who then had 22 days in which to file a motion for new trial, but was unable to obtain the transcript of the proceedings until seven months after the trial. *Id.,* at 1919.

The Court also explained that the "Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review." *Id.* Consequently, "Texas now can point to only a comparatively small number of cases in which a defendant has used the motion-for-a-new-trial mechanism to expand the record on appeal and then received a hearing on his ineffective-assistance-of-trial-counsel claim on direct appeal." *Id.,* at 1920. The Court concluded by holding that "where, as here, 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, our holding in *Martinez* applies. . ." 133 S.Ct. at 1921.

The Petitioner argues that the reasoning of *Trevino* applies to the Tennessee courts because they do not provide a meaningful opportunity for a defendant to raise a claim of ineffective assistance of counsel on direct appeal. To support his argument, Petitioner cites numerous cases in which the Tennessee courts suggest that ineffective assistance of counsel claims are generally more appropriately raised in a post-conviction relief petition. *See, e.g.*, *State v. Sluder*, 1990 WL 26552, at *7 (Tenn. Crim. App. Mar. 14, 1990).

The Respondent argues that the Tennessee system is sharply and fundamentally different from those in Arizona and Texas. While there is a 30-day deadline for an initial motion for new trial, the courts are to "liberally grant motions to amend" until the day the motion is heard. Tenn. R. Crim. P. 33(b). Defendants are permitted to present testimony in open court and/or file affidavits on the issues raised in the motion. Tenn. R. Crim. P. 33(c). Unlike Texas, there is no deadline for resolution of the new trial motion, and consequently, there is no impediment to obtaining the record of the trial and sentencing before the court is required to rule on the new trial motion.

This Court is persuaded that the Tennessee courts offer a meaningful opportunity for defendants to raise ineffective assistance claims during the direct appeal process, and therefore, the decisions in *Martinez/Trevino* do not apply to the Tennessee courts. While the more common approach is for a defendant to raise the ineffectiveness claim in post-conviction, numerous defendants have raised the claim in a motion for new trial instead. *See State v. Urbano-Uriostegui*, 2013 WL 1896931, at *15 (Tenn. Crim. App. May 6, 2013); *State v. Monroe*, 2012 WL 2367401 (Tenn. Crim. App. June 22, 2012); *State v. Smith*, 2011 WL 5517646 (Tenn. Crim. App. Nov. 14, 2011); *State v. Johnson*, 2010 WL 3565761, at *12-18 (Tenn. Crim. App. Sept. 15, 2010); *State v. Norman*, 2010 WL 3448108 (Tenn. Crim. App. Sept. 2, 2010); *State v. Beheler*, 2010 WL 271284 (Tenn. Crim. App. Jan. 25, 2010); *State v. Crosby*, 2007 WL 189384 (Tenn. Crim. App. Jan. 26, 2007); *State v. Norton*, 2005 WL 1950295 (Aug. 12, 2005); *State v. Lance*, 2003 WL 1960270 (Tenn. Crim. App. April 28, 2003); *State v. Waters*, 2003 WL 824278

(Tenn. Crim. App. Mar. 6, 2003); *State v. Brandon*, 2002 WL 31373470 (Tenn. Crim. App. Oct. 15, 2002); *State v. Anderson*, 835 S.W.2d 600, 607-08 (Tenn. Crim. App. 1992).

The Petitioner argues that Tennessee courts discourage defendants from bringing ineffectiveness claims on direct appeal, and therefore, there is no "meaningful opportunity" to raise such a claim until the post-conviction process. The Petitioner is correct that Tennessee courts have warned defendants against raising claims on direct appeal, but their concern is that the defendant may raise such a claim without developing a record to support the claim through an evidentiary hearing in the trial court:

> Initially, we note that this court has repeatedly warned appellants against presenting claims of ineffective assistance of counsel on direct appeal because (1) it may be difficult to establish ineffective assistance without an evidentiary hearing and (2) raising the issue on direct appeal bars appellant from raising the issue in a post-conviction petition. *See State v. Anderson*, 835 S.W.2d 600, 607 (Tenn. Crim. App.1992); *State v. Thomas D. Taylor*, No. E2011-00500-CCA-R3- CD, 2012 WL 6682014, at *9 (Tenn.Crim.App. Dec. 21, 2012). However, in this case, the first reason for caution has been mitigated because the trial court used the motion for new trial hearing as an evidentiary hearing for appellant's claim of ineffective assistance.

State v. Urbano-Uriostegui, 2013 WL 1896931, at *15 (Tenn. Crim. App. May 6, 2013). *See also State v. Smith,* 2011 WL 5517646, at *12 ("This Court has consistently 'warned defendants and their counsel of the dangers of raising the issue of ineffective assistance of trial counsel on direct appeal because of the significant amount of development and fact finding such an issue entails.'") The court went on to consider the defendant's claim by reviewing the testimony adduced at the hearing on the motion for new trial. *Id.*

Ineffectiveness claims brought in a motion for new trial are subject to the same standards as those brought in a post-conviction petition. *See*, *e.g.*, *State v. Monroe*, 2012 WL 2367401, *4 (Tenn. Crim. App. June 22, 2012). Indeed, the defendants in *State v. Honeycutt*, 54 S.W.3d 762 (Tenn. 2001) and *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999) were successful in overturning their convictions on direct appeal by raising ineffective assistance of counsel claims in a motion for new trial and developing proof at evidentiary hearings held on the motions.

The Petitioner cites numerous Tennessee cases where the courts have "routinely refused to consider ineffectiveness claims raised on direct appeal." (Docket No. 353, at 2, n. 1). In those cases, however, the defendants have failed to develop the record at a hearing in the trial court (or failed to file the record on appeal), and the appeals court has refused to consider the claim in order to preserve it for post-conviction. *State v. Allen*, 2011 Tenn. Crim. App. Lexis 260, *23 (Tenn. Crim. App. Apr. 5, 2011)(defendant concedes claim should not be addressed on appeal because not addressed by trial court); *State v. Roberts*, 2011 Tenn. Crim. App. Lexis 240, *11-12 (Tenn. Crim. App. Mar.

30, 2011)(transcript of motion for new trial hearing not included in record); *State v. Johnson*, 2010 Tenn. Crim. App. Lexis 143, *22-23 (Tenn. Crim. App. Feb. 18, 2010)(claim not raised in trial court); *State v. Gerhardt*, 2009 Tenn. Crim. App. Lexis 523, *54- 58 (Tenn. Crim. App. Jan. 23, 2009)(claim not raised in trial court); *State v. Lones*, 2007 Tenn. Crim. App. Lexis 206, *14-15 (Tenn. Crim. App. Mar. 6, 2007)(defendant concedes claim is not ripe for review as no evidence presented in trial court); *State v. Haynes*, 2006 Tenn. Crim. App. Lexis 275, *4-8 (Tenn. Crim. App. Apr. 3, 2006)(claim not raised in trial court); *State v. Holloway*, 2003 Tenn. Crim. App. Lexis 797, *23-24 (Tenn. Crim. App. Sept. 17, 2003)(no evidence presented at hearing on motion for new trial as defendant raised claims *pro se* and counsel requested that the court not rule on the merits); *State v. McCann,* 2001 Tenn. Crim. App. Lexis 840, *41-42 (Tenn. Crim. App. Oct. 17, 2001)(claim not raised in trial court); *State v. Belcher*, 1997 Tenn. Crim. App. Lexis 1185, **15-16 (Tenn. Crim. App. Nov. 26, 1997)(claim not raised in trial court); *State v. Madkins*, 1997 Tenn. Crim. App. Lexis 808, *12-13 (Tenn. Crim. App. Aug. 22, 1997)(claim not raised in trial court); *State v. Sepulveda*, 1997 Tenn. Crim. App. Lexis 598, *16-20 (Tenn. Crim. App. Jun. 26, 1997)(no evidence presented to support claim in trial court); *State v. Turner*, 1997 Tenn. Crim. App. Lexis 552, *26-29 (Tenn. Crim. App. Jun. 11, 1997)(claim not raised in trial court); *State v. Blye*, 1990 Tenn. Crim. App. Lexis 846, *4-6 (Tenn. Crim. App. Dec. 17, 1990)(no proof presented in trial court on *pro se* ineffectiveness claims, but appeals court preserves issue for post-conviction); *State v. Tilley*, 1990 Tenn. Crim. App. Lexis 845, *4-5 (Tenn. Crim. App. Dec. 14, 1990)(claim not raised in

trial court); *State v. Fletcher,* 1990 Tenn. Crim. App. Lexis 830 (Tenn. Crim. App. Dec. 13, 1990)(claim not raised in trial court); *State v. Sluder*, 1990 Tenn. Crim. App. Lexis 222, *22-24 (Tenn. Crim. App. Mar. 14, 1990)(claim not raised in trial court).

Unlike defendants in Texas, defendants in Tennessee are not faced with a system in which it is "highly unlikely" they will have "a meaningful opportunity" to raise a claim of ineffective assistance of trial counsel during the direct appeal process. As the cases cited above indicate, procedural rules allow Tennessee defendants such a meaningful opportunity through the motion for new trial and evidentiary hearing mechanism. That most defendants choose to defer raising such a claim until the post-conviction process does not mean that raising the claim on direct appeal is "virtually impossible" as was the case in *Trevino*.

Petitioner also argues that the *Martinez/Trevino* decisions apply in this case because he had no "meaningful opportunity" to raise a claim of ineffective assistance of counsel due to the nature of his representation. Petitioner argues that trial counsel represented him at the motion for new trial, and therefore, a conflict of interest prevented him from raising claims of his own ineffectiveness as part of that proceeding; and direct appeal counsel also represented him in postconviction proceedings, and therefore, a conflict of interest prevented him from raising claims of his own ineffectiveness in the post-conviction proceedings.

The lack of a "meaningful opportunity" the Court referred to in *Martinez/Trevino*, however, was caused by the procedural rules imposed by the state courts in

Arizona and Texas. Neither case considered the "conflict of interest" argument made by the Petitioner here, and Petitioner has not cited any authority in which the Supreme Court or the Sixth Circuit has expanded the *Martinez/Trevino* decisions as suggested by the Petitioner. Indeed, in *Hodges v. Colson*, 711 F.3d 589, 603 (6th Cir. 2013), the Sixth Circuit refused to expand the *Martinez* decision to ineffective assistance of *appellate* counsel claims:

> The Court in *Martinez* purported to craft a narrow exception to *Coleman*. We will assume the Supreme Court meant exactly what it wrote: '*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause and this remains true *except* as to initial-review collateral proceedings for claims of ineffective assistance of counsel *at trial.'*
>
> * * *
>
> . . . [H]ere [Hodges] claims ineffective assistance of post-conviction counsel as cause to excuse default of his claim of ineffective assistance of *appellate* counsel for failure to raise the juror misconduct issue on direct appeal. Under *Martinez* 's unambiguous holding our previous understanding of *Coleman* in this regard is still the law – ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel.

711 F.3d 589, 602-03 (footnote omitted).

Finally, the Court notes that none of the cases cited by the Petitioner in his Second and Third Supplemental filings analyze and apply *Martinez* and *Trevino* to the Tennessee state courts. *Balentine v. Thaler*, 133 S.Ct. 2763 (June 3, 2013); *Haynes v. Thaler*, 133 S.Ct. 2764 (June 3, 2013); *Mitchell v. Fortner*, Case No. 1:93-0073 (M.D. Tenn. June 13, 2013).[2] The Court is not persuaded that these cases dictate a different result.

It is so ORDERED.

/s/Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

---

[2] Two of those decisions were simply orders by the Supreme Court remanding cases, which involved the same Texas court system that was at issue in *Trevino,* to the Fifth Circuit for further consideration in light of *Trevino*. *See*, *e.g.*, *In re: Whirlpool Corporation Front-Loading Washer Products Liability Litigation*, 2013 WL 3746205, at *1 (6th Cir. July 18, 2013)("[A] GVR order does not necessarily imply that the Supreme Court has in mind a different result in the case, nor does it suggest that our prior decision was erroneous.") The third decision is an order with no analysis of the legal issues.

APPENDIX C

No. 13–6126

United States Court of Appeals
for the Sixth Circuit.

ABU-ALI ABDUR'RAHMAN,
Petitioner-Appellant

v.

WAYNE CARPENTER, Warden,
Respondent-Appellee

ORDER
Filed: March 2, 2016

Before: COLE, *Chief Judge*; SILER and BATCHELDER, *Circuit Judges.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issue raised in the petition were fully considered upon the original submission and decision on the case. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
DEBORAH S. HUNT, CLERK