CAPITAL CASE
NO EXECUTION DATE SET

No. 16-144

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

DAVID BRUCE WESTBROOKS, WARDEN,

Respondent.

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

PETITIONER'S REPLY

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Petitioner presented two important questions, both involving acknowledged circuit splits, for this Court's review. The first, which is also presented in a case already pending for oral argument before the Court, is whether a motion for relief under Rule 60(b)(6) can succeed if predicated on the change in law created by *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). The second is whether those cases reach ineffective-assistance-of-appellate-counsel (IAAC) claims because, like the ineffective-assistance-of-trial-counsel (IATC) claims they specifically addressed, such claims cannot arise before post-conviction review. While seeking a grant on both questions, the petition expressly asked that, like another petition from the Sixth Circuit presenting the same question, *see Johnson v. Carpenter*, No. 15-1193, this case at least be held pending the decision in *Buck v. Davis*, No. 15-8049, which will undoubtedly affect the first question presented. *See* Pet. 2.

In response, the State fails to present any serious reason why this petition should not be held pending *Buck* or granted in its own right. Most notably, the State fails to even mention—let alone distinguish—the *Johnson* petition this Court is already holding for *Buck*. Instead, the State makes two vehicle arguments that are plainly false. The State's failure to press even one substantial argument in opposition to certiorari, in a capital matter with acknowledged circuit splits, demonstrates that the questions presented merit an independent grant of plenary review even if the disposition of *Buck* does not require a remand.

I. The First Question Presented Merits A Grant Or Hold.

As to the first question presented, the State argues exclusively that this Court should deny certiorari because the decision below arises from a circuit that is already on the defendant's side of the 4-3 split identified in the petition. *See* BIO 9-13. The State believes the Sixth Circuit has actually adopted the flexible approach of the Third, Seventh, and Ninth Circuits, and thus holds that petitioners identifying no change in law or circumstances beyond *Martinez* and *Trevino* actually do qualify for Rule 60 relief. This argument fails for two reasons. First, and most importantly, it is untrue: The Sixth Circuit has plainly adopted the precise opposite rule. Second, the State fails to even address the standard for a hold and possible GVR in light of *Buck*, which requires only that *Buck*'s rationale could create "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). At a minimum, that standard is easily met here.

A. The Sixth Circuit has adopted the challenged categorical rule.

The State's argument that the Sixth Circuit has actually adopted a flexible approach to Rule 60 motions in *Martinez* cases—one that acknowledges that such motions can prevail based on case-specific equities—relies on a critical mischaracterization of the dispute. The State points to *McGuire v. Warden*, 738 F.3d 741 (6th Cir. 2013), for the proposition that Rule 60(b)(6) generally requires a "case-by-case inquiry"

that involves balancing "numerous factors"—a truism no court could dispute. *See* BIO 11 (quoting *McGuire*, 738 F.3d at 750); 7 J. Lucas & J. Moore, *Moore's Federal Practice* ¶60.27[2] at 375 (2d ed. 1982) (Rule 60(b)(6) is a "grand reservoir of equitable power to do justice in a particular case."). The actual question presented is more precise, however, and concerns the Sixth Circuit's holding that, in cases where the petitioner bases a Rule 60(b) motion on *Martinez* or *Trevino*, he must point to another *change*—and not just other, pre-existing equitable considerations in the case—in order to prevail. That requirement is evident on the face of *McGuire* itself, *see* 738 F.3d at 750; in fact, the State affirmatively identified that holding and relied on it below. *See infra* pp.5-6.

The best evidence of this *per se* rule, however, is the actual decision below. It holds that petitioner must lose because he did not "point to any other extraordinary circumstances; there are *no newly developed facts* since the denial of his habeas petition … and the *Martinez* exception is not a change in the constitutional rights of criminal defendants."[1] Pet. App. 7a (emphasis added). This is the exact opposite of the rule adopted in the Third, Seventh, and Ninth circuits, which hold that the combination of the "remarkable" change in *Martinez* and *Trevino* with

[1] The State's description of the case below as one that considered "the absence of other extraordinary circumstances," BIO 12, deceptively leaves out everything after the semicolon—including the Court's critical holding that such circumstances must have arisen *since the prior decision* in order to be relevant. This requirement of additional *changes* is precisely what is at issue with respect to the challenged categorical rule.

other *preexisting* equitable considerations in the case can merit Rule 60(b)(6) relief. *See Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012); *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015); *Cox v. Horn*, 757 F.3d 113, 125–26 (3d Cir. 2014). The question presented is whether the Sixth Circuit is wrong and these other courts are correct, or the other way around.

More proof is in the pudding. The Sixth Circuit failed to consider *any* of the equitable factors that the more flexible circuits have identified, including petitioner's diligence in pursuing relief, and the merit of the underlying claims defaulted by his ineffective counsel. Most strikingly, the Sixth Circuit does not even mention the capital nature of petitioner's case, a "special" consideration emphasized by the Third Circuit's contrary approach in *Cox*, 757 F.3d at 126. In fact, the Sixth Circuit *did not even allow petitioner to file a brief* regarding the "case-by-case" balancing of equities that the State now claims the Sixth Circuit performs in every *Martinez* case arising under Rule 60(b)(6). And it denied that briefing even though this issue *had not even been considered by the district court*, which instead ruled on an admittedly erroneous ground. If the Sixth Circuit does not in fact categorically deny the eligibility of petitioners like Abdur'Rahman for relief, there is no justification consistent with due process for denying him that right to be heard, nor for denying certificates of appealability to similarly situated petitioners like Johnson. *See* Petition, *Johnson v. Carpenter*, No. 15-1193, at 30-35.

Finally, to the extent there is any doubt about what rule the Sixth Circuit applies, it is a reason to grant review (or at least to hold for a possible GVR) and not the opposite. By failing to allow petitioners like Abdur'Rahman to brief the equitable considerations in their cases—and denying others the COAs necessary to do so—the Sixth Circuit has made it impossible even for capital defendants to obtain clarity on why their Rule 60(b)(6) motions are being denied. If the Sixth Circuit's position is actually that petitioners may be eligible for Rule 60(b)(6) relief when the only change they identify is *Martinez*, but are simply failing to identify the right equitable considerations, it must certainly say so. Until it does, it is not appropriate for this Court to approve executions on the theory that the Sixth Circuit *might* have a more permissive approach.

That is particularly so because the State argued below that, under Sixth Circuit precedent, the Court was *required* to deny petitioner relief where "petitioner did not suggest newly developed facts in addition to the *Martinez* and *Trevino* holdings to support his motion." Appellee's Br., CA6 No. 13-6126, Doc. 32, at 13.[2] In fact, the State even cited with approval below to the rules adopted in the Fifth and Eleventh Circuits—on the *other side* of the alleged split. *Id.* at 14. That argument prevailed; the State cannot now turn around and argue that the Sixth Circuit's

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[2] *See also* Appellee's Opp. to Remand, CA6 No. 13-6126, Doc. 38, at 3-4 ("The procedural holdings of *Martinez* and *Trevino* are not extraordinary; therefore, some further factual development is necessary to warrant Rule 60(b)(6) relief. *McGuire*, 738 F.3d at 750. As was the case in *McGuire*, the petitioner does not bring anything new to the table.").

decision is immune from review because it actually follows a more flexible balancing approach. The Sixth Circuit's *per se* rule is plain, and merits review.

B. At a minimum, a hold for *Buck* is plainly appropriate.

Separately, the State barely disputes that the minimum relief of a hold for *Buck* is appropriate here. In particular, although it was a centerpiece of the petition, *see* Pet. 17-22, the State does not dispute that the Court is already correctly holding for *Buck* another Sixth Circuit case presenting the same question, nor does it make any effort to distinguish that case from this one. There is no discernable basis on which the resolution in *Buck* might affect the outcome in *Johnson* but not in this case: All three directly implicate the question whether a petitioner can obtain relief if the only change in circumstances they identify is *Martinez* and *Trevino*. The Court will thus quite likely address the breadth of possible Rule 60(b)(6) relief for *Martinez*/*Trevino* petitioners in *Buck*. And that makes it certain that *Buck*'s disposition could create "a reasonable probability that the decision below rests upon a premise [about the breadth of possible Rule 60(b)(6) relief] that the lower court would reject if given the opportunity for further consideration," *Lawrence*, 516 U.S. at 167.

Indeed, it is notable that the State does not even mention this Court's standard for a hold and GVR in light of an intervening decision. It does argue that this case is distinguishable from *Buck*, *see* BIO 13, but that is irrelevant: Holds and GVRs are not reserved for *indistinguishable* cases where the petitioner will *necessarily* prevail in light of intervening precedent.

In fact, this Court GVR'd two cases in a Rule 60(b) posture when it decided *Trevino* itself. Because it is not even disputed here that *Buck* could influence the scope of Rule 60(b)(6) relief allowed to *Martinez* petitioners, it is impossible to deny that, at a minimum, a hold for *Buck* is the appropriate course.

II. The Second Question Is Undisputedly Certworthy, And Was Not Waived Below

The second question presented is whether, as the Ninth Circuit has held, IAAC claims should qualify for *Martinez* and *Trevino* relief just as IATC claims do—as should, perhaps, any other important claim that necessarily arises for the first time on state post-conviction review. *See Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1290 (9th Cir. 2013); *see also Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) (noting that there is "not a dime's worth of difference" between IATC and IAAC under the logic of *Martinez*). The State's opposition to a grant on this question is remarkable, and in fact demonstrates that plenary review on this question would be appropriate without regard to the disposition of *Buck*.

As an initial matter, the Brief in Opposition is striking for all the points it concedes. It does not contest that there is at least a 3-1 circuit split on the question presented, that the Sixth Circuit has adopted a categorical rule against IAAC claims, that this issue is recurring and important, and that this case is a good vehicle because of the strength of Abdur'Rahman's claim of IAAC here in light of the failure to preserve a (now unambiguously winning) claim of cumulative error. *See* Pet. 22-34; BIO 14-17. In fact, the State does not even contest the petition's point that the rule

against applying *Martinez* and *Trevino* to IAAC claims is illogical, and founded on nothing more than the narrowness of the language this Court used in deciding *Martinez* itself. *See* BIO 14-15 n.3 (arguing exclusively that Sixth Circuit has reasonably read the limited language of *Martinez*, and not contesting that differentiation between IAAC and IATC claims is illogical). Put otherwise, the State—in this *capital* matter—has openly failed to contest *every* important indicia of certworthiness to which this Court ordinarily looks.

Instead, the State raises a vehicle problem that is plainly mistaken in three separate respects. It argues that this Court should not reach this issue because petitioner's Rule 60 motion failed to assert a claim of IAAC based on appellate counsel's failure to preserve his cumulative error claim. This argument is: (1) obviously false; (2) irrelevant, because this issue was both pressed *and* passed upon below; and (3) itself waived, because the State has never mentioned it before.

Remarkably, although it is the *sole* basis for contesting certiorari here, the claim of waiver is plainly false. On page 114 of the State's own appendix, petitioner's Rule 60 motion enumerates the reasons why he is entitled to relief, including that "post-conviction counsel was ineffective for failing to allege a claim that Abdur'Rahman was denied due process given cumulative error *and*/or *for failing to otherwise allege that trial or appellate counsel were ineffective for failing to raise the cumulative error claim*." *See* BIO App. 114 (emphasis added). There—plain as day—is a *Martinez* claim that ineffective post-

conviction counsel defaulted a substantial claim of IAAC when he failed to assert the failure of that counsel to preserve petitioner's cumulative-error claim. To be sure, because this claim boils down to cumulative error at bottom, petitioner sometimes described it below in shorthand as his cumulative-error claim (rather than his claim of post-conviction ineffectiveness as a gateway to raising direct-appeal ineffectiveness regarding the default of cumulative error). But that unremarkable effort to make his motion readable cannot possibly constitute waiver of an IAAC-based *Martinez* claim that was precisely and correctly stated in the motion itself, and clearly understood by *every* relevant decision below. *See* Pet. App. 8a.

Indeed, even if there were any lack of clarity in petitioner's underlying Rule 60 motion (which there is not), it would not matter, because the Sixth Circuit clearly identified petitioner's argument and adjudicated it, applying the rule that IAAC claims are ineligible for relief under *Martinez* and *Trevino*. *See id.* ("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."). The issue was thus both pressed and passed upon below, either of which would have been sufficient to preserve the issue for this Court's review. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). In fact, the published opinion below not only firmly establishes the Sixth Circuit's position on the question that is presented here and divides the Courts of Appeals, but it is the only basis on which the Court below disposed of petitioner's claim

regarding IAAC in the failure to preserve his winning claim of cumulative error.[3] It is thus remarkable for the State to argue that this question is somehow not actually presented for purposes of certiorari review; the Sixth Circuit's unambiguous holding manifestly makes this case an opportunity to bring consistency to the circuits on a matter of importance to countless capital cases.

Finally, even if the State's waiver argument did not suffer from the two insurmountable issues above, it would be unavailable, because it is itself waived. Nowhere in its briefing below did the State argue that a claim of IAAC based on failure to preserve cumulative error was missing from the Rule 60 motion; instead, it responded to that claim on the merits. *See* Appellee's Br., CA6 No. 13-6126, Doc. 32, at 40-43. Perhaps for that reason, the State does not

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[3] The sole additional discussion of this claim below involves "dissect[ing] the cumulative error claim" into each individual alleged error, which is exactly the form of analysis that prejudiced petitioner's claim in the previous appeal. *See* Pet. App. 8a; *see also Abdur'Rahman v. Colson*, 649 F.3d 468, 472-73 (6th Cir. 2011) (expressly refusing to cumulate petitioner's claim in previous appeal because of procedural default). It is thus mystifying for the State to argue in its BIO that the defaulted claims were "fully adjudicated against him" in the previous cases, *see* BIO 18; the whole point of petitioner's motion is that the cumulative-error claim has never been adjudicated because his ineffective counsel defaulted it. Moreover, the BIO does not contest that, under *current* Supreme Court law, even fresh, *individualized* analysis of petitioners' claims would now require relief. And that would, of course, be doubly so if petitioner's claim of cumulative error were now available for its first merits consideration.

even purport to identify any prejudice to the State from the consideration of this claim in this Court or any other, nor does it point to any other argument it would have raised below. Nor does the State purport to identify any respect in which this Court's review would be hamstrung by the alleged deficiency of petitioner's Rule 60(b)(6) motion (which, again, is not actually deficient in any respect).

In sum, this petition clearly presents the independently certworthy question whether *Martinez* and *Trevino* should apply to IAAC claims, and the State's *only* argument in opposition is facially false, irrelevant, and waived. Notably, the Court has expressed interest in this very question in a pending petition, *see McClain v. Kelly*, No. 15-8901 (CFR in case presenting this question), and this case represents a vehicle free from the problems the respondent identified in that matter. The Court's interest in this second question presented makes perfect sense, as it is the subject of an important circuit split that dispositively affects capital cases—including this one. Accordingly, regardless of the disposition on the first question presented, this Court should grant plenary review on the second question as well.

CONCLUSION

The Court should grant plenary review on the second question presented or, at a minimum, hold this case for *Buck v. Davis*, No. 15-8049.

Respectfully submitted,

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