*****THIS IS A CAPITAL CASE*****
******EXECUTION SCHEDULED FOR TODAY AT 8:00 P.M. EDT******

No. _____

In the Supreme Court of the United States

MARCEL WAYNE WILLIAMS

Petitioner

v.

WENDY KELLEY, Director, Arkansas Department of Correction,

Respondent

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
CAPITAL CASE

In 2007, the federal district court, after a several-day hearing, found that Marcel Williams "was subject to every category of traumatic experience that is generally used to describe childhood trauma. He was sexually abused by multiple perpetrators. He was physically abused by his mother and stepfather, who were his primary caretakers. He was psychologically abused by both of his primary caretakers. He was subjected to gross neglect in all categories of neglect: medical, nutritional, educational. He was a witness to violence in the home and in his neighborhood throughout his childhood. As an adolescent, he was violently gang-raped in prison." Mr. Williams's jury heard none of this because his trial counsel failed to investigate and present this evidence. The federal district court found these claims substantial and granted relief. The Eighth Circuit reversed. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009). Two judges of this Court agreed with the federal district court that this evidence was substantial and would have granted a petition for a writ of certiorari. *Williams v. Hobbs*, 562 U.S. 1097 (2010) (Sotomayor, J., and Ginsburg, J., dissenting).

Mr. Williams now faces imminent execution on the basis of law that predates this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). Because Mr. Williams's post-conviction counsel failed to investigate and present this substantial claim of trial-counsel ineffective assistance, he would today be entitled to relief. Although the district court granted Mr. Williams a certificate of appealability (COA), the Eighth Circuit nevertheless denied his motion for a stay of execution.

The questions presented are:

1. Should this Court resolve a split among the Circuit Courts of Appeals to decide whether Petitioner is entitled to a stay of execution, given that a Certificate of Appealability has been granted?

2. Does the rule set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012), apply where initial post-conviction counsel asserted, but ineffectively failed to develop and present, a substantial claim of trial counsel ineffectiveness?

3. Should Petitioner be permitted to reopen his judgment pursuant to Rule 60(b)(6) so that the District Court may reconsider his substantial, but defaulted, claim of ineffective assistance of trial counsel at his penalty phase, including the failure to present evidence of Mr. Williams' substantial abuse, neglect, and trauma, under *Martinez v. Ryan*, 566 U.S. 1 (2012)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marcel Williams respectfully requests a petition for a writ of certiorari to review the capital post-conviction proceeding under 28 U.S.C. §2254 and the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is included as Appendix A (App. 1a–10a). The district court's opinion is included as Appendix B (App. 11a–20a).

JURISDICTION

The Eighth Circuit entered judgment on April 24, 2017. App. 1a. The Petition is timely under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Rule 60(b)(6) provides for relief from judgment for "any other reason that justifies relief"" Rule 60(c)(1) states that a motion under Rule 60(b)(6) "must be made within a reasonable time."

STATEMENT OF THE CASE

The Petitioner, Marcel Wayne Williams, was convicted of capital murder in the Circuit Court of Pulaski County, Arkansas, on January 14, 1997. At trial, Mr. Williams's lawyers conceded his guilt, declined to cross-examine the prosecution's witnesses, and allowed the introduction of evidence to which they might have objected otherwise. During the penalty phase of his capital trial, his lawyers called as their sole witness an inmate who did not know Mr. Williams but who had once been housed on death row. This inmate testified that life was more pleasant on death row than in the general population of the prison. No further evidence was presented at sentencing on Mr. Williams's behalf. Mr. Williams's attorneys subsequently admitted that they did not put forth any true mitigation evidence because they did not know how to properly present a mitigation case for a capital defendant. Mr. Williams was sentenced to death.

During state post-conviction proceedings, Mr. Williams's counsel submitted a nominal "claim" concerning the ineffectiveness of trial counsel at the sentencing phase, yet failed to offer any evidence that Mr. Williams was prejudiced by trial counsel's ineffectiveness. The state court rejected the "claim" for that very reason. No claims were raised in post-conviction concerning the effectiveness of trial counsel during the guilt phase. Not surprisingly, Mr. Williams was denied post-conviction relief altogether. After being denied relief in the state courts, Mr. Williams filed a habeas petition in the district court challenging his death sentence based upon, among other grounds, the fact that his trial lawyers rendered ineffective assistance during both the guilt and penalty phases of his capital trial.

Based on evidence presented at an evidentiary hearing, the district court found *Strickland* prejudice and granted relief on Williams's claim that his lawyers were ineffective at the penalty phase. ECF Doc. 94. On Appeal the Eighth Circuit reversed and reinstated the death sentence,

holding the record was limited by section 2254(e)(2) to the evidence presented in state court and finding that, on that record, the state court decision was not contrary to or an unreasonable application of *Strickland*. *Williams v. Norris*, 576 F.3d 850, 858-63 (8th Cir. 2009). Over a vigorous dissent, this Court denied Williams's petition for a writ of certiorari. *Williams v. Hobbs*, 562 U.S. 1097 (2010) (Sotomayor, J., and Ginsburg, J., dissenting).

On April 1, 2017, Mr. Williams asked the district court to reconsider its ruling concerning these claims under Fed. R. Civ. P 60(b)(6). Mr. Williams also filed a motion to stay his execution to allow consideration of this motion. The district court denied that motion on April 18, 2017 and granted a certificate of appealability. Mr. Williams filed a Notice of Appeal the same day.

On April 20, 2017 Mr. Williams filed a Motion for Stay of Execution pending the appeal of the district court's denial of 60(b) relief with the Eighth Circuit Court of Appeals. On April 24, 2017, the Eighth Circuit denied that motion.

REASONS FOR GRANTING THE PETITION

The district court granted a Certificate of Appealability on Mr. Williams's motion for relief under Rule 60(b), given that his underlying claim that trial counsel was ineffective, and his request for Rule 60(b) relief based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), raised issues that are at least debatable among jurists of reason. Nevertheless, the district court and the Eighth Circuit denied Petitioner's motions for a stay. This Court should grant certiorari to settle the split among the circuits as to whether the grant of a COA entitles a capital petitioner to a stay of execution; to clarify whether post-conviction counsel defaults a claim by failing to investigate it; and to clarify the availability of Rule 60(b) relief to claims defaulted by state post-conviction counsel.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE GRANT OF A CERTIFICATE OF APPEALABILITY ENTITLES A CAPITAL HABEAS PETITIONER TO A STAY OF EXECUTION.

The Circuit Courts are divided on the question of whether a petitioner is entitled to a stay of execution once a Certificate of Appealability has been granted. Here, the District Court granted a COA, finding that the issues presented in the Rule 60(b) motion are at least debatable. App. 10. Under *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983), a stay of execution should be granted when a capital habeas petitioner's claims meet that standard.

But despite the District Court's grant of a COA, no stay of execution was granted by either the District Court or the Court of Appeals. Under *Barefoot* and the Circuit's Local Rules, when the District Court grants a COA, a stay of execution pending appeal must be granted so that the issues can be given the full appellate briefing, argument, and judicial review that they deserve. *Barefoot*, 463 U.S. at 893-94 ("[A] circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause."); Eighth Circuit Local Rule 47A ("[I]n an in forma pauperis appeal in which a certificate of appealability has been issued, the court will afford 14 days' notice before entering summary disposition if the briefs have not been filed.") (emphasis supplied). The Eighth Circuit's ruling creates a conflict among the Courts of Appeals.

Other Courts of Appeals have recognized that a stay of execution must be granted when a COA is granted. See *Gore v. Crews*, 720 F.3d 811, 815 (11th Cir. 2013) (explaining that, because district court had granted a COA, the circuit court granted a "temporary stay of execution in order to prevent Gore's death mooting the appeal"); *Ferguson v. Sec'y, Fla. Dep't*

of Corrections, 716 F.3d 1315, 1330 (11th Cir. 2013) (staying an execution following district court's grant of COA, which was issued "less than one hour before Ferguson's scheduled execution"); *Simon v. Epps*, 463 F. App'x 339, 340 (5th Cir. 2012) (staying an execution scheduled for four days after the district court granted a COA, explaining that the stay was necessary "in order to consider [Simon's] appeal"); *Michael v. Wetzel*, Order, No. 12-9006 (3d Cir. Nov. 8, 2012) ("Because the District Court has not granted a stay of execution [to accompany its grant of a COA], we hereby grant the Appellant's stay of execution filed with this court.") (citing *Barefoot*).

This conflict needs to be resolved, not only to ensure consistency among the Courts of Appeals, but in order to create a rule that is capable of straightforward application by courts facing the time pressure of an impending execution. If the rule is clear that a petitioner who obtains a COA is also entitled to a stay of execution, there will be less of a reason for last-minute appeals to higher courts, including this Court.

The standards for a stay of execution are well-established. Relevant considerations for granting a stay include the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Nooner v. Norris*, 491 F.3d 804, 808 (8th Cir. 2007). All three factors weigh strongly in Mr. Williams's favor. Here, where Petitioner's claims justifying reversal of his death sentence are at least debatable, there is no meaningful countervailing interest in proceeding hastily with the

execution. The state, after all, has an equally compelling interest in ensuring no one is unfairly executed. *Burger v. Kemp*, 483 U.S. 776, 785 (1987).

Moreover, in light of the District Court's recognition that Appellant's claims are at least debatable, he is entitled to the full benefit of counsel. In *McFarland v. Scott*, 512 U.S. 849 (1994), this Court emphasized the role of counsel:

> [C]riminal defendants are entitled by federal law to challenge their conviction and sentence in habeas corpus proceedings. By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.

Id. at 859.

McFarland, and the intent of Congress, would be thwarted if counsel is not permitted the opportunity to fully brief the claims. As Petitioner's procedural arguments are potentially meritorious, warranting the reopening of his habeas litigation, *McFarland* demands that he has the full benefit of counsel, something he will not receive should the stay be denied.

II. THE COURT SHOULD CONSIDER WHETHER *MARTINEZ* EXTENDS TO FAILURE TO DEVELOP EVIDENCE TO SUPPORT TRIAL COUNSEL'S INEFFECTIVENESS

The Eighth Circuit concluded that Petitioner's ineffective-assistance-of-sentencing-counsel claim was decided on the merits during state post-conviction review. Post-conviction counsel's failure to investigate the claim brought in federal habeas did not create default of the claim. That is a questionable conclusion, for several reasons.

First, because it is an equitable doctrine, *Martinez* should be understood as establishing an equitable exception to the operation of § 2254(e)(2). *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-32 (2013) (recognizing fundamental miscarriage of justice equitable exception to running of statute of limitations).

Second, § 2254(e)(2) and procedural default are so closely related that it would be inconsistent with the purpose and holding of *Martinez* to fail to apply it in the context of § 2254(e)(2). The *Martinez* rule was created for precisely this circumstance: "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Martinez*, 132 S. Ct at 1316. In this case, no state court at any level heard the actual substance of Mr. Williams's ineffective assistance of trial counsel claim. At the very least, the state court review would "not have been sufficient to ensure that proper consideration was given" to the claim. *Id*. at 1318.

Failure to develop under § 2254(e)(2) is a procedural ground very similar to a procedural default finding. *See Williams v. Taylor*, 529 U.S. 420, 437 (2000) (whether petitioner "failed to develop" evidence depends on whether he was "diligent in developing the record and presenting, if possible, all claims of constitutional error"); *Wilson v. Beard*, 426 F.3d 653, 665 (3d Cir. 2005) (procedural default doctrine and § 2254(e)(2)'s diligence requirement are analytically linked). Indeed, the rationale and purpose of the procedural default doctrine and § 2254(e)(2) are virtually identical.

As this Court pointed out in *Coleman*, without the procedural default doctrine, habeas petitioners would be given "an end run around the limits of this Court's [direct review certiorari] jurisdiction and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U.S. at 731; *see also id.* at 750 (describing procedural default rule as furthering State interests in "channeling resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors"). In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), this Court described its failure-to-develop doctrine (later codified and strengthened in § 2254(e)(2), *see Williams*, 529 U.S. at 434) in very similar terms, stating that the doctrine "will appropriately

accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum." *Id.* at 8; *see also id.* (it is "irrational to distinguish between failing to properly assert a federal claim in state court [i.e., procedural default] and failing in state court to properly develop such a claim"). Thus, cause for a procedural default and cause for failure to develop the factual basis for a claim are identical. *See Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) (where there is cause for procedural default, petitioner did not "fail to develop" the record under § 2254(e)(2)) (citing *Williams*, 529 U.S. at 444).

Third, the opening clause of § 2254(e)(2) states that the statute's preclusive effect applies only "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings … ." As this Court explained in *Williams*, this language means that the preclusive effect applies only if the petitioner has been at fault in some way, and that "a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another … ." *Williams*, 529 U.S. at 432. The Court went on to equate failure to develop with "lack of diligence … attributable to the prisoner or the prisoner's counsel." *Id.*; *see also id.* at 432-33 (discussing *Keeney* and describing *Keeney* as a case in which the failure to develop was "an omission caused by the negligence of his state postconviction counsel"); *Keeney*, 504 U.S. at 7-8 (citing and discussing *Coleman*).

Under *Coleman*, "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Coleman*, 501 U.S. at 753 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).[1] Thus, in *Williams* and *Keeney*, this Court equated a petitioner's lack of diligence with the lack of diligence of state post-conviction counsel.

[1] In *Keeney*, the Court's reliance on *Coleman* was extensive and explicit. While that reliance was less explicit in *Williams*, there the Court cited *Coleman*, *see Williams*, 529 U.S. at 436, and then discussed at

The *Coleman* paradigm, however, was upended in *Martinez*. In *Martinez*, after citing the *Coleman* agency paradigm, the Court went on to explain that, in an initial-review collateral proceeding, "if counsel's errors … do not establish cause to excuse the procedural default …, no court will review the prisoner's claims." *Martinez*, 132 S. Ct. at 1316. The only way to avoid that result was to discard the *Coleman* agency paradigm in this setting:

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors … caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken … with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim … where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*.

Id. at 1318.

This reasoning applies with full force to a failure to develop under 28 U.S.C. § 2254(e)(2). The pertinent question is whether counsel's lack of diligence should be attributed to the petitioner under § 2254(e)(2). For exactly the same reasons that it is inequitable to attribute counsel's lack of diligence to the petitioner for purposes of procedural default, it is likewise inequitable to do so under § 2254(e)(2).

Therefore, this Court should clarify that *Martinez* allows a petitioner to develop in a federal habeas court the factual basis for his ineffective assistance of trial counsel claim if the petitioner's failure to develop the facts in state court resulted from the inaction of counsel who was ineffective under the *Strickland* standard. *See Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) (where postconviction counsel's ineffective assistance would provide cause for a default under *Martinez*,

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length why the petitioner had "failed to develop" one of his claims, given that state habeas counsel had access to documents putting counsel on notice of the evidence supporting the claim. *Id.* at 438-40.

§ 2254(e)(2) does not preclude district court from holding hearing on claim); *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) (same; "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him.").

III. MR. WILLIAMS'S JUDGMENT SHOULD BE REOPENED UNDER RULE 60(B)(6) TO PERMIT HIM TO SHOW CAUSE AND PREJUDICE FOR THE DEFAULT OF HIS INEFFECTIVENESS-OF-PENALTY-PHASE-COUNSEL CLAIM.

Recently, in *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017), this Court made clear that Rule 60(b)(6) is the proper vehicle to reopen a judgment where claims of trial counsel ineffectiveness were deemed defaulted by state post-conviction counsel. As did the petitioner in *Buck*, Mr. Williams demonstrates his eligibility for relief under Rule 60(b).

A. Petitioner has Demonstrated the "Extraordinary Circumstances" Necessary to Reopen a Judgment under Rule 60(b)(6).

The extraordinary circumstances invoked by Mr. Williams are every bit as compelling as the circumstances accepted as sufficient by this Court in *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017).

1. The one court that has reviewed fully the effectiveness of penalty-phase counsel found that habeas corpus relief was warranted.

After a three-day evidentiary hearing, the district court granted habeas corpus relief in a thirty three page written opinion. Opinion, ECF Doc. 94. The merits of Mr. Williams's claim are beyond dispute.

In *Buck*, this Court emphasized that the underlying merits of a claim, including claims of prejudice resulting from counsel's ineffectiveness, can constitute extraordinary circumstances justifying relief under Rule 60(b)(6). See *Buck*, 137 S. Ct. at 778. Prejudice amounting to

extraordinary circumstances is present in this case, as found by the district court and as recognized by two justices of this Court. *Williams v. Hobbs*, 562 U.S. 1097 (2010) (Sotomayor, J., and Ginsburg, J., dissenting). Mr. Williams, when he has received proper review of the adequacy of counsel's mitigation presentation at the penalty phase of his trial, has shown his claims have merit, but the procedural problems dealt with in *Martinez and Trevino* prevented relief.

This Court has made clear that capital counsel's penalty-phase duties are substantial, starting with a thorough investigation, particularly as relates to mental impairment. In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court, after observing that "[t]he lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing," concluded that "[i]nvestigation is essential to fulfillment of these functions." Id. at 524-25 (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed.1982)); see also *Sears v. Upton*, 561 U.S. 945, (2010); *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 379 (2005); *Williams v. Taylor*, 529 U.S. 352 (2000).

Nothing approaching what is required under *Wiggins* was accomplished here, as recognized by the district court. A wealth of available mitigation, directly relevant to Mr. Williams's culpability, went unpresented. The performance of Mr. Williams's state-appointed lawyers was deficient because they presented no evidence at the penalty phase despite the ready availability of compelling mitigating evidence. Mr. Williams was prejudiced by this failure. Mr. Williams's childhood was characterized by severe physical, psychological, and sexual abuse and gross neglect. As the district court found:

> Williams was subject to every category of traumatic experience that is generally used to describe childhood trauma. He was sexually abused by multiple perpetrators. He was physically abused by his mother and stepfather, who were his primary caretakers. He was psychologically abused by both of his primary

> caretakers. He was subjected to gross neglect in all categories of neglect: medical, nutritional, educational. He was a witness to violence in the home and in his neighborhood throughout his childhood. As an adolescent, he was violently gang-raped in prison.

Opinion, ECF Doc 94 at 4. But no juror heard this evidence because of the failure of his lawyers.

The lasting and detrimental effects of childhood sexual abuse are well documented. It can lead to conduct disturbances, fears, anxiety, sleep difficulties, irregular appetite, and inability to concentrate on schoolwork. Older children or adolescents may become involved in drugs, make suicide attempts, run away, and act out beyond the control of their parents or teachers. *See* D. Lisak, The Psychological Impact of Sexual Abuse: Content Analysis of Interviews With Male Survivors, Journal of Traumatic Stress, 7, 525-48 (1994).

Mr. Williams should not be executed after the district court found his claims of ineffective assistance of counsel had substantial merit and warranted habeas corpus relief which was taken away by the very procedural rule that Martinez and *Trevino,* changed. Had these two cases been in existence when Mr. Williams's was on appeal in the Eighth Circuit that court could not have taken away the relief granted by the district court.

2. Arkansas post-conviction procedures and policies inhibit effective representation.

The daunting procedural framework under which capital counsel labor in Arkansas is extraordinary as well. Arkansas state post-conviction procedures are rotely enforced even though they fail to account for the complexities of capital post-conviction litigation. All claims of error in this legally complex, fact-intensive, life or death proceeding had to be condensed into an

initial petition of just ten pages. *See Washington v. State,* 823 S.W.2d 900 (1992) (rule limiting petitions to ten pages is a purportedly reasonable restriction).

Also relevant is the state's refusal to make minimal funds available to assist counsel in performing their constitutionally required duties. Little or no monies were made available to provide an independent expert for either trial or penalty phases.

3. The writ of habeas corpus plays a vital role in protecting constitutional rights, particularly in capital cases.

"The writ of habeas corpus plays a vital role in protecting constitutional rights," *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), and has been "aptly described as the 'highest safeguard of liberty,'" *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (quoting *Smith v. Bennett*, 365 U.S. 708, 712 (1961)); see also *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (habeas corpus is "a right of first importance"); *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (Supreme "Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme").

The interest in merits review (and thus Rule 60(b)(6) relief) is even stronger here than in an ordinary habeas case with strong claims, because this is a capital habeas case. Not only is this a capital habeas case but this is one where the merits of the underlying facts have been found worthy of relief. See, e.g., *Burger v. Kemp*, 483 U.S. 776, 785 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (capital case requires "the high regard for truth

that befits a decision affecting the life or death of a human being"); *Cox v. Horn*, 757 F.3d 113, 126 (3d Cir. 2014) ("Courts must treat with particular care claims raised in capital cases.").

4. *Martinez* and *Trevino* dramatically altered habeas corpus procedure.

Finally, the revolution in the law represented by *Martinez* and *Trevino*, even if not dispositive, carries much weight in the "extraordinary circumstance" calculus.

In *Martinez*, this Court overruled in part the long-standing rule that ineffective assistance of post-conviction counsel could not constitute cause for procedural defaults, the very rule applied to Mr. Williams by the Eighth Circuit Court of Appeal to overturn his grant of relief.. See *Coleman v. Thompson*, 501 U.S. 722, 757 (1991). In *Martinez*, the Court "carved out a significant exception to" *Coleman*. *Cox v. Horn*, 757 F.3d 113, 119 (3d Cir. 2014). *Martinez* held that a showing of ineffective assistance of first state post-conviction counsel can serve as cause to excuse default of ineffective assistance of trial counsel claims, where state post-conviction proceedings present the first opportunity to adjudicate such claims. *Martinez*, 132 S. Ct. at 1318. While the Court couched its holding as a "qualification" to *Coleman*, id. at 1319, "what the Court did was significant," *Cox*, 757 F.3d at 119, because it "altered Coleman's well-settled application of the procedural default bar and altered the law of every circuit." Id. at 124.

Had this change in the law been in effect when the Respondent here appealed the grant of habeas corpus relief the Eighth Circuit would not have reversed the district court.

This jurisprudential change is rightly considered a significant factor in whether a Rule 60(b) motion should be entertained. See *Buck*, 137 S. Ct. at 780; see also id. at 772, 778 (district court abused its discretion where it rejected reliance on *Martinez* and *Trevino* by reasoning that "a change in decisional law is rarely extraordinary by itself"); Cox, 757 F.3d at 122 (adopting "multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment

change in the law, that takes into account all the particulars of a movant's case"); *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987) (rejecting argument a change in law can never provide extraordinary circumstances to Rule 60 relief; finding Rule 60(b) relief warranted in light of impact of change in equities of case).

B. The Rule 60(b)(6) Motion was Timely.

Although finding the issue debatable, the District Court did not agree that the motion was filed within a reasonable time. ECF Doc. 141 at 9. Rule 60(b)(6) by its very language does not impose a strict time limit for filing and thus the reasonableness of the timing is a question vested in the "wide discretion" of the court. *Buck*, 137 S. Ct. at 777. Considering all the relevant circumstances Mr. Williams's motion was timely.

There was considerable conflict in the courts as to whether the 60(b) was available to raise claim of *Martinez* default post-judgment. Buck has now made that clear it is and Appellant filed his motion within weeks of *Buck*. At the time of Mr. Williams's habeas proceedings, post-conviction counsel's ineffectiveness provided neither an independent avenue of relief nor cause for any default. *Coleman v. Thompson*, 501 U.S. 722, 752-55 (1991). While the Supreme Court created exceptions to Coleman through its decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), it was not until the February 2017 decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), that the Court made clear that Rule 60(b) was available to reopen judgments in light of Martinez. In fact, prior to *Buck*, multiple circuit courts had expressly rejected this notion. See, e.g., *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014) ("[N]either *Martinez* nor *Trevino* sufficiently changes the balance of the factors for consideration under Rule 60(b)(6) to warrant relief."); *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013) (holding that, even after *Trevino*, this Court's decision in *Martinez* was simply a change in

decisional law which did not warrant relief under Rule 60(b)). But in *Buck*, the Supreme Court ruled for the first time that *Martinez* and *Trevino* are properly considered as, and can support a finding of, extraordinary circumstances under Rule 60(b)(6). *Buck,* 137 S. Ct. at 780; see also *id*. at 772, 778 (district court abused its discretion where it rejected reliance on *Martinez* and *Trevino* by reasoning that "a change in decisional law is rarely extraordinary by itself"). Mr. Williams filed his motion for relief from judgment on April 1, 2017 – just over a month after *Buck* was decided.

To the extent *Buck* provides some guidance, there the Supreme Court granted relief to a habeas petitioner who availed himself of Rule 60(b) nearly twenty years after his capital conviction to raise a claim defaulted by post-conviction counsel, and then only after *Trevino* clarified Martinez (thus coming fully two years after *Martinez*). Under the circumstances of this case and the further clarification provided by *Buck*, the filing is timely.

Mr. Williams filed his Rule 60(b) motion within a reasonable time.

CONCLUSION

WHEREFORE, for all the reasons set forth above, Mr. Williams respectfully requests that the Court grant his petition for a writ of certiorari and stay of execution, and remand the case to the court of appeals for full briefing on the issues for which a Certificate of Appealability was granted. In the alternative, this Court should grant certiorari and hear the case on its merits.

APRIL 24, 2017

Respectfully submitted,

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