No. 15-1193

IN THE
Supreme Court of the United States

DONNIE JOHNSON,

Petitioner,

v.

WAYNE CARPENTER, WARDEN,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFNESE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has approximately 9,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal courts have the discretion to correct their own errors, even when those errors become clear after final judgment. Fed. R. Civ. P. 60(b). But in a handful of circuits, district courts are being denied the discretion even to *entertain* correcting one of the most grievous mistakes imaginable: failure even to consider a constitutional error in a conviction and death sentence. This Court has already made clear those claims should have been considered. But a minority of circuits are preventing district courts from implementing this Court's decisions.

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[1] No counsel for a party authored this brief in whole or in part, and no one other than NACDL, its members, or its counsel contributed any money intended to fund the preparation or submission of this brief. Counsel provided timely notice of NACDL's intent to file this brief, and all parties consented.

This Court's groundbreaking decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), held that federal courts must consider on the merits a set of Sixth Amendment ineffective-assistance-of-counsel claims that lower courts had previously, and wrongly, treated as procedurally barred. In some cases, considering those claims on the merits means setting aside a conviction or death sentence. Most circuits recognize that district courts may correct the error identified in *Martinez* through a Rule 60(b) motion. But three outlier circuits say no—*never*—no matter how serious the Sixth Amendment violation. In those circuits, a defendant can even be executed when other circuits would allow him to walk free. As long as this split continues, whether a prisoner is executed may depend on which circuit has jurisdiction over his federal habeas claim.

This is not hyperbole. Before *Martinez*, David Barnett was on death row, denied the opportunity to litigate his Sixth Amendment claim because of incompetent lawyering. But after *Martinez*, once he got to present his claim for relief on the merits under Rule 60(b), he uncovered the wealth of evidence that a constitutionally-effective attorney would have presented at trial. One of the jurors at his trial, while "very, very comfortable" with the jury's death sentence based on the evidence presented at trial, recently stated that "[t]here's no way" he would have voted for death had he seen the new evidence an effective trial counsel would have uncovered and presented to the jury. The federal district court granted Barnett habeas relief, and set aside his death sentence, through the vehicle of a Rule 60(b) motion. But had Barnett been in the Sixth Circuit's jurisdic-

tion, he would not have had the opportunity to even argue that he was entitled to Rule 60(b) relief. And unless this Court grants certiorari, Donnie Johnson, the petitioner here, will be categorically barred from seeking Rule 60(b) relief. He will therefore be executed even if he could make the same showing as David Barnett, and even though the federal district court was "deeply troubled" by its inability to consider the impact of mitigating evidence Johnson's trial counsel had failed to introduce. Pet. App. 93a n.142.

Certiorari is especially warranted because courts categorically barring federal habeas petitioners from seeking Rule 60(b) relief based in part on *Martinez* and *Trevino* inappropriately limit Rule 60(b) by incorrectly interpreting this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). *Gonzalez* held that intervening decisions from this Court are generally not *sufficient*, standing alone, to create the "extraordinary circumstances" necessary for Rule 60(b) relief. But this Court did not hold that federal courts must *ignore* errors laid bare by decisions of this Court; it certainly did not suggest that such errors can never combine with other case-specific factors—such as the petitioner's diligence, the egregiousness of the error, and the extent of the prejudice (such as difference between a death sentence and life)—to create "extraordinary circumstances." If anything, *Gonzalez* suggested the opposite: *Gonzalez* itself analyzed case-specific circumstances in concluding that those circumstances were not "extraordinary."

ARGUMENT

I. The Circuit Split Makes Rule 60(b)'s Safety Valve Of Relief From Judgment In "Extraordinary" Cases Available Only To Prisoners In Certain Circuits.

Until this Court's decisions in *Martinez* and *Trevino*, many criminal defendants were convicted—and some even sentenced to death—without constitutionally effective representation at trial and without an effective attorney to challenge that constitutionally-ineffective trial representation. This situation was caused by the unfortunate interaction of state and federal law: Many states do not provide defendants a meaningful opportunity to challenge their trial counsel's effectiveness on direct appeal, defendants currently have no constitutional right to counsel in state collateral proceedings where ineffectiveness of trial counsel claims can first be raised, and federal courts would not consider ineffectiveness claims that had not been presented to the state court. The net result was that, although the guarantee of constitutionally effective representation is "a bedrock principle in our justice system," a defendant could be convicted, and sentenced to death, without a single court considering whether his conviction and death sentence were the result of constitutionally-ineffective trial representation. *Martinez*, 132 S. Ct. at 1316-1317.

Martinez and *Trevino* solved this problem by holding that federal habeas courts can consider a prisoner's ineffective-trial-counsel claim in the first instance if a state does not provide a meaningful opportunity to raise the claim on direct appeal, and if the prisoner did not have counsel for collateral re-

view or that counsel was constitutionally ineffective. *Martinez*, 132 S. Ct. at 1318; *Trevino*, 133 S. Ct. at 1921. *Martinez* held that a prisoner can establish "cause" to excuse default of an ineffective-assistance claim in state court when the "state court did not appoint counsel" in collateral proceedings or where appointed counsel "was ineffective under the standards of *Strickland v. Washington*, 446 U.S. 668 [] (1984)." *Martinez*, 132 S. Ct. at 1318. *Trevino* held that *Martinez* applies to all states whose procedures "make[] 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." *Trevino*, 133 S. Ct. at 1921.

The problem that *Martinez* and *Trevino* addressed—that defendants could be convicted, and executed, without any court considering whether they had constitutionally effective trial counsel—still exists in some circuits. Before this Court's decisions in *Martinez* and *Trevino*, many courts incorrectly rejected federal habeas claims based on defaults in state court caused by ineffective post-conviction counsel. This Court's subsequent rulings did not categorically reopen all those cases, as Supreme Court decisions *must* be applied only to cases that are not yet final. *E.g.*, *Gonzalez*, 545 U.S. at 536. But categorically barring prisoners whose federal habeas claims were finally, but mistakenly, rejected from relying on *Martinez* and *Trevino* risks great injustice: among other things, it will lead to execution of prisoners who diligently pursued ineffective-assistance claims, and who have strong claims that they would not have been sentenced to death with effective trial counsel. For instance, in the case of David Barnett, whose federal habeas claim for inef-

fective trial counsel was finally and wrongly rejected based on state court default, one juror recently stated that while he was "very, very comfortable" with the jury's death sentence based on the evidence presented at trial, if he had seen the mitigating evidence that should have been, but was not, presented at trial, "[t]here's no way" he would have voted for the death penalty.[2]

Federal Rule of Civil Procedure 60(b)(6) provides a safety valve for precisely such "extraordinary" cases in which reconsidering a final judgment is necessary "to do justice in a particular case." *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014). Rule 60(b)(6) allows courts to provide relief from final judgment for "any … reason that justifies relief." This Court has cautioned that, in order to preserve the finality of judgments, courts should only employ Rule 60(b) in "extraordinary circumstances," and has held that a change in decisional law alone is insufficient to constitute such circumstances. *Gonzalez*, 545 U.S. at 535. But this Court has never addressed whether a change in decisional law, combined with other "extraordinary circumstances"—like those the district court found present in Barnett's case—could be the basis for Rule 60(b) relief.

The circuit split the petition describes concerning whether *Martinez* and *Trevino* can ever combine with other circumstances to warrant Rule 60(b) relief is therefore a crucial one. Although only "rarely" will

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[2] *See* Robert Patrick, *Juror who voted to execute Glendale killer now hopes for mercy*, St. Louis Post-Dispatch, Dec. 22, 2015, http://www.stltoday.com/news/local/crime-and-courts/juror-who-voted-to-execute-glendale-killer-now-hopes-for/article_f5770ba9-3fcc-5975-855e-2b3ddc1a81e5.html.

cases involve the "extraordinary" circumstances warranting Rule 60(b)(6) relief, *Cox*, 757 F.3d at 123, the difference between "rarely" and "never" is vitally important. That difference is the safety valve that can prevent executions of diligent prisoners with strong cases that they would not have been sentenced to death had they been provided effective trial counsel—cases that would persuade a district court to use its discretion to grant relief, had not the court of appeals taken that discretion away. And that difference is the safety valve the drafters of the Federal Rules intended when they granted courts, in Rule 60(b)(6), a "grand reservoir of equitable power to do justice in a particular case." *Cox*, 757 F.3d at 122.

Right now, that safety valve is available only to prisoners in certain circuits. While every circuit split creates some unfairness, this one is particularly problematic because it arbitrarily cuts off any chance that certain prisoners will have to take advantage of *Martinez*'s vindication of the right to counsel—a right that is a "bedrock principle in our justice system" that forms the "foundation for our adversary system," *Martinez*, 132 S. Ct. at 1317—while allowing other prisoners to show that "extraordinary circumstances" permit them to invoke *Martinez* and overcome state procedural defaults.

II. Deciding Whether *Martinez* and *Trevino* Can Ever Form Part Of The Basis For "Extraordinary Circumstances" Justifying Rule 60(b) Relief Is Particularly Important In Capital Cases.

The circuit split concerning whether Rule 60(b) relief is ever available for prisoners whose habeas peti-

tions were incorrectly decided under this Court's decision in *Martinez* is especially important in capital cases. The circuits that allow Rule 60(b) motions have written that those motions will establish the required "extraordinary circumstances" only "rarely," and that there may not be "much daylight between the 'never' position of [some circuits] and the 'rarely' position" of others. *Cox*, 757 F.3d at 121. But in capital cases that daylight can be a matter of life or death. Until this Court grants certiorari, whether a prisoner who was sentenced to death while represented by constitutionally-ineffective counsel has any chance of raising that claim in federal court will depend on the happenstance of where he is imprisoned.

A comparison of this case to the case of David Barnett illustrates the dangers of allowing the Rule 60(b) circuit split to continue. Barnett was sentenced to death in 1997. *Barnett v. Roper*, E.D. Mo. No. 03-cv-614, ECF No. 361, at 3 (Aug. 18, 2015). As it would become clear later, trial counsel's mitigation case had dramatic flaws. Trial counsel did not meet with Barnett's mother. *Id.* at 174. Because of this, Barnett's attorneys did not know the "strong history of addictions and extreme violence on both sides of Mr. Barnett's biological family." *Id.* at 175. Barnett's attorneys similarly failed to investigate or adequately present evidence concerning significant sexual abuse Barnett suffered as a child. *Id.* at 177-78.

Shortly after Barnett was sentenced, he filed a *pro se* motion for post-conviction review in state court and was appointed counsel to assist with the petition. *Id.* at 4. The Missouri courts found that the motion counsel submitted, replacing the *pro se* mo-

tion, was procedurally defaulted as to Barnett's ineffective assistance of trial counsel claim because it did not follow a local pleading requirement. *Id.* at 4-5. Barnett filed a federal habeas petition in 2004, but the federal court held that Barnett's ineffective assistance claim was barred from federal review due to the state procedural default. *Id.* at 5. The district court's decision is incorrect under this Court's later decision in *Martinez*, because only his post-conviction lawyer's further incompetence prevented him from obtaining review of his ineffective-assistance claim.

After this Court decided *Martinez*, Barnett moved for relief from judgment under Rule 60(b)(6). The district court conducted a thorough analysis of the equities of Barnett's case, including Barnett's diligence, the state's and the victims' interests in finality, the capital nature of Barnett's case, the judicial review Barnett's case had already received, the connection between Barnett's case and *Martinez*, and the underlying strength of Barnett's ineffective-assistance claim. *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1118-21 (E.D. Mo. 2013). Balancing these factors, the district court concluded that "although the type of supervening change in law in *Martinez* may not alone warrant the reopening of a habeas judgment, here, the equitable factors offered in conjunction with the strength of the underlying constitutional error alleged enables Barnett to satisfy the high standard of Rule 60(b)(6)." *Id.* at 1120-21. The district court thus ordered a hearing on the merits of Barnett's ineffective assistance claim.

The district court ultimately found, in a nearly 200-page opinion, that "Mr. Barnett received ineffective assistance of counsel at trial and during the

[post-conviction] proceedings." *Barnett*, E.D. Mo. No. 03-cv-614, ECF No. 361, at 187. The court found that trial counsel's failure to adequately investigate and present mitigating evidence was ineffective. *Id.* at 180. And it found that "the jury would have sentenced Mr. Barnett differently had it been fully informed of the mitigating evidence" not presented at trial. *Id.* at 185. The court therefore held that Barnett had established "cause" for his state-court procedural default under *Martinez*, and granted habeas relief from Barnett's death sentence.[3] *Id.* at 188.

Barnett would not have been entitled to relief from his death sentence had he been in the Sixth Circuit, as petitioner Donnie Johnson's case demonstrates. Johnson was sentenced to death in Tennessee. Pet. App. 1a. Johnson's post-conviction counsel did not argue that his trial counsel were ineffective for failing to investigate Johnson's abusive upbringing. *See* Pet. 6-7. When Johnson's new lawyers raised that argument as part of Johnson's federal habeas petition, the federal court held that Johnson's argument was procedurally defaulted. Pet. App. 91a-92a. Because the argument was procedurally defaulted, the court did not reach the merits of Johnson's ineffective-assistance-of-trial-counsel claim, or evaluate the effectiveness of Johnson's post-conviction counsel. But the court did note that Johnson's trial attorneys failed to present what appeared to be "valid mitigating evidence," and expressed "dismay" at the "scant

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[3] As discussed above, the district court's conclusion was buttressed when, several months after the court's opinion, one of Barnett's jurors publicly stated that while he was "very, very comfortable" with the jury's death sentence based on the evidence presented at trial, "[t]here's no way" he would have voted for death based on the new mitigating evidence. *See supra* at 6.

attention" post-conviction counsel paid to Johnson's "potentially meritorious" claim of ineffective trial counsel. Pet. App. 93a n.142. And the court admitted to being "deeply troubled by its inability to consider what appears to be valid mitigating evidence." *Id.*

After this Court decided *Martinez*, Johnson, like Barnett, moved for relief from judgment under Rule 60(b). But whereas the district court in Barnett considered whether *Martinez*, combined with numerous case-specific factors, established "extraordinary circumstances" necessary to warrant relief from judgment, the district court in Johnson's case denied Johnson's Rule 60(b) motion simply by citing the decisions categorically barring Rule 60(b) relief premised on *Martinez*. Pet. App. 10a. The Sixth Circuit subsequently adopted the same reasoning, *see* Pet. 16-17 (citing *Abdur-Rahman v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015)), and denied a certificate of appealability in Johnson's case, Pet. App. 1a-3a.

Had Barnett been in the Sixth Circuit, he would not have been granted federal habeas relief from his death sentence, and would likely be executed. And Johnson will be executed, absent a grant of certiorari, even if he could make the same "extraordinary circumstances" and trial and post-conviction ineffectiveness showing that Barnett made. This Court should grant certiorari to ensure that whether a prisoner is executed does not turn on where the prisoner lives.

III. *Gonzalez* Held That Intervening Supreme Court Decisions Are Not *Sufficient* for Rule 60(b) Relief, But Did Not Hold Such Decisions Could Not Form Part Of The Basis For Such Relief.

The circuits holding that *Martinez* and *Trevino* can never be the basis for Rule 60(b) relief rely largely on this Court's decision in *Gonzalez v. Crosby*. But that decision held only that a change in decisional law does not itself constitute "extraordinary circumstances." It did not address whether a change in decisional law could form one piece of a case-specific "extraordinary circumstances" argument.

In *Gonzalez*, the district court had dismissed petitioner's federal habeas petition as time-barred under then-applicable law. 545 U.S. at 536. After this Court's decision in *Artuz v. Bennett*, 532 U.S. 4 (2000), suggested that the district court's opinion was incorrect, the petitioner sought relief from judgment under Rule 60(b). This Court held that *Artuz* alone did not establish the "extraordinary circumstances" warranting Rule 60(b) relief: "It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of the relevant time-bar. *Gonzalez*, 545 U.S. at 536. The petitioner in *Gonzalez* was not sentenced to death, nor did he identify any specific circumstance about his case that made it "extraordinary." His argument was simply that *Artuz*'s new interpretation of the time bar *alone* merited Rule 60(b) relief. This Court never discussed whether a change in the law like *Martinez* could form part of a case-specific argument for relief from judgment.

If anything, *Gonzalez* suggested that case-specific factors *are* relevant, and could form the basis for Rule 60(b) relief in particular cases. After holding that its intervening decision in *Artuz* was not itself an extraordinary circumstance, this Court went on to note that the circumstances in *Gonzalez* were "all the less extraordinary … because of [petitioner's] lack of diligence in pursuing review of the statute-of-limitations issue." *Gonzalez*, 545 U.S. at 537. The Court then explained the petitioner's lack of diligence, and how that case-specific factor weighed against finding his case "extraordinary." This analysis would have been unnecessary if changes in decisional law could never be part of a case-specific argument for "extraordinary circumstances."

Gonzalez thus at least leaves open the question whether *Martinez* and *Trevino* could be part of a case-specific "extraordinary circumstances" argument, and even suggests that such an argument is permissible.

CONCLUSION

Only by granting certiorari can this Court ensure that whether prisoners with meritorious ineffective-assistance claims are executed does not turn on where they are imprisoned. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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