**NO. 17-10066**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**In Re: TERRY DARNELL EDWARDS,**
**Movant**

**CONSOLIDATED WITH 17-70003**

**TERRY DARNELL EDWARDS,**
**Petitioner - Appellant**
**v.**
**LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,**
**Respondent – Appellee**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**
**Trial Court No. 3:10-CV-00006-M**

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# PETITIONER-APPELLANT TERRY DARNELL EDWARDS'S BRIEF

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

**THE HONORABLE BARBARA M.G. LYNN** United States District Judge
Northern District of Texas, Dallas Division
1100 Commerce, Room 1572
Dallas, Texas 75242

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## STATEMENT REGARDING ORAL ARGUMENT

Counsel request oral argument. Appellant's present serious issues which have never received a full and fair hearing. Thus, though his pending execution date requires expeditious resolution of the issues before the Court, the issues are compelling and warrant argument.

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## I. JURISDICTIONAL STATEMENT

Appellant, Terry D. Edwards, is under a death sentence pursuant to a Texas court judgment. 28 U.S.C. §2254 has permitted Appellant to petition the district court for writ of habeas corpus, and 18 U.S.C. §3599 entitled him to counsel in proceedings thereafter. Appellant moved the District Court for the Northern District of Texas to reopen his federal habeas corpus application pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. On January 19, 2017, the district court's judgment found a lack of jurisdiction and transferred this motion to this Court, and granted a certificate of appealability. Appellant noticed an appeal the same day. The Court has appellate jurisdiction. *See* 28 U.S.C. §§1291, 2253.

## II. STATEMENT OF ISSUES

Whether effective abandonment of Appellant by his federally appointed counsel constitutes a defect in the integrity of the original proceedings that may authorize Rule 60(b) relief?

Whether the district court had jurisdiction to address Appellant's Rule 60(b) Motion?

## III. STATEMENT OF THE CASE

Texas is scheduled to execute Terry Edwards on January 26, 2017 for having shot and killed two former coworkers, Ms. Mickell Goodwin and Mr. Tommy Walker, during a robbery of a Subway sandwich shop that he carried out with his

older cousin in July 2002. In November 2003, the Dallas County District Attorney tried him for the murder of Ms. Goodwin and the robbery. Prosecutorial misconduct and defense counsel's complicity resulted in the *agreement to strike the entire African-American cross-section* from the three thousand Dallas County citizens comprising the venire, resulting in the seating of an all white jury. Edwards, who is African-American, was convicted and sentenced to death. But Edwards, who had never before been charged with a violent crime, did not shoot either victim. A few weeks after the trial, his cousin, Kirk Edwards, a violent recidivist, quietly pled guilty only to robbery despite having been charged with both murders. He is serving a term of years that will conclude in 2027. He is currently eligible for parole.

Due to pervasive prosecutorial misconduct and incompetence of Edwards's defense counsel, *both sides* expressed to the jury that Edwards did, in fact, shoot and kill the victims, both of whom were white. The State's evidence did not support that conclusion. In fact the forensics evidence and testimony was not meaningfully tested at all. The defense failed even to engage an expert to evaluate the State's evidence, let alone testify about it. Had the defense performed its basic adversarial role, the jury would have ascertained that the State's evidence, in fact, actually supported the conclusion that Edwards did not fire the murder weapon. Further, the State suppressed highly exculpatory forensics from the defense

material. The evidence contradicted the State's case utterly, but it emerged only months ago, through the investigation of current federally appointed counsel.

At every step of his proceedings, Edwards has received abysmal representation, culminating at the state habeas level in fraud on the court and in the Northern District of Texas in a conflict of interest rising to attorney abandonment. Federal counsel, appointed in January 2010, accepted fulltime employment without notifying the court in March 2011, during the pendency of his habeas petition, which he had timely filed in December 2010. For years, the resulting disengagement of federal counsel, Mr. Richard Wardroup, an attorney whom the Texas Bar had previously disciplined at least six times with, inter alia, suspensions and public reprimands, caused a grave defect in the District Court's proceedings. These proceedings ended by the denial of Edwards's petition on August 6, 2014.

In the opinion at bar, the District Court acknowledged the presence of this defect, but held that Rule 60(b) relief was unavailable because federal counsel's conflict did not arise from having represented Edwards in state court and because Edwards might raise claims upon reopening the case, but had not established the viability of those claims (including any rejoinders to procedural defenses potentially raised by the State) in his motion to reopen. However, the provenance of the federal attorney's conflict against his client is immaterial to the fundamental question of whether the incapacity of nominal counsel, Wardroup, rendered the

habeas proceedings defective. Title 18 U.S.C. §3599 has guaranteed Edwards actual counsel in his habeas proceedings and this was violated during its pendency, causing a profound defect. Further contrary to the District Court's determinations below, Edwards, as set forth herein, has viable means to raising substantial claims upon a reopening.

### A. Mr. Edwards's Conviction And Sentence Are Constitutionally Infirm In Light Of The Recently Discovered Prosecutorial Excesses And Trial Counsel's Grossly Deficient Performance

On Monday morning, July 8, 2002, Ms. Goodwin and Mr. Tommy Walker, employees of a Subway franchise in the Dallas suburb of Balch Springs, were shot and killed during a robbery. Local police apprehended Edwards as he fled the scene on foot, running him down with a patrol car minutes after the shootings. His co-defendant, Kirk Darnell Edwards, fled the scene in the getaway car. The following day, Kirk Edwards turned himself in to the authorities. After convicting Terry Edwards of the murder of Ms. Goodwin pursuant to Cause No. F02-15086, on November 21, 2003 his jury answered the special issues pursuant to the capital prosecution in a manner compelling a death sentence. Four days later, the State successfully moved to dismiss its separate indictment for the murder of Mr. Walker under Cause No. F02-15087.

On December 11, 2013, Kirk Edwards, who had been jointly indicted under a single cause for the murders of both Mr. Walker and Ms. Goodwin (No. F02-

150585), pled guilty merely to aggravated robbery in exchange for a sentence of twenty-five years. For several years he has been eligible for parole and, in any event, will finish his term of years by 2027.

### 1. The State Prosecuted and Convicted Mr. Edwards As The Triggerman Despite The Evidence's Indication That He Did Not Fire The Murder Weapon

The State's lead prosecutor, Assistant District Attorney Tom D'Amore, tried Appellant as the shooter in this double-homicide. As D'Amore put it during his closing in the penalty phase, "Yes, Kirk Edwards is involved but the man that pulled the trigger is sitting right here", (Trial Tr., Vol. 55, 115-16),[1] and later: "Did he [Terry Edwards] do the shooting? Yes, overwhelmingly." (Tr.55 at 118). The State was very effective; by the trial's end, defense counsel had subscribed to the State's narrative: "He killed two people out there." "We'll concede that." (Tr.55 at 79). Throughout Petitioner's trial, ADA D'Amore pressed an extremely aggravated account: Terry Edwards was a "personification of evil" who wanted vengeance against an employer who fired him (Tr.55 at 75); he went to Subway "with murder in mind, with greed in mind, with evil in his heart . . ." (*Id.* at 115-16), and he "controlled" and "engineered" the entire crime, including two execution-style murders of former colleagues (*Id.* at 74, 75).

[1] The transcripts do not appear as part of the electronic Record on Appeal that was docketed on January 23, 2017. This brief cites to the trial transcripts independently. Upon request, undersigned are able to provide a copy of the transcripts.

But the evidence did not actually support this portrayal, and the defense failed to subject the State's case to meaningful testing. The State's physical evidence submitted at trial did not establish that Appellant had used the murder weapon. Trial counsel, Messrs. Paul Brauchle and Hugh Lucas, failed to conduct any substantial investigation of its own and to mount any meaningful defense against the State's theory that Terry Edwards was the triggerman in the two shootings and that his culpability thus justified a death sentence. Had they done so, both forensic evidence and evidence from Kirk Edwards's family members would have indicated the falsity of the State's claims.

The State conducted gunshot residue (GSR) handwipings of Terry Edwards immediately upon his arrest, which occurred just minutes after the robbery, yards away from the crime scene where Petitioner had been left behind to dispose of the weapon and sandwich bags of cash from the store's proceeds from the Fourth of July Weekend.

The State established that the firearm recovered from the crime discharged antimony, barium, and lead. Terry Edwards was tested for this GSR and his results were negative; his handwipings failed to manifest the .380 automatic's trio of chemicals.[2] (17-7000.495). At trial, the State introduced evidence of the negative

[2] A trace level of barium was detected but "antimony, barium, and lead levels meeting the criteria for evidence of gunshot residue were not found." Trace Evidence Report, Dec. 5, 2002. (17-70003.495).

results from tests of decedent Tommy Walker's hands. The defense called a single witness at the guilt/innocence phase, Ms. Vickie Hall, a Trace Evidence Examiner employed by the Dallas County crime lab, the Southwestern Institute of Forensic Science (SWIFS). Hall testified only about the testing of the hands of Terry Edwards and Mr. Walker, which had been conducted by Senior Trace Evidence Examiner David W. Spence. (Tr.52 at 168). However, due in part to counsel's lack of understanding of the forensic evidence against their client, due to their failure to consult with an expert, the prosecutor was able to elicit false and misleading testimony on cross-examination that Edwards could have physically removed trace chemical components from his hand. (*See* Tr.55 at 68-69).

The prosecutor elicited from Hall that GSR could be partially removed from someone's hands through profuse sweating (*see* Tr.52 at 186: "If there's a large amount of sweat, some of that moisture could rinse some of that residue away"), but, Hall further explained, its absence would be more likely explained by some sort of physical removal. (*Id*.). The prosecution then improperly argued, in closing, that the presence of traces of barium on Edwards's hands – without the presence of the other two chemical components that testing had established were discharged in equivalent portions from the weapon – was just as strong as evidence that Terry

Edwards was the triggerman as evidence that all three chemical components had been deposited would have been.[3] (Tr.53 at 62).

Appellant's current counsel, appointed in the Northern District of Texas in June 2016, obtained a preliminary expert assessment of this key facet of the prosecution's case. According to Mr. Paul Kilty, a GSR expert with decades of FBI experience (including years as the Chief of the FBI Laboratory's Gunshot Analysis Unit in Washington D.C.), presence of an elevated amount of barium on the hands does not indicate or suggest a likelihood that there is gunshot residue on Edwards's hands or that he fired a gun." (17-70003.477). The prosecution's argument regarding the barium is not only wrong, Mr. Kilty found, it is "scientifically unsupportable." (17-70003.476).[4]

While Hall testified about Appellant's handwipings, the State has disclosed only in recent months that Hall, herself, also tested Ms. Goodwin's hands. (17-70003.496). But at the time of the trial, the State had failed to provide that any such examination had been carried out. According to the results, Ms. Goodwin's right hand, which suffered a defensive wound during the shootings, tested positive for the firearm's GSR. *Id.* In contrast, Terry Edwards, who the State argued

[3] Barium is relatively commonplace in the environment and, by itself, without detection of the other two chemical components of the firearm's gunshot residue, does not suggest the likelihood that such residue had been on the individual's hands.

[4] Specifically, Mr. Kilty stated that: "It is **not possible** that a defendant who had gunshot residue on his hands could simply wipe two of the three components off of his hands and not the third." (17-70003.490-491) (emphasis added)).

discharged the weapon three times, tested negative. (17-70003.495). This material evidence was absent from the record, as it was not disclosed to the defense. In the light of these tests, Hall's failure to identify the Goodwin testing during her trial testimony raises serious issues, especially when coupled with the State's suppression of the report.

Ms. Goodwin and Mr. Walker were shot point blank, resulting in soot and stippling around the sites of their wounds and bleeding. (Tr.52 at 17-18; 17-70003.479-80) But, as the State admitted at trial, Terry Edwards not only lacked the GSR indicative of having fired the murder weapon, but he had not a drop of blood on him from either victim when he was arrested just moments after the shootings. (Tr.51 at 224-227). The extensive testing of his body and clothing for a blood match found only *his own* blood as a result of being hit by the patrol car during his arrest.[5] (*Id.*). The State's failure to test his clothing for GSR residue before trial, an omission contrary to the best practice, only exacerbates the overarching absence of evidentiary support for its theory of the case against Appellant. (17-70003.480, 17-70003.491).

Further, with respect to blood drops at the crime scene, preliminary review of crime scene photographs establish that the two victims were shot while upright

[5] At the time of the initial investigation, a search warrant had been issued for the getaway car driven by Kirk Edwards. As of this filing, the result of the issuance of that search warrant – including any forensic examination of the automobile – has not been disclosed.

(17-70003.475, 17-70003.479), and not, as ADA D'Amore insisted — without actual evidence-- while kneeling. (Tr.55 at 117). The State, as set forth below, misused expert testimony to prop up this theory of execution-style murders and was enabled to do so by the defense's failure to consult with even a single independent forensics expert. Had they attempted to meaningfully prepare Appellant's defense, they would have secured readily attainable evidence demonstrating, in fact, that the State's theory was unsupported. Current expert review of the evidence establishes that due to the large size of the blood drops from Ms. Goodwin "it is indisputable that [she] was standing when shot." (17-70003.479).[6] "Similarly," Mr. Tressel found, "there is no question that Mr. Walker was standing at the time that he was shot. Again the crime scene photographs make this a clear and indisputable conclusion." (17-70003.479). Had trial counsel consulted with an expert, as reasonably competent counsel would have, they would have been able to prove that the State's highly aggravated theory that the victims were on their knees, pleading for their lives, was not "a reasonable deduction" from the actual evidence.

Members of the Edwards family would have also been willing to testify about the relationship between Appellant and Kirk Edwards and explain that Kirk was a bully known for harassing and physically and psychologically intimidating

[6] As Mr. Tressel has explained: "In this case, it is clear that Ms. Goodwin's blood dropped from a substantial height, approximately five feet above the floor." (17-70003.491).

those around him. They would have testified that the gun used in the homicides belonged to Kirk (17-70003.524-25), and that Kirk bragged about his assaultive behavior (17-70003.531), and was widely believed within the family to be the person who planned the robbery and ultimately perpetrated the homicides. (17-70003.527, 17-70003.540, 17-70003.543-44) These family members could have also testified to Kirk's post-crime behavior that strongly suggests he was the one responsible for the shootings. (17-70003.516-17, 17-70003.519).

By the same token, these family members were prepared to testify about the sharp contrast that Terry Edwards presented to Kirk. They would have testified that Terry was a "sensitive boy," (17-70003.522) for whom committing the present offenses were far outside his character, and who had overcome a challenging upbringing to become a loving father. (17-70003.514-515, 17-70003.529-530, 17-70003.536-537)

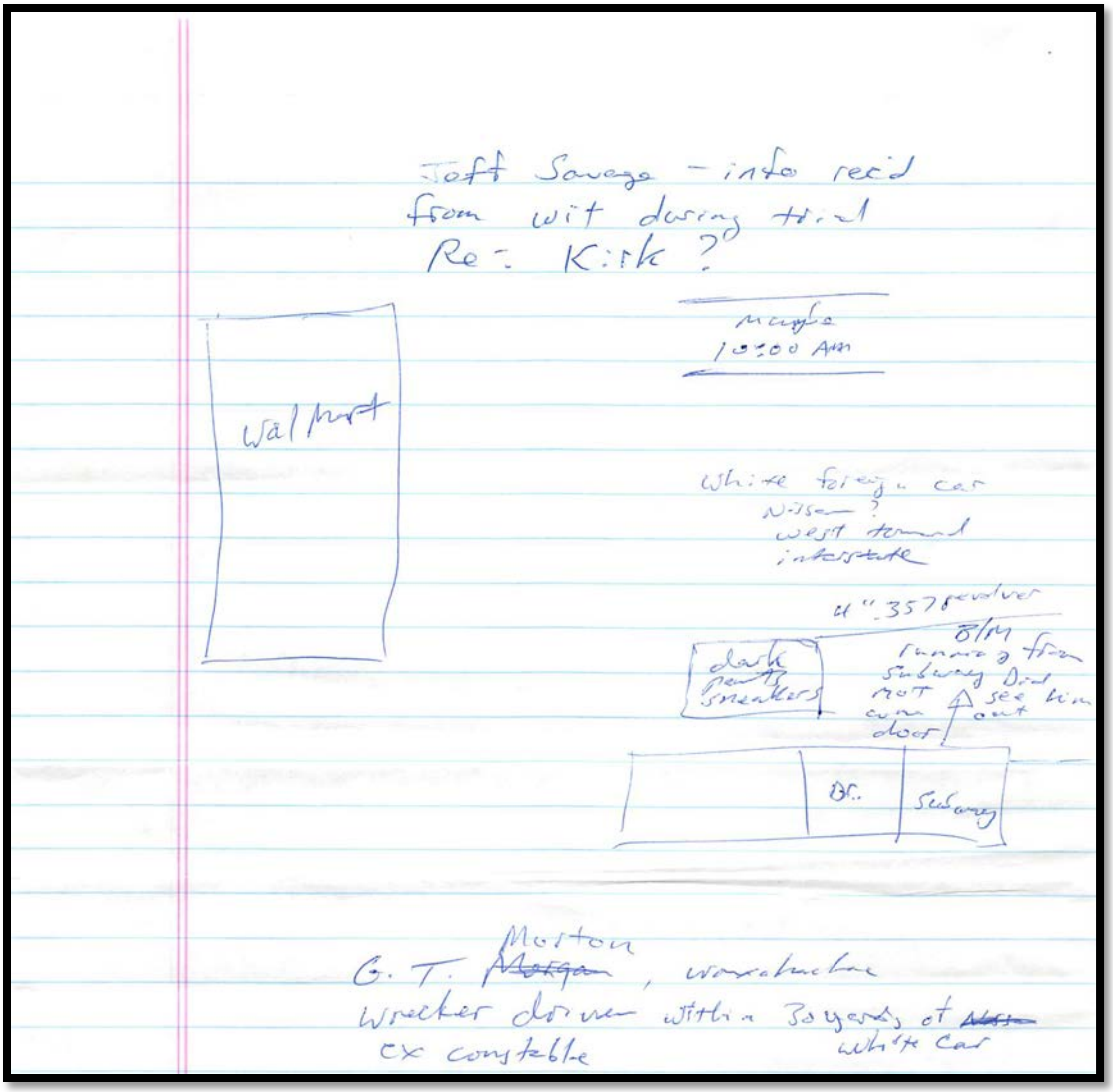
However, beyond Edwards's mother, who was largely uninvolved in his upbringing and who suffered significant problems of her own, trial counsel failed to present the testimony of a single member of Edwards's family. (Tr.53 at 346-69). Moreover, with the exception of a ten-minute phone call,[7] defense counsel at trial and every prior member of Edwards's defense team failed to even interview these family members.

[7] This telephone call was with Edwards's maternal cousin, Consuelo Moss. (*See* 17-70003.544).

Because trial counsel failed to conduct investigation into Edwards's family – a particularly important part of the investigation in light of the blood relation of Appellant and Kirk Edwards – the jury never heard this information.

The jury also never heard that there was an eyewitness that placed Kirk Edwards inside the subway. At trial, the State called a single witness regarding Kirk's involvement in the shooting. That witness insisted she had not seen Terry Edwards inside the Subway, recanting her prior averments to the police that she had seen him enter the Subway. (Tr.\52 at 146-48). The Dallas County District Attorney's Office recently disclosed handwritten notes describing a potential eyewitness to the homicide with a description given to Jeff Savage, an investigator with the DA's office, that matches Kirk Edwards. (17-70003.671).

This is the suppressed note:




(*Id.*). G.T. Morton does not appear on the State's final witness list prepared in connection with trial. (17-70003.680).

The details contained in the note clearly describe Kirk. First, Terry Edwards was wearing shorts, not pants, on the day of the robbery. (Tr.51 at 33, 145-146, 222). Kirk Edwards, on the other hand was wearing pants. (Tr.51 at 237-38). It was Kirk who borrowed his girlfriend's vehicle, a light-colored Nissan Maxima on the morning of the offense. (17-70003.672-673). Terry Edwards exited out of the back

and was arrested in a gas station parking lot shortly after the crime, but Kirk Edwards would have been in a position to escape heading west toward the interstate in said vehicle on the morning of the shooting.

The note not only suggests an additional eyewitness may have been able to place Kirk at the scene of the crime, it also suggests he had exited the front door of the Subway, contradicting all of the witnesses and forensic evidence presented at trial. The note also suggests that the witness may have been in position to see the homicide take place. He appears to have been in front of the Subway with a view of the store that would have included the site of the murders.

Given the State's theory of the crime and extensive argument that Terry Edwards was the triggerman, and especially that only a single eyewitness mentioned seeing Kirk, and that this witness did not place him in the store when she testified at trial,[8] evidence of such a witness would have been to refute the State's theory of the crime.

**2. The State Introduced Unchallenged Evidence Of Appellant's Involvement In A Prior Robbery That Newly Discovered Evidence Suggests Was Contrived.**

During the trial's penalty phase, the State introduced evidence that Appellant had been involved in a robbery of a Subway in Fort Worth that had taken place months before the Balch Springs robbery. That evidence was identification from a

[8] Although this witness indicated, in her original statement to the police, that she had, in fact, seen both men enter the Subway, she recanted this version of events in her trial testimony. (Tr.52 at 146-148).

photo lineup by a single witness who had provided a distinctly different description of the robbery at the time of the crime in April 2002. (Tr.53 at 87-118). None of the other eyewitnesses to the Fort Worth robbery positively identified Appellant (*id.* at 125-129), but there is no indication that defense counsel attempted to investigate the circumstances of that crime despite the State's heavy reliance on it under its theory of the capital case. It is apparent that evidence pointing to other perpetrators, individuals who had nothing to do with Appellant, had been available but untapped at trial. Critical law enforcement records, regarding the investigation of the Fort Worth aggravator, as well as other similar crimes, were withheld.

### 3. Defense Aided The Prosecution In Its Use of Dallas County's Longstanding Racially Discriminatory Practices In Jury Selection, Resulting In Jurors Unfit For Service

Mr. Walker and Ms. Goodwin were white. Terry Edwards is black. From an initial pool of approximately 3,000 county residents, the parties individually questioned 143 venire members to select Edwards's jury that, in the end, initially seated only white people. (An alternate of Hispanic ethnicity later replaced one of the initially seated jurors).

Edwards's jury was empaneled months after the first Supreme Court opinion addressing the Dallas County DA's racially discriminatory practices in the case of Mr. Thomas Miller-El. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).[9] In Miller-El's

[9] *See also Miller-El v Dretke*, 545 U.S. 231 (2005), decided shortly after Edwards's case.

Dallas County trial in 1986, the DA's Office used peremptory strikes to eliminate 10 out of the 11 black venire members individually questioned. Months after that trial, the Dallas Morning News published its first investigative journalism on that office's institutionalized practices in capital jury selection.[10] As displayed in the *Miller-El* litigation, the DA's Office under Bill Hill and his predecessors had an entrenched practice of striking prospective African-American jurors that manifested a consistent pattern encompassing the period of the trial at bar.[11]

The jury selection record at bar (consisting of 47 transcript volumes), reflects the District Attorney's use of its practice of trading strikes by mutual agreement based upon juror questionnaires. In Appellant's case, this dictated the removal, off the record and without individual questioning, of swaths of the venire. This trading practice is known to have "impacted prospective black jurors far more than others, and kept many of those jurors from ever graduating to individual voir dire." (17-70003.1089). As reflected in Edwards's case, the agreement method "stripped" away "the general demographic representativeness of" Dallas County and enabled the empanelment of a white jury without, apparently, the use of a single peremptory strike exercised against a black venire member.

[10] The Dallas Morning News extensively chronicled this era, publishing two separate series of stories, one in 1986 and another in 2005, on the actual practices in that office. *See, e.g.*, Steve McGonigle & Ed Timms, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases,* Dallas Morning News, Dec. 21, 1986 (1986 WLNR 1716765).

[11] *See* Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors*, Dallas Morning News, Aug. 21-23 (2005).

The ostensible basis for this comprehensive striking by agreement of the entire black venire, apart from the two African-American prospective jurors struck for cause, would have been the individual member's answers to the questionnaire form. However, the DA has provided Appellant's current counsel with copies of what that office has represented is the entirety of the questionnaires in its possession. These copies number only 35 of the 143 questioned venirepersons. Among those 35 is a single questionnaire completed by an African-American. It lacks any material that would supply a creditable basis for a cause strike of that venire member, yet the DA and defense agreed – off the record – to strike her, just as the State and defense had done with every other Black venire member.

Current counsel for Appellant have also obtained a strike list apparently maintained by ADA D'Amore (and/or ADA Tokoly) that includes, next to 32 of the venire members, a handwritten, encircled "B."[12] (17-70003.1094). Especially in light of the troubled history of this District Attorney's Office,[13] there is obvious reason for "concern[] that these markings strongly suggest racial indications." (17-70003.1093). These present deeply concerning markers of potentially odious prosecutorial misconduct and constitutional violations and, further, strongly

[12] This marking system may reflect race-based jury selection tactics historically used in the county and also encountered elsewhere. *See Foster v. Chatman*, 136 S.Ct. 290 (2016).

[13] In *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003), published a mere months before Edwards's trial, the Supreme Court noted that the fact that Dallas County ADA's marked race on the prospective juror's cards "reinforced" the supposition of racial discrimination established in the record in that case.

reflects the profound consequences of defense counsel's appeasement of the State's trading practice to strip away diversity and representativeness from Edwards's jury.

The process also produced a jury headed by a foreperson biased against criminal defendants who assert their right to a trial and plagued by at least two jurors who prematurely deliberated, relying on extraneous evidence to decide upon a verdict of death during the guilt phase. Juror #5, who also served as the jury foreperson, failed to disclose information about his prior jury service on his jury questionnaire.

On his questionnaire, the foreperson indicated that he had served on a jury once before, also in 2002, and was unaware of the outcome. (Doc. 85 at 1299). In a subsequent declaration, however, he indicated that he had, in fact, served on multiple juries prior Mr. Edwards's case, including one in Fort Worth in 1995. (*Id*. at 1298, 1291). He also indicated that he had formed strong opinions about the outcomes in both of the cases, which he perceived to involve abuses of the judicial system. Because of his prior juror service, he had come to view a defendant's exercise of his right to a trial, as well as Edwards's "whole case," as "a waste of taxpayer time and money." (*Id*. at 1289

Additionally, two other jurors decided to impose the death penalty before the penalty phase started. They expressed to a third juror that they were worried that, as Christians, they would be unable to impose a death sentence. The third juror "suggested that they read the passage of Romans that helped [the third juror] and it would tell them what to do." That day, they went "home and read the verse." Having read the verse, they informed the third juror that they were "ready to impose the death penalty." (*Id*. at 1287).

The sworn statement of one of these two jurors corroborates that her decision to impose death was made (1) before the penalty phase and (2) as a result of having referenced the passage from Romans. She averred, "I knew that when we were deciding guilt that Terry Edwards would automatically be sentenced to death." (*Id*. at 1310). Although the Bible did not itself physically enter the jury room in Edwards' case, its influence on the deliberative process is clear. (*Id.* at 1287). From voir dire to entry of the death verdict, Edwards's trial was marked with constitutional violations related to the jury in his case.

#### 4. Members of the Victim's Family Were Available and Wanted to Testify on Mr. Edwards's Behalf

On the final day of Edwards' penalty phase, defense counsel informed the court that Ms. Cassandra McDaniel-Horridge, the mother of two of the children of decedent, Mr. Walker, contacted him to express their support of Edwards. (Tr.55 at 8-9). Counsel requested a brief continuance, noting they had not spoken to these potential witnesses. (Tr.55 at 9). Counsel informed the trial court that these witnesses "could be material to this Jury." (Tr.55 at 9). Specifically, knowing that Edwards and Mr. Walker were friends, trial counsel noted that the testimony could "go to the Defendant's background . . . and it may certainly be something that the Court might need to be mitigation evidence." (*Id.*). The trial court denied the continuance, and Ms. McDaniel-Horridge and her children did not have an opportunity to testify.

If trial counsel had ensured these witnesses were interviewed prior to trial, counsel and the jury would have learned about the enduring positive relationship between Appellant and Mr. Walker. They would have learned that Mr. Walker did not, in fact, think Edwards was responsible for the problems at the store that resulted in his termination. The jury would have further learned that Mr. Walker's family did not, in light of this relationship, believe Edwards was the shooter and that they wanted to testify on Edwards's behalf. In sum, the jury would have heard powerful evidence from a victim's family that rebutted key aspects of the state's case.

In light of the state's allegations – that Edwards robbed his prior employer in a revenge execution – competent counsel would have conducted investigation into the relationship between Appellant and Mr. Walker. That investigation would necessarily include "taking measures to interview members of Mr. Walker's family prior to trial." (17-70003.1081). That investigation was left undone, and the jury never learned the true nature of the relationship between Edwards and Mr. Walker.

### B. On Direct Review, Appellate Counsel Filed A Copied And Pasted Brief After Being Threatened With Contempt.

Edwards' appeal raised only two case-specific claims and the appellate briefing appears to be largely copied and pasted by his lawyer from other briefs prepared for other cases. After granting a five-month extension of time, the court on direct appeal entered an order that counsel for Edwards would receive "NO

FURTHER EXTENSIONS" and threatened him with contempt if he failed to file a brief. (17-70003.1097). Unmoved, the counsel filed nothing on Edwards's behalf on the due date. On December 16, 2004, the clerk sent appellate counsel in this capital appeal notice that he had failed to file. On December 22, appellate counsel mailed a brief and request for an extension "until December 30, 2004, or the date the Court receives this brief, whichever is later." (17-70003.1099). In light of the apparently hasty preparation, it is no surprise that, like state habeas counsel's effort, the filing was largely copied and pasted from prior briefs. Having done obviously little to prepare the briefing, appellate counsel then compounded his dereliction by affirmatively waiving oral argument. (17-70003.1100).

Despite significant preserved issues that struck at the heart of the State's case, appellate counsel failed to raise the claims. The appellate counsel did not raise a claim that the trial court should have provided defense counsel with a short continuance to talk with one of the victims' children and their mother, witnesses who counsel had never spoken to prior to the last day of the penalty phase. The appellate counsel also failed to raise preserved issue of the improper argument by the prosecutor, an argument that went to the heart of the State's (false) case for Edwards as the shooter. The counsel then wrote the Court of Criminal Appeals to affirmatively waive oral argument. In light of appellate counsel's non-advocacy,

the Court of Criminal Appeals reached the predictable result, affirming the conviction and sentence on March 1, 2006.

### C. State Habeas Counsel Copied And Pasted Mr. Edwards's Petition From Other Cases, Appears To Have Conducted No Investigation, And May Have Committed Grave Misconduct Under His Appointment.

Mr. C. Wayne Huff represented Edwards in state habeas proceedings. On July 5, 2005, Huff requested a three-month extension for his petition on the grounds that "counsel's investigation of this case will involve the review of many documents not contained in the record, and the interview of witnesses not called at trial." *State v. Edwards*, F02-15086 (August 5, 2005). However, by the time of the November 3, 2005 filing of the petition, the pleading reflected that Huff had completed no investigation and offered not a single meaningful claim for Edwards. The state habeas petition contained just six boilerplate claims. Line-by-line review of the 58-page petition Huff filed for Edwards – compared to filings he had made for other clients and an appendix prepared by Edwards's appellate counsel – has determined that *the entire pleading contains only 10 original sentences*. (17-70003.681). (Five days after he filed this petition, Huff invoiced the state $24,611.81 for its preparation, which raises facial questions concerning misconduct in terms of fraud.). (17-70003.1094).).

Less than a month before he filed the state petition for Edwards, the Western District of Texas published an opinion concerning Huff's performance in a prior

state habeas case. That federal court found that his capital habeas work for Mr. Rolando Ruiz was "appallingly" and "egregiously inept", "egregiously deficient", and "wholly incompetent." *Ruiz v. Dretke*, No. Civ SA-03-cv-303-OG, 2005 WL 2620193, at *2-3 (W.D. Tex. Oct. 13, 2005). In a description that easily applies to Huff's performance in the present case, the district court described his failure to investigate, develop and preserve meritorious extra-record claims surrounding constitutional violations stemming from Mr. Ruiz's capital prosecution. As he did in *Ruiz*, Huff "made no apparent effort to investigate and present a host of potentially meritorious and readily available claims for relief." *Id.* at *2. Here, as in *Ruiz*, Huff made "virtually no effort to present the state habeas court with any evidence supporting the vast majority of the claims for state habeas relief." *Id.*

A national expert on state and federal post-conviction litigation in capital cases described Huff's work in similar terms:

> In the few other cases I am aware of where no additional evidence was presented [in state habeas corpus], the reason was not the lack of new evidence but post-conviction counsel's failure to do a competent, adequate investigation. This, standing alone, is strong evidence of counsel's failure to function as counsel for Mr. Edwards. . . . Competent post-conviction representation in a capital case requires more than copying and pasting language from past work. It requires an individualized assessment of the case facts and investigation in response to facts suggestive of potential claims.

(17-70003.1083). Significantly, Huff did not raise either an ineffective assistance of trial counsel claim or a claim that the prosecution suppressed exculpatory evidence, "[t]he most common claims that arise is state post-conviction proceedings." (*Id*.)

The State filed its 20-page Reply on April 6, 2006. The Dallas County District Court entered an order finding that there were no issues warranting a hearing and directed the parties to file Proposed Findings of Fact and Conclusions of Law within 30 days. The State filed its Proposed Findings ten days later on April 17, 2006. Eight days later, on April 25, 2006, without waiting for the 30 days to expire, the Dallas County district judge signed the State's Proposed Findings and Conclusions of Law, with the word "State's" still in the title. Huff failed to object to this or any other aspect of the order or file his own Proposed Findings and Conclusions. The CCA affirmed the trial court on December 16, 2009.

### D. The Federal District Court Acknowledged Federal Counsel's Functional Abandonment, But Held That Such Abandonment Is Not Cause To Reopen The Case

Edwards's federal habeas proceedings were marred by his appointed attorney's abandonment during a critical period of his case. Appointed federal counsel, Mr. Richard Wardroup, accepted fulltime employment in early 2011 with the Texas Criminal Defense Lawyers Association, employment that required his

full attention. Yet, Wardroup failed to move to withdraw or notify the Court of his disengagement from the obligations under his appointment.

Wardroup served as the sole §3599 appointed counsel from the date of his appointment on January 11, 2010 until the Fifth Circuit replaced him on June 25, 2015 with the substitution of Mr. Donald Vernay, who represented Edwards for the limited purpose of filing a petition for writ of certiorari from the United States Supreme Court because Wardroup could not be admitted in that Court due to his six Texas disbarments over the years.

Nearly eleven months after Wardroup's appointment, he filed Edwards's habeas corpus petition on December 10, 2010 (17-70003.21) which was ultimately denied on August 6, 2014. (17-70003.219). The petition lacked any investigation-based claims, and all six grounds sought "relief pertaining to jury selection issues." (17-70003.220). The claims were a rehash of the claims Huff had copied in their entirety from a wholly different case that he had litigated shortly before he filed Edwards's state petition.

After his December 2010 filings, Wardroup filed only an eight-page response to Respondent's answer on March 9, 2012 (17-70003.210), and, upon the Court's judgment on August 6, 2014, a notice of appeal. (17-70003.249). On November 14, Wardroup presented two issues in a seventeen-page application for certificate of appealabilty in this Court. *Edwards v. Stephens*, No. 14-70026 (5th

Cir.). The State responded on December 12, 2014. Wardroup filed nothing further, and on May 19, 2015, the Court denied the application. Because Wardroup's Texas disciplinary record precluded him from being counsel of record in the Supreme Court, he moved for substitution and, on June 23, 2015, this Court appointed Vernay in his place. Vernay filed a petition for a writ of certiorari on August 14, 2015, which was denied on November 2, 2015. *Edwards v. Stephens*, 136 S.Ct. 403 (Nov. 2, 2015) (mem.) (denying certiorari).

### E. Abandoned At The Close Of Federal Review, Mr. Edwards Wrote The Court To Obtain Counsel.

On January 8, 2016, the Dallas County District Attorney moved to set Edwards's execution for May 11, 2016 and served process on Wardroup, despite the indication in the federal dockets that Vernay had substituted in as counsel for Edwards. The motion was unopposed, and on February 1, 2016, the presiding judge ordered Edwards to be executed on May 11, 2016. On February 5, 2016, Edwards learned about his rapidly approaching execution date from the prison officials tasked with handling the related logistics.

On March 2, Edwards mailed a handwritten letter to the district court addressing his abandonment by his last counsel, Mr. Vernay. (17-70003.267).For his part, upon the Supreme Court's denial of the certiorari petition, Vernay attempted to return responsibility of the case to Wardroup. In Edwards's letter, he explained that he had sent two letters to Messrs. Wardroup and Vernay, seeking to

discern who his counsel was. He also had his mother call Wardroup. Neither Wardroup nor Vernay responded to these inquiries.

On March 6, Edwards wrote again to the district court, explaining he lacked counsel. He had received neither the motion and order from the trial court nor the warrant setting his execution. The last he had communicated with counsel was on November 10, 2015, when Vernay informed him that the Supreme Court denied certiorari. Edwards had written to Vernay in December, January, and February with no response. Edwards requested appointment of counsel.

In response, Vernay submitted a pleading to the district court defending his reputation and conduct. He explained that Wardroup had approached him "for the sole purpose of preparing a petition for certiorari, since Wardroup was not admitted before the United States Supreme Court." (17-70003.269). He explained that he had "never met or spoken with Edwards" and that Wardroup provided him with "no file or documents other than [the district court's] denial of the petition of habeas corpus and the opinion of [this Court]." (*Id.*). On June 2, Vernay filed a motion to substitute counsel, naming Ms. Jennifer Merrigan and Mr. Joseph Perkovich as lead counsel. On June 14, 2016, the District Court granted the motion, appointing Merrigan and Perkovich as lead counsel along with undersigned counsel as local counsel.

### F. Substitute Counsel's Investigation Necessitated Modification Of The Execution Date

Substitute counsel Merrigan and Perkovich embarked on a review of and investigation into Appellant's case. On the basis of negotiations with the Dallas County District Attorney's Office, the parties in the trial court jointly moved to modify the execution date to January 26, 2017 to afford additional time for investigation and case preparation. The 195th Judicial District Court of Dallas County granted the motion by an order dated September 29, 2016.

### G. The District Court Acknowledged Federal Counsel's Abandonment, But Declined To Reopen The Case

On January 10, 2017, counsel for Edwards filed a Motion to Reopen Judgment Pursuant to Rule 60(b) of the Rules of Federal Procedure. (17-70003.398). The Motion was premised on two fundamental defects that, in light of all the circumstances (*supra*), warranted reopening the case. Specifically, the Motion relied on Wardroup's abandonment of Edwards and his related failure to undertake any advocacy on his behalf in light of the sea change in the law wrought by *Martinez v. Ryan* and *Trevino v. Thaler*. On January 17, 2017, the State filed its Response. (17-70003.1348).[14] On Thursday, January 19, the court entered an order transferring the Motion to Reopen to this Court.[15] (17-70003.1418).

In its order, the district court noted that it was "deeply troubled by the allegations of abandonment" by federal §3599 counsel but held that abandonment

[14] Counsel for Edwards did not file a Reply after the Clerk informed counsel that the Court would had moved for leave to file a Reply. However, that Motion

[15] The district court also transferred Edwards's Application for Stay of Execution and Amended Application for Stay of Execution. (17-70003.1417).

by federal counsel was insufficient to reopen the case. (17-70003.1416). To reopen the case, the court would require Edwards to show at the outset "how [the abandonment] could have impacted anything that was, or could have been, presented during the limitations period that had expired months before such employment began." (*Id*.). The court categorically held that "any newly asserted claims would . . . have been subject to a time bar." (*Id*.).

The court further concluded that because, upon reopening, counsel may allege new claims (in addition to claims that relate back to those alleged in his petition), the Motion to Reopen constituted a successive habeas petition. (*Id.*). As such, the court reasoned, it lacked jurisdiction to consider the pleading and transferred it to this Court. (17-70003.1417).. The court issued a certificate of appealability on a single issue: "whether the effective abandonment of Petitioner by his federally appointed habeas counsel constitutes a defect in the integrity of the original habeas proceedings that may authorize Rule 60(b) relief in this Court." (#11 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court did not reach the merits of the Motion to Reopen.

## IV. SUMMARY OF THE ARGUMENT

The district court declined to rule on the crucial issue before it: whether federal habeas counsel's abandonment constituted a defect in the proceedings and whether all the circumstances warranted reopening the case. *Gonzalez v. Crosby*,

545 U.S. 524 (2005). Instead, the court below assumed that because, upon reopening, Edwards may raise substantial claims for relief, the Rule 60(b) was an impermissible successive habeas petition.

Appellant's Rule 60(b) was actually premised on federal habeas counsel's abandonment, abandonment that badly exacerbated prior counsel's abysmal representation. In the course of the federal habeas proceedings, counsel took full time employment in March 2011 and disengaged with the case without informing the court, even after the case was closed in August 2014. In light of the extreme defect in Edwards's proceedings, the district court should have ruled on the motion. *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015) (Owen, J.).

Moreover, absent this abandonment, counsel could have raised substantial claims in light of *Martinez v. Ryan* and *Trevino v. Thaler*, and upon reopening, Appellant will have viable ineffective assistance of counsel and *Brady* claims. In light of these meritorious, cognizable claims, the district court also erred in concluding that any abandonment was essentially harmless and that reopening the case would be futile. The question was whether a defect warranted reopening in light of all the circumstances; "any other issues, . . . including wither any new matters that additional counsel might identify are barred by any provisions of AEDPA," should have been taken up after reopening the case. *Mendoza*, 783 F.3d at 211; *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2015).

# V. ARGUMENT

## A. Federal Counsel's Conflict Of Interest, Culminating In His Abandonment, Is A Defect In The Integrity Of The Habeas Corpus Proceedings That May Warrant Reopening The Judgment

In transferring Appellant's case to this Court, the district court authorized "a certificate of appealability on the question of whether the effective abandonment of Petitioner by his federally appointed habeas counsel constitutes a defect in the integrity of the original habeas proceedings that may authorize Rule 60(b) relief in this Court." (17-70003.1419). The court found that while it was "deeply troubled" by the allegations that federally appointed counsel had abandoned his client, Appellant "has not shown how that could have impacted anything that was, or could have been, presented during the limitations period that had expired months before such employment began." (17-70003.1419). Critically, the court observed that: "Edwards has not identified any claim that had been asserted in his original habeas petition that could have benefited from any change in law resulting from *Martinez*." *Id*. This reasoning is as faulty and contravenes the analysis in *Mendoza*, which recognizes that questions of technical bars are to be determined subsequent to the answer of whether the defect in the proceedings and the extraordinary circumstances in the motion merit reopening. Further, Appellant *would* be able to identify claims that may benefit from the advent of *Martinez* and *Trevino*. However, to have raised such claims at this juncture would have been to have

submitted a successive petition. Thus Appellant did not submit such claims. Perplexingly, the district court nonetheless faulted Appellant having done so.

As discussed below, abandonment can constitute "extraordinary circumstances" sufficient to trigger the equitable remedy of Rule 60(b). Additionally, Appellant has, in fact, "identified [a] claim that had been asserted in his original habeas petition that could have benefited from any change in law resulting from *Martinez*." *Id.* This reasoning is faulty as it contravenes the analysis in *Mendoza*, which recognizes that questions of technical bars are to be determined subsequently to the answer of whether a defect in a proceedings and related extraordinary circumstances merit reopening. Further, Appellant would be able to identify claims that may benefit from the advent of *Martinez* and *Trevino*. As the district court knew, however, to have pleaded such claims in the 60(b) Motion would have amounted to a successive petition. Thus, Appellant did not submit such claims. Perplexingly, the district court nonetheless faulted Appellant exactly this. (Doc. 91 at 9-10).

**1. Edwards's federal appointed counsel abandoned him.**

On January 11, 2010, the district court appointed Richard Wardroup to represent Appellant in his habeas corpus proceeding. (17-70003.14-15). On December 15, 2010, Wardroup filed Appellant's habeas petition. (17-70003.14-15). Three months later, in March 2011, Wardroup "accepted a full time position

with the Texas Criminal Defense Lawyers Association (TCDLA)," (17-70003.472), a position that "has demanded and continues to demand [his] full attention." (*Id*.). As Wardroup admits, "When I took the TCDLA job in March 2011, I *generally stopped work on my cases* in order to dedicate my time to my full time employment for TCDLA."[16] (*Id*.). (emphasis added). Wardroup acknowledges his abandonment in a sworn statement:

> I never attempted to withdraw from representing Mr. Edwards or to inform the district court of my changed status although I stopped working on his case until the court's scheduling order required that I file a response to the State's answer to the habeas petition. . . . I then did not consider the case, in any meaningful way that I can recall, until it was denied over two years later.

(17-70003.472-473). Wardroup's full time position, about which he failed to notify the district court, constituted a conflict of interest that culminated in the abandonment of his client. (*See* (17-70003.1086-087).

Wardroup's resulting absence is partly illuminated by comparing his profile in a parallel case before the district court, *Braziel v. Stephens*, No. 3:09-cv-1591-M, wherein he and Mr. Don Vernay had been appointed on September 29, 2009. (17-70003.20-). In that case, Wardroup "simply let [Vernay] handle that litigation after I took on my employment responsibilities with TCDLA." (17-70003.473).

[16] According to Mr. Wardroup, the position with TCDLA focuses on his "trial-level experience. In fact, I had no meaningful habeas corpus experience before being appointed to these cases in 2009 and 2010." (17-70003.472).

Wardroup did not move to withdraw from the case until June 2014, after the district court had scheduled a hearing. The Motion to Withdraw averred that Don Vernay had assisted Wardroup, "at all times" in the representation and that though Wardroup had kept up with the litigation since he began work for TCDLA", "he has not been actively engaged in the representation." *Braziel v. Stephens,* 3:09-cv-01591, Doc. 56, at 1 (Jun. 17, 2014). Because Wardroup's "responsibilities with TCDLA have made it impossible for him to be actively involved in the litigation of this matter as it goes forward," Wardroup moved to withdraw. *Id*. at 2.

At the evidentiary hearing, the Court granted Wardroup's motion to withdraw, "conditioned upon Wardroup providing an affidavit regarding any knowledge of the whereabouts of the file of state habeas counsel Douglas Parks." *Braziel v. Stephens,* 3:09-cv-01591, Doc. 64, (Jul. 31, 2014). At the hearing, it had emerged that Wardroup "had not supplied Mr. Vernay with the whole file of state habeas counsel." (*Id*.).

Unlike the *Braziel* case, in Edwards's case, Wardroup "was the only attorney appointed to represent him in his habeas corpus case." (17-70003.473). Nonetheless, Wardoup admits that "[o]ver the years that I was counsel of record for him while employed by TCDLA, I took no steps to withdraw or to replace myself with an available, qualified attorney." (17-70003.474-75); *compare Christeson v. Roper*, 135 S.Ct. 891, 895 (2015) (per curiam) (explaining that active

representation of the petitioner in federal appellate or collateral proceedings did not obviate the conflict).

Edwards's federal attorney of record had, thus, abandoned him, leaving him, for the majority of his time in federal court, with federal habeas counsel in a "technical" sense only. *See Battaglia v. Stephens*, 824 F.3d 470, 473 (5th Cir. 2016) (reversing N.D. Tex. (Boyle, J.) (reversing denial of motion for appointment of §3599 counsel and motion for stay of execution, remanding for appointment of conflict-free counsel to perform under the statute's clear criteria).

**2. Grave Misconduct Of Appointed Counsel Caused Profound Defect At The Heart Of The District Court Proceedings**

Initial federal counsel's abandonment, an extreme instance of misconduct, caused a fatal defect in the district court proceedings. Coupled with the misconduct of state habeas counsel, which apparently rose to the level of fraud, these problems warrant invocation of Rule 60(b)'s equitable powers. *See Mendoza v. Stephens*, 783 F.3d 203 (Mem.) (5th Cir. 2015) (per curiam) (remanding to district court weeks following Supreme Court's decision in *Christeson* and pursuant to *Trevino*, which had been decided years prior but during case's pendency in circuit court). This way forward is clear in the light of recent jurisprudence from the Supreme Court and the Fifth Circuit.

During the pendency of *Mendoza* in the Fifth Circuit, the Supreme Court decided *Christeson*, which held that a habeas petitioner saddled with an attorney

laboring under a conflict of interest is entitled to new habeas counsel and a remand in order to explore available bases under Rule 60(b) for reopening his habeas case closed as a consequence of attorney misconduct. Promptly thereafter, the Fifth Circuit remanded Mendoza's case to the district court "to determine whether there are any ineffective-assistance-of-trial-counsel claims that should have been, but were not, raised in the state habeas proceedings" filed many years prior. *Mendoza*, 783 F.3d at 205 (Owens, J., concurring).

*Christeson* recognized that the entitlement to federal habeas counsel safeguards the client from harm that would otherwise result from his appointed counsel's conflict of interest in the representation. In *Christeson*, the issue causing the conflict had been the federal attorneys' own misconduct that resulted in their failure to timely file his habeas petition. 135 S.Ct. at 892.

In *Mendoza*, the conflict is more like the problem at the center of Edwards's federal habeas proceedings in that it concerned the incapacity to properly litigate the federal case based on the evolution of the jurisprudence marked by *Trevino*. Specifically, Mendoza's state habeas attorney brought his case into federal habeas court and thus could not be relied on to "conduct a review to determine whether there are any ineffective-assistance-of-trial-counsel claims that should have been, but were not, raised in the state habeas proceedings." *Mendoza*, 783 F.3d at 205.

In contrast, Appellant was saddled with counsel who admits that he "stopped working on the case" after March 2011 and "then did not consider the case, in any meaningful way that I can recall, until it was denied over two years later." (17-70003.474).). During this time period, the Supreme Court issued *Trevino* (*see also Mendoza*). The previously undisclosed conflict and profound attorney misconduct must alter the understanding of Wardroup's appointment in this Court and, on the basis of the foregoing Fifth Circuit and Supreme Court precedents, necessitate the reopening of this case for further proceedings whereby conflict-free counsel may be able to develop and present meritorious claims for the Court's review. Despite the revelation of Wardroup's egregious misconduct, the district court elided the implications of *Mendoza* entirely, failing to address the clear implications of this case.

Further, as *Mendoza* recognized, a motion to reopen a habeas action due to a defect in the proceedings is explicitly *not* the time to decide "any other issues, . . . including whether any new matters that additional counsel might identify are barred by any provisions of AEDPA." *Mendoza*, 783 F.3d at 211; *see also Battaglia*, 824 F.3d at 475. At bottom, during the case's pendency between 2010 and 2014, new grounds for cause and prejudice to excuse claims defaulted due to state habeas counsel's fraudulent conduct emerged, yet were left unused due to federal habeas counsel's conflict of interest.

### 3. Counsel's abandonment constitutes "extraordinary circumstances" under Rules 60(b).

This Court has repeatedly found attorney abandonment to be a defect in the proceeding which may provide a basis for Rule 60(b) relief. *See Associated Marine Equipment LLC v. Jones*, 301 Fed.Appx. 346, 284 (2008) (Finding that petitioner's "scenario seems to resemble more closely that of the parties in Seven Elves, where counsel's abandonment of his clients warranted relief from the judgment" and remanding for further fact finding about the abandonment.); *Hester Intern. Corp. v. Federal Republic of Nigeria*, 879 F.2d 170 (1989) (Upholding the grant of a Rule 60(b) Motion and new trial on the basis on the basis of abandonment of counsel); *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1083 (1984) (This Circuit's "cases liberally construing Rule 60(b) focus upon the abandonment of clients by their lawyers."); *see also Perez v. Stephens*, 745 F.3d 174 (2014) (Dennis, J., dissent) ("Attorney abandonment, the Supreme Court has indicated, is sufficient to constitute the 'extraordinary circumstances' necessary to trigger relief from judgment under Federal Rule of Civil Procedure 60(b)(6)" (citing *Maples*, 132 at 927; *Holland v. Florida*, 130 S.Ct. at 2564; *Gonzalez*, 545 U.S. at 535.)).

In *Seven Elves, Inc. v. Eskenazi*, two defendants were represented by an attorney in a malicious prosecution and slander suit. *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 98 (1981). Unbeknownst to two of the defendants, their counsel withdrew from the case, and the defendants were thus absent from and

unrepresented at trial. *Id*. at 399. The district court struck their pleadings, entering judgment against them. *Id*. After defendants learned of the judgment, they retained new counsel and filed a Rule 60(b) Motion in the district court *Id*. That court denied their Rule 60(b) motion. *Id.* Based on counsel's abandonment, this Court reversed the district court, granting the Rule 60(b) Motion and remanding for a full trial.

In *Maples v. Thomas*, the Supreme Court considered a case in which attorneys abandoned their client, causing him to miss a statutory deadline. Discussing at length the facts surrounding counsel's conduct as well as their interaction with their client, the Court explained:

> [A] client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him. We therefore inquire whether Maples has shown that his attorneys of record abandoned him, thereby supplying the "extraordinary circumstances beyond his control," necessary to lift the state procedural bar to his federal petition.

*Maples v. Thomas*, 132 S.Ct. 912, 924, 181 L. Ed. 2d 807 (2012) (internal citation omitted).

The abandonment in this case caused actual harm to Appellant. Though the district court faults Edwards for failing to identify a "claim which could have benefited from any change in law resulting from *Martinez,*" Appellant did identify

such a claim.[17] As the district court recognized in its Order, Appellant raised six claims in his federal habeas petition, one of which asserted ineffective of counsel. (17-70003.1410). ("Trial counsel's failure to challenge the Dallas County venire selection process as violating Edwards' right to a jury consisting of a fair cross section of the community constituted ineffective assistance of counsel (Pet. at 39-47). This exact claim was also raised in state post-conviction. (*See* 17-70003.413; 17-70003.427; 17-70003.473).

State habeas counsel, however, did not include a single fact specific to Appellant, his trial, or his case in the paltry state habeas claims. Those claims were copied verbatim from several different briefs drafted for other clients.[18] Huff's patchwork state habeas brief, which, *in its entirety*, contained ten original sentences, was his sole filing in Appellant's case. Huff did not bother filing proposed findings, nor did he file a request for a hearing. Remarkably, the voir dire IAC claim itself included *nothing* about the racial makeup of Appellant's venire, or the actions of Appellant's counsel in 1) agreeing to shuffle the venire and "trade" jurors, without even questioning them; 2) failing to make *any* record whatsoever about the racial composition of the venire; 3) failing to make *any* record whatsoever about race throughout the voir dire.

[17] As discussed below, in Section B, he was foreclosed under *Gonzalez* from pleading that claim in his Rule 60(b) Motion; however, he identified the potential claim below.
[18] The statement of claims, copied verbatim from the direct appeal, omitted entirely a discussion of voir dire.

When federally appointed counsel asserted the claim in December 2010, he relied exclusively on state counsel's evidentiary presentation. Federally appointed counsel did not assert any new evidence about trial counsel's abject failure to adequately challenge the racial makeup of the venire and jury or even to make any record of it at all.

However, such evidence existed. Trial counsel failed at every step of Appellant's voir dire to protect and preserve key issues regarding the racial composition of the venire and the jury. The systemic failure of counsel in Dallas County capital cases to adequately preserve issues regarding the racial composition of juries has undermined the availability of this evidence. (17-70003.1088).The unreasonable failure on the part of Dallas County defense attorneys does not protect African-American and Hispanic jurors from unconstitutional exclusion from participation in the venire and the jury. This practice specifically impacted black jurors. Moreover, the defense's failure to adequately preserve the racial composition of the venire, jury, and of the prosecution's strikes, stripped Appellant of critical appellate review. (17-70003.1089).Trial counsel were unreasonably deficient in failing to preserve key issues surrounding the racial composition of the venire and jury. The result was that an all-white jury was seated, while the State was not even required to exercise a single peremptory strike against an African-American venire member.

The strike list uncovered by undersigned counsel is additional evidence of the systematic stripping of African-American jurors from service on the jury. It further underscores the failure of trial counsel's to make an adequate record with regard to *any* of these jurors and the venire as a whole.

During the pendency of Appellant's habeas corpus petition (between Dec. 15, 2010 and Aug. 6, 2014), the Supreme Court issued two opinions of vital importance to Appellant, *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). Together, those cases establish that the deficient performance of state habeas counsel may provide grounds to overcome the otherwise applicable procedural default of unexhausted trial counsel ineffectiveness claims. Those cases "fundamentally altered the obligations of federal habeas corpus counsel as the cases literally opened a potential new gateway for additional claims (and facts supporting claims) that would previously have been deemed procedurally barred." (17-70003.1086). Yet Appellant's nominal §3599 counsel "was no longer functioning as such, having taken another full time position" (17-70003.1085). Counsel of record thus completely ignored both *Martinez* and *Trevino* to the grave disadvantage of Petitioner. (*Id.*).

The grave misconduct by state habeas counsel is exactly what *Martinez's* equitable remedy sought to address. Federal counsel could have, or at least, should have, been aware of Huff's astounding incompetence. By 2012, Huff's

incompetence was well known; in October 2005, a Texas federal district court had described Huff's work as both "appallingly inept" and "egregiously inept." *Ruiz v. Dretke*, 2005 WL 2620193, at *2-3 (W.D. Tex. Oct. 13, 2005). Thus, once *Martinez* and then *Trevino* came down, federal counsel could have supplemented the ineffective assistance of counsel claim with the evidence of trial counsel's abject failure to protect and preserve issues of race throughout voir dire. Due to federal counsel's abandonment, however, that was not done.

### B. Federal District Courts Have Jurisdiction To Consider Motions To Reopen Premised On A Defect In The Integrity Of The Original Habeas Proceedings

The court below ruled that because Appellant had raised claims (or would raise claims), his Motion to Reopen was an impermissible successive habeas petition, for which it lacked jurisdiction to consider. The court further reasoned that because Edwards had *failed to raise* cognizable claims, it could not reopen judgment. The district court's basic assumption was wrong: Appellant's Motion to Reopen was premised on a defect in the proceedings, specifically Wardroup's conflict of interest vis-à-vis taking full-time employment in the midst of the case, leading him to abandon Appellant. The Motion was not based on claims.

Further, the court's requirement that Appellant allege cognizable claims leaves him in a Catch-22. On the one hand, the court declined to reopen (despite the defect) because Appellant had "raise[d] claims 'challenging the petitioner's

conviction or sentence that was or could have been raised in an earlier petition,' [and was] successive." *In re Sepulvado*, 707 F.3d 550, 553 (5th Cir. 2013) (quotation omitted). On the other hand, the court faulted Appellant because he had "not identified any claim that could have been asserted in his original habeas petition that could have benefited from any change in law." (17-70003.1417). Thus, although the court was "deeply troubled" by federally appointed counsel's conduct, it found that Appellant could not reopen the case because (1) he had identified potential claims and (2) he did not plead with specificity how those claims would be both cognizable and survive any procedural defense raised by the state. The court should not have it both ways.

In any case, if the court below does reopen the case, there are cognizable claims for review, *infra*. However, the court short-circuited the inquiry by focusing on potential claims instead of the proper inquiry for the motion before the court: whether "'extraordinary circumstances' justif[y] the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950). The court reached the wrong conclusion on jurisdiction and erroneously transferred the case to this Court.

This Court "review[s] *de novo* the district court's determination of its jurisdiction." *Wadsworth v. Johnson*, 235 F.3d 959, 961 (5th Cir. 2000); *see Royal v. Tombone*, 141 F.3d 596, 599 (5th Cir. 1998) (reviewing a district court's

determinations of law *de novo*). "It is a fundamental rule that a court has 'jurisdiction to determine jurisdiction.'" *James Talcott, Inc. v. Collier*, 357 F.2d 23, 25 (5th Cir. 1966) (quoting *Taubeli-Cott-Kitzmiller Co. v. Fox*, 264 U.S. 426 (1924)). "If the jurisdiction of a federal court is questioned, the court has the power, subject to a review, to determine the jurisdictional issue." Wright, Law of Federal Courts § 16, at 50 (2d ed. 1970).

A Rule 60(b) motion attacking "only a defect in the integrity of the federal habeas proceedings should not be treated as a successive habeas application." *Ochoa Canales v. Quarterman*, 507 F.3d 884, 887 (5th Cir. 2007) (citing *Gonzalez* 545 U.S. at 532). "When no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application." *Gonzalez*, 545 U.S. at 533. That is, "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," it is not a successive habeas petition. *Id.* at 532. As such, the district court properly has jurisdiction over a motion that is not premised on new claims. *Compare Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007) (noting district court had jurisdiction where Rule 60(b) motion attacked defect in the proceedings); *with Adams v. Thaler*, 679 F.3d 312, 322 (5th Cir. 2012) (upholding finding of lack of jurisdiction in the district court and transfer to the Fifth Circuit where Rule 60(b) motion raises claims for relief).

Here, the district court did not address whether abandonment that constitutes a defect arising from a conflict of interest is a defect in the integrity of the proceedings (*supra*). It did not address whether Appellant had established the "extraordinary circumstances" necessary to reopen those proceedings. *Gonzalez*, 545 U.S. 524, 535. Instead, it offered a limited holding: it lacked jurisdiction because Appellant's Motion to Reopen was a successive petition because it asserted claims for relief. (17-70003.1417). However, Appellant's Motion repeatedly went out of its way to make clear that it was not stating any such claims for relief. It was seeking to reopen the case based on Wardroup's conflict of interest and abandonment (*supra*). Because Appellant's Motion to Reopen did not assert any claims, it should have been ruled on in the first instance by the district court.

The court below next faulted Appellant for failing to "identify any claims asserted in that original petition that the new claims would relate back to." (*Id*. n. 2). In essence, the court faulted him for failing to identify claims he could raise. Beyond the Catch-22 this creates, *supra*, the district court would have reached a different conclusion if the court had reopened the case and permitted Appellant to make pleadings articulating his theory for why each claim was cognizable.

As explained *supra*, Appellant had a substantial claim for relief that plainly relates back to his state and federal habeas corpus petition, making it available for

the district court's review. However, Appellee raised and the district court erroneously credited the view that *Cullen v. Pinholster*, would limit the capacity for the court to take new evidence upon reopening and for Appellant to amend claims to relate back under Fed. R. Civ. P. 15(c) to the initial petition. (See 91 at 9 n.2, citing Resp. at 22-23 (citing *Mayle v. Felix*, 545 U.S. 644, 664 (2005)) This is mistaken but the complexity and contestability of the point underscores the soundness in the reasoning in *Mendoza*. (*Supra*). A motion to reopen a habeas action is the time to consider the nature of a defect in the original proceedings; it is explicitly *not* the time to decide "any other issues, . . . including whether any new matters that additional counsel might identify are barred by any provisions of AEDPA." *Mendoza*, 783 F.3d at 211; *see also Battaglia*, 824 F.3d at 475

Other claims would also be viable if the district court reopens the case. For example, Appellant has substantial claims of ineffective assistance of trial and appellate counsels. Trial counsel failed to conduct independent forensic testing that would have established Appellant was not the triggerperson, failed to conduct investigation into Appellant's family that would have revealed Kirk Edwards's penchant for violence, and incriminating post-crime behavior. Trial counsel engaged in a flawed jury selection process, allowing the prosecution to engage in racially motivated jury selection resulting in a jury with two members who prematurely deliberated based on extraneous evidence and a foreperson who

concealed his bias towards criminal defendants. Trial counsel also failed to conduct investigation into the relationship between Appellant and the victims, an investigation that would have allowed the jury to learn that he and Mr. Walker had an enduringly positive relationship that, from the victim's family's vantage, eliminated Appellant from consideration as the shooter or as party to any plan involving shooting. Appellate counsel failed to raise meritorious claims, including a claim that the trial court should have provided defense counsel with a short (one-day) continuance to interview members of the victim's family who had only recently come to his attention.

The State has also only recently disclosed exculpatory evidence. This evidence, *inter alia*, includes an eyewitness that describes Appellant's co-defendant as the likely shooter, evidence fundamentally at odds with the State's theory at trial. The state also withheld exculpatory evidence related to an uncharged robbery that it used in penalty to suggest a *modus operandi* by Appellant. Specifically, the state failed to disclose evidence that the person behind the cash register, a reporting witness to the robbery, failed to identify Appellant as the perpetrator. In light of the weaknesses in the evidence of the prior robbery, this failure to identify Appellant by the person best in a position to see him would have fatally undermined this element of the State's case in aggravation.

Regarding any of these potential claims, the State may seek to assert procedural defenses. However, in light of the seriousness of the state misconduct at issue, their duty to seek justice may outweigh their interest in finality. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("the representative . . . of a sovereign . . . whose interest . . . in a criminal case is not that it shall win a case, but that justice shall be done."). In any event, should the State assert potentially applicable procedural defenses, available equitable exceptions to them would likely apply.

That is, any procedural default or non-jurisdictional statutory bar to review of the ineffective assistance of trial and appellate counsel claims would excused by *Martinez* and *Trevino*.[19] In lieu of guaranteeing counsel in state initial collateral review proceedings, the Supreme Court has fashioned a sensible and just rule for the lower courts to excuse a "procedural bar," *Martinez*, 132 S.Ct. at 1316, which is one of several commensurable "threshold barriers," *Day v. McDonough*, 547 U.S. 198, 205 (2006) (holding district court had discretion to dismiss petition based on AEDPA time bar despite state's erroneous computation and waiver of the defense), against a Sixth Amendment trial counsel claim that would be kept from merits review in federal habeas court due to failings suffered in the initial collateral

[19] Any day, a decision is expected from the Supreme Court in *Buck v. Davis*, No. 15-8049 (U.S.). There, the Court will address, *inter alia*, the availability of Rule 60(b) relief premised on a *Martinez* claim. Although this case has a separate, defect sufficient to Reopen the proceedings, the abysmal representation of state habeas counsel resulted in Edwards's foregoing state and federal review of substantial claims of ineffective assistance of trial counsel and would provide an additional basis for reopening the case.

review stage.[20] These "threshold barriers" include, *e.g.*, a "limitations defense," "exhaustion of state remedies, . . . [and] nonretroactivity," *id.*, and *Martinez* introduced a rule to negotiate such impediments when they arise from ineffective state habeas counsel.

The requirement to exhaust state remedies and state procedural bars are both "principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1989). After discussing the "principles of comity" at work in this exhaustion doctrine, *Coleman* explains that "[t]hese same concerns apply to federal claims that have been procedurally defaulted in state court." 501 U.S. at 731. *Coleman* articulates the equivalence, in effect, of these closely connected doctrines, as has been repeatedly recognized. *See, e.g.*, *Greenberry v. Greer*, 481 U.S. 129, 135 (1987) ("comity and federalism" underlie the court's determination of whether to raise, *sua sponte*, the exhaustion bar).

AEDPA's statute of limitations serves similar purposes. It "promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while

[20] The Supreme Court recently agreed to review the question of whether *Martinez* extended to claims of ineffective assistance of appellate counsel. At least one circuit has concluded that it does, (*Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013)), and the Court granted review of a case from this Circuit concluding it does not. *Davila v. Davis*, 650 Fed. App'x 860 (5th Cir. 2016) *cert. granted* No. 16-6219 (U.S. Jan. 13, 2017).

the record is fresh, and lends finality to state court judgments within a reasonable time." *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (quoted in *Day*, 547 U.S. at 206). For this reason, "it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners." *Day*, 547 U.S. at 209.

If threshold barriers must be understood in this way with regard to their imposition as a defense – even if the defense, under the ordinary use of the term, is waived, *id.* at 205 – the same rationale must control the answer to questions prompted by equity and animated by "equal protection and due process concerns." *Halbert*, 545 U.S. at 610. Thus, a distinction in this respect between a time bar and a procedural bar is semantic, at best. At worst – as it would be if such a distinction is allowed to stand in Appellant's case – it is a veneer to justify an inequitable and unjust working of a scheme founded upon a notion of comity that requires reciprocity in ways that the State of Texas has not delivered through its state habeas corpus process.

By its terms, *Martinez* applies to a state procedural bar. This Court and the Supreme Court have not yet explicitly held that similar threshold barriers to federal habeas corpus review, this Court has recognized the similarities among the "judge-created procedural bars or non-jurisdictional statutes." *Perez v. Stephens*, 745 F.3d 174, 179-80 (5th Cir. 2014) (citing *Holland v. Florida*, 560 U.S. 631 (2010)).

Appellant's case presents the opportunity to clarify that, when the reasons underlying the threshold barriers are similar to those underlying state procedural bars, the equitable rule in *Martinez* will excuse those barriers and permit review of substantial ineffective assistance of counsel claims.

Likewise, for *Brady* claims, §2244(b)(2)'s bar on "second or successive" petitions must not be understood to exclude meritorious *Brady* from all review. The phrase "second or successive" must be understood as the "term of art" that it is. *Slack*, 529 U.S. at 486. The phrase is "not self-defining" or meant literally. *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). In *Panetti*, the Court concluded that a *Ford* incompetent-to-be-executed claim that was second in time was not "second or successive" for purposes of §2244(b). The Court reasoned that it should not apply §2244(b)'s gatekeeping standards in such a way that would "foreclose any federal review of a constitutional claim, or otherwise lead to perverse results, absent a clear indication that Congress intended that result." *United States v. Lopez*, 577 F.3d 1053, 1063 (9th Cir. 2009) (citing *Panetti*, 551 U.S. at 945-46). Furthermore, because construing §2244(b)(2) to foreclose competency claims would also fail to serve "AEDPA's purposes" of finality, comity, and judicial economy, the Court declined to hold that competency to be executed claims were foreclosed. *Panetti*, 551 U.S. at 945-46. Instead, the Court held that "second in time" claims of incompetency to be executed are not barred by §2244(b)(2).

As the Ninth Circuit has recognized, similar problems inhere with *Brady* claims that arise only after the conclusion of federal habeas corpus review. *Lopez*, 577 F.3d at 1066. *Lopez* concluded that the *Brady* claim at issue was not material and, therefore, §2244(b) barred review. However, it acknowledged that a meritorious *Brady* claim would warrant an exception to §2244(b). This is because precluding review would either insulate the claim from review despite the lack of fault with the defendant or require "that all possible claims be raised in state collateral proceedings, even when no known facts support them." *Strickler v. Greene*, 527 U.S. 263, 286-87 (1999). The latter requirement would be anathema to "[p]roper respect for state procedures." *Id.* The former alternative would risk placing petitioners at risk of "forever losing their opportunity for any federal review of their unexhausted claims," raising serious constitutional questions about the viability of such an interpretation. *Rhines v. Weber*, 544 U.S. 269, 275 (2005); *see also INS v. St. Cyr*, 533 U.S. 289, 299 (2001) (avoiding "constitutional problems" that would arise from an interpretation that "would entirely preclude review of a pure question of law by any court" by construing the statute otherwise).

The wiser path is to interpret §2244(b)'s bar as excluding new meritorious *Brady* claims, particularly where they are brought subsequent to the court's reopening the case in light of a defect in the proceedings. Under this theory, a

theory as yet unaddressed by this Circuit, each of Appellant's *Brady* claims are both timely and properly before the District Court.

However, like the other theories outlined *supra*, this was not fully briefed below for the simple reason that it was not relevant to the district court's decision. Instead of simply ruling on the issue before the district court – the sufficiency of the Rule 60(b) showing – the court below engaged in a speculative discussion of how any claims Appellant would eventually raise would play out. This misplaced focus erroneously led the court to conclude that all potential claims would be foreclosed and to conclude that it lacked jurisdiction to decide the motion before it. The first conclusion was misplaced because there was basis for merits review of each of the potential claims put forth before the court. The second conclusion was wrong because the Motion to Reopen was based on a defect in the proceedings, and the district court, therefore, had jurisdiction to address the defect.

For these reasons, this Court should reverse and remand with instructions for the district court to consider Appellant's Motion to Reopen the case.

## VI. CONCLUSION

Because of the seriousness of these issues – Appellant could be executed without any court ever hearing critical evidence involving gross prosecutorial misconduct and appallingly deficient performance by trial counsel – this Court must intervene. The Court should reverse the lower court, stay the execution and

permit full briefing and argument, or enter a stay and remand for further fact finding on the defaulted *Martinez* claim.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2017, the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing and its viewing and downloading are thereby provided to call counsel of record by cooperation of the CM/ECF system.

/s/ Carl David Medders
CARL DAVID MEDDERS

## CERTIFICATE OF COMPLIANCE

I further certify that (1) this Brief was prepared in 14-point Times New Roman font using Microsoft Word software, (2) this Brief is 12,976 words, excluding the parts of the Brief exempted by the rules of court, and (3) this Brief has been scanned for viruses and the Brief is virus-free.

/s/ Carl David Medders
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