

No. 16-
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2016
WILLIAM CARY SALLIE
Petitioner,
v.
ERIC SELLERS, WARDEN
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

**Imminent Execution Scheduled
7:00 P.M. ET, December 6, 2016**

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CAPITAL CASE: IMMINENT EXECUTION

QUESTIONS PRESENTED

In *Buck v. Davis*, No. 15-8049, the Court will address the scope of Rule 60(b)(6)'s extraordinary circumstances inquiry, including determining whether it applies to claims premised on the equitable rule announced in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and applied in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). In *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014), the Eleventh Circuit Court of Appeals categorically rejected Rule 60(b)'s application to *Martinez/Trevino* claims, foreclosing Mr. Sallie's efforts to reopen this case.

In the same decision, the Eleventh Circuit foreclosed *Martinez's* equitable rule from applying to AEDPA's statute of limitations, *id.* at 630, even though this Court has repeatedly noted "it would make 'scant sense' to treat AEDPA's statute of limitations differently from other threshold constraints on federal habeas petitioners," including "'failure to exhaust state remedies, a procedural bar, [and] non-retroactivity.'" *Wood v. Milyard*, 132 S. Ct. 1826, 1833 (2012); *quoting Day v. McDonough*, 547 U.S. 198, 209 (2006). That inflexibility has prevented all federal consideration of the merits of Mr. Sallie's meritorious claim and presents the following questions:

1. Is a Rule 60(b)(6) motion premised on *Martinez/Trevino* categorically barred?
2. Does *Martinez's* equitable rule ever permit federal review of ineffective assistance of trial counsel claims otherwise defaulted after finality of direct review but prior to commencement of the initial-review collateral proceeding?
3. Does *Martinez's* equitable rule to excuse a state procedural bar also encompass other similar threshold barriers to federal review?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William C. Sallie respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The November 29, 2016 per curium opinion of the Court of Appeals denying Petitioner's application for certificate of appealability, petition for hearing *en banc*, and motion for stay of execution is reproduced in Appendix A. Pet. App. 2a-9a. The November 22, 2016 order denying Petitioner's Motion to Reopen Habeas Corpus Application Pursuant to Federal Rule 60(b)(6) is reproduced in Appendix B. Pet. App. 10a-16a.

JURISDICTION

The Court of Appeals entered its judgment on November 29, 2016. Pet. App. 2a-9a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 60(b)(6) of the Federal Rules of Civil Procedure provides: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief."

STATEMENT OF THE CASE

I. INTRODUCTION

William Sallie returns to this Court days away from his execution date after being denied review *less than three weeks ago* on a petition concerning the standard for granting a certificate of appealability on the denial of a federal habeas petition. *Sallie v. Sellers, Warden*, No. 16-5876. On November 15, 2016, the day after his denial, he moved pursuant to Rule 60(b)(6) in the district court to reopen his habeas case pursuant to *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which he later amended, Pet. App. 17a-65a, when the State of Georgia obtained an execution order from his trial court the following day. On November 16, in the hours before carrying out the execution of Mr. Steven Spears, a volunteer, Georgia secured Mr. Sallie's execution order and it has been scheduled for **December 6 at 7:00 p.m. EST**.

This petition raises vital points of clarification for the Court's equitable jurisprudence dedicated to addressing untenable excesses in federal habeas corpus procedure. Because of Georgia's arch denial of entitlement to or provision of counsel, Mr. Sallie had no counsel during the entire period from finality of his state court judgment to the belated commencement of his state habeas proceedings. Then, after obtaining counsel approximately half-a-year *into* those proceedings, endured grossly ineffective assistance. His attorneys failed to undertake rudimentary investigation that would have developed, as substantiated in the federal record, claims of trial counsel ineffectiveness warranting relief from his judgment based on the defense's failure to litigate—after the trial judge's waving of the biggest and brightest red flag—one of the most remarkable instances of, to date, unchecked juror misconduct, dishonesty, and bias.¹

However, because of the time bar that resulted from the denial of counsel prior to

¹ See, e.g., Andrew Cohen, *The Night the Lights Went Out in Georgia* (Dec. 2, 2016), Brennan Center for Justice available at <http://www.brennancenter.org/analysis/night-lights-went-out-georgia>.

commencement of his “initial-review collateral proceedings” (IRCP), *Martinez*, 132 S. Ct. at 1315, Mr. Sallie obtained no merits review of those claims. In *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014), the Eleventh Circuit panel foreclosed any review of the issue despite this Court’s decision in *Trevino*, 133 S. Ct. at 1915, extending *Martinez* to Georgia and thereby presenting Petitioner with the equitable means to excuse his procedural bar, which he initially moved in the district court to achieve less than three weeks after the *Trevino* decision.² Given the pendency of *Buck v. Davis*, No. 15-8049, and the several petitions currently held for *Buck* concerning petitioners who had concluded their federal habeas proceedings before *Martinez*, and then *Trevino*, and thus sought reopening of their cases,³ Petitioner has also moved under Rule 60(b)(6).

The challenge since *Martinez* has been for its equitable rule to be actually available to the prisoners who need it. This petition presents the Court with vital points needing clarification: Does the IRCP stage include the period *before* initiation of state habeas proceedings (and after finality of the state court judgment), and does its cause to excuse the threshold barrier of a procedural bar also include other, indistinguishable constraints—in Mr. Sallie’s case, a limitations bar?

The above-mentioned *Arthur* decision claimed the Eleventh Circuit’s place alongside the Fourth, Fifth, and Sixth Circuits in applying a categorical preclusion of Rule 60(b)(6) from entertaining motions precipitated by the change in law wrought by *Martinez/Trevino*. This

² By the time the district court decided the matter for Mr. Sallie, the *Arthur* panel decision had come done and thereby controlled the determination. *Sallie v. Chatman*, No. 5:11-cv-075-MTT, Doc. 158 (M.D. Ga. Mar. 11, 2014), *vacated and replaced*, Doc. 169 (M.D. Ga. Jul. 15, 2014).

³ *Moses v. Thomas*, No. 16-5507 (petition filed Aug. 5, 2016, last distributed for conference of Nov. 10, 2016); *Abdur’Rahman v. Westbrooks*, No. 16-144 (petition filed July 29, 2016, last distributed for conference of Oct. 7, 2016); *Johnson v. Carpenter*, No. 15-1193 (petition filed Mar. 22, 2016, last distributed for conference of June 2, 2016); *Wright v. Westbrooks*, No. 15-7828 (petition filed Jan. 19, 2016, last distributed for conference of Sept. 26, 2016)

Court's determination of the Rule 60(b) question in *Buck* should afford Mr. Sallie, in the end, an equitable application of the quintessential equitable rule of federal procedure and permit review of the clear bases for the reversal of his tainted judgment that now poises the State of Georgia to execute him. This Court should hold this case to permit the resolution of the aforementioned circuit split on the *Martinez/Trevino* Rule and its availability for Rule 60(b)(6) motions. Further, it should use Mr. Sallie's case to clarify the vital facets of the *Martinez/Trevino* Rule placed in relief by the history of this unjust case.

His district court litigation was, for all intents and purposes, dedicated to the question of equitable tolling of the limitations period's default prior to initiation of his IRCP, when Georgia law—in its singular manner, concretized in its struggle with the former Fifth Circuit (pre-1981) to obstruct the effects of an evolving modern federal habeas law (*infra*)—denied him capital habeas counsel.

The district court's scheduling and briefing orders consistently narrowed the litigation in order to resolve the equitable tolling question. This foreclosed virtually all resources and avenues of investigation by federal habeas counsel, despite Mr. Sallie's entitlement to representation under 18 U.S.C. §3599. This was a case of neither the chicken, nor the egg: *Martinez* might justify a need for investigation, despite the strictures on taking evidence in the federal court, *e.g.*, *Cullen v. Pinholster*, 563 U.S. 170 (2011), but *Martinez* does not apply in Georgia; *Trevino* might justify investigation resources in Georgia, but Sallie cannot bring a claim under *Trevino*. But federal habeas counsel (at counsel's own expense), retained an investigator amidst the demanding equitable tolling litigation in order to address a bright red flag from the trial record, which waved feverishly in the first post-sentencing hearing in March 2001, 15 months before denial of a new trial and timely notice of the appeal to the Georgia Supreme Court.

At that hearing, the Honorable L.A. “Buster” McConnell regaled counsel for the parties with a tawdry vignette in the wake of the death sentence. Pet. App. 207a-09a. A few days earlier, a wife of one of the jurors called chambers to learn when her husband would be released from jury service and sequestration in a hotel near the courthouse. *Id.* However, the judge had already released the jury days prior. Brief consultation with courtroom bailiffs prompted their dispatch to the home of one juror, a Ms. Gina Dawson. Greeted at her door, the bailiffs apprised Ms. Dawson that her fellow juror’s wife was inquiring. By the time trial counsel filed the notice of appeal to the Georgia Supreme Court, they had uncovered nothing about Ms. Dawson.

Yet in the clerk’s files in the very courthouse where Ms. Dawson voted to sentence Mr. Sallie to death were voluminous records betraying a deeply troubled domestic history of four divorces by the age of 28—three of which were ordered by Judge McConnell and the fourth finalized by another judge in the courthouse on the very day Mr. Sallie’s trial opened. *Compare Rompilla v. Beard*, 545 U.S. 374, 384 (2005) (underscoring deficiency in failure to obtain records from same courthouse as the petitioner’s trial). Ms. Dawson’s marriages were riddled with domestic turmoil ending in ugly divorce and punctuated by protracted, bitter child custody strife with dueling court proceedings in Georgia and Florida. In other words, highly relevant traumas mirroring those at the heart of Mr. Sallie’s case, a bitter separation and custody battle in courts in Georgia and Illinois. Pet. App. 250a-94a. Ms. Dawson obscured all of this personal history during her empanelment.

Upon investigation carried out by federal habeas counsel in late 2012, these uncanny parallels and a record of her broad and deep dishonesty in jury selection were finally revealed to Mr. Sallie. Had she answered her questioning truthfully, she doubtless would have been struck for cause in February 2001 pursuant to *McDonough Power Equipment v. Greenwood*, 464 U.S.

548 (1984) (Rehnquist, J.). Instead, In October 2012 she would brag to an investigator that she moved an evenly divided jury to commit unanimously to sentencing Mr. Sallie to die. Pet. App. 223a.

While Mr. Sallie had no attorney during the entirety of 2004, lawyers had very much to do with the ultimately catastrophic failure in his case. The conduct of his prior lawyers before (and even *during* 2004), coupled with the gross and varied failings of the Atlanta public interest office (the Georgia Resource Center) responsible for “monitoring” death penalty cases like his, explain the time bar that immediately emerged upon filing his initial federal habeas petition in the Middle District of Georgia in 2011. To date, the breakdown of his federal case prior to and during his state habeas case has precluded any review of a grave constitutional violation and preempted, despite the handing down of *Trevino*, any further investigation of his case—a case that has desperately required more investigation, given the obvious absence of it as it emerged out of state habeas.

II. FINALITY OF THE STATE JUDGMENT AND GEORGIA’S DENIAL OF CAPITAL HABEAS COUNSEL

A. Trial Counsel’s “Agreement On Legal Representation” Signed With Mr. Sallie On Eve Of Jury Selection Promised Trial Counsel’s Enduring Representation Of Sallie “Through State And Federal Habeas” And, “If He So Desires, For The Rest Of His Life”

On October 6, 2003, Mr. Sallie’s capital judgment rendered in March 2001 and (affirmed in *Sallie v. State*, 578 S.E.2d 444 (Ga. 2003)), became “final” for purposes of the one-year federal limitations period under 28 U.S.C. §2244(d)(1)(D). *Sallie v. Georgia*, 540 U.S. 902 (2003) (cert. denied). His trial attorneys remained his counsel through the direct appeal and prepared and filed his petition and the subsequent rehearing petition, which on December 8, 2003 the Court also denied. *Sallie v. Georgia*, 540 U.S. 1086 (2003).

On the Saturday before the start of his trial in February 2001, Mr. Sallie believed he had entered into a binding contract with his trial attorneys. Pet. App. 66a. This “Agreement on Legal Representation” contemplated that these individuals would act for Mr. Sallie on all subsequent litigation, if he so chose, throughout his direct and collateral review and beyond. The Agreement stated:

Because William Sallie has agreed to allow the use of the life without parole third sentencing option at his retrial, **Christopher Johnson and Palmer Singleton agree to continue to represent William Sallie**, even if he receives a sentence other than death, through direct appeals, **through state and federal habeas**, and at any subsequent retrial, even if the charges at subsequent retrials do not carry a possible death sentence. We also agree that Christopher Johnson and Palmer Singleton will continue to represent William Sallie, if he so desires, for the rest of his life.

This 10th day of February, 2001. [signed by all]

Id. (emphasis added).

The terms of this ersatz agreement, brokered under the duress of a capital trial and amidst great tension between the client and his attorneys regarding their strategic determinations, was in no way enforceable with regard to the attorneys’ guarantee to represent Mr. Sallie “through state and federal habeas.” Further, the promise of acting as counsel “for the rest of his life” was beyond dubious. Trial counsel sought to placate their client and avoid controversy with the trial judge, such as by a late-stage request for the appointment of new counsel. The terms were presented to mollify Mr. Sallie at that extraordinarily pressurized moment.⁴ Understandably, Mr. Sallie expected that a contract written by two attorneys would be enforceable and prepared in good faith.

⁴ See Christopher Johnson (Mr. Sallie’s trial counsel), *The Law’s Hard Choice: Self-Inflicted or Lawyer-Inflicted Indignity*, 93 Ky. L. J. 39, 76 (2004-2005). Not long removed from the 2001 trial and Mr. Johnson’s capital defense work, he published this 103-page law review article. It is a meditation on the very crisis that he and his colleague experienced in the trial at this decisive moment: “Sometimes a dispute remains hidden from the judge and does not appear in the record until a post-trial claim of ineffective assistance of counsel is filed.” 93 Ky. L.J. at 75. In this case, because of the choice of post-conviction counsel, no such claim was made in state habeas.

He learned otherwise in December 2003. Shortly after the denial of his rehearing petition in this Court, one of his trial attorneys, Mr. Johnson, called from New Hampshire (where he had relocated upon leaving Atlanta and capital defense practice), to inform him of the denial and to explain that, notwithstanding their Agreement, the lawyers could represent him no longer because he would need new counsel to investigate their performance and other issues. This came as a great shock and disappointment to Mr. Sallie. Unbeknownst to him, by this point, two months had run off the one-year federal limitations period that commenced after the October 6, 2003 denial of certiorari review. What Mr. Sallie *did* know at that point, as he entered 2004, was that the lawyers he thought he had secured were, in fact, abandoning him.

The professional and ethical problems with the Agreement imposed on Mr. Sallie by his attorneys are obvious, starting with the fact that they could never have fulfilled the main benefit of the bargain Mr. Sallie thought he had made. In order for his collateral review to have any utility, former trial counsel clearly could not continue representing him. Doing so would foreclose litigation of trial counsel issues. Professional responsibility canons have long precluded an attorney from litigating a claim of ineffectiveness in the attorney's own performance and this had been well established under Georgia law since even before *Strickland v. Washington*, 466 U.S. 668 (1986). *Castell v. Kemp*, 331 S.E.2d 528, 530 (Ga. 1985).

B. Counsel's Abandonment Before State Habeas Left Mr. Sallie To Struggle Desperately For Legal Assistance, To No Avail

Thus, Mr. Sallie's attorneys abandoned him and failed to recognize a modicum of their enduring fiduciary duty after the disclosure of their fraud years earlier. As the following sets forth, they failed to arrange for replacement counsel to take his case and, crucially, botched any sort of transition with Georgia's monitor of capital post-conviction cases, the Georgia

Resource Center.⁵ Rather than facilitating at least some consultation on what might be done to safeguard his interests, the lawyers left it to the monitoring attorneys to sort out the turmoil and transferred all of Mr. Sallie's file to them as well, further hamstringing the prisoner.

Upon digesting this news in December 2003, Mr. Sallie wrote his other trial attorney, Mr. Singleton, who remained on the staff at the Southern Center for Human Rights. Pet. App. 95a. Former counsel left him to initiate and navigate Georgia state habeas proceedings without counsel. Since enactment of its modern habeas statute in 1967, the Georgia legislature has refused to guaranty post-conviction counsel, as virtually every state does,⁶ and Georgia's judiciary has refused to find a state constitutional guarantee of such counsel under this scheme, as has been decided in other states, *see, e.g., Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999). Several years before Mr. Sallie concluded the direct review of his 2001 judgment, the Georgia Supreme Court decided *Gibson v. Turpin*, 513 S.E.2d 186 (Ga. 1999), reaffirming Georgia's steadfast refusal to guarantee counsel to even its condemned prisoners seeking to challenge the constitutionality of their confinement.

On March 19, 2004, Mr. Brian Kammer, then a staff attorney for the Georgia Resource Center, held an introductory visit with Mr. Sallie at the Georgia Diagnostic & Classification Prison in Jackson. Pet. App. 95a. Mr. Sallie also heard from Mr. Singleton around that time, who informed him that the Resource Center was monitoring the case and Mr. Kammer would be in contact. *Id.* In April, Mr. Sallie wrote Mr. Kammer seeking advice on how to handle his state

⁵ The Georgia Appellate Practice and Education Resource Center is a nonprofit organization established in 1988 by "the Georgia Supreme Court, the State Bar of Georgia, the Georgia Attorney General, and the federal judiciary to provide expert assistance to attorneys who volunteer to represent indigent, death row inmates in post-conviction proceedings." Pet. App. 145a. Historically, it is primarily funded by the Georgia Legislature. *See, e.g.,* 2003 Ga. HB 122, Amended by 2003 Ga. HB 1180.

⁶ Forty-three states provide some degree of statutory entitlement to post-conviction counsel. Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook* 9 (2013)

habeas petition and requesting a list of lawyers who might be able to take his case. Mr. Sallie received no response. *Id.* Mr. Sallie would neither see nor hear from Mr. Kammer for over six months. *Id.*

On April 21, 2004, Mr. Sallie received a letter from New Hampshire from Mr. Johnson, who wrote explaining that he was “still on the lookout for a good lawyer for you” and “[p]lease do keep me posted on what is happening in your case.” Pet. App. 96a.

On April 26, 2004, Mr. Sallie wrote Mr. Kammer to learn of the Resource Center’s efforts to get volunteer counsel. Pet. App. 98a. The Resource Center never responded. *Id.*

Mr. Sallie proceeded to reach out to every potential source of legal help that he could imagine. He had befriended a law student, Mr. Cristman, who had been a legal intern for his trial team in 2001 and was now a practicing criminal defense attorney. Pet. App. 90a. Mr. Cristman, in turn, introduced a fellow attorney to Mr. Sallie, a Mr. Bartels. Pet. App. 90a-91a. These men routinely visited with Mr. Sallie in 2004 and regularly discussed his legal predicament. However, as recently admitted attorneys, they did not have the training and experience to act in a Georgia capital post-conviction case even though they practiced criminal law in Atlanta. *Id.* One must consider how a high school educated prisoner would assess his chances of navigating habeas corpus practice when two criminal defense attorneys continuously communicated to him that they were professionally incapable of assisting such litigation.

Contemporaneous correspondence to or from Mr. Sallie suggests that he raised the issue of his need for counsel every time he communicated with either of these well-intentioned attorneys. *Id.* Mr. Cristman called law firms for Mr. Sallie, including using a law school contact to reach out to King & Spalding LLP. Pet. App. 91a. Mr. Bartels, for his part, provided Mr. Sallie with a list of law firms identified as having “active *pro bono* practices conceivably including

capital habeas work.” *Id.* Mr. Sallie wrote to each of the listed firms and received no responses. *Id.* In addition, Mr. Bartels unfruitfully sought assistance from Georgia’s Multi-County Defender Program in identifying volunteer attorneys. Pet. App. 92a.

Mr. Sallie also wrote the Georgia Legal Services Program and the Atlanta Legal Aid Society. Each organization responded by reciting their respective policies of not assisting death row inmates. *Id.*

By May 2004, he had had no success in recruiting volunteer advice or counsel through these efforts. At that point in Georgia’s troubled history with the death penalty, the demands on the state bar and the ability of major firms elsewhere that have taken capital post-conviction cases via the efforts of the American Bar Association were greater than could be met. By the time the Atlanta Journal Constitution published a piece in January 2005 on this general state of affairs, seven men, including Mr. Sallie, were in their state habeas proceedings without any legal representation.⁷

C. Mr. Sallie Had No Realistic Chance Of Accessing The Legal Information Necessary For Navigating State And Federal Habeas Without Counsel

Mr. Sallie did all that he could to reach outside of the Georgia Diagnostic & Classification Prison to secure help. At that time, due to decades of unconstitutional policy, meaningful access from inside his prison to the legal information necessary to construe Georgia state habeas and AEDPA was improbable for even a hypothetical prisoner with extensive prior law education. Mr. Sallie had a high school education and Army training while stationed at Fort Stewart.

In in the late 1970s, the Georgia Department of Corrections outsourced its obligations

⁷ Bill Rankin, *Prisoners on death row face appeals alone*, ATLANTA JOURNAL CONSTITUTION (Jan. 18, 2005) (chronicling plight of seven prisoners who had exited direct review and languished on death row without counsel).

under *Bounds v. Smith*, 430 U.S. 817 (1977), to the Prisoner Legal Counseling Project (PCLP). Initially, Georgia's death row had a law library and a program for shuttling materials to and from the main prison law library pursuant to a conditions litigation decree in 1981. Pet. App. E at 117a *et seq.* Whatever merits the 1981 decree may have had, according to Thomas J. Killeen, former director of PCLP, the prison physically dismantled the G-House law library not long afterward. Pet. App. H at 159a.

By 1987, PLCP's mandate included, generally, providing representation on habeas corpus cases. But that mandate never extended to capital cases and in the late 1980s the entity began to wind down its activity in such cases. In 1988, the Supreme Court of Georgia, the State Bar of Georgia, the Georgia Attorney General, and the federal judiciary formed the Georgia Resource Center. Pet. App. I at 161a. A central part of the Resource Center's mandate has been to supply "legal guidance" for Georgia's condemned. Pet. App. K at 167a. This, however, has contributed to the sealing away of legal information. The larger contribution to this has come from the absence of programmatic resources for these prisoners because of the Resource Center's mandate.

On March 1, 1996, the Georgia DOC notified PLCP that its "contract was cancelled effective April 1, 1996." Pet. App. H at 159a. PLCP transferred all case files to an entity named the "Center for Prison Legal Assistance" ("CPLA"). *Id.* The CPLA "contracted to serve the entire prison population of unrepresented prisoners in the State's corrections system with between four and seven attorneys." Pet. App. E at 122a, Pet. App. J. at 163a.

At some point in 2003, the DOC informed the CPLA that it would not renew its contract for 2004. Pet. App. J at 163a. CPLA's contract terminated at the end of 2003, at the time that Mr. Sallie was absorbing that his trial/appellate lawyers had defrauded him and were abandoning him

before his entrance to state habeas court. Around that transition, it was “understood that the DOC planned to rely on computer-stored files of appellate opinions to” stand in for CPLA. Pet. App. J at 163a.

A former Georgia Resource Center co-director and longstanding state habeas litigator averred that “the prison has never provided death row inmates with even the most basic assistance from licensed attorneys (even ones untrained in state or federal collateral review or constitutional law), trained law librarians, or even inmate law clerks (or jailhouse lawyers) to aid inmates in determining procedural requirements and filing deadlines, much less to aid inmates in preparing and filing meaningful legal papers.” Pet. App. I at 162a. Further, the death row “never had access to any room resembling a library or otherwise possessing reference or research materials.” *Id.* The rudimentary library service operates, at best, as a highly cumbersome retrieval system where—if a prisoner has a specific citation—the corrections personnel may retrieve the authority, if it is within the prison’s collection, and eventually supply it to the inmate’s cell. Pet. App. H at 159a. This may occur in a serial manner but prisoners do not obtain multiple cases or authorities, making the prospect of meaningful, availing legal research highly unrealistic for even highly trained attorneys.

It is clear that no space resembling the “prison’s writ room” in Raiford, Florida where Albert Holland, during one of his routine periods reviewing court records and reporters, famously learned of the denial of his state habeas appeal. *Holland v. Florida*, 560 U.S. 631, 672 (2010) (Scalia, J., dissenting); citing *Holland v. Florida*, 539 F.3d 1334, 1337 (11th Cir. 2008).

The only viable source of legal information for those confined in G-House circa 2004 (and to this day) is a properly functioning Georgia Resource Center. Tragically, it is apparent that the small public interest office was not functioning in the very basic sense at the critical time

for Mr. Sallie in late 2004.

D. With Less Than Five Months Before The One-Year Federal Deadline, Of Which He Was Totally Unaware, Mr. Sallie Did Everything He Could To Protect His Rights As His Entire File Was Transferred To The Georgia Resource Center Attorneys Who Were “Well Aware Of The Relevant Time Deadlines”

Mr. Sallie wrote a letter on May 17, 2004 to his mother requesting her help in finding contact details of a former attorney from his first appeal, a Mr. Rosenthal. Pet. App. 93a. Mr. Rosenthal held a Skadden fellowship in the 1990s with the Southern Center when the office was handling Mr. Sallie’s direct appeal that reversed his first judgment in 1998, *Sallie v. State*, 499 S.E.2d 897 (1998), and led to the office’s handling of his 2001 re-trial. By June and July of 2004, when Mr. Sallie ultimately wrote soliciting his help, Mr. Rosenthal was employed by the Civil Rights Division of the Department of Justice . Pet. App. 93a-94a.

Mr. Rosenthal, who could not consider representing Mr. Sallie due to his employment, contacted Mr. Singleton at the Southern Center to inquire about the status of Mr. Sallie’s representation. Mr. Sallie learned from Mr. Rosenthal that the Georgia Resource Center had obtained Mr. Sallie’s case file from the Southern Center. Pet. App. 94a. In reply, Mr. Sallie asked him to ask the Washington, D.C. legal community for a volunteer attorney.

On July 19, 2004 (with 79 days left on the one-year statute of limitations), Mr. Singleton wrote Mr. Sallie in response to the latter’s July 13 letter. Mr. Singleton wrote:

Yesterday, I emailed Brian Kammer, an attorney at the Resource Center, and he assured me that they are well aware of the relevant time deadlines. They did get all the materials that we have concerning your cases several weeks ago.

This office will continue to seek volunteer counsel to represent you in conjunction with the Resource Center. We have notified the ABA counsel project concerning your case, but to date no one has stepped forward to do the case. We will also continue to try and interest the lawyers we know to take on your case.

Please contact the Resource Center and keep me posted.

Pet. App. 169a.

Mr. Sallie continued to respectfully request that the Southern Center lawyers honor their “Agreement,” Pet. App. 95a, but the record is silent about their response beyond July 2004.

In late August 2004, at Mr. Sallie’s instruction, Pet. App. 99a, his mother called the Resource Center seeking to speak to its director, Mr. Dunn. She spoke to someone else from the office and jotted down what she was told on that call, specifically: (i) staff from the Center would visit her son; (ii) the ABA was “looking for an attorney;” (iii) he had until *January* to file some unspecified filing; and (iv) the Resource Center had obtained prior counsel’s file in order to keep the Attorney General’s office from claiming it. Pet. App. 171a.

Mr. Sallie’s mother relayed what the lawyers at the Resource Center told her, which was clearly an *ad hoc* accounting of a deadline—and an unspecified filing, at that. This was the only information he received from the Resource Center and it reflected an effort to appease a condemned man’s mother rather than any guidance. It was misleading and harmful.

Thus, as his statute of limitations ran out on October 6, 2004, the Resource Center had possession of Mr. Sallie’s entire case file (via prior counsel), and he had been instructed to rely on the Resource Center, aware as they were of his case deadlines, in their role as monitors of Georgia post-conviction cases. The only instruction he could obtain from them is deeply troubling and betrays the disarray in that office at that time.⁸

⁸ In the district court equitable tolling litigation, counsel argued that Mr. Sallie had shown far more than “reasonable diligence,” as *Holland* requires. It is hard to imagine a prisoner pursuing his rights with greater diligence and under worse conditions. However, the lower federal courts have conflated legal efficacy with diligence. In the end, Mr. Sallie was blamed for failing to overcome the foregoing circumstances and filing a state petition in time to toll his federal limitations period. His failure to timely file was deemed dispositive—in the negative—of his diligence. That is not the inquiry mandated by *Holland* but that is how the question was answered for Mr. Sallie. This orientation has proven to render the *Holland* inquiry hermetically sealed from protecting any petitioner who fails to timely file a petition, thus utterly subverting *Holland*’s point. See *Cadet v. Florida Dep’t of Corr.*, 742 F.3d 473 (11th Cir. 2014).

E. Denied a Lawyer By Georgia Law, Mr. Sallie Could Not Hope To Obtain A Federally Appointed Attorney Despite His Statutory Entitlement To One

With “the ink of *Fay v. Noia* well dried, the Georgia Supreme Court citing its own pre-*Fay v. Noia* decisions,” (see *Sims v. Balcom*, 136 S.E.2d 766, 768 (Ga. 1964)), reaffirmed its fidelity to Georgia’s historically narrow and parsimonious “writ of habeas corpus [as] . . . an available remedy to attack a void judgment” and little more. *Whippler v. Balkcom*, 342 F.2d 388, 392 (5th Cir. 1965). This “crabbed view of postconviction habeas corpus” and hostility to “expand[ing] the scope of the writ in response to *Fay*” continued after *Whippler*, necessitating legislative intervention. Donald E. Wilkes, Jr., *A New Role For An Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part II)*, 9 Ga. L. Rev. 13, 49 (1974-75).

The Georgia General Assembly’s enactment of the Habeas Act of 1967 expanded the substantive scope of the Georgia writ to generally mirror the change in the federal writ’s scope during the prior 15 years or so. But this new framework possessed a critical feature that has perennially betrayed what are, in actuality, the more limited consequences of the facial expansion. That feature is the exclusion of any guarantee to representation.

As an early commentator noted in 1975, “since adoption of the 1967 Habeas Corpus Act, the Georgia Supreme Court has held “time and again that a petitioner in habeas corpus attacking the illegality of detention pursuant to conviction for crime is not entitled to appointment of

The second element of *Holland*, the “serious instance of attorney misconduct” *Holland v. Florida*, 560 U.S. 631, 652 (2010), was deemed unsatisfied here because the deprivation of counsel is not an impediment to overcome under the equitable tolling analysis. This picture prominently features former counsel and prospective counsel, acting at various points in the different roles of contracted counsel, “monitor,” quasi-counsel, and counsel-in-waiting. Their conduct should have a direct bearing upon the *Holland* analysis, but it was disregarded in the lower courts’ analyses. The point in this petition, however, is to reflect, from the perspective of the *Martinez/Trevino* analysis, the ramifications for Mr. Sallie of the staggering degree of system failure in Georgia enveloping his case after finality of his judgment and through his “initial-review collateral proceeding,” *Martinez*, 132 S. Ct. at 1315.

counsel.” *Id.* at 76 n. 298 (citing over 20 published cases). Decades later, the law had not budged: “During the 30-year period from 1969 through 1998, the Georgia Supreme Court held again and again that no such right exists in this state.” Donald E. Wilkes, Jr., *The Great Writ Hit: The Curtailment of Habeas Corpus in Georgia Since 1967*, 7 J. Marshall L.J. 415, 505 n.310 (2014). The ignominious decision of Exzavious Gibson’s case (*supra*, *Gibson*, 513 S.E.2d 186), wherein the Georgia Supreme Court affirmed the denial of counsel for an intellectually disabled and mentally ill prisoner, 17 years old at the time of his crime, who was made to conduct his state habeas evidentiary hearing *pro se*, freshly reaffirmed this law when Mr. Sallie entered Georgia post-conviction.

The state of the federal law at that time is critical in the understanding of Mr. Sallie’s circumstances. Ten years prior, this Court decided *McFarland v. Scott*, 512 U.S. 849 (1994), which accorded pursuant to 18 U.S.C. §3599 a condemned prisoner’s entitlement to counsel prior to filing a petition. But *McFarland*’s pertinence for Mr. Sallie’s predicament—assuming there was ever any realistic prospect of Mr. Sallie ever hearing about this case—must be gathered from the legal context and practice in the Middle District of Georgia, where *McFarland* has never been used to provide pre-petition counsel. In this vein, *Lugo v. Florida Dep’t of Corr.*, 750 F.3d 1198 (11th Cir. 2014), made the circuit’s first utterances on the prospect of federal appointment prior to state post-conviction (but concerning only Florida), suggesting that the §3599 entitlement may ripen “perhaps even before [the prisoner] sought state collateral relief,” *id.* at 1213, but the court hastened to “emphasize . . . that a state prisoner is not entitled, as a matter of statutory right, to have federally paid counsel assist him in the pursuit and exhaustion of his state post-conviction remedies, including the filings of motions for state collateral relief that would toll the one-year federal filing period.” *Id.* Perhaps more to the point, in 2004, *United*

States ex rel. Kennedy v. Tyler, 269 U.S. 13, 17-19 (1925), *cited in Rose v. Lundy*, 455 U.S. 509, 515 (1982), was unambiguous that such a petition of unexhausted claims would be dismissed. This Court did not decide *Rhines v. Weber*, 544 U.S. 269 (2005), until March 30, 2005.

F. Chain Of Events Among Georgia's Condemned And Unrepresented Finally Causes Mr. Sallie To Receive Legal Attention—Eight Days Too Late

On October 4, 2004, two days before Mr. Sallie's federal statute would expire, a trial judge in Clayton County issued an execution warrant in a case unrelated to Mr. Sallie's for another Georgia prisoner in post-conviction and without an attorney, Mr. Richard Sealey. Through the handling of the Sealey emergency, other capital attorneys in Atlanta became aware on October 8, 2004 that Mr. Sallie and another indigent and unrepresented prisoner, Mr. Braley, had statute of limitations problems—Braley's date of finality, October 6, 2003, was the same as Sallie's. *Braley v. Georgia*, 540 U.S. 835 (2003). Through a chain of events in the Federal Defender Program's Atlanta office, several capital defense attorneys became aware of the problem.

On October 12, 2004, Mr. Kammer and another attorney arrived at the prison in Jackson, Georgia to obtain signatures for nominally *pro se* habeas petitions for Messrs. Braley, Sallie, and Sealey. Pet. App. 102a-03a. That was Mr. Sallie's first contact with Mr. Kammer since their previous visit on March 19 (*supra*). The petitions were filed on October 14, 2004, eight days too late to statutorily toll the one-year federal limitations period for Sallie and Braley. 28 U.S.C. §2244(d)(2).

The petitions included a footnote “request[ing that] copies of any pleadings and orders in [the] case can [sic] be served on the Georgia Resource Center . . . so that it can effectively carry out its duty of monitoring the case.” Pet. App. 172a n.1. The petition for Richard Sealey (who did not have the same one-year statute of limitations problem as the other two men), stated that

“[b]ecause the Georgia Resource Center cannot competently and thus, ethically, undertake the representation of more capital habeas petitioners at this time, Mr. Sealey files his petition *pro se* . . .” Pet. App. 103a n.154 (emphasis added).

In Mr. Braley’s case, correspondence in December 2004 from the Resource Center to the state habeas judge explains the office’s dire circumstances:

the Resource Center is unable to undertake Mr. Braley’s direct representation at this time because the current volume of cases has overwhelmed staff and funding ability. In keeping with its mandate, however, the Resource Center is monitoring the case and is working with the American Bar Association Death Penalty Representation Project to recruit volunteer counsel to take the case.

Pet. App. 145a. Mr. Braley’s state habeas case concluded about a year ahead of Mr. Sallie’s and was a bellwether for the federal habeas litigation.⁹

Mr. Sallie entered state habeas court with no counsel in the midst of a death penalty scheme in grave disrepair. On February 1, 2005, Mr. Kammer appeared at Mr. Sallie’s first court hearing where he represented that “[r]ight now we are unable to take Mr. Sallie’s case, but that is not going to be the case if we end up getting funding for our office during the winter’s legislative session.” Pet. App. 192a-93a.

Mr. Kammer and his office ultimately entered the state habeas case in April 2005.

III. STATE HABEAS PROCEEDINGS

The state habeas proceedings exhausted no meritorious claims. The most significant issues readily available to the eventual state habeas attorneys from the Resource Center—for present purposes, IRCP counsel, *Martinez*, 132 S. Ct. at 1315—related to the misconduct

⁹ Mr. Braley’s federal petition was filed in the Northern District of Georgia on October 1, 2009 by attorneys with the Federal Defender Program. Five days later, the State moved to dismiss it as time bared. Due to their conflict concerning the untimeliness, Mr. Braley’s attorneys moved to withdraw on December 2, 2009, but before withdrawing filed an amended petition on December 23, 2009. On New Year’s Day 2010, Mr. Braley was found dead, hanging in his cell.

precipitating, and then enshrouding, the Agreement on Legal Representation and the failure of those same lawyers to initiate even a rudimentary background investigation into the biased juror. Yet IRCP counsel withheld any disclosure of the Agreement in relation to not only the trial but the post-finality period also. Further, counsel from the Resource Center failed in much the same way as trial counsel to undertake the first step in investigating the most remarkable element in the trial record, *viz.*, the extra-marital, post-sentencing liaison between jurors.

The present analysis must simply note the obvious point that IRCP counsel (once Mr. Sallie obtained such counsel during the IRCP), failed to meaningfully investigate and raise the juror bias issue that the district court, in the throes of the equitable tolling litigation, adjudged as “unexhausted,” and “procedurally defaulted.” *Sallie v. Chatman*, 34 F.Supp.3d 1272, 1301 (M.D. Ga 2014). These, of course are predicates for the *Martinez/Trevino* Rule and the law of the case, including Respondent’s argument in federal habeas that trial counsel were deficient in not investigating the issue, establishes them beyond dispute. That failure stems from two features of this history. Mr. Sallie had no lawyer at all during key periods before and after the filing of his state petition and ineffective counsel when he did have counsel during his IRCP. The preceding discussion focuses on the record up to the belated (for tolling purposes) filing of the state petition, and does not rake over the similarly shabby saga before and after Mr. Sallie secured IRCP counsel.

IV. FEDERAL HABEAS PROCEEDINGS

As set forth above, Mr. Sallie entered federal habeas proceedings represented by his counsel from his state habeas litigation, attorneys from the Georgia Resource Center, the same office responsible for monitoring his case when the time bar occurred on October 6, 2004. Thus, shortly upon initiation of the federal habeas application, the district court ruled that the petition

was untimely and recognized the conflict that the Resource Center's attorneys had in any litigation of equitable tolling. Undersigned counsel entered appearances there after and proceeded, pursuant to the district court's scheduling and other orders, to litigate equitable tolling. After seeking time to investigate the juror issues presented in the trial record, the district court rule in a December 1, 2011 order that it "fails to see how any additional investigation is needed" and denied allowing for time, let alone resources, to pursue this avenue. *Sallie v. Humphrey*, 5:11-cv-075-MTT, Doc. 64 (M.D. Ga.).

After provided amended pleadings and briefing in the first part of 2012, federal habeas counsel retained an investigator in the fall in order to follow-up on the juror issues. This led ultimately to the Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody (Doc. 122), filed on May 9, 2013. Pet. App. R at 225a *et seq.* Set forth therein, via 133 exhibits in over a thousand pages of public records and statements, is the substantiation of profound juror bias issues. Pet. App. R at 250a-294a. Trial counsel did not pursue any of this wealth of material and thereby were patently deficient. *Compare Rompilla*, 545 U.S. 384 (finding counsel's performance deficient in failing to obtain mitigating records of client from courthouse files). The prejudice from this deficient performance could hardly be greater in that it failed to bring to court clear bases for reversing the conviction and sentence. *McDonough Power Equipment*, 464 U.S. at 556. The district court record concerning the second and third amended petitions setting forth the juror bias claims and the derivative trial counsel ineffectiveness claims readily cross the merit threshold posited in *Martinez* concerning the substantiality of "the underlying ineffective-assistance-of-trial-counsel claim." 132 S. Ct. at 1318-19, citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

REASONS FOR GRANTING THE WRIT

I. THE SEVERE CIRCUIT SPLIT ON THE FIRST QUESTION PRESENTED IS ALREADY UNDER THIS COURT’S REVIEW; DENIAL OF THE WRIT WOULD CAUSE A GRAVE INJUSTICE

The first question presented addresses a persistent and deepening circuit split on whether a Rule 60(b)(6) motion premised on *Martinez* and *Trevino* is categorically barred. That is, *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), established the equitable rule excusing a state procedural bar to federal habeas corpus claims of substantial ineffective assistance of trial counsel claims that could only be brought during initial-review collateral proceedings. *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), established that where it was practically impossible to bring such claims until collateral review, *Martinez*’s equitable rule applied.

Four circuits, including the Eleventh, have categorically excluded *Martinez* and *Trevino* from consideration as part of a motion to reopen a federal habeas case under Rule 60(b)(6). That Rule allows a party to seek relief from “a final judgment, order, or proceeding” and reopen the case for “any . . . reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). It functions as an equitable rule and empowers courts to “vacate judgments whenever such action is appropriate to accomplish justice.” *Klapprott v. United States*, 335 U.S. 601, 615 (1949); see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995) (Rule 60(b)(6) reflects court’s inherent power “to set aside a judgment whose enforcement would work inequity.”). To satisfy Rule 60(b)(6), a petitioner must demonstrate “‘extraordinary circumstances’ justifying the reopening of a final judgment.” *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackerman v. United States*, 340 U.S. 193, 199 (1950)). The “extraordinary circumstances” inquiry is a wide-ranging and fact-intensive one, including an assessment of the applicant’s diligence, the probable merit of the underlying claims, the interest in finality, and other equitable considerations. See 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2857 (2d ed. 1995 and Supp.

2004).

Despite the equitable underpinnings of Rule 60(b)(6), four circuits have categorically excluded Rule 60(b)(6) motions premised on *Martinez/Trevino* claims. *Moses v. Joyner*, 815 F.3d 163, 168-69 (4th Cir. 2016); *Arthur v. Thomas*, 793 F.3d 611, 633 (11th Cir. 2014); *Hamilton v. Sec’y, Florida Dep’t of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (noting split with Third Circuit); *Abdur’Rahman v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015); *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012). Three other circuits have taken the opposite position, considering such equitable claims on a case-by-case basis. *See Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015); *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014); *Lopez v. Ryan*, 678 F.3d 1131, 1135-37 (9th Cir. 2012).

This split will be resolved by a case currently awaiting decision from this Court. *Buck v. Davis*, No. 15-8049 will address the role of *Martinez* and *Trevino* in Rule 60(b)(6) and resolve questions in at least four other cases with petitions for certiorari pending before the Court. *See Moses v. Thomas*, No. 16-5507 (petition filed Aug. 5, 2016, last distributed for conference of Nov. 10, 2016); *Abdur’Rahman v. Westbrooks*, No. 16-144 (petition filed July 29, 2016, last distributed for conference of Oct. 7, 2016); *Johnson v. Carpenter*, No. 15-1193 (petition filed Mar. 22, 2016, last distributed for conference of June 2, 2016); *Wright v. Westbrooks*, No. 15-7828 (petition filed Jan. 19, 2016, last distributed for conference of Sept. 26, 2016). Mr. Sallie’s case presents the same question, and this Court should hold this petition pending resolution of *Buck*.

At bottom, a life is in the balance in this litigation. Unless this Court grants review, no court will have the opportunity to “search for constitutional error with [the] painstaking care”—or search at all—as is required in capital cases. *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The

Court should hold this case pending resolution of *Buck* so that Mr. Sallie can retain the possibility of litigating his compelling claims.

II. THIS CASE CALLS FOR CLARIFICATION OF *MARTINEZ/TREVINO*

A. The *Martinez* Rule Serves To Remedy Equal Protection And Due Process Shortfalls From Inequitable IRCP

Martinez, a non-capital case, addressed the distressing gap that results in states where ineffective assistance of trial counsel claims are litigated in “collateral proceedings which provide the first occasion to raise [such] a claim,” *i.e.*, “initial-review collateral proceeding,” 132 S. Ct. at 1315. *Martinez* specifically addressed states that lack the basic constitutional protections that accompany a “first-tier appeal.” *Halbert v. Michigan*, 545 U.S. 605, 611 (2005), citing *Douglas v. California*, 372 U.S. 353, 357 (1963). As *Halbert* explained, “appeal barriers encountered by persons unable to pay their own way” cause “both equal protection and due process concerns.” 545 U.S. at 610, *quoting M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996). *Martinez* speaks to an important barrier of this kind. Georgia’s adamant refusal to provide counsel in even *capital* IRCP strips away the basic safeguards for the “bedrock principle in our justice system” of “[t]he right to the effective assistance of counsel at trial.” *Martinez*, 132 S. Ct. at 1317. Mr. Sallie’s predicament manifests the brutal consequences of Georgia’s recalcitrance.

Stopping short of guaranteeing counsel in IRCP, this 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 IRCP stage. 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 either ineffective habeas counsel or, in extreme instances—such as in Mr. Sallie’s case—the denial of 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.” *Coleman*, 501 U.S. at 731. *Coleman* articulates the equivalence, in effect, of these closely connected doctrines, as has been repeatedly recognized by this Court. See *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 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 the distinction is allowed to stand in Mr. Sallie’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 Georgia has not delivered through its post-conviction process.

By its terms, *Martinez* applies to a state procedural bar. This Court has not yet addressed other similar threshold barriers to federal habeas corpus review. Mr. Sallie’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. For example, given the differences in the interests in finality between non-retroactivity and state procedural bars, *Teague*-barred claims may be deemed not to deserve the same protection from *Martinez*’s rule as other, otherwise commensurable bars should obtain. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (holding federal court, as with other threshold constraints, “may, but need not, decline to apply [a *Teague* bar] if the State does not argue it.”).

By contrast, AEDPA’s statute of limitations serves less substantial interests than state procedural bars. *Acosta*, 221 F.3d at 123. Further, those interests—judicial economy, accuracy of state court judgments, and finality of state court judgments—are vitiated where IRCP counsel is wholly absent due to the failure of the state to guarantee such counsel. In light of these identical or diminished interests, this Court should clarify that *Martinez* may excuse AEDPA statute of limitations bar that would prevent review of a substantial claim of ineffective assistance of trial

counsel.¹⁰ 132 S. Ct. at 1320. Thus, the Court already ruled that comity and federalism concerns may give way to overcome a state default. Surely those concerns are of decidedly less weight for the federally imposed statute of limitations, and sufficient to excuse that default when it is a product of a fundamental breakdown in the initial-review process, precluding review of ineffective assistance of trial counsel claims.

The circuit courts assess the timeliness of claims in a pending federal habeas corpus case on a claim-by-claim basis. *See Fielder v. Varner*, 379 F.3d 113, 118 (3d Cir. 2004) (Alito, J.); *see also* Brian R. Means, *Post Conviction Remedies* § 25:6 (July 2016 Supp.) (collecting cases). Thus, the application of the *Martinez* rule with respect to other bars, *e.g.*, a time bar under AEDPA, is entirely workable within the prevailing timeliness analysis applied in every federal habeas case.

B. If *Martinez/Trevino* May Encompass A Time Bar, Then Mr. Sallie’s Deprivation Of Counsel Pre-/During IRCP Surely Warrants Cause To Excuse Untimeliness By Eight Days

If the Court so holds, Mr. Sallie would surely be entitled to relief. Mr. Sallie had *no counsel* in 2004. Leading into his state habeas proceedings, when the federal statute of limitations ran out and he suffered an inevitable time bar in his federal case before he even entered state court for his IRCP, Petitioner struggled mightily but to no avail. Equitable tolling certainly may apply in such circumstances and the requisite inquiry must be undertaken. *Holland v. Florida*, 560 U.S. 631 (2010). But the Eleventh Circuit’s post-*Holland* jurisprudence dictated denial of such equitable relief for Mr. Sallie—as it has **in every single one of the 36 cases** where it addressed the merits of an equitable tolling claim after this Court reversed *Holland v. Florida*,

¹⁰ As with other equitable doctrines, the courts should not be “rigid and inflexible” and should address the importance of the underlying equitable principles with an eye to the unique aspects of “each special situation.” *Frisbie v. Collins*, 342 U.S. 519, 521 (1952).

539 F.3d 1334, 1339 (11th Cir. 2008) (holding that only “egregious attorney misconduct,” meaning “bad faith, dishonesty, divided loyalty, mental impairment or so forth” may justify tolling). Pet. App. U at 347a-350a. *See, e.g., Cadet v. Florida Dept. of Corr.*, 742 F.3d 473, 478 (11th Cir. 2014) (holding that nothing short of “abandonment” may supply “extraordinary circumstance”); *but see Christeson v. Roper*, 135 S. Ct. 891 (2015) (*per curiam*), quoting *Holland*, 560 U.S. at 651-52, “serious instances of attorney misconduct” standard).

Holland must not have the *only* word on the equitable determination of a case where the state obscenely failed to safeguard an indigent *capital* prisoner’s interests going into (and during) his IRCP. *Martinez*, on its own terms, speaks to the breakdown in fundamental equal protection and due process concerns and the rule from *Martinez* should be clarified to communicate the untenable facets of any scheme that denies counsel at that pivotal juncture.

Eleventh Circuit law has denied Mr. Sallie any benefit from *Martinez* and, vitally, *Trevino*’s extension of it to Texas and similar jurisdictions, like Georgia, where the state’s “procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal.” *Id.* at 1921. Pet. App. C at 29a.

III. WITHOUT THE WRIT, MR. SALLIE WILL BE EXECUTED DESPITE CASE EQUITIES THAT SHOULD REOPEN HIS HABEAS PETITION AND REVERSE HIS CONVICTION AND SENTENCE

“In simple English, the language of the ‘other reason’ clause [of Rule 60(b)], for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” *Klaprott v. United States*, 335 U.S. 601, 614-15 (1949) (Black, J.). In our context, “[a] motion that . . . challenges only the District Court’s failure to reach the merits” “is not to be treated as a successive habeas

petition.” *Gonzalez v. Crosby*, 545 U.S. 524, 539 (2005). There is absolutely no dispute that the Sixth Amendment trial counsel claim concerning the juror’s bias has had no merits determination—the lower courts have steadfastly avoided *any* discussion of the merits of this claim despite 133 exhibits and over a thousand pages of documentary evidence substantiating it in the district court record. Pet. App. R at 250a-294a.

Petitioner’s current attempt to present his *Trevino*-based Sixth Amendment claim in light of the pendency of *Buck* (and the aforementioned petitions being held for it) falls under the very circumstances of Rule 60(b)’s use in federal habeas. *Gonzalez v. Crosby*, 545 U.S. 524 (2005); *Hernandez v. Thaler*, 630 F.3d 420, 427 (5th Cir. 2011) (*per curiam*) (ruling that “where a habeas petitioner ‘merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as . . . statute-of-limitations bar’ Rule 60(b) empowers a federal court to hear the petitioner’s challenge”), quoting *Gonzalez*, 545 U.S. at 532 n. 4; *Butz v. Mendoza-Powers*, 474 F.3d 1193, 1194 (9th Cir. 2007) (ruling challenge to habeas petition’s dismissal not a second or successive petition when district court dismissed on technicality and failed to reach merits of claims presented in petition); *Spitznas v. Boone*, 464 F.3d 1213, 1225 (10th Cir. 2006) (finding “a ‘true’ claim for Rule 60(b) relief” where “district court’s . . . failure to make any ruling on a claim that was properly presented in . . . habeas petition”).

“A movant’s diligence in pursuing review of his ineffective assistance claims is also an important factor.” *Cox v. Horn*, 757 F.3d 113, 126 (3d Cir. 2014). Mr. Sallie has pursued review of his *Trevino*-based claim since *Trevino* was published. Further, it is long recognized that “[c]ourts must treat with particular care claims raised in capital cases.” *Id.*, citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The level of disregard that the state and federal courts have

demonstrated for this capital case defies description. This litigation has not reflected well on the justice system to date.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests this that this Court grant his petition for a writ of certiorari or hold it pending resolution of *Buck v. Davis*, 15-8049.

Respectfully submitted,

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December 3, 2016

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following addresses on this the 3rd day of December, 2016:

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