NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LESLIE ROBERSON III,
Petitioner,

v.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED (CAPITAL CASE)

In *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), this Court held that, for the purposes of federal habeas relief, deficient state post-conviction representation excuses forfeiture of a substantial ineffective-assistance-of-counsel ("IAC") claim. *Martinez* therefore creates a straightforward conflict for any federal habeas lawyer who would be forced to attack that lawyer's own performance in a prior phase of the case. In order to facilitate non-conflicted representation under 18 U.S.C. § 3599, the Fifth Circuit appoints "supplemental counsel" to litigate the IAC claim in lead counsel's place.

This case presents the following question:

Under 18 U.S.C. § 3599, whether a federal court can permit "supplemental counsel" to litigate a procedurally defaulted Sixth Amendment ineffective-assistance-of-counsel claim, when supplemental counsel is not appointed under § 3599(c) and is not functionally independent of the lead counsel whose performance would be attacked in the litigation.

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Robert Leslie Roberson III, was the Petitioner before the United States District Court for the Eastern District of Texas and the Appellant before the United States United States Court of Appeals for the Fifth Circuit. Roberson is a prisoner sentenced to death and in the custody of William Stephens, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director and his predecessors were the Respondents before the United States District Court for the Southern of Texas and the Appellee before the United States Court of Appeals for the Fifth Circuit.

Roberson asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Robert Leslie Roberson III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The June 30, 2015 unpublished Order of the United States Court of Appeals for the Fifth Circuit, denying a putative motion to appoint supplemental counsel, is attached as Appendix A. The May 22 unpublished Order of the Fifth Circuit denying a motion to relieve counsel is attached as Appendix B.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 and 2254. Under 28 U.S.C. § 1291, the Fifth Circuit had jurisdiction over habeas issues certified for the appeal. Under 28 U.S.C. § 2253, the Fifth Circuit had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability ("COA"). Under 18 U.S.C. § 3599, the Fifth Circuit had jurisdiction to issue the order denying appointment of counsel. This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1), over all issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 & 2253, and under 18 U.S.C. § 3599.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

* * * *

18 U.S.C. § 3599 provides in pertinent part:

(a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28,

> United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f). * * *
>
> (c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.
>
> (d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

* * * *

STATEMENT OF THE CASE

A. Trial and Direct Review

On January 31, 2002, two-year-old Nikki Curtis died from injuries inflicted by her father, Robert Roberson III. After the conclusion of the trial's guilt phase, the jury convicted Roberson of capital murder. Before Roberson could be capitally sentenced, Texas Code of Criminal Procedure Article 37.071 required his punishment-phase jury to conclude (1) that no "sufficient mitigating circumstance or circumstances . . . warrant that a sentence of life imprisonment rather than a death sentence be imposed," and (2) he "would commit criminal acts of violence that would constitute a continuing threat to society." CR 272.[1]

[1] References to the clerk's state post-conviction record are denoted as "CR [Page Number]." References to the trial transcript are denoted as "[Volume] TR [Page Number]."

Several witnesses testified for the State at the sentencing phase. Della Lucretia Gray, Roberson's ex-wife, testified that he was abusive. 47 TR 10-37. Erica Marie Gomez, Roberson's neighbor, testified that Roberson hit her brother in the jaw. 47 TR 45-47. Dr. Thomas G. Allen, a psychologist, had interviewed Roberson and testified that Roberson would probably commit future acts of violence. 48 TR 116, 120, 141-42. Dr. David Self, a psychiatrist, had also interviewed Roberson and concluded that Roberson might commit violent acts in prison. 48 TR 154-55, 158, 166. Teddie Cox, Roberson's girlfriend, testified to witnessing Roberson stab one of her schoolmates in the head with a box cutter. 48 TR 177.

Defense counsel called five sentencing-phase witnesses. A jail lieutenant and the jail administrator testified that Roberson was not violent while he was incarcerated at the county facility. 47 TR 69-81. Defense counsel also called Dr. John Claude Krusz, who testified Roberson had a "post-concussional type syndrome" and "brain damage" caused by multiple traumatic brain injuries that manifested in issues with concentration, attention, and memory. 47 TR 87, 96. Dr. Krusz's diagnosis was based solely on a verbal history provided by Roberson, MRI and EEG findings, and psychological testing data provided by another expert. 47 TR 86-87. Dr. Krusz's sole source of Roberson's personal, medical, and familial history appears to have been Roberson himself, who Dr. Krusz admitted was "tangential," "not a very good historian," and "extremely difficult to keep on track." 47 TR 86, 101, 111, 129, 132. Dr. Krusz testified about the effect of the organicity on future dangerousness, explaining that it would not prevent Roberson from controlling his behavior in prison, and

that Roberson's condition could be effectively managed through psychological and other interventions. 47 TR 97, 103, 105-06. On cross-examination, Dr. Krusz conceded that there can be several different causes of organic brain disorder, and that drug abuse might be one potential contributor to Roberson's condition. 47 TR 118-19.

During cross-examination, it became apparent that Dr. Krusz had not been provided with basic, relevant information about Roberson. Dr. Krusz admitted that he did not have the same "confidence" in Roberson's self-reported history as he might with "someone else." 47 TR 111. He had not been provided with key historical facts about Roberson—for example, that Roberson could not control his drug habit, had seizures, had abused his family, made As and Bs in algebra as a child, and had an IQ score of 87 from junior high school. 47 TR 110-12, 115, 116, 119. Nor was Dr. Krusz provided with medical records confirming Roberson's anecdotal medical history, which he conceded would have been "helpful" to review. 47 TR 111, 119-20, 129-30. Although Dr. Krusz testified that Roberson had suffered multiple concussions—his most recent from a car accident on November 1, 2001—he had reviewed no medical records confirming those concussions; and the records from the November 2001 car accident, which the prosecutor presented to Dr. Krusz, contained no diagnosis of a concussion. 47 TR 114, 120, 123-24. At the end of cross-examination, Dr. Krusz agreed with the prosecutor that Roberson could have antisocial personality disorder. 47 TR 131. On re-direct, Dr. Krusz stated that Roberson was incapable of providing the medical details the prosecutor had elicited from the records and

emphasized that it is "obviously more difficult to get a detailed history when somebody is not a good historian than when somebody is." 47 TR 132.

Defense counsel then called Billy Burleson, M.D., a psychologist with the state prison system, who testified that Roberson would not be a danger in prison. 47 TR 135, 138. Defense counsel also called Dr. Kelly Renee Goodness, Ph.D, a forensic psychologist who interviewed Roberson, tested him, and spoke to several others who knew him. 48 TR 9, 11-12, 21. Although it was "difficult . . . to really access much information" from Roberson's family, Dr. Goodness testified that Roberson had "very likely" been abused as a child. 48 TR 27. She suspected that Roberson's children had been abused, but she was not certain who was responsible for the abuse. 48 TR 29-30. Dr. Goodness was not certain of the total amount of time Roberson had been incarcerated, did not know if his cognitive problems were genetic or caused by head trauma, and did not know that he had attacked someone with a box cutter. 48 TR 30, 32, 78. Dr. Goodness explained that she had learned new information about Roberson from watching the trial, which increased his dangerousness in her eyes "a little bit." 48 TR 45, 53. Dr. Goodness felt that Roberson was "a very poor historian." 48 TR 28. She concluded that Roberson currently suffered from brain damage, depression, substance dependence, and anti-social-personality disorder. 48 TR 36, 37, 46. She also testified that Roberson was unlikely to be a future danger in a prison environment. 48 TR 48-49, 56.

The defense rested after Dr. Goodness's testimony, and the jury sentenced Roberson to death. The Texas Court of Criminal Appeals ("TCCA") denied relief on

direct appeal. *Roberson* v. *State*, No. AP-74,671, 2002 WL 34217382 (Tex. Crim. App. June 20, 2007). Roberson sought certiorari review from this Court, which was denied on April 14, 2008. *Roberson* v. *Texas*, 552 U.S. 1314 (2008).

B. State Post-Conviction Proceedings

Through attorney James W. Volberding—whose ethical conflict is the subject of this Petition—Roberson filed a first state post-conviction application on December 13, 2004.[2] The application raised thirty-four claims, none of which was a claim that trial counsel was ineffective for failing to conduct a proper investigation of mitigating evidence.[3] CR 28-257. On July 15, 2005, the trial court issued findings. On August 5, and during the pendency of the first state application, Roberson filed a *pro se* "Notice of Desire to Raise Additional Habeas Corpus Claims" in the TCCA.

On September 16, 2009, the TCCA denied all relief. With respect to the state post-conviction application Roberson filed on December 13, 2004, the TCCA adopted the trial court's findings. See *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738, at *2 (Tex. Crim. App. Sept. 16, 2009). The TCCA treated the *pro*

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[2] Through Mr. Volberding, Roberson filed an Ex Parte Motion by Petitioner to Appoint Investigator Rex Olson on May 22, 2003. CR 2-4. Mr. Olson had also served as an investigator during trial proceedings. CR 3. The trial court granted the motion. 1 CR 6. According to billing records, Mr. Olson appears to have conducted a total of 46 hours of investigation and travel, which consisted primarily of reviewing news articles and juror questionnaires, and reflected no investigation of Roberson's personal history or mental health. CR 18-20.

[3] The application included a claim, which it mislabeled as a claim under *Wiggins* v. *Smith*, 539 U.S. 510 (2003), that the trial court failed to properly fund the defense team because it substantially cut the invoices submitted by trial counsel and the investigator—and that trial counsel should have objected. CR 220.

se additional-claim notice as a successive state post-conviction application and dismissed it as an abuse of the writ. See *ibid.*

C. Habeas Proceedings in the Federal District Court

On October 22, 2009, Mr. Volberding, who had represented Roberson in state post-conviction proceedings, filed a motion under the Criminal Justice Act ("CJA") to have himself appointed as Roberson's "lead counsel" in federal habeas proceedings. See Application for Appointment of Counsel in Death Penalty Case, *Roberson* v. *Stephens*, No. 2:09-cv-00327, *4-*6 (E.D. Tex. Oct. 22, 2009) (No. 1). On November 3, the district court appointed Mr. Volberding as "lead counsel" and Jon Wright as "co-counsel." See Order, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Nov. 3, 2009) (No. 5). On November 9, the district court docketed a letter from Roberson stating that he "[does not] want to keep the same attorneys that I have now." Notice, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Nov. 12, 2009) (No. 6). On November 12, the district court docketed Roberson's motion to remove "the same attorney that I had for my state writ of habeas corpus (James Volberding)." Mot. for Appointment of Another Counsel, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Nov. 12, 2009) (No. 7).[4] The district court denied the request. See Order, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Dec. 21, 2009) (No. 10).

On September 14, 2010, lead counsel Mr. Volberding and co-counsel Mr. Wright pleaded an ineffective-assistance-of-counsel ("IAC") claim involving trial

[4] Roberson later signed a letter indicating that he reconciled with Volberding. See Additional Attachment, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Dec. 17, 2009) (No. 9).

counsel's failure to conduct an adequate mitigation investigation ("Claim 38"), along with several other claims relating to trial counsel's constitutionally defective representation during the sentencing phase of Roberson's capital murder trial. Pet. for Writ of Habeas Corpus, *Roberson* v. *Stephens*, No. 2:09-cv-00327 at *159-86, *278-81 (E.D. Tex. Sept. 14, 2010) (No. 11); Supp. Pet. Writ of Habeas Corpus at *1-*3, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Sept. 16, 2010) (No. 12). (An excerpt of the Habeas Petition is attached as Appendix C, and Claim 38 appears on pp. App.C278-81.) Claim 38 was a "*Wiggins* claim" asserting that Roberson was entitled to relief on an IAC theory based on this Court's ruling in *Wiggins* v. *Smith*, 539 U.S. 510 (2003). App.C278-81. The *Wiggins* claim was based on the brief investigation of Deborah Wright. The heading to the *Wiggins* claim stated:

> By failing to conduct an adequate investigation into Mr. Roberson's background, mental health record, family history and upbringing, and by failing to present the results of an adequate investigation to competent experts or to present and explain the result of his investigation to the sentencing jury, trial counsel performed deficiently and below the prevailing professional norms of the legal profession as they existed in 2003. This failing to investigate prejudiced Mr. Roberson's case for a lesser included offense and for a life sentence upon conviction for capital murder.

App.C278-79. The Habeas Petition went on to state that "the mitigation investigation and presentation failed to meet prevailing professional norms for capital cases in Texas at the time of the 2003 trial." App.C280. Mr. Volberding and Mr. Wright attached an affidavit from Ms. Wright, stating that she had spoken with two of Roberson's family members, who disclosed an extensive family history of mental illness. App.C280. In her affidavit, Ms. Wright mentioned that the family members "were reluctant to divulge information." App.D83. The Habeas Petition described

this family history of mental illness as a "classic mitigating circumstance" militating in favor of life. App.C280-81. The Habeas Petition also stated that the failure to investigate mental health evidence compromised counsel's sentencing-phase argument: that Roberson suffered from a serious mental illness and therefore did not deserve the death penalty. App.C281. Federal habeas counsel, however, never formally requested resources to develop Claim 38.

On February 28, 2012, Mr. Wright moved to withdraw and have Seth Kretzer take his place as co-counsel. See Mot. to Substitute Counsel, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Feb. 28, 2012) (No. 25). The February 28 motion indicated that Mr. Kretzer would begin to read the petition and record while preparing the reply to the Director's principal brief: "*When the Attorney General files his response*, Mr. Kretzer will have adequate time to *read the record and the petition* in order to represent Mr. Roberson properly." *Id.* at *2 (emphasis added). Although the February 28 motion recited Mr. Kretzer's qualifications, it did not state that Mr. Kretzer met 18 U.S.C. § 3599(c)'s lead-counsel requirements. *Ibid*.[5] On March 5, fifteen days before this Court announced *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), the district court ordered that "Seth Kretzer . . . replace Jon Wright as *co counsel* for Roberson." Order Substituting Counsel, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Mar. 5, 2012) (No. 26) (emphasis added).

[5] Section 3599(c) provides that lead counsel must "have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases."

This Court decided *Martinez* on March 20, 2012, holding that inadequate state post-conviction lawyering may excuse procedural default of an IAC claim. See *Martinez*, 132 S. Ct. at 1315. Because lead counsel Mr. Volberding was Roberson's state post-conviction lawyer, a *Martinez* argument required him to attack his own performance. Mr. Volberding and Mr. Kretzer filed the Reply in support of Roberson's Petition on January 7, 2013, arguing only that *Martinez* applied in Texas. See Reply to Answer of Resp't Thaler at *16-*19, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Jan. 7, 2013) (No. 39). They did not address the merits of the *Wiggins* claim or address Mr. Volberding's state post-conviction performance. See *ibid.*

On May 28, 2013, in *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013), this Court held that *Martinez* applied in Texas. On April 7, 2014, Roberson supplied the district court with a copy of a letter that he wrote to lead counsel Mr. Volberding, requesting that Mr. Volberding make an argument for review of his IAC claims under *Martinez* and *Trevino*. See Letter from Robert L. Roberson III to Wes Volberding, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Apr. 7, 2014) (No. 41). Mr. Volberding and Mr. Kretzer did not make the requested argument, which would have required an attack on Mr. Volberding's state post-conviction representation. On August 20, 2014, the Magistrate issued a Report and Recommendation (attached as Appendix D), recommended that all relief be denied, and noted that Mr. Kretzer and Mr. Volberding did not argue the merits of the *Wiggins* claim or the inadequacy of state post-conviction representation necessary to excuse its default:

> In his response to the answer, Roberson merely discussed the Supreme Court's decision in *Martinez* and argued that it applies to Texas. The applica-

> bility of *Martinez* to Texas, however, is not an issue in light of *Trevino*. Roberson did not respond to the Director's answer regarding the merits of his *Wiggins* claim.

App.D88. The Magistrate's Report and Recommendation explicitly noted that lead counsel Mr. Volberding had served as both federal and state post-conviction counsel, **and that he had forfeited the *Wiggins* claim**. See App.D84 ("The Court would note that Roberson's federal counsel was also his state habeas counsel, and he had the opportunity to present the [IAC] claim in the state habeas corpus proceedings; nonetheless, he failed to present the [IAC] claim until the present proceeding."). The Magistrate found the *Wiggins* claim procedurally defaulted. See App.D88.

On September 28, 2014, co-counsel Mr. Kretzer filed Roberson's Objection to the Report and Recommendation, but again failed to address the merits of the *Wiggins* claim or the *Martinez* excuse, providing no reasoning beyond an assertion that "the R&R inaccurately decided" the IAC claims. Roberson's Objections to Magistrate's Report and Recommendation at *25, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Sept. 28, 2014) (No. 47). On October 30, the district court issued an order adopting the Magistrate's Report and Recommendation. Order, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Sept. 30, 2014) (No. 48). Roberson filed a Notice of Appeal to the Fifth Circuit on September 30. See Notice of Appeal, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Sept. 30, 2014) (No. 50).

On October 30, 2014, Roberson filed a *pro se* motion in the district court, seeking to have Mr. Volberding and Mr. Kretzer removed as his CJA-appointed counsel, and requesting that the court "appoint unconflicted counsel that will prop-

erly raise issues related to *Martinez v. Ryan* . . . and *Trevino v. Thaler* . . . in federal proceedings." Pet'r's Mot. to Stay Proceedings and Appoint Counsel, *Roberson* v. *Stephens*, No. 2:09-cv-00327, at *1 (E.D. Tex. Oct. 30, 2014) (No. 52). The district court denied the motion on the ground that, *inter alia*, "all motions should be filed by [Mr. Kretzer and Mr. Volberding]." Order, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Oct. 31, 2014) (No. 53). The Court denied the motion on the further ground that the Fifth Circuit had acquired jurisdiction over the case. See *ibid.*

D. Federal Habeas Proceedings in the Fifth Circuit

On February 23, 2015, Mr. Volberding and Mr. Kretzer filed an Application for a Certificate of Appealability in the Fifth Circuit. *See* Appl. for Certificate of Appealability, *Roberson* v. *Stephens*, No. 14-70033 (5th Cir. Feb. 23, 2015). It did not mention the district court's disposition of the *Wiggins* claim. *See id.* at *2.

On May 4, 2015, after the Director answered, Roberson moved the Fifth Circuit to have Mr. Volberding and Mr. Kretzer withdraw from the case, again citing the conflict created by the Court's decision in *Martinez*. See Petr's Mot. Stay Proceedings and Appoint Counsel, *Roberson* v. *Stephens*, No. 14-70033 (5th Cir. May 4, 2015). On May 6, Mr. Kretzer and Mr. Volberding responded to Roberson's request for their removal (attached as Appendix E), representing to the Court that no potential *Martinez* excuse existed because Mr. Volberding had not forfeited any claim in state post-conviction proceedings. App.E1. Mr. Kretzer and Mr. Volberding's response to Roberson's motion states, in pertinent part:

> Mr. Kretzer also took the lead in the Petition for COA filed in this Court. Mr. Kretzer warrants to this Court that he was very cognizant of any potential

> *Martinez*/*Trevino* issues, and found none. To be clear, Mr. Kretzer reviewed the entire state and federal appellate record, and all state and federal pleadings, *and found no claim or potential claim that was not raised, or raised incorrectly, by Mr. Volberding*. Without that basic requirement, there is no justification for a *Martinez* conflict claim. We would point out that Mr. Roberson does not identify any such claim or matter. We respectfully recommend that the Court deny Mr. Roberson's motion.

App.E1 (emphasis added).

On May 22, 2015, relying on the inaccurate representations of Mr. Kretzer that Mr. Volberding had not forfeited any claim in state post-conviction proceedings, the Fifth Circuit denied the motion to remove the two lawyers. See App.B. In its order, the Fifth Circuit referred to Mr. Kretzer as "supplemental counsel," a term used to describe a lawyer appointed for the sole purpose of exploring whether a client's existing lawyer ("incumbent counsel") caused the client to default an IAC claim in state post-conviction proceedings. See App.B2; see also *Speer* v. *Stephens*, 781 F.3d 784, 786 (5th Cir. 2015) ("direct[ing] the appointment of supplemental counsel for the sole purpose of determining whether Speer has additional habeas claims that ought to have been brought"); *Mendoza* v. *Stephens*, 783 F.3d 203, 203 (5th Cir. 2015) (per curiam) (granting "motion for the appointment of new supplemental counsel"). The Fifth Circuit stated that "Roberson has already received the benefit of independent, conflict-free counsel *to investigate* potential *Martinez-Trevino* issues." App.B2.

On May 27, 2015, Roberson retained undersigned counsel from Texas Defender Service ("TDS") for the limited purpose of securing his right to counsel under 18 U.S.C. § 3599. TDS agreed to represent him on this issue *pro bono*. Roberson did

not seek to have TDS appointed as supplemental counsel; he sought only to have TDS make the motion for such counsel.

On June 11, 2015, undersigned counsel Lee B. Kovarsky contacted the Fifth Circuit's Clerk's Office to alert it to Roberson's desire to file a motion requesting supplemental counsel. The Fifth Circuit's Clerk's Office informed Mr. Kovarsky that, before Roberson could move for any such relief through TDS, he would need to deliver a hard copy of a letter requesting electronic filing privileges ("Electronic Filing Request") because undersigned counsel were not appointed to represent Roberson under 18 U.S.C. § 3599. On June 12, 2015, Roberson hand delivered the Electronic Filing Request to the Fifth Circuit, asking it to "grant electronic filing privileges" to undersigned counsel so that Roberson could file his motion for conflict-free counsel. Letter from Lee B. Kovarsky, Post-Conviction Director, Texas Defender Service, to Fifth Circuit Court of Appeals at 1, *Roberson* v. *Stephens*, No. 14-70033 (5th Cir. June 12, 2015).

The Electronic Filing Request contained only a skeletal description of the Motion sought to be filed; it was not itself a motion. See *id.* at *5 ("Mr. Roberson . . . respectfully requests that undersigned counsel *be permitted to move* for the appointment of Supplemental Counsel under *Speer* and *Mendoza*.") (emphasis added). Under a heading "Reasons for Permitting Mr. Roberson to Seek Relief," Roberson identified three major problems that his forthcoming motion would detail: (1) Mr. Kretzer was the § 3599(d) *co-counsel* appointee, and that status required an ongoing working relationship with lead counsel Mr. Volberding that limited Mr. Kretzer's

ability to zealously question Mr. Volberding's performance in a prior phase of the case; (2) Mr. Kretzer and Mr. Volberding engaged in paid, joint representation of many other inmates created a financial and professional incentive for Mr. Kretzer to avoid adversity with Mr. Volberding; and (3) Mr. Kretzer's inaccurate statement to the Fifth Circuit regarding the forfeiture of Claim 38 compromised his ability to zealously litigate the *Wiggins* issue going forward. See *id.* at *4-*5.

Even though no motion was ever filed, on June 30, 2015, the Fifth Circuit addressed the Electronic Filing Request as a motion to appoint TDS as supplemental counsel, and the docket reflects that the Fifth Circuit had issued a "Court Order Denying Motion to Appoint Co-Counsel." In the June 30 Order, the Fifth Circuit stated that "Kretzer suffices as conflict-free counsel for the purposes of reviewing *Martinez-Trevino* issues, a function he has represented to this court that he has performed." App.A5. It remarked that "Roberson does not explain what the supplemental counsel would be able to do in [the Fifth Circuit]," and that a "difference of opinion is not grounds for finding a conflict of interest or for appointing a third lawyer." App.A5. The Fifth Circuit conceded that Mr. Volberding had in fact defaulted Claim 38, but reinterpreted Mr. Kretzer's verifiably inaccurate assertion that Mr. Volberding had forfeited no IAC claim as a debatable statement about the merit of a *Martinez* excuse. App.A4 ("It is true that the district court found Claim 38 to be procedurally defaulted due to failure to raise the claim in the state habeas corpus proceedings."); App.A5 ("Further, that another lawyer may disagree with Kretzer's assessment of a potential *Martinez–Trevino* issue is not probative.").

On July 1, 2015, undersigned counsel Mr. Kovarsky wrote an email to the Clerk's Office explaining that Roberson "never made [a motion to appoint TDS as co-counsel]" and requesting that the Court "let Roberson file the Motion it denied yesterday" so that Mr. Roberson could "perfect the record." Email from Lee Kovarsky, Post-Conviction Director, Texas Defender Service, to Monica Washington, Capital Case Clerk, Fifth Circuit Court of Appeals (July 1, 2015 8:47 a.m. EST) (on file with undersigned counsel). The Fifth Circuit Clerk's Office did not respond.

On August 10, 2015, the Fifth Circuit denied relief in the underlying appeal. On August 13, the Fifth Circuit received, through TDS, an Advisory and Proffer from Roberson. In the Advisory and Proffer, Roberson explained that the Fifth Circuit had misconstrued the Electronic Filing Request in two ways. First, he noted that the Electronic Filing Request was not a motion; it was merely a request for the filing privileges necessary to file a motion for supplemental counsel. See Advisory and Proffer to the Court at 2-3, *Roberson* v. *Stephens*, No. 14-70033 (5th Cir. Aug. 13, 2015). Second, Roberson underscored the fact that he was not seeking to have TDS appointed as supplemental counsel; he simply wanted TDS to move for supplemental counsel to be appointed because his CJA-appointed lawyers would not make that motion. See *id.* at 2.

Moreover, Roberson proffered the motion along with two expert declarations that he would have filed had the Fifth Circuit not misconstrued the Electronic Filing Request as a motion for the appointment of supplemental counsel. See *id.* Ex. 2. One expert declaration was from Charles Herring, who wrote TEXAS MALPRACTICE

AND LAWYER DISCIPLINE (1990, rev. eds. 1997, 2002, 2004-14), served on the Texas Supreme Court's Grievance Oversight and Advisory Committees, and chaired the Texas Supreme Court's Task Force on Sanctions and the State Bar of Texas Task Force on Legal Malpractice Prevention. (The Herring Declaration is attached as Appendix F.) Mr. Herring concluded that "James Volberding and Seth Kretzer have conflicts of interest that should prevent them from representing Mr. Roberson on the issue of whether ineffective state post-conviction representation excuses procedural default of Mr. Roberson's underlying [IAC claim]." App.F2. Mr. Herring explained that the "continued representation" of Mr. Volberding and Mr. Kretzer "violat[es] their ethical obligations under the Texas Disciplinary Rules and the ABA Model Rules, as well as fiduciary duties." App.F8. Specifically, Mr. Herring believed that the primary sources of the conflict arose from: (1) "Mr. Kretzer's longstanding working relationship with Mr. Volberding" in which "they frequently serve as co-counsel in capital cases;" and (2) their statement in the May 6, 2015 letter to the Fifth Circuit incorrectly stating that Mr. Volberding had not forfeited an IAC claim in state post-conviction proceedings. App.F10-11.

The other expert declaration was from Lawrence Fox, the George W. and Sadella D. Crawford Visiting Lecturer in Yale Law at Yale Law School. (The Fox Declaration is attached as Appendix G.) Professor Fox teaches legal ethics and professional responsibility, and is the Supervising Lawyer at the Ethics Bureau at Yale. See App.G1. Mr. Fox is the former Chair of the ABA Standing Committee on Ethics and Professional Responsibility and former Chair of the ABA Section of Liti-

gation. Mr. Fox concluded "to a reasonable degree of a professional certainty that both lawyers are operating under profound conflicts of interest that prevent them from continuing the representation[.]" App.G3. Mr. Fox believed that the primary sources of conflict arose: (1) because "a lawyer is subject to a conflict of interest created when that lawyer has to raise the ineffectiveness of his co-counsel;" and (2) because Mr. Volberding and Mr. Kretzer have an ongoing co-counsel relationship, spanning many cases, that "triggers . . . ethical obligations" similar to those barring lawyers from the same firm attacking one another. App.G5.

The Fifth Circuit docketed the Advisory and Proffer, but the docket entry stated that the Court would take no action on it. On September 9, 2015, the Fifth Circuit denied the petition for rehearing that Mr. Volberding and Mr. Kretzer filed in the underlying appeal. This Petition attacks only the order denying the putative motion for supplemental counsel, and does not seek relief on other appellate issues.

REASONS FOR GRANTING RELIEF

Martinez v. *Ryan*, 132 S. Ct. 1309 (2012), and *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013), created an obvious conflict for a federal habeas lawyer who also represented her client in state post-conviction proceedings ("*Martinez* conflict"): excusing procedural default requires the lawyer to attack her own performance. See *Trevino*, 133 S. Ct. at 1915; *Martinez*, 132 S. Ct. at 1318. Rather than forcing all *Martinez*-conflicted lawyers to withdraw, some federal appeals courts have held that the 18 U.S.C. § 3599 right to counsel can be satisfied through a device that the courts call "supplemental counsel." *Speer*, 781 F.3d at 786; *see also* REASONS Part I (explain-

ing the genesis of the Fifth Circuit rule) REASONS Part II (detailing *Martinez*-conflict rules in other jurisdictions). Specifically, these federal courts designate as supplemental counsel a lawyer who did *not* represent the client during state post-conviction proceedings, and require that lawyer to evaluate and litigate any IAC claim that was defaulted because of incumbent counsel's ineffectiveness.

This Petition seeks review of the Fifth Circuit rule that the only supplemental-counsel qualification is that the lawyer did not represent the client in state post-conviction proceedings. In other jurisdictions, the requirements for a supplemental-counsel appointment are more stringent: the lawyer must be qualified as lead counsel under 18 U.S.C. § 3599(c) and must operate independently of incumbent counsel.

Mr. Kretzer was *not* a § 3599(c) lead-counsel appointee, and he was not acting independently of incumbent counsel. The Fifth Circuit's failure to require sufficient experience and independence culminated in the unseemly spectacle of Mr. Kretzer and Mr. Volberding securing their continued CJA appointment by working against their client's interest—by opposing Roberson's motions for new counsel, making verifiably inaccurate representations about Roberson's case, and attempting to extinguish the excuse for their client's defaulted IAC claim. See App.E1.

I. FOR A *MARTINEZ* CONFLICT IN THE FIFTH CIRCUIT, 18 U.S.C. § 3599 IS SATISFIED BY THE APPOINTMENT OF ANY LAWYER WHO DID NOT REPRESENT THE INMATE IN STATE POST-CONVICTION PROCEEDINGS.

The CJA entitles indigent, capitally sentenced inmates to appointed federal habeas counsel. See 18 U.S.C. § 3599(a)(2). This Court has interpreted § 3599 to require *conflict-free* counsel. See *Christeson* v. *Roper*, 135 S. Ct. 891, 894 (2015);

Martel v. *Clair*, 132 S. Ct. 1276, 1284-86 (2012). *Martinez* and *Trevino* created a straightforward conflict of interest for any CJA-appointed lawyer who also represented an inmate in state post-conviction proceedings, as that lawyer must evaluate the effectiveness of her own representation. An uncured *Martinez* conflict therefore violates an inmate's statutory right to conflict-free counsel.

The Fifth Circuit addresses *Martinez* conflict using supplemental-counsel—i.e., by requiring that an attorney who did not represent the client in state post-conviction proceedings evaluate and litigate potential IAC claims and any corresponding *Martinez* excuses. The Fifth Circuit interprets § 3599 to permit a supplemental-counsel designation for *any* lawyer who did not serve as state post-conviction counsel and to require no further inquiry into the qualifications or functional independence of that lawyer.

A. 18 U.S.C. § 3599 Specifies a Statutory Right to Qualified, Conflict-Free Federal Habeas Counsel.

Under 18 U.S.C. § 3599(a)(2), a provision enacted as part of the CJA, an indigent, capitally sentenced state inmate has a statutory right to counsel in federal habeas corpus proceedings. See *Clair*, 132 S. Ct. at 1280. Section 3599(a)(2) further provides that a capitally sentenced inmate be appointed "one or more attorneys . . . in accordance with subsections (b) through (f)." 18 U.S.C. § 3599(a)(2).

Subsections (c) and (d) set forth the respective qualifications for CJA-appointed lead and co-counsel. (The statute does not actually use the terms "lead counsel" and "co-counsel," although courts routinely use those terms.) Subsection (c) requires that lead counsel "must have been admitted to practice in the court of ap-

peals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." 18 U.S.C. § 3599(c). Subsection (d) permits a co-counsel appointment "for good cause" and if co-counsel possesses "background, knowledge, or experience [that] would otherwise enable him or her to properly represent the [inmate]." 18 U.S.C. § 3599(d). The district court appointed Mr. Volberding to be lead counsel; it appointed Mr. Kretzer to be co-counsel. See Order, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Nov. 3, 2009) (No. 5); Order Substituting Counsel, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Mar. 5, 2012) (No. 26).

Subsection 3599(e), in turn, provides the statutory authority for appointing substitute counsel upon an inmate's motion, and a court must "ensure that the [inmate's] statutory right to counsel [is] satisfied throughout the litigation." *Clair*, 132 S. Ct. at 1286. In *Clair*, this Court interpreted § 3599(e) to require substituted counsel by reference to the "interests of justice," and held that new CJA counsel should be appointed when incumbent CJA counsel "develop[s] a conflict" with the client. *Id.* at 1284, 1286. In *Christeson*, this Court decided that "conflict with a client" includes any "conflict of interest" affecting the client's CJA-appointed lawyers. See 135 S. Ct. at 894. The sum of *Christeson* and *Clair* is the principle that, if federal habeas lawyers must make an argument that "threatens their professional reputation and livelihood," then such a conflict "is grounds for substitution." *Id.* at 894-95 (citing *Clair*, 132 S. Ct. at 1284, 1286).

B. The Fifth Circuit Uses A "Supplemental Counsel" Device To Cure *Martinez* Conflicts.

In *Martinez*, this Court held that ineffective state post-conviction representation can excuse default of a substantial IAC claim. See 132 S. Ct. at 1318. Shortly after *Martinez* was decided, the Fifth Circuit held that it did not apply to Texas because state inmates could technically assert an IAC claim on direct review of a conviction. See *Ibarra* v. *Thaler*, 687 F.3d 222, 227 (2012). *Trevino* voided *Ibarra*. 133 S. Ct. at 1915. *Martinez* therefore creates a conflict of interest for a CJA lawyer who forfeited an IAC claim while serving as an inmate's state post-conviction counsel—it requires that lawyer to attack her own state post-conviction representation.

In order to "cure" *Martinez* conflicts, the Fifth Circuit announced a supplemental-counsel rule. When a CJA-appointed lawyer is subject to a *Martinez* conflict, the Fifth Circuit designates a supplemental counsel to make all litigation decisions regarding IAC claims that might conflict incumbent counsel. The Fifth Circuit developed this approach in *Speer* v. *Stephens*, 781 F.3d 784, 786 (5th Cir. 2015) and *Mendoza* v. *Stephens*, 783 F.3d 203, 203 (5th Cir. 2015) (per curiam), which were decided on the same day.

In *Speer*, incumbent counsel sought to withdraw because he represented the inmate during state post-conviction proceedings. See 781 F.3d at 785. The Fifth Circuit refused his request. See *id.* at 786. Instead, the Fifth Circuit decided that, "in the interest of justice," it would exercise its authority under 18 U.S.C. § 3599 to appoint "supplemental counsel for the sole purpose of determining whether Speer has additional habeas claims that ought to have been brought." *Ibid.* The Fifth Circuit determined that the conflict was "cured" by the appointment of counsel

solely "to address a specific legal question: whether any procedural default of ineffective assistance of trial counsel claims by state habeas counsel may be excused." *Id.* at 786 n.9. It remanded the case solely for the appointment of supplemental counsel and for the district court to consider whether Mr. Speer could establish cause to excuse the procedural default of his IAC claim. See *id.* at 787. See also *Mendoza*, 783 F.3d at 203-04 (granting inmate's request for supplemental counsel). *Roberson* is an application of *Speer* and *Mendoza*.

C. The Fifth Circuit Rule Permits a Supplemental-Counsel Designation for any Lawyer Who Did Not Represent the Inmate in State Post-Conviction Proceedings.

In *Roberson*, the Fifth Circuit did not require that supplemental counsel be qualified under § 3599(c) or be functionally independent of conflicted incumbent counsel. In its June 30, 2015 Order denying what it treated as a motion for co-counsel, the court explained that the requirements of § 3599 were satisfied simply because Mr. Kretzer was not Roberson's post-conviction lawyer: "Roberson has the benefit of supplemental counsel, Seth Kretzer, who did not represent [Roberson] in the state habeas corpus proceedings." AppA2 (alterations in original).

The Fifth Circuit's conception of supplemental counsel as being nothing more than a lawyer who was not also state post-conviction counsel is particularly expansive, in two respects. First, the Fifth Circuit held that an inmate is not actually entitled to the appointment of § 3599(c) lead counsel, as long as there is *any* lawyer on the case who was not the client's state post-conviction representative. See App.A2-3. Mr. Kretzer had been appointed as co-counsel (not supplemental counsel)

and had been working with Mr. Volberding long before *Trevino* was decided—i.e., before federal courts in the Fifth Circuit even recognized a conflict. See Order Substituting Counsel, *Roberson* v. *Stephens*, No. 2:09cv327 (E.D. Tex. Mar. 5, 2012) (No. 26). Nor was Mr. Kretzer a § 3599(c) lead-counsel appointee—a requirement that other jurisdictions have imposed to ensure that supplemental counsel has the qualifications and independence necessary to serve in the role that the device contemplates. See *ibid.*

Second, the Fifth Circuit held that the extent to which supplemental and incumbent counsel engage in joint CJA representation of other clients—and any monetary interest such representation creates—is irrelevant to whether the supplemental-counsel appointment actually satisfies § 3599. See App.A4. In response to being confronted with evidence that Mr. Kretzer and Mr. Volberding were jointly appointed for paid work in many other capital habeas cases and that Mr. Kretzer was in fact the only lawyer with which Mr. Volberding assumed joint representation, the Fifth Circuit offered no reasoning beyond the statement: "That argument lacks merit." *Ibid.* The Fifth Circuit treated as irrelevant that, if Mr. Kretzer were to become adverse to Mr. Volberding in *Roberson*, then the two attorneys would have to withdraw from joint representation in other cases or, at the very least, seek client waivers to continue to receive payment from working together. See *ibid.*

* * * *

Under the Fifth Circuit's supplemental-counsel device, 18 U.S.C. § 3599 requires nothing more than the presence of a habeas lawyer who was not also the

client's state post-conviction representative. It does not require that any defaulted IAC claim be litigated by a functionally independent § 3599(c) lead-counsel appointee, treating as irrelevant any interest created by supplemental counsel's paid or professional relationship with incumbent counsel.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF 18 U.S.C. § 3599 IS INCONSISTENT WITH THAT OF THE FOURTH CIRCUIT, WHICH REQUIRES A § 3599(c) LEAD-COUNSEL APPOINTMENT AND AN INQUIRY INTO SUPPLEMENTAL COUNSEL'S FUNCTIONAL INDEPENDENCE.

The Fifth Circuit interprets § 3599 to permit a supplemental counsel designation for any lawyer who did not represent the client in state post-conviction proceedings. The Fourth Circuit, by contrast, understands § 3599 to encompass a right to appointment of supplemental counsel who is qualified to represent the petitioner as lead counsel under § 3599(c) and is functionally independent of incumbent counsel.

A. The Fifth Circuit Rule Requiring Only That Supplemental Counsel Not Have Served As State Post-Conviction Counsel Is Inconsistent With The Fourth Circuit Rule, Which Also Requires That Supplemental Counsel Be Qualified Under 18 U.S.C. § 3599(c) And Independent Of Incumbent Counsel.

The Fourth Circuit is the only other appeals court to address what 18 U.S.C. § 3599 requires when a CJA-appointed attorney has a *Martinez* conflict.[6] Unlike the

[6] Two other appeals courts have addressed alleged *Martinez* conflicts, but the idiosyncrasies of those cases limit the information that one can glean from comparison with *Roberson*. The Ninth Circuit has found that there is no *Martinez* conflict when federal counsel served as state post-conviction counsel, but where proceedings in district court concluded more than two years before *Martinez* was decided. See *Jones* v. *Ryan*, 733 F.3d 825, 836 (9th Cir. 2013). The Eleventh Circuit has rejected a request for appointment of new counsel when raising a *Martinez*-excusable IAC claim would be futile because of the statutory restrictions on timeliness and successive petitions. See *Chavez* v. *Secretary*, 742 F.3d 940, 946 (11th Cir. 2014).

Fifth Circuit, the Fourth Circuit requires that inmates receive the benefit a functionally independent § 3599(c) lead-counsel appointee to investigate—among other things—the performance of incumbent counsel.

The leading § 3599 supplemental-counsel case in the Fourth Circuit is *Juniper* v. *Davis,* 737 F.3d 288 (4th Cir. 2013). Before *Juniper*, the Fourth Circuit had already held (in an unpublished case) that a *Martinez* conflict required independent counsel to litigate the IAC claim that created the conflict for incumbent counsel. See *Gray* v. *Pearson*, 526 F. App'x 331, 332-34 (4th Cir. 2013). *Juniper* was a published opinion in which the Fourth Circuit held that § 3599 requires supplemental counsel that meets the more stringent qualifications for lead counsel under § 3599(c) and that is functionally independent of conflicted counsel. Juniper's incumbent counsel had represented him in state post-conviction proceedings. See *Juniper*, 737 F.3d at 290. The Fourth Circuit found that it was "ethically untenable" and a violation of the client's statutory rights under § 3599 to require incumbent CJA counsel "to assert claims of his or her own ineffectiveness in the state habeas proceedings." *Ibid.* The Court observed:

> To be clear, if a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under *Martinez* in a state where the petitioner may only raise ineffective assistance claims in an "initial-review collateral proceeding," qualified and independent counsel is *ethically required.*

Ibid. Unlike the inmate in *Gray*, Juniper had been represented by CJA co-counsel who did not represent him in state post-conviction proceedings. See *id.* at 290 n.2.

The Fourth Circuit went on to explain that Juniper's co-counsel did not meet § 3599's requirements for its version of supplemental counsel. Because the co-counsel was not qualified as lead counsel under § 3599(c), she was (1) not the qualified counsel to which Juniper was entitled "at all stages of his capital habeas proceedings, including the investigation of claims under *Martinez*," and (2) could not function independently of incumbent counsel. *Ibid.* In other words, § 3599 required that supplemental counsel be qualified to represent the client without co-counsel and be capable of acting independently of incumbent counsel. See *ibid.* Therefore, the Fourth Circuit remanded the case for the appointment of supplemental counsel. See *id.* at 290. The Fourth Circuit requirement of independence is evident from *Morgan* v. *Joyner*, in which the court held that an attorney from the same firm as incumbent counsel could not serve as supplemental counsel. See Pet'r's Mot. for Appointment of Qualified and Independent Counsel in Light of *Juniper* v. *Davis* ¶¶ 8-9, *Morgan* v. *Joyner*, No. 12-6 (4th Cir. Jan. 30, 2014) (No. 15); Order, *Morgan* v. *Joyner*, No. 12-6 (4th Cir. June 26, 2014) (No. 19).

In *Fowler* v. *Joyner*, 753 F.3d 446 (4th Cir. 2014), the Fourth Circuit affirmed that the salient features of *Juniper*'s rule were supplemental counsel's qualifications under § 3599(c) and supplemental counsel's functional independence from incumbent counsel. In *Fowler*, the federal habeas claimant's appellate lawyers sought a supplemental-counsel designation and to have the case remanded to the district court to allow them to investigate the existence of substantial IAC claims not presented to the state court. See *id.* at 460. In district court, the inmate had

been represented *both* by a lawyer subject to a *Martinez* conflict and by one of the appellate lawyers, who was not subject to such a conflict. See *ibid.* Fowler did not allege that both lawyers in the district court were subject to a *Martinez* conflict, and the Fourth Circuit rejected his motion. See *id.* at 450; Pet'r's Mot. for Appointment of Qualified and Independent Counsel in Light of *Juniper* v. *Davis*, *Fowler* v. *Joyner*, No. 13-4 (4th Cir. Dec. 31, 2013) (No. 38-1). The Fourth Circuit explained that Fowler's unconflicted lawyer fulfilled the role of supplemental counsel because she was qualified to (and had been appointed to) represent Fowler independently under § 3599(c); the unconflicted lawyer in *Juniper*, by contrast, had not been qualified for a § 3599(c) appointment. See 753 F.3d at 465 n.7. Fowler's supplemental counsel "did not labor under *any* conflict of interest that would have hindered her ability to investigate whether there were any *Martinez*-based ineffective-assistance-of-trial-counsel claims that had not already been ferreted out by Fowler's prior trial and postconviction counsel." *Id.* at 465.

In sum, the Fourth Circuit interprets § 3599 to require conflict-free supplemental counsel that is appointed under § 3599(c) and is functionally independent of conflicted incumbent counsel. The Fourth Circuit's interpretation is in tension with that of the Fifth Circuit, which has interpreted § 3599's requirement to be satisfied by any co-counsel, regardless of their relationship with conflicted counsel and regardless of whether they are functionally autonomous.

B. In Federal Circuits That Have Announced No Formal Rule For Resolving *Martinez* Conflicts, District Courts Are Taking Inconsistent Approaches.

In jurisdictions where there is no circuit-level rule, district courts confronting a *Martinez* conflict apply 18 U.S.C. § 3599 inconsistently. First, some district courts have determined that § 3599 always requires wholesale replacement of incumbent counsel—i.e., they reject the concept of supplemental counsel entirely. In *Smith* v. *McDaniel*, for example, the district court held that failing to appoint new, independent counsel to review possible IAC claims would risk "forever denying petitioner the ability to raise those possible claims." Order, *Smith* v. *McDaniel*, No. 3:08-CV-00335, 2014 WL 2197799, at *3 (D. Nev. May 27, 2014). Independent counsel was ultimately appointed "to review petitioner's state habeas corpus proceedings for any potential [IAC claims] that were not raised in those proceedings." *Id.* See also Order, *Bergna* v. *Benedetti*, No. 3:10-CV-00389, 2013 WL 3491276, at *2-*3 (D. Nev. July 9, 2013) (vacating incumbent counsel's appointment and appointing new counsel when incumbent counsel had a "real, actual and current" conflict of interest because she was "placed in a position of having to review the performance of a state post-conviction litigation team on which she worked—including as an attorney—to determine whether the team inadequately failed to raise additional [IAC claims]"); *Huebler* v. *Vare*, No. 3:05-cv-00048, 2014 WL 1494271, at *16 (D. Nev. Apr. 15, 2014) (replacing "conflict-laden" incumbent counsel with new, independent counsel).

A second set of district courts have determined that § 3599 requires independent, conflict-free counsel to investigate potential IAC claims only when an inmate can point to the existence of a defaulted IAC claim that has some merit. In *Merck* v. *Secretary*, for example, the district court ruled that the inmate was enti-

tled to conflict-free counsel under § 3599 when his underlying IAC claims were "not futile." Order, *Merck* v. *Secretary, Dep't of Corrections*, No. 8:13-CV-1285-T-27 at *8 (M.D. Fla. Feb. 12, 2014) (No. 28). The district court was troubled by the practical consequences of requiring an inmate to make a "substantial" merits showing without being "afforded an opportunity to investigate and develop an evidentiary basis for his claims." *Id.* at *8-*10. Therefore, it determined that an inmate "must be afforded an opportunity to investigate and develop an evidentiary basis for his claims," and explained that "he can do so only through conflict free counsel." *Id.* at *10. The district court ordered the appointment of conflict-free counsel to conduct an investigation of, and develop a record on, any underlying IAC claims. *See id.* at *11. See also, Order, *Seibert* v. *Jones*, No. 11-22386-CIV, at *16 (S.D. Fla. Aug. 10, 2015) (No. 32) (appointing supplemental counsel with notation that such counsel is only appropriate if underlying *Martinez*-based claims are not "futile"); *Hutton* v. *Mitchell*, No. 1:05-CV-2391, 2013 WL 4060136, at *2 n.3 (N.D. Ohio Aug. 9, 2013) ("Regardless of whether a conflict of interest arose because Hutton's counsel represented him on both post-conviction and habeas, the Court notes that it did not '[find] that the performance of postconviction counsel resulted in an undeveloped issue . . . .'").

A third set of district courts have allowed otherwise conflicted counsel to remain on a case until a petitioner can identify a procedurally defaulted IAC claim. See, e.g., *Ferguson* v. *Alabama*, No. 3:09-cv-0138, 2014 WL 3689784, at *13 n.15 (N.D. Ala. July 21, 2014) (with respect to *Martinez* conflict, stating that "[i]f there is

a claim of ineffective assistance of trial counsel that was procedurally defaulted before the [state] court, and further examination shows that resolution of the claim will necessarily create conflict of interest as to [petitioner]'s further representation, the court will separately address the matter"); Order, *Farnum* v. *LeGrand*, No. 2:13-cv-01304, at *1 (D. Nev. May 7, 2014) (denying State's motion to disqualify petitioner's counsel because of a *Martinez* conflict when (1) State could not identify any procedurally defaulted IAC claims, and (2) inmate executed a waiver of the conflict).

III. THIS COURT SHOULD GRANT REVIEW TO AFFIRM THAT 18 U.S.C. § 3599 ENTITLES AN INMATE WITH A DEFAULTED IAC CLAIM TO QUALIFIED AND ADVERSELY UNRESTRICTED CJA COUNSEL.

18 U.S.C. § 3599 entitles indigent, capitally sentenced inmates to qualified, conflict-free counsel. In the event of a *Martinez* conflict, however, the Fifth Circuit does not interpret the CJA to require a § 3599(c) lead-counsel appointee who is independently qualified and not adversely limited by a relationship with incumbent counsel. In *Roberson*, the Fifth Circuit retroactively designated Mr. Kretzer supplemental counsel even though (1) he was not the § 3599(c) lead-counsel appointee, and (2) his relationship with Mr. Volberding "adversely limited" his representation, in violation of the ethics requirements of the Texas Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. See TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06(b) (1989) (barring representation that "reasonably appears to be or become adversely limited by the lawyer's . . . responsibilities . . . to a third person or by the lawyer's . . . own interests."); MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (1983) (barring representation if "there is a significant risk that the represen-

tation . . . will be materially limited by . . . a personal interest of the lawyer."). Without this Court's intervention, Roberson will go without qualified, independent representation on his *Wiggins* claim.

A. The Court Should Hold That 18 U.S.C. § 3599 Requires a Procedurally Defaulted IAC Claim To Be Litigated By a § 3599(c) Lead-Counsel Appointee Who is Not Adversely Limited.

Qualified and independent counsel would not have erroneously warranted to the Fifth Circuit that incumbent counsel had forfeited no IAC claims. See App.E1. The erroneous warranty that Mr. Volberding had forfeited no IAC claim both reflects and amplifies Mr. Kretzer's conflict of interest.

1. Mr. Kretzer was not appointed as counsel qualified to lead the litigation under § 3599(c).

First, the Fifth Circuit does not require that supplemental counsel be a § 3599(c) lead-counsel appointee, thereby failing to condition the appointment on the accumulated experience that the provision ordinarily requires. Congress enacted 18 U.S.C. § 3599(c) to ensure that capital inmates receive the "qualified legal counsel," *McFarland* v. *Scott*, 512 U.S. 849, 854 (1994), to which they are statutorily entitled. See also *Martel* v. *Clair*, 132 S. Ct. 1276, 1285 (2012) ("[The statute] aims . . . to improve the quality of representation afforded to capital petitioners.").

Although supplemental counsel may not direct litigation for the rest of the case, they are lead counsel as to any forfeited IAC claims. That role requires knowledge, expertise, and experience commensurate with the qualifications for lead counsel specified in § 3599(c). Section 3599(c) requires that a lead-counsel appointee (1) have been admitted to practice in the court of appeals for at least five years, and (2)

possess at least three years experience handling felony appeals in that court. These requirements ensure that lead counsel has the experience indispensable to spearheading the "unique and complex" litigation, *Clair*, 132 S. Ct. at 1284-85, of a capital post-conviction case. By failing to require that supplemental counsel be a § 3599(c) lead-counsel appointee, the Fifth Circuit reduces IAC claims to second-class status for no reason other than the presence of a *Martinez* conflict.

The district court did not appoint Mr. Kretzer to spearhead the capital litigation as § 3599(c) lead counsel. Rather, he was appointed under the far less demanding provision for § 3599(d) *co-counsel*, who assist § 3599(c) counsel in the representation. Unlike lead counsel appointed under § 3599(c), co-counsel appointed under § 3599(d) need meet no objective requirements relating to experience in serious criminal cases. See 18 U.S.C. § 3599(d).

The failure to impose the §3599(c) requirements was prejudicial in this case. Mr. Kretzer appeared to believe that, to discern whether any *Martinez*-eligible IAC claims existed, he had to conduct no extra-record investigation. In his letter to the Fifth Circuit, he averred that he limited his inquiry of *Martinez*-eligible claims to a review of "the entire state and federal appellate record, and all state and federal pleadings." App.E1. That response captures the failure of Roberson's representation on the *Wiggins* issue.

Experienced counsel would have understood that a *Wiggins* claim requires a post-conviction lawyer to seek information located outside the four corners of the state and federal record. See, e.g., *Wiggins* v. *Smith*, 539 U.S. 510, 516 (2003) (de-

tailing post-conviction investigation involving presentation of expert evidence, development of a social history report, family interviews, and reliance on state social services, medical, and school records); see also American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition*, 31 HOFSTRA L. REV. 913, 1115 (2003), Guideline 10.7(B)(1) ("Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case."). An inmate cannot show *Wiggins* deficiency without knowing what mitigating evidence failed to make its way into the official record and cannot show *Wiggins* prejudice without telling a court what the omitted investigation would have disclosed. See, e.g., *Sears* v. *Upton*, 561 U.S. 945, 948-49, 951 (2010) (per curiam) (finding counsel's mitigation investigation "constitutionally inadequate" based on post-conviction discovery of evidence showing a threatening childhood environment, sexual abuse, learning disability, behavioral handicaps, and deficits in cognition and reasoning); *Porter* v. *McCollum*, 558 U.S. 30, 30 (2009) (per curiam) (finding in favor of IAC claimant based on post-conviction investigation and discovery of "significant mitigation evidence that Porter's counsel neither uncovered nor presented"); *Rompilla* v. *Beard*, 545 U.S. 374, 382 (2005) (finding trial counsel was "deficient in failing to examine the court file on Rompilla's prior conviction"); *id.* at 390-93 (finding prejudice because the post-conviction investigation showed that, had counsel examined the file on Rompilla's prior conviction, "it is uncontested they would have found a range of mitigation leads" that would have significantly altered their mitigation strategy and could

have produced a different outcome); *Wiggins*, 539 U.S. at 525 (determining that trial counsel's investigation was unreasonable because, "[h]ad counsel investigated further, they might well have discovered the sexual abuse later revealed during state postconviction proceedings"); *Williams* v. *Taylor*, 529 U.S. 362, 370-71 (2000) (finding that trial counsel's performance was deficient because trial counsel failed to make part of the record or further investigate evidence in their possession that disclosed mistreatment, abuse, neglect, intellectual disability, head injuries, and organic mental impairments). Contrary to Mr. Kretzer's suggestion and his apparent assumption in this case, federal habeas counsel can never exclude a *Wiggins* claim simply by reading the state and federal record.

2. Mr. Kretzer was adversely limited by his role as co-counsel and by interests created by other joint representation that he regularly undertakes with Mr. Volberding.

The Fifth Circuit also rejected the need for any inquiry into whether supplemental counsel was functionally independent of incumbent counsel, thereby diluting the statutory guarantee of conflict-free representation. Cf. *Christeson* v. *Roper*, 135 S. Ct. 891, 895 (2015) (holding that the statute obliges courts to replace counsel whose representation is not independent because they are adversely limited by their own interests, and when it is in the interests of justice to do so). As the Supreme Court recognized in *Christeson*, "[c]ounsel cannot reasonably be expected" to make an argument that "threatens their professional reputation and livelihood." *Id.* at 894. The risk is that an adversely limited attorney will not investigate or present an IAC claim because doing so is contrary to her own interests—a risk addressed by

Texas and ABA ethics rules requiring that, absent a client's informed consent, attorneys simply refrain from such representation. See TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06 (1989); MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983).

Mr. Kretzer was adversely limited in attacking incumbent counsel Mr. Volberding's performance for two reasons. First, Mr. Kretzer's ongoing status as co-counsel in Roberson's case prevented him from independently performing supplemental-counsel duties, which include a willingness to assume an adverse posture to incumbent counsel. The district court never actually appointed Mr. Kretzer to be conflict-free supplemental counsel. Rather, Mr. Kretzer was a co-counsel appointee charged with assisting lead counsel Mr. Volberding—before *Martinez* was decided, and thus before the Fifth Circuit had even conceived of supplemental counsel as a solution to *Martinez* conflicts. See Order Substituting Counsel, *Roberson* v. *Stephens*, No. 2:09-cv-00327 (E.D. Tex. Mar. 5, 2012) (No. 26).

The difference between co-counsel and conflict-free supplemental counsel is crucial. Co-counsel jointly undertakes the entire representation with the § 3599(c) lead-counsel appointee. In contrast, conflict-free supplemental counsel must independently explore a single issue—whether incumbent counsel forfeited an IAC claim when serving as state post-conviction counsel and, if so, whether *Martinez* may excuse that forfeiture. See *Speer* v. *Stephens*, 781 F.3d 784, 786 (5th Cir. 2015). Because Mr. Kretzer was actually functioning as co-counsel for Roberson, the efficacy of his representation depended largely on a fruitful working relationship with Mr. Volberding. As explained by ethics expert Lawrence J. Fox, "[T]he co-counsel

relationship is critical to the success of the representation." App.G4. Mr. Kretzer would have damaged that working relationship if he were to have attacked Mr. Volberding's performance as state post-conviction counsel. App.G4 ("[A] lawyer is subject to a conflict of interest created when that lawyer has to raise the ineffectiveness of his co-counsel."). The fact that Mr. Kretzer was appointed as § 3599(d) co-counsel enhanced the conflict because Mr. Kretzer was tasked with assisting § 3599(c) lead counsel Mr. Volberding, not spearheading the litigation himself.

The second adverse limitation the Fifth Circuit treated as irrelevant—it stated that the concern "lack[ed] merit," without elaboration—was the pecuniary and professional interest created by the many joint representations that supplemental and incumbent counsel undertake. App.A4. Roberson called the Fifth Circuit's attention to the fact that, according to its electronic docket, Mr. Kretzer and Mr. Volberding have been co-counsel on four capital habeas appeals in the last thirty months: *Roberson* (at issue here); *Garcia* v. *Stephens*, No. 14-70035 (5th Cir., filed Nov. 10, 2014), *Holiday* v. *Stephens*, No. 13-70022 (5th Cir., filed July 15, 2013), and *Williams* v. *Stephens*, No. 13-70015 (5th Cir., filed Apr. 8, 2013). Mr. Kretzer replaced Mr. Volberding as counsel in yet another capital case, *Lewis* v. *Thaler*, No. 10-70031 (5th Cir., filed Nov. 3, 2010). See Order Granting Mot. To Substitute Counsel, *Lewis* v. *Director*, No. 5:05-cv-00070 (E.D. Tex. Dec. 17, 2012) (No. 62). According to that docket, during the past thirty months, Mr. Volberding has not co-counseled in a capital habeas appeal with any attorney other than Mr. Kretzer.

Mr. Kretzer and Mr. Volberding's joint representations adversely limit Mr. Kretzer's ability to represent Roberson on the *Wiggins* claim. Mr. Kretzer has a financial and professional interest in avoiding adversity with Mr. Volberding. As explained by ethics expert Charles Herring, "Given that ongoing personal and professional relationship, Mr. Kretzer would appear to have a personal interest in avoiding taking a position that attacked Mr. Volberding or that was otherwise substantially adverse to Mr. Volberding." App.F10. Indeed, were Mr. Kretzer to become adverse to Mr. Volberding, it would compromise Mr. Kretzer's position as counsel on numerous cases: Any adversity would almost certainly require the two lawyers to obtain conflict waivers from all other clients that they jointly represent, and it would require withdrawal in the cases in which clients did not waive that conflict. See TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06(c)(2) (1989); see also MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (1983). Mr. Kretzer's "own interest[]" in preserving his relationship with Mr. Volberding conflicted with his duty as supplemental counsel to investigate Mr. Volberding's performance and potentially expose its inadequacies. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06(b)(2) (1989); see also App.F10; MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (1983) (stating that a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer"). Mr. Kretzer's interest "[wa]s at odds with his client's strongest argument" (indeed, his only argument) for receiving federal review of the defaulted *Wiggins* claim. *Christeson*, 135 S. Ct. at 894 (quotation marks omitted); see also *Mendoza*,

783 F.3d at 207 (Owen, J., concurring) (noting that the attorney's "loyalty to her client reasonably appears to be adversely limited because" arguing that she was ineffective as state post-conviction counsel "may affect not only that counsel's professional reputation but her future earnings, as well").

B. This Case Is A Strong Vehicle For Considering The Issue.

This case is a strong vehicle for considering whether § 3599 entitles inmates to qualified and independent counsel to investigate their *Martinez*-eligible claims. The issue represents the precise point of disagreement between the federal courts of appeals, illustrating the effects of the Fifth Circuit's failure to require a § 3599(c) appointment and to inquire into the functional independence of supplemental counsel.

At least five features of the *Wiggins* litigation to-date reflect the absence of a lead counsel that is adversely unrestricted: (1) the record reflects no attempt by Mr. Volberding and Mr. Kretzer to develop the underlying *Wiggins* claim after this Court's decisions in *Martinez* and *Trevino*; (2) the record reflects no attempt by Mr. Volberding and Mr. Kretzer to argue Mr. Volberding's ineffectiveness as an excuse to procedural default; (3) Mr. Volberding and Mr. Kretzer failed to raise specific objections to the Magistrate's findings denying the defaulted IAC claim; (4) Mr. Volberding and Mr. Kretzer thereafter abandoned the *Wiggins* claim in the Fifth Circuit; and (5) Mr. Volberding and Mr. Kretzer took a position adverse to their client in the Fifth Circuit by inaccurately representing that "no claim" existed beyond those raised by Mr. Volberding in state post-conviction proceedings. See Ex-

hibit G, Herring Decl. ¶ 24. Had Roberson's case arisen in the Fourth Circuit, his § 3599 right to counsel would have required a federal court to appoint a different lawyer to evaluate and litigate the *Wiggins* claim.[7]

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Roberson prays that this Court grant a writ of certiorari to resolve the Question Presented.

September 28, 2015

Respectfully Submitted,

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[7] Toward the end of the June 30 Order, the Fifth Circuit observed that the district court "alternatively rejected Claim 38 on the merits." App.A5. The Fifth Circuit was referencing the Magistrate's Report and Recommendations, which contained the sentence: "Alternatively, [the *Wiggins* claim] may be rejected because it lacks merit." App.D88. The implications of the Fifth Circuit observation are unclear. Any favorable disposition in this Court would result in a vacatur of the district court's judgment, and a merits disposition may then be made in an appropriate posture. After *Martinez*, Roberson's counsel were both conflicted from developing the claim. Even though the habeas application expressly noted the need to seek investigative services to develop the allegations, such services were never sought, even after *Martinez* provided a procedural pathway to merits review. Thus, the district court denied the claim on a record compiled by conflicted counsel. One would have to read the district court to be stating that the *Wiggins* claim could *never* succeed before its "merits holding" could present a vehicle problem—and the opinion cannot sustain that interpretation.

NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT LESLIE ROBERSON III,
Petitioner,

v.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

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

CERTIFICATE OF SERVICE

I, Lee B. Kovarsky, hereby certify that true and correct electronic versions of this Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on September 28, 2015, via e-mail to:

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