No. 15-6282

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT LESLIE ROBERSON,
Petitioner,
v.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
Fifth Circuit Court of Appeals

PROOF OF SERVICE

I hereby certify that on the 28th day of October, 2015, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Katherine C. Black, Burke M. Butler, and Lee B. Kovarsky, Seth Kretzer, and James W. Volberding. All parties required to be served have been served. I am a member of the Bar of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Roberson was properly convicted and sentenced to death and his federal habeas proceedings commenced before *Martinez v. Ryan* and *Trevino v. Thaler.* Consequently, Roberson's state habeas counsel, James Volberding, continued to represent him in federal proceedings—but not alone. The federal district court also appointed first John Wright and, later, Seth Kretzer. Neither were involved in Roberson's state-habeas proceedings

Roberson asked the court below to appoint a fourth attorney and remand his case for a *Martinez/Trevino* investigation. But because Kretzer had already investigated the issue and found that it could not save any of Roberson's claims, the Fifth Circuit denied Roberson's request. Roberson now challenges that denial.

The questions, then, are:

1. In federal habeas corpus cases in which the petitioner is represented by one attorney who represented him in state post-conviction proceedings and one attorney who did not, do *Martinez* and *Trevino* require the appointment of an additional attorney?

2. And if not, did the Fifth Circuit abuse its discretion in this case when it denied Roberson's motion to appoint supplemental counsel, which was based on a futile *Martinez/Trevino* argument for a meritless claim?

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas proceeding in which Petitioner Robert Leslie Roberson unsuccessfully challenged his presumptively valid capital-murder conviction and death sentence pursuant to 28 U.S.C. § 2254. Roberson now asks this Court to grant certiorari and to remand his case for further proceedings because, he alleges, the Fifth Circuit abused its discretion when it denied Roberson's motion for supplemental counsel. As discussed below, this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Statement of the Facts

A. Facts of the crime

Petitioner Robert Leslie Roberson, III, lived in Palestine, Texas with his daughter Nikki Curtis, his girlfriend Teddie Cox, and his girlfriend's daughter Rachel Cox. 42 Reporter's Record (RR) 162. Nikki Curtis originally lived with her maternal grandparents, but Roberson obtained custody at the urging of his mother and his girlfriend. 42 RR 162–64. Approximately three months after Roberson gained custody of Nikki, he had to care for her alone for the first time because his girlfriend was in the hospital and Nikki's maternal grandmother was sick. 42 RR 129–34, 168. Roberson picked Nikki up from her grandmother's late in the evening on January 30, 2002. The next morning, Nikki arrived at the Palestine Regional Medical Center emergency room limp,

blue, not breathing, and showing extensive head injuries. 44 RR 64–65, 115–20. When he arrived at the emergency room with Nikki, Roberson told hospital staff that she had fallen off the bed. 41 RR 69. Nikki was flown to a hospital in Dallas, where she succumbed to her injuries.

Doctors and nurses who examined Nikki before she died did not believe that falling from a bed could have caused her injuries. 41 RR 69–70; 42 RR 21, 85, 113. The pediatrician who examined Nikki testified that she had a subdural hematoma and swelling of the brain, which caused it to shift from right to left within her skull. 42 RR 18–19. The forensic pathologist who performed the autopsy on Nikki testified that she died of blunt force head injuries. 43 RR 85.

A grand jury in Anderson County, Texas indicted Roberson on charges of capital murder and injury to a child. 1 Clerk's Record (CR) 2. During the guilt phase of Roberson's trial, the State called Teddie Cox to testify about Roberson's relationship with Nikki and his behavior since her death. Cox testified that she had asked Roberson directly if he killed Nikki:

> Q. Did you ever come right out and ask him, "Robert, did you kill Nikki?"
>
> A. Yes, I did.
>
> Q. When did that take place?
>
> A. During one of my visitations when I went to see him.
>
> Q. Okay. And that was in Anderson County Jail?
>
> A. Yes, sir.
>
> Q. All right. You asked him, "Did you kill Nikki?"

A. Yes, sir.

Q. And how did he respond?

A. He told me that if he did do it, he don't remember, that he snapped, and he don't remember doing it.

Q. So he doesn't remember doing it, but he might have and he might have snapped?

A. Yes, sir.

42 RR 190: 11–25. Teddie Cox also testified that Roberson had a violent temper and had abused Nikki in the past. 42 RR 165–72. Rachel Cox testified that she had seen Roberson shake Nikki and threaten to kill her. 42 RR 69, 71.

The jury found Roberson guilty of capital murder. 5 RR 644.

B. Facts Related to Punishment

The CCA summarized the relevant evidence in its opinion on direct appeal:

> At the punishment phase, the State began by offering [Roberson]'s pen packets. They showed that [Roberson] had been convicted previously of burglary of a habitation, for which he was sentenced to ten years in prison (upon revocation of his probation). They also showed a prior conviction for felony theft, for which [Roberson] received a seven-year sentence, as well as a five-year term for another theft conviction. In total, [Roberson] had been arrested at least seventeen times before murdering Nikki.
>
> The State then called Della Gray, [Roberson]'s ex-wife and the mother of his two older children. Gray testified that [Roberson] was physically abusive towards her both before and after they got married, including incidents where he strangled her with a coat hanger, punched her in the face and broke her nose while she was pregnant, and beat her with a fireplace shovel. She also told of a time when she had gone out to help a friend, leaving [Roberson] and their son, Robert, Jr., at home alone together. When she

returned, Robert, Jr. had a bruised face, and when she asked him what happened, Robert, Jr. told her he had fallen off the bed. She also described an incident in which [Roberson] was alone in a bedroom with their then-two-year-old daughter Victoria for thirty minutes. Victoria was screaming and upset, and when [Roberson] finally let her out of the room she had a "hickey" on her neck. Overall, Gray described herself as scared of [Roberson], such that she never reported any of the suspected abuse to the authorities. She said she currently was not allowed to spend any time with her children. On cross-examination, Gray admitted she had been involved in a lengthy custody battle against [Roberson] and his mother, which she ultimately lost, some eleven years previously. She also admitted to some history of alcohol and drug abuse, and that she had not provided, nor has she been asked to provide, any support for her children in the years since she lost custody of them.

There was testimony from another witness concerning a dispute with a neighbor that escalated into a physical altercation with a teenage boy. The State then rested its punishment case-in-chief.

[Roberson] called two officers from the Anderson County jail to testify that [Roberson] had no history of violence or disciplinary problems while incarcerated there. [Roberson] then called Dr. John Krusz. Dr. Krusz's testimony consisted of that which was offered and excluded at the guilt-innocence phase, namely, a discussion of what he referred to as [Roberson]'s "post-concussional type syndrome." Dr. Krusz said that his evaluation of [Roberson] led him to conclude that, despite his poor ability to deal with stressful situations in the past, [Roberson] would be able to control his behavior in the controlled, structured environment of prison.

On cross-examination, Dr. Krusz acknowledged that the major portion of his work was in the treatment of chronic pain and migraine headaches. He also admitted that [Roberson] had not informed him of his history of abuse towards his ex-wife and children. He also acknowledged that, even if [Roberson] was brain damaged, there are many people in the world who are brain damaged and have not murdered a child. Dr. Krusz also conceded that [Roberson]'s brain disorder might be attributable to [Roberson]'s long-term history of drug abuse, including intravenous drugs.

[Roberson] then called Kelly R. Goodness, Ph.D. Dr. Goodness was a forensic psychologist who had interviewed [Roberson] while he was incarcerated during this trial, as well as other people who knew [Roberson], including his family. Dr. Goodness testified that, in her opinion, [Roberson] had been physically abused as a child by his father, despite denials of abuse by [Roberson] and his family. She also said she believed that [Roberson]'s two older children had been abused, but that she could find no conclusive evidence to say whether the abuse came from [Roberson] or his ex-wife. She said she believed [Roberson] suffered from brain damage-specifically, that his brain was "compromised"—as well as depression, substance dependence, and antisocial-personality disorder. She also testified that [Roberson]'s mother had a very dominant influence on him and that, if not for her influence, he likely would not have sought custody of Nikki. In her opinion, [Roberson] was unlikely to attempt to escape from prison, nor was he likely to pose a future danger while in prison. After Dr. Goodness's testimony, [Roberson] rested his punishment case-in-chief.

In rebuttal, the State called Thomas Allen, Ph.D., a psychologist who interviewed [Roberson] and reviewed his records. Dr. Allen testified that, based on the severity of the crime in this case, [Roberson]'s family history, his history of substance abuse, and other factors, he believed that [Roberson] was a psychopath and that it was probable he would commit future acts of violence, even in prison.

The State then called David Self, M.D., a psychiatrist who interviewed [Roberson] along with Dr. Allen. Dr. Self disputed Dr. Krusz's diagnosis of post-concussion syndrome. He agreed that [Roberson] has poor impulse control, but that led him to conclude that [Roberson] would be at risk to engage in future acts of criminal violence because he would be targeted by other inmates in prison as someone who had hurt a child, and he likely would have to defend himself from physical attacks. On cross-examination, Dr. Allen acknowledged that many people in [Roberson]'s condition do not act out violently in prison, and that [Roberson] himself had no history of violent incidents during his prior years of incarceration.

Roberson v. State, No. AP–74,671, 2002 WL 34217382, at *9–10 (Tex. Crim. App. June 20, 2007).

On this evidence, the jury sentenced Roberson to death. The Texas Court of Criminal Appeals (CCA) denied relief on direct appeal. *Id.* This Court denied certiorari on April 14, 2008. *Roberson v. Texas*, 552 U.S. 1314 (2008). Meanwhile, Roberson began seeking habeas corpus relief in state court.

II. Roberson's Representation in State and Federal Post-Conviction Proceedings

Roberson's post-conviction case is not unique. He is one of many capital offenders who have been represented by the same counsel in both state and federal habeas corpus proceedings. This practice took advantage of the inherent efficiencies of counsel being able to use much of the same legal research and factual knowledge in subsequent proceedings. In fact, before 2010, it was standard practice in Texas for habeas petitioners' attorneys to serve both roles.[1] While recent case law casts doubt on the wisdom of this

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[1] The practice began to change when the Texas Legislature established the Office of Capital Writs (OCW) in September of 2010. OFFICE OF CAPITAL WRITS, http://www.ocw.texas.gov (last visited Oct. 13, 2015). The OCW provides representation for indigent death-sentenced prisoners in state post-conviction proceedings but is statutorily precluded from practicing in federal court. Tex. Gov't Code Ann. §78.054 (West 2014). Therefore, prisoners who are represented by the OCW during state proceedings are appointed new counsel for federal proceedings.

practice going forward, a large number of capital offenders were represented in this fashion.[2]

James Volberding represented Roberson in state habeas proceedings. At the conclusion of those proceedings, in 2009, the federal district court appointed Volberding to serve as lead counsel in Roberson's federal habeas proceedings. *See* Docket Entry (DE) 5. At that time, the federal district court also appointed John Wright, who had not represented Roberson in state habeas proceedings, to serve as co-counsel. *Id.* As death-sentenced prisoners so often do, Roberson asked the court for new counsel. DE 6 & 7. He also asked for a new judge. *Id.* But the district court denied Roberson's requests, as he had not provided any legal reason for either. DE 10. Furthermore, the district court noted that Wright had been appointed as co-counsel and thus provided a fresh outlook on the case. *Id.*

A year and a half before this Court issued its opinion in *Martinez v. Ryan*,[3] Volberding and Wright filed a petition, asserting forty-five claims on

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2 *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), has reinforced the post-OCW representation structure, making the change not only the norm, but also a necessity. Prospectively, capital murderers in Texas will be represented by different counsel in state and federal habeas proceedings. Thus, the issue before the Court is of diminishing relevance. Granting certiorari in this case would be to write new law to echo the change that is already underway.

3 132 S. Ct. 1309 (2012).

Roberson's behalf. DE 11. Included amongst those claims was a *Wiggins*[4] claim that had not been exhausted in state habeas proceedings. *See id.* at 279–281. The new claim asserted that trial counsel should have completed a more thorough investigation of Roberson's family history of mental illness. *See id.* Although trial counsel had provided three witnesses who spoke to Roberson's mental illness—one of whom had interviewed family members[5]–Volberding and Wright hired a mitigation specialist to determine whether the investigation satisfied prevailing professional norms. *See Roberson v. Director*, No. 2:09-cv-327, 2014 WL 5343198, at *54 (E.D. Tex. 2014). But Volberding and Wright apparently faced the same limitations that trial counsel did: Roberson's family members were not forthcoming. *Compare* 48 RR 27 (defense's forensic psychologist reporting that it was difficult . . . to really assess much information" from Roberson's family), *with* DE 11, at 280; *Roberson v. Director*, 2014 WL 5343198, at *54 (federal habeas investigator reporting that Roberson's relatives were reluctant to divulge information and expressed a desire not to testify). In any event, the federal habeas investigation duplicated that of trial counsel and reached the same conclusion: Roberson

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4 *Wiggins v. Smith*, 539 U.S. 510 (2003).

5 *See* 47 RR 81–105, 131; 48 RR 9, 11–12, 21 (defense forensic psychologist reporting that she had contacted "a number of . . . relatives, family members, . . . employers, members of the community . . . who might have information about the defendant").

might be genetically predisposed to mental illness. *Compare* 48 RR 30–32 (expert at trial reporting that Roberson's mental infirmities could be genetic), *with Roberson v. Director*, 2014 WL 5343198, at *54 (federal habeas mitigation specialist expressing opinion that Roberson probably inherited a predisposition toward poor mental health). Despite the weak foundation for the *Wiggins* claim, Volberding and Wright decided to include the claim in the federal petition, perhaps hoping they would come across new evidence that might undermine trial counsel's investigation.

Before the Director filed his response, Wright had taken employment with an organization that prohibited his continued service in Roberson's case. Therefore, on, March 5, 2012, Wright withdrew, and Kretzer was appointed in his place. DE 26. Fifteen days later, this Court issued its opinion in *Martinez*. Although it was unclear at that time whether *Martinez* would apply to Texas, Kretzer (who had taken the lead role in this case)[6] argued in his reply brief that it did. DE 39, at 16–19. He cited cutting-edge cases and made the argument that this Court ultimately adopted in *Trevino*. *Id.* But ultimately, the district court found that Roberson was not entitled to federal habeas relief or a certificate of appealability (COA) on any of his 45 claims.

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6 *See* Letter from Kretzer, *Roberson v. Stephens*, No. 14-70033 (noting that Kretzer authored the reply brief and the petition for COA).

On appeal, Kretzer made what appears to be a strategic decision to hone his argument. In so doing, he dropped several of Roberson's less-compelling claims, including the *Wiggins* claim. *See* Pet. App. Cert. Appealability, *Roberson v. Stephens*, No. 14-70033, 2015 WL 3396822 (5th Cir. 2015). While Kretzer's approach proved successful in obtaining a COA, Roberson continued to file what appear to be ghost-written letters to the district court and Fifth Circuit asking for new counsel. With his futile *Wiggins* claim and unsubstantiated allegations against the attorney who secured a COA on his behalf, Roberson now asks for the opportunity to start over in district court.

REASONS FOR DENYING THE WRIT

I. Standard of Review

A. AEDPA's prohibition against successive petitions

Roberson challenges the Fifth Circuit's denial of his motion to appoint supplemental counsel. Pet. at 18. While the standard of review for this challenge is whether the lower court abused its discretion, *see Christeson v. Roper*, 135 S. Ct. 891, 894 (2015), the adjudication thereof is constrained by AEDPA, which governs all federal habeas corpus review. Generally speaking, AEDPA limits a petitioner's federal habeas claims to those raised in his first federal petition. 28 U.S.C. § 2244(b)(2). And even then, it limits a petitioner to one round of litigation for those claims. *Id.* at § 2244(b)(1). Thus, barring an

exception, petitioners are prohibited from raising in a second or successive petition claims omitted from or included in their first petition. *Id.*

If remanded, Roberson will almost certainly do what AEDPA prohibits. Asserting what he calls an "adverse limitation," Roberson attempts to skirt AEDPA's bar against successive petitions so that he can relitigate his meritless *Wiggins* claim. And while remand may be appropriate in cases involving a true conflict of interest that deprives a petitioner of federal habeas review, that conflict should not be presumed, as such a presumption would greatly undermine AEDPA and the finality it was written to protect.

B. Section 3599 and the interest-of-justice standard

Section 3599 provides a means for indigent, death-sentenced habeas petitioners to secure legal representation in capital cases. 18 U.S.C. § 3599(a) (2015). They are entitled to qualified legal counsel in what may be their final round of litigation. *Id.* And where there is good cause, courts are authorized to appoint additional counsel. *Id.* at (d). The statute does not, however, entitle these petitioners to a team of lawyers of their choosing. *Christeson*, 135 S. Ct. 893. Nor does it provide them with the autonomy to hire and fire counsel at whim. *See id.* While some cases may involve conflicts of interest that render new counsel appropriate, it is the federal court, not the petitioner, who is to make that determination. *See Martel v. Clair*, 132 S. Ct. 1276, 1287 (2012); *Christeson*, 135 S. Ct. 891.

In assessing a petitioner's allegations of conflict, courts are instructed to apply the interest-of-justice standard. *Martel*, 132 S. Ct. at 1287. This standard calls for a "peculiarly context-specific inquiry" that varies from circuit to circuit but generally considers the following: "the timeliness of the motion; the adequacy of the [lower] court's inquiry into the defendant's complaint; and the asserted cause for the complaint, including the extent of the conflict or breakdown in communication between the lawyer and the client (and the client's responsibility, if any, for that conflict)." *Id.* at 1277. Because a lower court's determination "on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion." *Id.* at 1287.

C. *Martinez* and *Trevino* did not alter the standard of review for determining whether a conflict exists.

In *Martinez* and *Trevino*, this Court carved out a narrow exception to the procedural default doctrine, allowing federal courts to review procedurally defaulted ineffective-assistance-of-trial-counsel claims where the petitioner was able to demonstrate that state-habeas counsel was also ineffective for failing to raise the underlying claim in state habeas proceedings. Thus, to revive certain procedurally defaulted claims, federal habeas counsel would need to prove that state habeas counsel (along with trial counsel) were ineffective. Since many of Texas's capitally-sentenced petitioners used to be

represented by the same counsel in state and federal proceedings, *Martinez* and *Trevino* have created the *potential* for a conflict of interest in those cases.

Terming this potential for conflict "the *Martinez* conflict," Roberson skips the fact-specific inquiry required by the interest-of-justice standard. He takes *Martinez* to confirm the presence of a conflict of interest under every situation in which one might possibly arise. And of course, he goes on to propose a generally-applicable solution: a new attorney and a do-over. But this Court's post-*Martinez* and post-*Trevino* precedent refutes the idea that conflicts might be presumed as such. Indeed, in *Christeson*, this Court noted that a legal framework requiring counsel to assert his own misconduct was itself insufficient to establish a conflict of interest. 135 S. Ct. 895 (recognizing that "not every case in which a counseled habeas petitioner . . . misse[s] AEDPA's statute of limitations . . . necessarily involves a conflict of interest"). The conflict must be factually substantiated. And that must be done through the interest-of-justice inquiry.

II. The Fifth Circuit Continues to Adhere to this Court's Precedent in Its Application of the Interest-of-Justice Standard.

Consistent with § 3599 and this Court's precedent, the Fifth Circuit has recognized that federal habeas petitioners are "entitled to conflict-free counsel . . . [in federal] habeas proceedings." *E.g.*, *Mendoza v. Stephens*, 783 F.3d 203, 210 (5th Cir. 2015). At issue then, is not whether the Fifth Circuit recognizes

that a petitioner has a right to conflict-free counsel, but instead whether the Fifth Circuit's framework for determining whether a conflict exists is within the bounds of its discretion. Case law reveals that it is.

As instructed by this Court, the Fifth Circuit continues to conduct a fact-specific inquiry to assess a petitioner's allegations of a conflict of interest. *E.g., Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015); *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015); *Tabler v. Stephens*, 591 Fed. App'x 281 (5th Cir. 2015); *Beatty v. Stephens*, No. 13-70026 (5th Cir. 2014) (order denying motion to recall mandate); *Roberson v. Stephens*, No. 14-70033 (order denying motion for co-counsel). In cases involving substantiated and uncured allegations of conflict, the Fifth Circuit remands the case to the district court and appoints supplemental counsel to investigate the potential for a *Martinez/Trevino* excuse. *E.g.*, *Speer*, 781 F.3d 784; *Mendoza*, 783 F.3d 203; *Tabler*, 591 Fed. App'x 281. But in other cases, such as this one, where the alleged "conflict" has been cured by unconflicted counsel's involvement, the Fifth Circuit has declined to allow the petitioner to restart his federal habeas proceedings. *E.g.*, *Beatty v. Stephens*, No. 13-70026 (order denying motion to recall mandate). This fact-specific inquiry is precisely what the statute authorizes, and is a direct application of this Court's precedent. It is also what the other circuits and their district courts are doing.

III. There Is No Circuit Split: The Fifth Circuit's Application of the Fact-Specific Interest-of-Justice Standard is Consistent with Fourth-Circuit Jurisprudence.

As noted above, § 3599(d) authorizes federal courts to appoint supplemental counsel where there is good cause, such a conflict of interest. *See Christeson*, 135 S. Ct. at 895. And, like the Fifth Circuit, other courts to address this issue have done just that. The circuits and their courts are applying the fact-specific interest-of-justice standard and implementing appropriate remedies, commensurate with the underlying conflict or absence thereof. Because courts' analyses and solutions are as unique as the cases before them, Roberson finds superficial differences. And with those, he attempts—and fails—to establish a circuit split.

At the crux of Roberson's argument—that circuits are applying a peculiarly fact-specific inquiry in peculiarly fact-specific ways—is his assertion that the Fifth Circuit has implemented a rule that qualifies to serve as co/supplemental counsel *any* non-state-habeas lawyer, irrespective of experience or independence. Pet. at 20–28. Unsupported by case law or fact, Roberson's manufactured "rule" is based on nothing but his dissatisfaction with the outcome of his case—and, perhaps, some misguided creativity. Thus far, the Fifth Circuit has appointed no one but highly qualified and experienced habeas attorneys to serve in this role. Nevertheless, Roberson goes on to

compare his inaccurate depiction of Fifth Circuit case law to a footnote in a Fourth Circuit case. Even then, his argument is unconvincing.

The Fourth Circuit's footnoted "rule" that supplemental counsel be qualified under § 3599(c) was a reaction to a case involving subordinate co-counsel. *Juniper v. Davis*, 737 F.3d 288, 290, n.2 (4th Cir. 2014); *see also Parker v. Joyner*, No. 5:03-HC-966-H, 2014 WL 6630108 (E.D. N. Car. 2014) (looking to Fourth Circuit's qualification rule because co-counsel was subordinate to conflicted counsel). Notably, the Fifth Circuit has never seen allegations of subordinate or ill-qualified co-counsel. Roberson certainly did not raise this issue, as his arguments in the lower court were all related to Kretzer's relationship to Volberding, not Kretzer's credentials. *See* Motion to Appoint Conflict-Free Supplemental Counsel, *Roberson v. Stephens*, No. 14-70033. Since the Fifth Circuit has yet to address this issue, it has had no occasion to follow or depart from the Fourth Circuit's approach. Furthermore, even were the factual circumstances between the circuits identical, different analytical frameworks would not necessarily mean a circuit split, as each court would be acting within its statutory discretion. *See* § 3599 (d) (affording federal courts discretion to appoint additional counsel for good cause, so long as supplemental counsel's "knowledge or experience would otherwise enable him or her to properly represent the defendant").

While no two circuits have reviewed cases involving challenges to co-counsel's qualifications, the Fourth and Fifth Circuits *have* had the opportunity to review cases involving allegations of *Martinez* conflicts of interest. Perhaps ironically, the Fourth Circuit provides a factually analogous case, in which it addressed Roberson's very argument, but declined to appoint supplemental counsel. In *Fowler v. Joyner*, 753 F.3d 446 (4th Cir. 2014), the petitioner had two state habeas attorneys who continued to represent him in federal habeas proceedings. But, then, just before this Court issued its opinion in *Martinez*, a new federal habeas attorney replaced one of his state habeas attorneys, leaving him with one state-habeas attorney and one non-state-habeas attorney. *Id.* at 464. The Fourth Circuit found that the new federal attorney did not even have the potential for a conflict of interest:

> [W]here . . . counsel who represents the petitioner in federal habeas proceedings "undertook representation after the initial-review collateral proceeding concluded, that counsel cannot be found ineffective before or after *Martinez*. Ethically, this means there is no potential conflict of interest in light of *Martinez* because there is no chance that the attorney would have to argue his or her own ineffectiveness or forego a potentially valid ineffective assistance of counsel claim."[7]

Id. at 465. *Fowler* is identical to the instant case. Krezter began representing Roberson *after* state postconviction proceedings, and thus has "no potential conflict of interest in light of *Martinez*." *Id.* This means that the Fourth Circuit

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[7] This Court denied certiorari in *Fowler*, 135 S. Ct. 1530 (Mar. 9, 2015).

would have reached the same outcome in this case: Kretzer does not face a *Martinez* conflict. Roberson's remaining allegations speak to a different sort of conflict—uncharted by any other circuit and still, unsubstantiated.

IV. The Fifth Circuit Did Not Abuse Its Discretion When It Denied Roberson's Motion for Supplemental Counsel.

Roberson's arguments in the lower court centered around the allegation that Kretzer faced some sort of conflict of interest and was thereby prevented from conducting a *Martinez/Trevino* investigation. Taking a different, more aggressive approach this time, Roberson takes issue with Kretzer's professional qualifications. Despite Roberson's attempt to conflate these arguments, they are properly divided into two categories: those regarding Kretzer's qualifications and those regarding Kretzer's independence. The Director will address each, first speaking to Roberson's attack on Kretzer's qualifications.

A. Since Roberson did not complain of Kretzer's qualifications in the Fifth Circuit, that court did not abuse its discretion in not reaching the issue. Moreover, Kretzer was and continues to be highly qualified to investigate and assert *Martinez/Trevino* arguments.

Roberson argues that the Fifth Circuit should have ensured that Kretzer, who was appointed as co-counsel, was qualified to serve as lead counsel.

Notably, Roberson never asked that court to do so.[8] Furthermore, the statute and common sense dictate otherwise.

Section 3599(c) requires lead counsel in capital federal habeas cases to (1) have been admitted to practice in the court of appeals for at least five years and (2) to possess at least three years of experience handling felony appeals in that court. And where there is good cause, § 3599(d) authorizes a court to appoint additional counsel "whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant." Because *Martinez* created a new procedural argument for petitioners, Roberson suggests that the statute should not apply as it is written, but should instead require lead-counsel qualification for all who might handle any piece of the case. But *Martinez* cannot be read to implicitly abrogate an unambiguous law of Congress that it fails to consider—or even mention.

Moreover, at the time of the appointment, Kretzer was (as he continues to be) an exceedingly qualified capital federal-habeas attorney. Though he had been admitted to the Fifth Circuit for fewer than five years when he was appointed, it should be noted that he was in fact clerking for the Fifth Circuit

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[8] Roberson's argument in the lower court that Kretzer was not appointed as supplemental counsel under *Mendoza* and *Speer* did not touch upon (or so much as imply) that Kretzer was somehow unqualified to investigate the *Martinez/Trevino* excuse. Not once did Roberson suggest that the court qualify Krezter under § 3599's lead counsel provision. Nor did he allege anything that might have prompted the lower court to consider Kretzer's credentials.

before then. *See* DE 25. When he was appointed as co-counsel, Kretzer had been an attorney for nearly eight years, during which time he completed two federal clerkships and worked for two Am Law 100 firms. *See id.* He had served as lead counsel on over 50 cases in the Fifth Circuit. He had led capital case defenses. He had secured unanimous reversals, including the reversal of 19 life sentences. *Id.* The contention that Kretzer was somehow unqualified to read two of this Court's cases and investigate their potential in this case is outright frivolous.[9]

Kretzer's qualification for the task is further confirmed through what he did in this case. *Martinez* issued fifteen days after Kretzer's appointment and, while it was unclear whether *Martinez* would apply in Texas, Kretzer argued in his reply brief that it did. DE 39 (filed Jan. 7, 2013). Less than six months later, this Court issued its opinion in *Trevino*, confirming the validity of Kretzer's legal argument. *Trevino*, 133 S. Ct. 1911 (issued May 28, 2013). But later, when it came time to plug this case's facts into the *Martinez* framework, it became apparent that the exception would be of little use to Roberson. The only claim *Martinez* had the potential to save was a farfetched *Wiggins* claim. Rather than taking the kitchen-sink approach, Kretzer honed Roberson's

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[9] Notably, known to be experienced and qualified on this issue, Kretzer has recently been appointed as supplemental counsel in *Gardner v. Director*, No. 1:10-cv-610 (E.D. Tex.).

application for COA to three colorable claims. He dropped the futile *Wiggins* claim, among others, and he succeeded in obtaining a COA on one of his other claims. *Roberson v. Stephens*, 2015 WL 3396822. Thus, Kretzer further demonstrated his qualification as federal habeas counsel, and the instant challenge plainly rings false.

B. The Fifth Circuit did not abuse its discretion when it determined that Krezter was not burdened by a conflict of interest in this case.

Roberson falsely asserts that the Fifth Circuit refused to consider Kretzer's independence. Pet. at 35. What really happened was the Fifth Circuit considered Roberson's allegations of conflict, but found them unsubstantiated. *See Roberson v. Stephens*, No. 14-70033, at *3 (order denying motion for co-counsel).

1. Kretzer's pre-*Martinez* appointment as co-counsel did not affect his ability to investigate and assert a *Martinez*-based argument.

Roberson argues that Kretzer faced some sort of adverse limitation because he was appointed co-counsel fifteen days prior to *Martinez*. He seems to suggest that the timing of the appointment and the designation as co-counsel (as opposed to supplementary counsel) prevented Kretzer from being able to independently investigate the *Martinez/Trevino* issue. Citing *Christeson*, he asserts that "counsel cannot reasonably be expected" to make an argument that "threatens their professional livelihood." Pet. at 35. But, as the Fourth Circuit noted in *Fowler*, any attorney appointed after state habeas proceedings

would not be required to argue their own ineffectiveness—whether appointed before or after *Martinez*. *See Fowler*, 753 F.3d at 465. Therefore, the timing of Kretzer's appointment provides no basis for conflict.

Roberson's co-counsel argument fares no better. Addressing this issue, the Fifth Circuit found Kretzer's formal designation to be less important than the role he actually served: Specifically, it found irrelevant "that Kretzer was not appointed solely as 'supplemental counsel' to investigate *Martinez-Trevino* issues . . . so long as he served that purpose." *Roberson v. Stephens*, No. 14-70033, at *3 (order denying motion for co-counsel). From Kretzer's representations to the court to his raising of a *Martinez* argument in his briefing, it is clear that he did not neglect the issue. *See* Letter from Kretzer, *Roberson v. Stephens*, 2015 WL 4720270 (stating that he was cognizant of potential *Martinez/Trevino* issues); DE 39, at 15–19 (arguing in reply brief that *Martinez* applied in Texas and requesting a hearing on the issue).

In the end, the facts in this case simply could not support a *Martinez* excuse, or the underlying *Wiggins* claim, for that matter. And contrary to Roberson's assertions, both of these things were very apparent from the record: Trial counsel hired three experts to investigate and testify to Roberson's mental health. Tests were conducted, family members were contacted, and evidence of mental illness proffered. *See Roberson v. Director*, 2014 WL 5343198, at *54–56. Because trial counsel's investigation was demonstrably

more than adequate, state habeas counsel could not have been ineffective for not conducting an additional investigation only to duplicate the theories the jury had already heard.

But Roberson attempts to get around the record's evidence with generic quotations and what appears to be a calculated decision to avoid any discussion of the merits of his underlying claim. Apparently, he believes federal habeas counsel has an obligation to raise *Martinez* arguments for *every* procedurally-defaulted ineffectiveness claim. But this position is untenable. A successful *Martinez* challenge requires a petitioner to demonstrate a substantial ineffective-assistance-of-trial-counsel claim along with proof that habeas counsel was also ineffective. *See Martinez*, 132 S. Ct. at 1319. On both ends, this standard is a difficult one to meet. *See Strickland v. Washington*, 466 U.S. 668, 690–94 (1984). Federal habeas counsel would be foolish to spend time and money conducting extra-record investigations in pursuit of an argument that the record conclusively refutes, as was the case here.

In addition to reviewing the merits of Roberson's allegations of conflict, the Fifth Circuit went on to address the rationale behind Roberson's co-counsel argument: "Under Roberson's reasoning, any time the district court appointed two lawyers as co-counsel, one of whom was an attorney in state proceedings, a third lawyer would be ethically required." *Roberson v. Stephens*, No. 14-

70033 (order denying motion for co-counsel). The court explained the consequences of such reasoning:

> If a district court retained the state habeas attorney and appointed a second attorney who, in addition to investigating *Martinez-Trevino* claims, also provided full legal representation to the indigent petitioner, the CJA would not be satisfied. If, however, the district court retained the state habeas attorney and appointed only a limited, "supplemental" attorney whose sole and limited charge was to address *Martinez-Trevino* issues, the CJA would be satisfied. We decline to subscribe to such reasoning.

Id. In short, Roberson asks this Court to presume a conflict, even where the evidence conclusively rebuts it. To do so would require otherwise needless remand and relitigation of so many cases. This Court has declined to remand similarly situated cases. And if the Fourth Circuit did not abuse its discretion in *Fowler*, the Fifth Circuit most certainly has not done so here.

2. Kretzer's co-counseling other cases with Volberding did not affect his ability to investigate the *Martinez-Trevino* argument in this case.

Roberson's attempt to conjure out of thin air a conflict of interest due to Kretzer and Volberding's professional history betrays a lack of understanding of the world in which experienced attorneys operate. It is neither uncommon nor improper for a lawyer to work with another lawyer on one case and against the same lawyer in the next. The fact that such may be less common in the habeas world does not change what is ethical and proper for lawyers in general. As the Fifth Circuit put it, this "argument lacks merit." *Roberson v. Stephens*, No. 14-70033 (order denying motion for co-counsel).

CONCLUSION

For the foregoing reasons, the Director respectfully requests that this Court deny Roberson's petition for writ of certiorari.

Respectfully submitted,

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