CAPITAL CASE

No. 17-5592

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD MIDDLEBROOKS,

Petitioner

vs.

TONY MAYS, Acting Warden,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Martinez applies to ineffective assistance of counsel claims that were never "properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." *Martinez v. Ryan*, 566 U.S. 1, 5 (2012). Here, the post-conviction trial court record speaks for itself. During the initial review collateral proceeding, post-conviction counsel never "properly presented" any of the varied ineffectiveness claims contained Middlebrooks' Amended Federal Habeas Corpus Petition ¶¶9a1(a-c), 9a2(a-c), 9a3(a-d), 9a4, 9a5, 9b4a, 9b4b, 9b4c, 9g, 9j, 9cc, 9s, 9t, 9x, 9y, 9z, and supported by the significant, substantial evidence presented for the first time in these federal habeas corpus proceedings. See Petition, pp. 5-11. Thus, *Martinez* applies.

Indeed, for example, nowhere during the initial review collateral proceeding did post-conviction counsel mention – let alone present proof concerning – ineffectiveness issues now presented in federal court, such as trial counsel's failure to investigate and present proof of: Middlebrooks' Axis-I major mental disorder of post-traumatic stress disorder, PTSD (as alleged in ¶9a of his federal habeas petition), his low IQ (as alleged in ¶9a1), slowness in processing information, distractability, and impulsivity (as alleged in ¶9a2), deficits in executive functioning (as alleged in ¶9a2(d)), psychosis and hallucinations (as alleged in ¶9a5), and maternal incest (as alleged in ¶9b2). The extensive proof presented in federal habeas corpus proceedings in support of these varied allegations – from Drs. Beaver, Woods, Kessler, Brown, and Lisak (*See* Petition, pp. 5-8) – also appears nowhere in the state court record. Such proof was never investigated or presented by post-conviction counsel. And nowhere in the initial review collateral proceeding did post-conviction counsel plead and present proof that trial counsel was ineffective for failing to strike clearly biased

jurors (as alleged in ¶¶9x, 9y, 9z), for failing to object to a jury instruction that contravenes *Lockett v. Ohio*, 438 U.S. 586 (1978)(as alleged in ¶9t), and for failing to object to the victim's mother sitting with the prosecutor throughout trial (as alleged in ¶9s). The post-conviction trial court record speaks for itself: *Martinez* applies.

As Donald Middlebrooks has emphasized, even the post-conviction trial court judge and post-conviction counsel agreed that counsel only presented and argued two specific ineffectiveness claims during the initial review collateral proceeding: (1) an ineffectiveness challenge to trial counsel's failure to present evidence of Roger Brewington's dominance of Middlebrooks; and (2) an ineffectiveness challenge to trial counsel's failure to prepare expert witness Smalldon. Judge: "Is that really what this whole hearing is about?" Post-Conviction Counsel: "That's what it boils down to, Judge." *See* Pet. 10. This further establishes that *Martinez* applies to Middlebrooks' never-before-presented and never-before-decided ineffectiveness claims raised in these proceedings.

In a vain effort to claim that *Martinez* does not apply to Middlebrooks' claims that were never properly presented in the initial review collateral proceeding, Respondent relies on the fact that post-conviction counsel *also* failed to properly present a number of ineffectiveness claims on post-conviction appeal – many of which have nothing to do with the new claims presented for the first time in these federal habeas proceedings. Respondent relies on an inadequate, slapped-together "addendum" that post-conviction counsel attached to his appellate brief (*See* BIO n.1), to claim that post-conviction counsel somehow only failed to properly raise Middlebrooks' claim on appeal.

But the fact that post-conviction *also* erred on appeal (by failing to brief issues never even properly raised below) does not mean that post-conviction counsel properly raised in the initial review court the ineffectiveness claims now before this Court. Post-conviction

counsel's inadequate briefing on appeal of ineffectiveness claims that are not at issue in these federal proceedings and/or were not properly presented in the initial review proceeding in the first place cannot (and does not) place Middlebrooks' case outside the reach of *Martinez*. The fact that post-conviction counsel failed miserably both in the trial court and the appellate court means that *Martinez* applies, because post-conviction counsel failed first in the post-conviction trial court – which is all that is required for application of *Martinez* – and there is no dispute on that point.[1]

Even for issues that were arguably listed in the addendum, post-conviction counsel's handling of such issues proves Justice Breyer's and Justice Sotomayor's insight from *Gallow v. Cooper*, 570 U.S. ___ (2013): How can one possibly say that post-conviction counsel "properly presented" to the post-conviction trial court any issue contained in that bare-bones addendum when post-conviction counsel failed to present any proof to the trial court on any of those issues? That's the point of *Gallow*. Under such circumstances, *Martinez* does apply and has to apply – lest petitioners like Donald Middlebrooks suffer the injustice that *Martinez* was designed to prevent: the denial of review in any court of substantial ineffectiveness claims.[2]

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[1] In reality, the fact that post-conviction counsel didn't properly raise issues for the first time on appeal (without having presented any proof in the initial review collateral proceeding) merely confirms that, under *Martinez*, post-conviction counsel was ineffective in the initial review proceeding in the first place.

[2] For example, in the appellate brief addendum, post-conviction counsel mentioned that trial counsel failed to present testimony from a neuropsychologist. But post-conviction counsel had not in the initial review proceeding properly presented any proof whatsoever from a neuropsychologist, as Middlebrooks has done for the first time here with Dr. Beaver. Similarly, post-conviction counsel mentioned that trial counsel could have obtained other experts to show Middlebrooks' "organic problems." Yet again, however, post-conviction counsel failed to properly present any such expert to the post-conviction trial court, again leaving Middlebrooks with no claim whatsoever in state court. The inadequate addendum

(continued...)

At bottom, Respondent's position boils down to the contention that, under *Martinez*, after never having had his current ineffectiveness claims and evidence heard in state court, Donald Middlebrooks should also be denied federal review of trial counsel's failure (for example) to present compelling mitigating evidence of serious brain dysfunction, PTSD, low IQ, hallucinations, psychosis, incest, and failure to make viable constitutional objections to the trial proceedings, *because* on post-conviction appeal, counsel attached to his brief a list (nothing more) of certain matters that post-conviction counsel never even properly raised in the post-conviction trial court. If that is the law, as Respondent urges, then (to quote Justice Sotomayor) this Court "create[d] a meaningless right in *Martinez/Trevino*." Tr. of Oral Arg. 70, in *Ayestas v. Davis*, O.T. 2017, No. 16-6795. The clear unfairness implicit in Respondent's argument proves its manifest error.

Martinez applies here with full force, and because the Sixth Circuit has failed to apply *Martinez* as this Court required in its remand order, this Court should grant certiorari again to ensure the proper application of *Martinez* when it most certainly applies.

In fact, when this Court earlier granted Donald Middlebrooks' petition for writ of certiorari, vacated, and remanded for application of *Martinez* (*See Middlebrooks v. Colson*, 566 U.S. 902 (2012)(U.S. No. 11-5067)), this Court issued the same GVR order in a nearly identical Tennessee case, *Smith v. Colson*, 566 U.S. 901 (2012)(U.S. No. 10-8629). On remand in *Smith*, the Sixth Circuit denied relief claiming that *Martinez* didn't apply to Smith's claims. *Smith v. Colson*, No. 05-6653 (6th Cir. Apr. 11, 2012)(Order). This Court, however, saw the error in that conclusion and again granted certiorari and vacated that

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[2](...continued)
does not in any way alter the fact that not one of the ineffectiveness claims contained in Amended Petition ¶¶9a1, 9a2, 9a3, 9a4, 9a5, 9b4a, 9b4b, 9b4c, 9g, 9j, 9cc, 9s, 9t, 9x, 9y, 9z was ever properly presented during the initial collateral review proceeding.

judgment, to ensure proper application of the rule set forth in *Martinez* and *Trevino v. Thaler*, 569 U.S. __ (2013). *See Smith v. Colson*, 569 U.S. ____ (2013)(U.S. No. 12-390) (second GVR order).

As this Court did in *Smith*, this Court should grant certiorari again to ensure that Donald Middlebrooks receives the proper application of *Martinez* that this Court mandated with its original GVR order, but which the lower courts (as in *Smith*) have failed to provide.

II. There Is Indeed A Conflict In The Circuits And Donald Middlebrooks Would Receive Review Of His Ineffectiveness Claims In Other Circuits

Respondent also vainly claims that there is not a conflict in the circuits on the question when an ineffectiveness claim is subject to *Martinez* because it is different from an ineffectiveness claim previously presented in state court and/or based upon evidence never presented to the state courts. Respondent claims that the circuits are all applying the same standard, just to different facts. Review of those circuit decisions proves otherwise, as the circuits employ divergent standards to cases like Donald Middlebrooks', thereby applying *Martinez* in divergent ways.

The Eighth Circuit applies *Martinez* to ineffectiveness claims presented in federal habeas and based upon new evidence so long as the claim presented in federal habeas is not "materially indistinguishable" from an ineffectiveness claim properly presented in the initial review collateral proceeding. *Dansby v. Hobbs*, 766 F.3d 809 (8th Cir. 2014). The Ninth Circuit, however, only applies *Martinez* if new evidence "fundamentally alters" an ineffectiveness claim decided by the initial review court, which suggests a higher and different standard. *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014)(en banc). The Fifth Circuit allows consideration of a new ineffectiveness claim under *Martinez* just so long as the ineffectiveness claim is "substantial" and the supporting evidence was not presented in

state court by ineffective counsel. *Newbury v. Stephens*, 756 F.3d 850, 871 (5th Cir. 2014).

If Donald Middlebrooks' case were heard in any of these other circuits, he would receive application of *Martinez* and an evidentiary hearing under *Martinez*. Consequently, this Court should grant certiorari, especially where the Eleventh Circuit (like the Sixth Circuit) refuses to consider in federal court any new ineffectiveness claim or evidence supporting an ineffectiveness claim, if any sort of sentencing-ineffectiveness claim had been presented in state court. *See Hamm v. Allen*, 620 Fed.Appx. 752 (11th Cir. 2015).

Contrary to Respondent's contention, therefore, the circuits are indeed applying conflicting standards for determining whether an ineffectiveness claim is subject to review under *Martinez*. Petitioners in the Fifth, Eighth, and Ninth Circuits receive application of *Martinez* under the circumstances presented here, while Middlebrooks has been denied a proper application of *Martinez*, like petitioners in the Eleventh Circuit. Again, this means that should this state of affairs continue, this Court did "create a meaningless right in *Martinez/Trevino*" for Donald Middlebrooks as he strives to have some court actually review his claims. Tr. of Oral Arg. 70, in *Ayestas v. Davis*, O.T. 2017, No. 16-6795.

This Court should therefore grant certiorari to give *Martinez* meaning, meaning that has been provided by these other circuits and presaged by Justice Breyer's opinion in *Gallow*, especially where such cases from the other circuits now provide the predicate for certiorari that was missing in *Gallow*. See Petition, p. 26 *et seq*.

III. Under The Eighth Amendment, There Is No Distinction Between A Prosecutor Pointing To A Victim And Telling The Jury To Vote For Death Because She Wants Death, And A Prosecutor Putting That Same Victim On The Witness Stand And Then Arguing For Death; This Court Should GVR In Light Of *Bosse v. Oklahoma*, 580 U.S. ___ (2016)(per curiam), Summarily Reverse, Or Otherwise Grant Certiorari

Respondent contends that the Eighth Amendment allows a prosecutor to argue for

death based on the victim's wishes, so long as the victim doesn't actually testify from the witness stand. *Bosse v. Oklahoma*, 580 U.S. ___ (2016)(per curiam), *Payne v. Tennessee*, 501 U.S. 808 (1991), *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989) prove Respondent's position untenable.

This Court's Eighth Amendment jurisprudence couldn't be any clearer: The jury's consideration of a "victim's family member's characterizations and opinions about . . . the appropriate sentence violates the Eighth Amendment." *Payne v. Tennessee*, 501 U.S. 808, 830 n. 2 (1991). In fact, this Court just reiterated that the Eighth Amendment "prohibits a court from admitting the opinions of the victim's family members about the appropriate sentence in a capital case." *Bosse v. Oklahoma*, 580 U.S. at ___ (slip op. at 1).

Here, the prosecution put before the jury precisely what the Eighth Amendment prohibits: The victim's personal opinion that death is the only appropriate punishment, which led to the unreliable and arbitrary imposition of the death sentence, based on passion and prejudice and emotion, not reason – especially where the prosecutor argued the victim's emotional pain to the jury.

Under the Eighth Amendment, it doesn't matter whether the jury hears the victim's constitutionally-prohibited opinion: (a) directly from the witness' mouth from the witness stand; (b) through the voice of the victim witness and the voice of the prosecution through argument; or (c) where that opinion emanates from the mouth of a prosecutor who points to the victim sitting at the prosecution table and forcefully argues to the jury the victim's wishes, thereby "admitting the opinions of the victim's family members about the appropriate sentence." *Bosse*, 580 U.S. at ___ (slip op. at 1). It's all the same under the Eighth Amendment (if not worse in this case).

Notably, the Tennessee Supreme Court recognized that by arguing for death based

upon the victim's opinion that Middlebrooks should be executed, the prosecution violated this Court's Eighth Amendment jurisprudence in *Booth* and *Payne*. *State v. Middlebrooks*, 995 S.W.2d 550, 558 (Tenn. 1999). It certainly would be ironic if, after the Tennessee Supreme Court applied this Court's Eighth Amendment jurisprudence, this Court would now fail to apply that same jurisprudence.

There has been clear Eighth Amendment error which needs to be rectified. Thus, this Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of this Court's intervening decision in *Bosse v. Oklahoma*, 580 U.S. ___ (2016)(per curiam). Alternatively, this Court should summarily reverse the Sixth Circuit. Short of that, this Court should grant certiorari, and afterwards, reverse the judgment below.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply to Brief in Opposition was served upon counsel for Respondent, Jennifer Smith, P. O. Box 20207, Nashville, Tennessee 37202, this 13th day of November, 2017.

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