

**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**

---

**PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR REHEARING, REQUESTING REHEARING PENDING  
*WESSINGER v. VANNOY*, U.S. No. 17-6844**

---

\* Paul R. Bottei  
Gretchen L. Swift

Office of the Federal Public Defender  
Middle District of Tennessee  
810 Broadway, Suite 200  
Nashville, Tennessee 37203  
(615) 736-5047

\*Counsel Of Record

On rehearing, Donald Middlebrooks has requested that this Court grant certiorari pending *Hidalgo v. Arizona*, U.S. No. 17-251 (distributed for six conferences, rescheduled once, and record requested). In this supplemental brief, Donald Middlebrooks also requests that this Court grant rehearing in light of another pending capital case – *Wessinger v. Vannoy*, U.S. No. 17-6844 – which, if granted – will be addressing Middlebrooks’ Question 2, namely:

**2. Does *Martinez* apply to ineffective-assistance-of-counsel claims raised in federal habeas corpus proceedings that, during the initial-review collateral proceeding in state court, were: (a) never pleaded or raised by post-conviction counsel; and/or (b) never supported by the specific evidence first discovered, pleaded, or presented during federal habeas corpus proceedings? See *Gallow v. Cooper*, 570 U.S. \_\_\_\_ (2013)(Breyer, J., respecting denial of certiorari).**

Petition for Writ of Certiorari, p. i (emphasis supplied). On January 16, 2018, this Court rescheduled its consideration of *Wessinger*. This Court should now hold this rehearing petition pending *Wessinger* and afterwards grant Middlebrooks’ rehearing petition, grant certiorari, vacate, and remand for reconsideration in light of *Wessinger*.

\* \* \* \* \*

In *Wessinger*, applying *Martinez v. Ryan*, 566 U.S. 1 (2012) on a motion to alter or amend judgment, the United States District Court granted *Wessinger* relief on his federal habeas claim that trial counsel was ineffective for failing to investigate and present mitigating evidence at his capital sentencing proceeding. *Wessinger v. Cain*, 2015 U.S. Dist. Lexis 97266 (M.D. La. July 27, 2015). Though *Wessinger* presented an ineffectiveness-at-sentencing claim in state court, the District Court concluded that *Wessinger* had not exhausted and thus procedurally defaulted his current federal claim which was a “new,” defaulted claim to which *Martinez* applies, because: (a) his new claim is based upon mitigating evidence that had never been presented in state post-conviction proceedings;

and (b) such new mitigating evidence has fundamentally altered the minimal claim presented in state post-conviction proceedings. *Id.* \*3 n.1, \*17 n. 3.

In concluding that *Martinez* applied to Wessinger's claim, the District Court cited *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014) and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014)(en banc) for the proposition that *Martinez* applies to an ineffectiveness-at-sentencing claim predicated on significant new evidence presented for the first time in federal habeas proceedings. *Wessinger*, \*3 n.1 & \*17 n.3. Thus applying *Martinez* to Wessinger's claim, the Court found that Wessinger had "cause" for defaulting his claim under *Martinez* (*Wessinger*, \*4-\*12) and found his claim meritorious. *Id.* \*16-\*26.

The Fifth Circuit reversed the grant of habeas relief. *Wessinger v. Vannoy*, 864 F.3d 387 (5th Cir. 2017). In doing so, the Fifth Circuit never questioned that Wessinger's current ineffectiveness-at-sentencing claim was unexhausted and procedurally defaulted – and therefore a new claim subject to the rule of *Martinez*. Rather, the state argued that Wessinger should be denied relief because to show "cause" under *Martinez*, a petitioner must show that post-conviction counsel was ineffective (*See Martinez*, 566 U.S. at 14), but "the State argue[d] that the district court erred in determining that [post-conviction counsel's] initial-review representation was ineffective." *Wessinger*, 864 F.3d at 391.

The Fifth Circuit noted that "[t]o determine whether initial-review counsel was ineffective" under *Martinez*, "we apply the familiar *Strickland* test." *Wessinger*, 864 F.3d at 391. Indeed, that is what *Martinez* requires. *Martinez*, 566 U.S. at 14. When evaluating post-conviction counsel's ineffectiveness, however, the Fifth Circuit concluded that post-conviction counsel had not performed deficiently, and thus Wessinger was not entitled to relief, as held by the District Court. *Wessinger*, 864 F.3d at 391-393.

Wessinger has now come to this Court arguing that he indeed has “cause” for the default of his ineffectiveness-at-sentencing claim because post-conviction counsel should have investigated the mitigating evidence presented now in federal habeas, and/or the state court made post-conviction counsel ineffective by failing to provide funding for investigative assistance. *See* Pet. for Writ of Cert. in *Wessinger v. Vannoy*, O.T. 2017, No. 17-6844, p. i, Question 1, and pp. 21-27 (querying whether post-conviction counsel was ineffective for failing to investigate mitigating evidence himself); *Id.*, p. 1, Question 2, and pp. 27-29 (querying whether post-conviction counsel was rendered ineffective by denial of funding).

In *Wessinger*, the respondent argues in this Court that the Fifth Circuit properly denied Wessinger’s ineffectiveness-at-sentencing claim, because, *inter alia*: (1) Wessinger’s ineffectiveness-at-sentencing claim had been presented by Wessinger in state courts and ruled on the merits and thus *Martinez* shouldn’t apply to his current claim at all (*Wessinger v. Vannoy*, O.T. 2017, U.S. No. 17-6844, Brief In Opposition, pp. 20-21); (2) the District Court on initial submission properly applied the AEDPA to Wessinger’s ineffectiveness claim and denied relief (*Id.* at 21-25); (3) after *Martinez*, the District Court concluded that Wessinger’s claim based upon new evidence was new and different and thus unexhausted and procedurally defaulted and subject to *Martinez* (*Id.* at 25); but (4) *Martinez* should not allow a petitioner like Wessinger to present new evidence to support an ineffectiveness-at-sentencing claim (*Id.* at 25-27); and (5) “[T]he *Martinez* exception to the *Coleman* rule does not allow new evidence where *Coleman* itself barred defaulted claims not new evidence of a claim that was barred on the merits.” *Id.* at 30.

As framed by the district court ruling and the parties in *Wessinger*, there are thus

two primary issues that this Court will consider in *Wessinger*:

(1) Does *Martinez* apply to an ineffectiveness-at-sentencing claim predicated on new or different mitigating evidence never presented by post-conviction counsel in state court proceedings? and

(2) If so, has *Wessinger* shown that post-conviction counsel was ineffective either because (a) counsel had to investigate that evidence himself or (b) counsel was rendered ineffective by the denial of funding?

In other words, ***Wessinger presents the exact issue presented by Donald***

***Middlebrooks in his Question Presented 2, notably Question Presented 2b:***

Does *Martinez* apply to ineffective-assistance-of-counsel claims raised in federal habeas corpus proceedings that, during the initial-review collateral proceeding in state court, were: (a) never pleaded or raised by post-conviction counsel; and/or (b) never supported by the specific evidence first discovered, pleaded, or presented during federal habeas corpus proceedings? *See Gallow v. Cooper*, 570 U.S. \_\_\_\_ (2013)(Breyer, J., respecting denial of certiorari).

Petition for Writ of Certiorari, p. i.

In fact, it is noteworthy that in his petition for writ of certiorari, Donald Middlebrooks has argued that his ineffectiveness-at-sentencing claims must be heard under *Martinez* given, *inter alia*, the very rulings cited and applied by the District Court in *Wessinger* (p. 2, *supra*) which hold that *Martinez* allows consideration of new evidence in support of an ineffectiveness-at-sentencing claim: *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014)(en banc) and *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014). *See* Middlebrooks' Petition for Writ of Certiorari, p. 29 (discussing *Dickens*); *Id.*, p. 30 (discussing *Escamilla*).

For this Court to resolve *Wessinger*, therefore, this Court will necessarily decide the very question presented by Donald Middlebrooks in his Question Presented 2b. Donald Middlebrooks' rehearing petition, therefore, presents a classic situation in which this Court

should hold a petition for rehearing pending the final disposition of a case being considered on certiorari which contains the identical issue. *See and compare Buck v. Davis*, U.S. No. 15-8049, 578 U.S. \_\_\_\_ (June 6, 2016)(granting certiorari to consider applicability of Fed.R.Civ.P. 60(b)(6) in capital case); *Wright v. Westbrooks*, U.S. No. 15-7828, 578 U.S. \_\_\_\_ (June 6, 2016)(on same day certiorari granted in *Buck*, ordering response to petition for rehearing where *Wright* involved same Rule 60(b) issue on which certiorari was granted in *Buck*, with *Wright* afterwards being held for *Buck*).

Accordingly, as this Court did when granting certiorari in *Buck* and then holding a rehearing petition in *Wright* pending *Buck*, this Court should hold Middlebrooks' petition for rehearing pending final disposition in *Wessinger v. Vannoy*, U.S. No. 17-6844. Assuming a grant of certiorari in *Wessinger*, this Court should then grant Middlebrooks' petition for rehearing in light of *Wessinger*, and then grant certiorari, vacate, and remand to the Sixth Circuit for further consideration in light of the decision in *Wessinger*.

#### CONCLUSION

This Court should hold Donald Middlebrooks' petition for rehearing pending the disposition of *Wessinger v. Vannoy*, and then grant rehearing, grant certiorari, vacate and remand in light of *Wessinger*.

Respectfully Submitted,



---

\* Paul R. Bottei  
Gretchen L. Swift

Office of the Federal Public Defender  
Middle District of Tennessee  
810 Broadway, Suite 200  
Nashville, Tennessee 37203  
(615) 736-5047

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing supplemental brief in support of petition for rehearing was served upon counsel for Respondent, Jennifer Smith, 425 Fifth Avenue North, Nashville, Tennessee 37243, this 24<sup>th</sup> day of January, 2018.



---

Paul R. Bottei

CERTIFICATE

I certify that this supplemental brief in support of petition for rehearing complies with United States Supreme Court Rule 44.2, is restricted to grounds specified by that rule, and is presented in good faith and not for delay.

A handwritten signature in cursive script, reading "Paul R. Bottei".

---

Paul R. Bottei