

# **APPENDIX A**

No. 18-5133

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Oct 31, 2018  
DEBORAH S. HUNT, Clerk

OSCAR SMITH, )  
 )  
Petitioner-Appellant, )  
 )  
v. )  
 )  
TONY MAYS, WARDEN, )  
 )  
Respondent-Appellee. )

ORDER

Before: COLE, Chief Judge, and COOK and GRIFFIN, Circuit Judges.

Oscar Smith, a Tennessee prisoner under sentence of death, petitions for rehearing en banc of this court’s order entered on August 22, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied as to the issues raised in the rehearing en banc petition. The petition then was circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

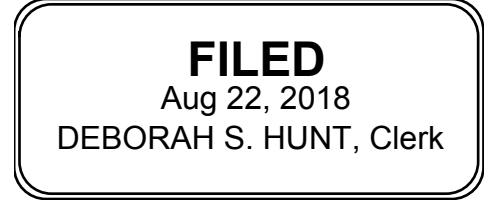


Deborah S. Hunt, Clerk

# **APPENDIX B**

No. 18-5133

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT



OSCAR SMITH, )  
 )  
 Petitioner-Appellant, )  
 )  
 v. )  
 )  
 TONY MAYS, Warden, )  
 )  
 Respondent-Appellee. )

ORDER

Before: COLE, Chief Judge; COOK and GRIFFIN, Circuit Judges.

Oscar Smith, a Tennessee prisoner under sentence of death, appeals from a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The district court’s decision followed a remand from the United States Supreme Court. The case is now pending before this court for review of Smith’s application for a certificate of appealability (COA).

In 1990, a Tennessee jury convicted Smith of three counts of premeditated first-degree murder. The trial court adopted the jury’s recommendation and sentenced Smith to death for each murder. The Tennessee Supreme Court affirmed Smith’s convictions and sentences on direct appeal. *State v. Smith*, 868 S.W.2d 561 (Tenn. 1993).

In 1997, Smith filed a state post-conviction petition, which the trial court denied. The Tennessee Court of Criminal Appeals affirmed the trial court’s denial of Smith’s petition, *Smith v. State*, No. 01C01-9702-CR-00048, 1998 WL 345353 (Tenn. Crim. App. June 30, 1998), and the Tennessee Supreme Court denied Smith permission to further appeal this decision.

In 1999, Smith filed his § 2254 petition, alleging numerous violations of his constitutional rights. The district court dismissed Smith’s petition as meritless. *Smith v. Bell*,

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No. 3:99-0731, 2005 WL 2416504 (M.D. Tenn. Sept. 30, 2005). On appeal, this court affirmed the district court's judgment. *Smith v. Bell*, 381 F. App'x 547 (6th Cir. 2010). The Supreme Court subsequently remanded the case for further consideration in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 423 (2013). Upon remand, the district court considered a number of Smith's ineffective-assistance-of-counsel claims in light of *Martinez* and *Trevino* and concluded that they did not warrant § 2254 relief. *Smith v. Carpenter*, No. 3:99-cv-0731, 2018 WL 317429 (M.D. Tenn. Jan. 8, 2018).

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

In its previous opinion and order dismissing Smith's § 2254 petition, the district court denied a number of his ineffective-assistance-of-trial-counsel claims because he procedurally defaulted them in state court. *Smith*, 2005 WL 2416504, at \*15, \*17-18. Smith now contends that the ineffective assistance of his post-conviction counsel can serve as cause to excuse his procedural default of these claims concerning his trial counsel. The Supreme Court traditionally has held that a prisoner has no constitutional right to an attorney in state post-conviction proceedings and, consequently, the prisoner cannot claim constitutionally ineffective assistance of counsel in those proceedings. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Further, any inadequate assistance by counsel in state post-conviction proceedings cannot constitute cause to excuse a habeas petitioner's procedural default of his claims in state court. *Id.* at 757.

In *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), the Supreme Court carved out a "narrow exception" to *Coleman*, holding that ineffective assistance of counsel during initial-review state collateral proceedings can establish cause for a petitioner's procedural default of an ineffective-assistance-of-trial-counsel claim. The petitioner's procedural default will not bar a federal

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habeas court from hearing a substantial claim of ineffective assistance of trial counsel if state law required that the claim of ineffective assistance of trial counsel be raised first in an initial-review post-conviction proceeding and no counsel assisted the petitioner during that proceeding or counsel's assistance in that proceeding was ineffective. *Id.* at 17. In *Trevino v. Thaler*, 569 U.S. 413, 423 (2013), the Court interpreted *Martinez* to hold that a federal habeas court can find cause to excuse a petitioner's procedural default, where: (1) the ineffective-assistance-of-trial-counsel claim was "substantial;" (2) the "cause" must consist of a lack of counsel or ineffective counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the initial review proceeding for the petitioner's ineffective-assistance-of-trial-counsel claim; and (4) state law requires that the ineffective-assistance-of-trial-counsel claim must be raised in the initial review post-conviction proceeding. In *Trevino*, the Court modified the fourth element to situations where state law does not provide most defendants with a meaningful opportunity to present claims of ineffective assistance of trial counsel on direct appeal. *Id.* at 429. This court has concluded that the *Martinez/Trevino* exception can apply to excuse the procedural default of ineffective-assistance-of-trial-counsel claims in Tennessee state court. *See Sutton v. Carpenter*, 745 F.3d 787, 795-96 (6th Cir. 2014).

In order for the *Martinez/Trevino* exception to apply, Smith must raise a substantial claim of ineffective assistance of counsel at trial. *See Abdur'Rahman v. Carpenter*, 805 F.3d 710, 713 (6th Cir. 2015). A substantial claim has some merit and is debatable among jurists of reason. *Martinez*, 566 U.S. at 14; *Abdur'Rahman*, 805 F.3d at 713. In his COA application, Smith asserts that his trial counsel rendered ineffective assistance by: (1) not effectively challenging the testimony of the prosecution's fingerprint expert; (2) not investigating and presenting evidence from the crime scene which countered the timeline for the murders established by the police; (3) not investigating and presenting evidence of other potential suspects; (4) not objecting to certain jury instructions; and (5) not investigating and presenting mitigating evidence of Smith's background and personal history. In order to establish ineffective assistance of counsel, the petitioner first must show that his counsel's performance was deficient. *Strickland v.*

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*Washington*, 466 U.S. 668, 687 (1984); *Hendrix v. Palmer*, 893 F.3d 906, 921 (6th Cir. 2018). The defendant has the burden of identifying counsel's acts or omissions that allegedly did not reflect reasonable professional judgment, *Strickland*, 466 U.S. at 687, and a strong presumption exists that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 689. Second, the petitioner must demonstrate that the deficient performance prejudiced his defense, which requires showing that counsel's errors were so serious as to deprive him of a fair trial. *Id.* at 687; *Hendrix*, 893 F.3d at 921. To establish prejudice, the petitioner must show that a reasonable probability exists that, except for counsel's deficient performance, the result of his trial would have been different. *Stojetz v. Ishee*, 892 F.3d 175, 193 (6th Cir. 2018).

We conclude that Smith has not raised a substantial claim of ineffective assistance of trial counsel. Smith first contends that his trial counsel was ineffective by not adequately investigating and challenging the prosecution's fingerprint expert, Sergeant Johnny Hunter. In *Smith*, 2018 WL 317429, at \*9, the district court summarized Hunter's testimony as follows:

Sergeant Johnny Hunter testified at trial that only one print found at the crime scene was identified as the petitioner's: the bloody handprint on the sheet near Judy Smith's body . . . . He explained that the print bore 15 points of identification, compared to the minimum 8 points required by the FBI, and that there was "no doubt" that the print belonged to the petitioner . . . . Hunter said that all the other prints found in the home either matched the victims (which he testified would be expected, "because anytime you have a crime scene you're going to have fingerprints on that crime scene of the victim"), were insufficient for comparison, or did not match any known individual.

Smith maintains that Hunter's conclusions were unreliable and inaccurate and that his counsel should have gone to greater lengths to challenge his conclusions. In support of this argument, Smith relies on a report from a forensic expert and certified latent print examiner, Kathleen Bright-Birnbaum. Bright-Birnbaum reviewed Sgt. Hunter's findings and determined that he had mis-identified two prints. Further, Sgt. Hunter had determined that a number of latent prints had no identifiable value, but Bright-Birnbaum was able to identify three of those

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prints as belonging to the victims. She also concluded that ten additional prints were of value for comparison purposes but, despite searching available databases, no matches were discovered.

Jurists of reason could not disagree with the district court's conclusion that Bright-Birnbaum's report is insufficient to establish prejudice from counsel's allegedly deficient performance. It is noteworthy that Bright-Birnbaum agrees with many of Sgt. Hunter's conclusions regarding the individual prints, and her determination of mis-identification is limited to two prints. While Bright-Birnbaum contends that a number of prints have identifiable value, which differs from a portion of Sgt. Hunter's findings, none of these prints uncovers any evidence of significance. Smith believes that these unidentified prints could belong to potential suspects in the murders, but it is more likely that they belong to visitors of the victims' home. Most critically, Bright-Birnbaum's report does not challenge Sgt. Hunter's conclusion regarding the key piece of fingerprint evidence—that the bloody handprint on the sheet near Judy Smith's body belonged to the petitioner. At most, Bright-Birnbaum's report raises some question about Sgt. Hunter's credibility, but it does not rise to the level of demonstrating a reasonable probability that, except for counsel's allegedly deficient performance, the result of Smith's trial would have been different.

Smith next contends that trial counsel was ineffective for not investigating and discovering evidence which would have raised doubt about the time of death. On the night of the murders, the police received a 911 call from the victims' home around 11:20 p.m., and officers were dispatched to the scene to investigate. Upon arrival, they received no answer when they knocked on the front door, and their canvass of the scene revealed nothing amiss. Although the victims' bodies were not discovered until about 3:00 p.m. the next day, the prosecution contended that Smith murdered them around the time of the 911 call. Smith's lead trial counsel testified at a federal court evidentiary hearing that he made a strategic decision not to challenge the time of death because he felt that it was established by the 911 call and he elected to pursue an alibi defense instead. *See Smith*, 2005 WL 2416504, at \*68. "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing



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the strategic decisions of trial counsel.” *Carter v. Mitchell*, 829 F.3d 455, 473 (6th Cir. 2016). Indeed, the strategic decisions of defense counsel are “virtually unchallengeable.” *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 849 (6th Cir. 2017); *Buell v. Mitchell*, 274 F.3d 337, 359 (6th Cir. 2001). Nonetheless, relying on evidence that allegedly demonstrates that the victims were killed later the next morning, Smith previously argued that his counsel erred by not challenging the time of death. However, the district court has repeatedly rejected this argument. *Smith*, 2018 WL 317429, at \*8, *Smith*, 2005 WL 2416504, at \*47-48, \*68-69.

Smith now relies on other evidence supposedly establishing a different time of death. When officers responded to the 911 call, they investigated the house, including looking into its windows. A victim’s body was discovered the next day in a room where, Smith maintains, it would have been seen through one of these windows. Since the police did not see the body when they conducted their canvass of the scene, Smith hypothesizes that it must not have been there at that time. However, his argument is tenuous at best. No evidence exists that a police officer actually looked through the window, and Smith’s argument that they “must have” is built on supposition and inference. Nor does any evidence support the inference that, even if an officer looked through that window, the victim’s body would have been plainly visible at nighttime. Smith’s inferences are insufficient to overcome the deference owed to counsel’s strategic decision.

For his next allegation of ineffective assistance, Smith argues that his counsel did not investigate and present evidence of other possible suspects. It is noted that counsel did investigate Billy Fields, Judith Smith’s boyfriend, as a potential suspect but could not find sufficient evidence to support the possibility that Fields was the killer. *See Smith*, 2005 WL 2416504, at \*45-46. Smith now refers to other potential leads from police reports that counsel failed to pursue. First, a witness reported seeing a black male run from the front yard of the victims’ house on the morning that the murders were discovered. The individual ran to a nearby corner where he stopped and appeared to be waiting for a bus. The witness had seen the same man wait at the same corner for a bus two weeks earlier. Beyond the fact that the man happened

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to run through the front yard of the victims' house, this activity is hardly suspicious and does not appear to have warranted further investigation.

Second, Smith relies on a police report from a confidential informant, who advised that Judith Smith had been engaged in drug dealing or other activity with a black male identified as "Dead Leg[.]" Judith Smith allegedly stole a car from Dead Leg, and he was trying to locate her. Although this evidence arguably could have warranted additional investigation by counsel, reasonable jurists could not disagree with the district court's conclusion that Smith has not shown any prejudice. He presents no other evidence beyond the brief mention in the police report that Dead Leg was a viable suspect, and the evidence of his own guilt was overwhelming.

Smith's next alleged instance of ineffective assistance concerns counsel's failure to object to certain jury instructions, including: (1) the prosecution's burden of proving guilt beyond a reasonable doubt; (2) the evaluation of the credibility given to prosecution witnesses; (3) whether premeditation could be formed in an instant; and (4) the double-counting of aggravating factors at sentencing. Despite Smith's procedural default of these challenges to his jury instructions, the district court considered the merits of these challenges in its original opinion and concluded that they did not warrant habeas relief. *Smith*, 2005 WL 2416504, at \*55-59, \*61. In his prior appeal, Smith sought a COA to review the district court's denial of these claims, but this court concluded that he had not made a substantial showing of the denial of a constitutional right and denied a COA for these claims. Since neither the district court nor this court relied on Smith's procedural default to preclude review of these claims' merits, it is unnecessary to apply the rule of *Martinez* and *Trevino* for these claims.

Lastly, Smith argues that his trial counsel provided ineffective assistance by failing to present mitigating evidence of his background and personal history. It is undisputed that Smith's post-conviction counsel raised this claim in his state post-conviction petition but his appellate post-conviction counsel failed to appeal the denial of the claim. This court has concluded that the *Martinez/Trevino* exception does not extend to ineffective assistance provided by post-conviction appellate counsel. *See West v. Carpenter*, 790 F.3d 693, 699 (6th Cir. 2015). Smith

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also attempts to rely on new evidence in support of this claim developed during his federal habeas proceedings, but this court has concluded that such an attempt is not permissible under *Martinez and Trevino*. See *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013).

Accordingly, since jurists of reason could not disagree with the district court's conclusion that Smith has failed to allege a substantial claim of ineffective assistance of trial counsel, we **DENY** him a COA and **DISMISS** the case.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk