No. 18-___

IN THE

Supreme Court of the United States

OSCAR FRANKLIN SMITH,

Petitioner,

v.

TONY MAYS, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In federal habeas, cases often arise where petitioners have had not only ineffective trial counsel, but also ineffective state habeas counsel—lawyers who maybe *mention* trial counsel's ineffectiveness in their state habeas petition, but produce no evidence of it at all. Two lines of this Court's precedent offer diverging guidance on whether such petitioners can ever prevail in federal court. *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 423 (2013), provide cause to excuse the default of ineffective-assistance-of-trial-counsel (IATC) claims by ineffective state habeas counsel. Yet *Cullen v. Pinholster*, 563 U.S. 170 (2011), forbids federal courts from expanding the record state habeas counsel created on a claim, however ineffectively. The problem, of course, is that obtaining relief under *Martinez* necessarily requires evidence the record lacks due to the ineffective performance of state habeas counsel—evidence *Pinholster* seems to bar.

This tension has troubled members of this Court since *Trevino* was decided. In *Gallow v. Cooper*, 570 U.S. 933 (2013), Justices Breyer and Sotomayor flagged as appropriate for certiorari the question whether *Pinholster* or *Martinez* should govern in this situation, while noting that no circuit conflict had yet arisen on that question. Now, however, the circuits are cleanly divided three to three on this issue. The question presented is thus:

Whether *Martinez* and *Trevino* apply to IATC claims that were technically raised in state habeas proceedings but went wholly unsubstantiated due to the ineffective assistance of state habeas counsel?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Oscar Franklin Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unpublished, as is its order denying rehearing en banc (Pet. App. 63a). The district court's memorandum (Pet. App. 12a) and order denying a certificate of appealability (Pet. App. 48a) are unreported but available at *Smith v. Carpenter*, No. 3:99-CV-0731, 2018 WL 317429 (M.D. Tenn. Jan. 8, 2018).

JURISDICTION

The judgment of the court of appeals denying a certificate of appealability was entered on August 22, 2018. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on October 31, 2018. Pet. App. 63a. On January 28, 2019, Justice Sotomayor extended the time to file this petition through February 28, 2019. No. 18A764. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

INTRODUCTION

This case presents a question two Justices of this Court have already identified as certworthy, and that question has since developed into a three-to-three circuit split. The issue arises frequently and could affect the outcome of many capital cases, including this one. As lower courts have recognized, the question presented is rooted in two conflicting lines of precedent from this Court, and so can only be resolved by this Court's intervention. This Court should accordingly grant certiorari and resolve the tension that currently exists among the circuits and within its own case law.

* * *

Ordinarily, a claim that is not raised in the state courts cannot be heard in federal habeas proceedings. This Court created a narrow exception to that rule, however, in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). In those cases, this Court held that criminal defendants must have one opportunity to raise the ineffectiveness of their trial counsel with the aid of a competent attorney. Thus, in jurisdictions where state postconviction review is the only practical opportunity to raise an ineffective-assistance-of-trial-counsel (IATC) claim, a federal habeas petitioner may excuse his failure to raise such a claim in state court by proving that his state habeas counsel was ineffective in failing to assert it. *See, e.g.*, *Trevino*, 569 U.S. 413.

On the heels of *Trevino*, Justice Breyer, in a statement joined by Justice Sotomayor, identified a closely related category of cases that were not formally addressed by *Martinez* and *Trevino*, but would seem to fall within their purview for all practical purposes. *See*

Gallow v. Cooper, 570 U.S. 933 (2013) (Breyer, J., respecting the denial of the petition for writ of certiorari). Those cases arise when a defendant's state habeas counsel technically identifies an IATC claim in his state habeas petition, but is so ineffective that he fails to present *any* evidence to support it. Because a "claim without any evidence to support it might as well be no claim at all," *id.* at 933, Justice Breyer suggested that *Martinez*'s exception should apply with equal force. "[W]here state habeas counsel deficiently neglects to bring forward 'any admissible evidence' to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim," allowing it to qualify for relief under *Martinez* and *Trevino*. *Id.*

Since *Gallow*, the lower federal courts have disagreed about whether Justice Breyer's suggestion is correct. The Fifth, Eighth, and Ninth Circuits have correctly answered yes; the Sixth, Tenth, and Eleventh Circuits have answered no. The circuits that disagree with *Gallow*'s suggestion have identified a different line of precedent—also identified by Justice Breyer—as controlling in these cases. That precedent generally forbids federal habeas courts from considering the kinds of new evidence that are admitted in *Martinez*/*Trevino* cases if the claim at issue has already been "adjudicated on the merits" in state court. *See Cullen v. Pinholster*, 563 U.S. 170 (2011). The upshot is that three circuits have concluded that cases like the one at issue here are akin to *Martinez* and *Trevino* and should follow the same procedural rule, while three

other circuits believe that *Pinholster* requires the exact opposite result.

This clear division in circuit authority—which tracks a clear division in this Court's own precedents—is breeding predictable confusion in the district courts, leading to different outcomes in identical cases. Moreover, this case is an unusually excellent vehicle through which to resolve that confusion, because it very precisely isolates the question presented, with a uniquely developed record for this kind of controversy. Had petitioner Oscar Smith been convicted in Arizona instead of Tennessee, he would have been given the benefit of *Martinez* and *Trevino*, and the rationale adopted by his habeas court for rejecting his IATC claim would have been unambiguously reversed by the Ninth Circuit where it was affirmed by the Sixth. Because "bedrock principle[s] in our justice system," *Martinez*, 566 U.S. at 12, should hold constant across the country, this Court should not wait to resolve this confusion any longer.

STATEMENT

I. Legal Background

This case lies at the intersection of two strands of habeas law: the rules from *Martinez* and *Trevino* that govern when and how an IATC claim procedurally defaulted in state court can be heard in federal habeas, and the rules from *Pinholster* strictly constraining the record that applies to claims that were in any way resolved in state court proceedings. We thus begin with a brief account of both sets of precedents.

Even before Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254 *et seq.*, this Court had held that claims

not raised in state court proceedings were generally off limits in federal habeas review. *Wainwright v. Sykes*, 433 U.S. 72 (1977). This Court later held that the ineffectiveness of counsel in state collateral review proceedings could not provide cause to excuse that procedural default. *Coleman v. Thompson*, 501 U.S. 722 (1991).

Twenty years later, this Court carved out a narrow exception to that rule in a pair of cases. In *Martinez v. Ryan*, 566 U.S. 1 (2012), it held that in jurisdictions where state law requires IATC claims to be raised in initial-review collateral proceedings, and state postconviction counsel was either not provided or herself ineffective, a federal habeas court *may* excuse the default of a substantial IATC claim. *Id.* at 17. The very next Term, in *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court extended *Martinez*'s rule to states that do not *formally* require defendants to first raise IATC claims on collateral review, but *functionally* require the same. *Id.* at 429. These cases recognized that defendants must be given one opportunity to litigate their IATC claims with the assistance of competent counsel, and thus provided that "a lawyer's failure to raise an ineffective-assistance-of-trial-counsel claim during initial-review collateral proceedings" would not "deprive a defendant of any review of that claim at all." *Id.* at 423.

Confusingly, the *Martinez*/*Trevino* exception was created just one year after this Court held that federal courts could not consider *any* new evidence that state habeas counsel had failed to submit, because federal habeas courts are "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Pinholster held that a district court had erred when it allowed a habeas petitioner to present new evidence demonstrating how his counsel had performed ineffectively at trial—exactly the kind of evidence a court would consider under *Martinez* and *Trevino*. Even at that time, some members of this Court expressed concern at the "harsh result" this would compel in those cases where habeas petitioners would lose solely because they were "unable to develop the factual basis of their claims in state court through no fault of their own." *Id.* at 206 (Sotomayor, J., dissenting).

Notwithstanding the evident tension between these lines of cases, this Court has not since clarified what happens when these two conflicting mandates coincide. For *Martinez* and *Trevino* to have any compass, the rule must be that *Pinholster*'s bar does not apply and new evidence of ineffective assistance by trial and postconviction counsel can be considered when *no* claim of IATC was raised *at all* in state habeas proceedings. The lower courts thus seem to agree on that much. But that is a highly stylized version of how these claims arise, and in the average case, the correct interaction of *Pinholster* and *Martinez* is far from clear. Consider the more likely scenario where ineffective state habeas counsel merely identifies a general IATC claim, or formalistically incants the words "ineffective assistance of counsel" in a state habeas petition, without presenting any supporting evidence or further explaining the claim. Must a federal court close its eyes to persuasive evidence of a winning IATC claim produced by a defendant's first competent counsel on federal habeas, simply because that evidence is not in the state record that the defendant's state habeas counsel incompetently created? Put otherwise:

Are these the kinds of claims petitioners should get one opportunity to raise through competent counsel (*a la Martinez*), or the kinds of claims on which the record must be closed, even if that record was created incompetently (*a la Pinholster*)?

Notably, this decision will almost always make all the difference. IATC claims "often depend on evidence outside the trial record," *Martinez*, 566 U.S. at 13—in fact, it is virtually impossible to show prejudice under *Strickland v. Washington*, 466 U.S. 668, 698 (1984), without presenting the evidence that competent counsel should have introduced at trial. And at the state habeas stage, petitioners are necessarily incarcerated, and so dependent on their counsel to develop that evidence. *Martinez*, 566 U.S. at 12. As such, reading *Pinholster* to freeze the record a federal habeas court reviews will effectively eliminate the *Martinez*/*Trevino* pathway to relief. That is because, even if *Martinez* and *Trevino* could in theory allow a federal habeas court to excuse the procedural default of an IATC claim, a petitioner cannot possibly prevail on such a claim supported only by the very record state habeas counsel ineffectively failed to develop.

As Justice Breyer recognized, the question therefore becomes whether to treat these kinds of never-really-asserted claims as having been procedurally defaulted under *Martinez* and *Trevino* and therefore beyond *Pinholster*'s scope. *See Gallow*, 570 U.S. at 933 (Breyer, J., respecting denial) ("[T]here seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim. … For that reason, the Fifth Circuit should not necessarily have found that it could not consider the [new evidence] … because of *Cullen v.*

Pinholster.”). And that is the question on which the courts of appeals are presently divided.

II. Procedural Background

1. Oscar Smith was arrested and tried for capital murder in Tennessee. His appointed counsel, Karl Dean, had never before served as lead counsel on a capital case. *Smith v. State*, 1998 WL 345353, at *5 (Tenn. Crim. App. June 30, 1998). Although the prosecution relied exclusively on circumstantial evidence, *see Smith v. State*, 868 S.W.2d 561, 566 (Tenn. 1993) (describing “[a]ll of the evidence” as “circumstantial”), Smith was convicted on all counts. *Smith v. Bell*, 2005 WL 2416504, at *10 (M.D. Tenn. Sept. 30, 2005).

The penalty phase of Smith’s trial lasted a single day. 2005 WL 2416504, at *10. Smith’s mitigation case relied mostly on character evidence from an inmate from the jail where Smith was held, who testified that he was a good prisoner; several of Smith’s coworkers, who testified that he was a good employee; and Smith’s mother and his daughter from a previous marriage, who testified to Smith’s character and that he had a severely intellectually disabled son who depended on him. *Smith*, 868 S.W.2d at 568. The defense also called two psychiatrists, one who testified that Smith had suffered a “nervous breakdown” on a business trip to Utah, and another who diagnosed him with certain psychiatric disorders following his arrest. *Id.* The jury returned a death sentence. *Id.* at 565.

2. Smith then sought relief through a *pro se* motion for state postconviction review. Smith was appointed new counsel charged with assisting on this petition. *Smith*, 2005 WL 2416504, at *11.

Because Tennessee highly discourages the litigation of IATC claims on direct review, *see Sutton v. Carpenter*, 745 F.3d 787, 792 (6th Cir. 2014), Smith's state postconviction petition was his first opportunity to pursue any trial-level ineffectiveness arguments. Smith's postconviction counsel did so, however, in a decidedly scattershot fashion. He identified over one hundred assignments of error, including forty-six IATC claims, few of which concerned trial counsel's sparse mitigation case. More importantly, Smith's counsel called fifteen witnesses, all of whose testimony related solely to his guilt-phase claims, and he introduced no evidence regarding the kind of mitigation case that competent trial counsel could have developed. Pet. App. 102a.

Accordingly, although Smith's state habeas counsel had recited three broad allegations of IATC in the development of Smith's mitigation case, that attorney utterly failed to investigate, develop, or substantiate those claims in any way. Notably, the state habeas court made clear that it was dismissing Smith's mitigation-related IATC claims for precisely that reason. Thus, while the court rejected the vast majority of the claims on their merits, *see, e.g.*, Pet. App. 101a-111a, the court's ground for dismissing the mitigation claims was that counsel "*ha[d] not presented mitigation evidence* which should have been presented by [trial] counsel and which would likely have changed the result of the trial." Pet. App. 114a (emphasis added).

3. Smith then sought federal habeas relief under 28 U.S.C. §2254 (2012) in the Middle District of Tennessee. He argued, among other things, that his state habeas counsel had been ineffective in prosecuting his substantial underlying IATC claims, including his

claims regarding the mitigation case. These arguments were rejected by the district court and Sixth Circuit—judgments this Court granted, vacated, and remanded in light of *Martinez*. *See Smith v. Colson*, 566 U.S. 901 (2012). The Sixth Circuit then reinstated its judgment, leading to a second GVR in light of *Trevino*. *See Smith v. Colson*, 569 U.S. 1015 (2013). The Sixth Circuit then remanded to the Middle District of Tennessee for reconsideration of whether *Trevino* provided Smith an opportunity to present these claims in a meaningful way for the first time. Pet. App. 50a.

4. On remand, Smith made a motion for additional discovery concerning the conduct of his state habeas counsel and original trial attorneys. Pet. App. 51a. The court granted that discovery in part, but only after recognizing that there was an open controversy about how to apply *Martinez* and *Trevino* to Smith's case. Pet. App. 57a-60a.

As the district court recognized, the difficulty stemmed from the fact that some of Smith's IATC claims—including his mitigation-related claims—had been nominally identified in his state habeas petition. The court acknowledged that the Sixth Circuit had not yet addressed whether *Martinez* applies to claims formally raised yet ineffectively submitted without any evidence in state postconviction proceedings. And it also noted that lower courts had split on the same question. Pet. App. 57a-60a; *see also* Pet. App. 57a ("[A] careful reading of *Martinez* reveals that the postconviction ineffectiveness to which it refers is never expressly limited to failure to raise a claim but appears to encompass the entirety of '[i]nadequate assistance of counsel at initial-review collateral proceedings' with respect to a claim of ineffective assistance of trial

counsel." (second alteration in original) (quoting *Martinez*, 566 U.S. at 9)).

Helpfully for present purposes, the district court decided to handle this open question by provisionally allowing Smith to take some discovery and develop evidence regarding his putative *Martinez*/*Trevino* claims. The district court reserved, however, the question whether this new evidence would ultimately be appropriate to consider in determining Smith's habeas petition. Pet. App. 55a, 59a-60a, 62a.

Thereafter, Smith submitted previously unused evidence that his new, competent counsel had developed, arguing that an effective state habeas attorney and trial attorney would have used this evidence in his mitigation case. He argued that this current IATC claim—a specific and substantial claim supported by evidence, unlike the naked and general allegation Smith's state habeas counsel had recited—had never been meaningfully presented on state collateral review and was thus procedurally defaulted and eligible for review under *Martinez*. Dist. Ct. Doc. 297 at 29-30 (Habeas Br.).

Among the evidence Smith submitted was an affidavit from a neuropsychologist regarding serious frontal lobe damage, Dist. Ct. Doc. 297-18 (Affidavit of Ruben Gur, Ph.D.), and records documenting Smith's father's severe intellectual disability and psychiatric disorders, *see* Dist. Ct. Doc. 297-20 (Oscar Earl Smith VA records). This evidence could have been used to draw a very different picture of Smith at sentencing—revealing his behavior to be the product of strong physical and genetic factors beyond his control. Smith argued that this evidence could have persuaded at least one juror to vote for life rather than death, and that

both Smith's trial counsel and state habeas counsel had been constitutionally ineffective in failing to develop or submit it. Habeas Br. 29-31.

At this point, the district court was required to decide the question it had previously reserved, and held unambiguously that this evidence could not even be considered in adjudicating Smith's habeas petition. *See* Pet. App. 12a-46a. The court held that it was bound in this regard by a Sixth Circuit precedent, *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013), which "stands for the proposition that, once a state court has heard a claim, *no matter how undeveloped it was*, *Martinez* does not apply." Pet. App. 25a. The district court thus inevitably rejected Smith's penalty-phase IATC claims, characterizing them as "the same claim litigated at the post-conviction hearing—that trial counsel ineffectively failed to investigate and present available mitigation evidence—with new facts raised in support of it," which facts could not be considered. Pet. App. 45a; *see also id.* ("In essence, [Smith] is attempting to do the same thing that the Supreme Court held Pinholster was prohibited from doing[.]"). In other words, the court concluded that because state habeas counsel had merely recited the penalty-phase claim, Smith had "had his day in court" and thus was ineligible for *Martinez* relief. *Id.*

5. Smith then requested a certificate of appealability (COA) from the Sixth Circuit. On the penalty-phase claim, Smith reiterated that in light of the mitigation evidence his competent federal counsel had finally developed, the current claim "was never presented in the initial collateral state post-conviction proceedings" and was thus "subject to *Martinez*." *See* C.A. Doc. 9 at 36. In so doing, he recognized that his

ability to rely on this evidence was foreclosed by *Moore*, but submitted that *Moore* was wrongly decided. *Id.* at 37. The Sixth Circuit rejected that view and denied the COA. Pet. App. 1a. It did so relying on *Moore*, which held in relevant part that, even after *Martinez* and *Trevino*, "*Pinholster* continues to limit our review to the evidence that was before the state court." *Moore v. Mitchell*, 848 F.3d 774, 778 (6th Cir. 2017) (reaffirming *Moore*, 708 F.3d 760, after *Trevino*).

Smith petitioned for en banc rehearing, asking the Sixth Circuit to resolve the tension between *Martinez/Trevino* and *Pinholster* and to overrule its holdings in *Moore*. The court of appeals denied rehearing. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Divided Three-To-Three On The Question Presented.

The question presented was precisely identified, and flagged as certworthy, by the author of *Trevino* shortly after that case was decided. *See Gallow*, 570 U.S. 933 (Breyer, J., respecting the denial of the petition for writ of certiorari). Justice Breyer, joined by Justice Sotomayor, suggested that there was no functional difference between the kind of IATC claim at issue in *Trevino* and one that had been technically identified in a state habeas proceeding but never developed with any evidence. *See id.* ("[W]here state habeas counsel deficiently neglects to bring forward 'any admissible evidence' to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim."). Notably, even as he made that sugges-

tion, Justice Breyer noted that it was not inevitably clear that such claims should be governed by *Martinez* and *Trevino*, rather than the rigorous restraints of *Pinholster*. *See id.* ("[T]he Fifth Circuit should not *necessarily* have found that it could not consider the affidavit and testimony supporting Gallow's claim because of *Cullen v. Pinholster*." (emphasis added)). In other words, he acknowledged that this was a debatable question of the kind this Court would eventually need to resolve. But Justice Breyer noted at the time that the issue was not yet ripe for this Court's intervention because, *Trevino* having just been decided, "no United States Court of Appeals ha[d] clearly adopted a position that might give Gallow relief." *Id.*

Now, however, there is no disputing that the question presented has matured into a square disagreement among the courts of appeals that is dividing and confusing the lower courts. *See, e.g.*, *Porter v. Johnson*, 2015 WL 1549274, at *32 (M.D. Tenn. Apr. 8, 2015) ("Courts considering this issue have come out on both sides."). The Ninth, Fifth, and Eighth Circuits take the view Justice Breyer suggested as the right conclusion and place cases like Smith's within the *Martinez* line of precedents; the Sixth, Tenth, and Eleventh Circuits take the opposite view and regard these cases as constrained to the (necessarily inadequate) state record by *Pinholster*. Because this question squarely divides the circuits, frequently arises in capital cases, and has already been identified by Justices of this Court as certworthy, it is hard to imagine a more natural candidate for this Court's review.

A. The Ninth, Fifth and Eighth Circuits resolve the question presented by following *Trevino*.

In the Ninth, Fifth, and Eighth Circuits, the Tennessee district court's holding—that it could not consider the evidence that Smith's first competent counsel developed on federal habeas review—would have been squarely reversed. In those circuits, when a defendant's state habeas counsel *identifies* but, due to her ineffectiveness, fails to *substantiate* an IATC claim with any evidence, that claim remains eligible for relief under *Martinez* or *Trevino*. To put it plainly, those courts have generally endorsed the common-sense proposition that, in the words of Justice Breyer, an IATC claim presented "without any evidence to support [it]" is essentially "no claim at all." *Gallow*, 570 U.S. at 933. (Breyer, J., respecting denial). And since that claim was never truly raised in state court, federal courts have the discretion to treat it as procedurally defaulted and can hear any evidence that *is* available but has (to that point) evaded any judicial forum due to ineffective counsel.

The Ninth Circuit's decision in *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014), exemplifies this approach. There, like here, Dickens's trial counsel had failed to bring forward key evidence at sentencing regarding the defendant's brain damage and psychological disorders. *Id.* at 1309. And there, like here, Dickens's state habeas counsel had identified an IATC claim during collateral proceedings, but had failed to substantiate it in any meaningful sense. *Id.* at 1317. Naturally, it was rejected in state court. *Id.* But rather than take Dickens's claim as fully adjudicated on the merits in state court and governed by *Pinholster*,

the Ninth Circuit resolved the case by reference to *Martinez*. In particular, it held that "*Martinez* may provide a path for Dickens to demonstrate cause" for the procedural default of his "newly-enhanced claim of ineffective assistance of sentencing counsel," provided he could show that "the claim [was] substantial and … that his PCR [*i.e.*, state habeas] counsel was ineffective under *Strickland*." *Id.* at 1320. In other words, even though Dickens's IATC claim was *formally* raised in state court, it *functionally* never stood a chance, and so was defaulted for *Martinez* purposes. As such, the Ninth Circuit remanded the case for further fact-finding. *Id.*

Notably, in so holding, the Ninth Circuit recognized the tension that could exist between the *Martinez* rule and *Pinholster* and formulated an answer that clearly restricted *Pinholster*'s scope. As that court put it: "We reject any argument that *Pinholster* bars the federal district court's ability to consider [a habeas petitioner's] 'new' IAC claim," because the absence, at the time of the initial "adjudication" of the evidence now presented, meant that the "claim was not 'adjudicated on the merits' by the [state] courts." 740 F.3d at 1320. In sum, the Ninth Circuit viewed *Martinez* as superseding *Pinholster*, at least in cases where habeas petitioners wanted to present new evidence that their trial *and* state habeas counsel had ineffectively failed to develop.

The Eighth Circuit has reached the same conclusion. A good example of its approach is *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013). There, Sasser's state habeas counsel had raised five different IATC claims in state postconviction proceedings. *Id.* at 837. Sasser then sought an evidentiary hearing in federal

court to produce, now with competent counsel, evidence of mitigation that his state habeas counsel had ineffectively failed to discover. *Id.* at 837-38. Rather than reject this request on the ground that a claim of IATC had been technically adjudicated in state court and that *Pinholster* thus limited review to the state record (as the district court had held), the Eighth Circuit granted Sasser's motion. "Under *Trevino*," the court reasoned, "Sasser's postconviction counsel's alleged ineffectiveness, if proved, establishes cause for any procedural default Sasser may have committed in not presenting these claims to the Arkansas courts in the first instance." *Id.* at 853 (internal quotation marks and alterations omitted).

The Fifth Circuit's decision in *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014), is of a part. There, the court recognized that while "*Martinez* does not apply to claims that were *fully* adjudicated on the merits by the state habeas court," *id.* at 394 (emphasis added), *Martinez* could still apply where new evidence revealed that state habeas counsel pursued the IATC claim ineffectively, *id.* at 395. It did so citing the Ninth Circuit's identical holding, set forth above. *See id.* (citing *Dickens*, 740 F.3d at 1320).

The Fifth, Eighth, and Ninth Circuits' approach has a clear upshot: An IATC claim can, under the right circumstances, qualify for *Martinez* even if nominally raised in a prior state proceeding. And, notably, this upshot has been clearly adopted as the governing rule in the district courts of those circuits. *E.g.*, *Creech v. Ramirez*, 2016 WL 8605324, at *14 (D. Idaho Jan. 29, 2016) ("*Martinez* can apply not only to IAC claims never adjudicated in state court, but also to IAC claims that *were* adjudicated on the merits, but were

adjudicated on an inadequate record as a result of [state habeas] counsel's ineffectiveness."); *Wessinger v. Cain*, 2015 WL 4527245, at *1 n.1 (M.D. La. July 27, 2015) ("As this Court has already stated, *Martinez* makes no distinction between whether IRC's ineffectiveness is measured by failure to present a claim of ineffective assistance of trial counsel or in connection with the ineffective prosecution of such a claim[.]"), *rev'd on other grounds sub nom. Wessinger v. Vannoy*, 864 F.3d 387 (5th Cir. 2017); *Navarro v. Ryan*, 2016 WL 6871855, at *2 (D. Ariz. Nov. 22, 2016) (similar); *cf. Hutcherson v. Norman*, 2017 WL 4533450, at *6 (W.D. Mo. Oct. 10, 2017) (similar).

B. The Sixth, Tenth, and Eleventh Circuits resolve the question presented by following *Pinholster*.

In contrast, the Sixth, Tenth, and Eleventh Circuits take the opposite approach. In those circuits, *Pinholster* radically constrains the reach of *Martinez* and *Trevino*. If an IATC claim is *never raised at all* in any form in state court, then it is procedurally defaulted and at least potentially eligible for relief under *Martinez*. But if an IATC claim has been even nominally identified in state habeas proceedings, *Pinholster* restricts the presentation of that claim in federal court to the state record. That record, however, will *by definition* have been ineffectively developed by state habeas counsel,[*] condemning the petitioner to lose for lack of an adequate record. The upshot in these circuits is, therefore, the opposite of the one above: Once

[*] For *Martinez* to matter in any case, we must assume that state habeas counsel was actually ineffective. Otherwise, petitioner would lose anyway in trying to apply *Martinez*.

state habeas counsel notes an IATC claim, no matter how incompetently, *Martinez* recedes and *Pinholster* forecloses review.

In addition to *Moore*—which the courts below invoked to squarely resolve the question presented in this case, *see supra* p.13—*West v. Carpenter*, 790 F.3d 693 (6th Cir. 2015), well demonstrates the Sixth Circuit's binary approach. There, like here, West's state habeas counsel had nominally (and unsuccessfully) raised his IATC claim in state court, and West argued that he had done so ineffectively. *Id.* at 698-99. For the Sixth Circuit, however, the details of state habeas counsel's performance were doctrinally irrelevant. "[T]o the extent that post-conviction trial counsel was ineffective, that ineffectiveness at trial could not have caused *procedural default*" because "the post-conviction trial court *identified* the claim and denied it on the merits." *Id.* at 699 (second emphasis added). In other words, as soon as the IATC claim had been *identified* in state court, *Martinez* and *Trevino* had no bearing. *Id.*; *see also Moore*, 708 F.3d at 785 ("*Pinholster* plainly bans such an attempt to obtain review of the merits of claims presented in state court in light of facts that were not presented in state court. *Martinez* does not alter that conclusion.").

The Tenth and Eleventh Circuits take the same tack. In *Carter v. Bigelow*, 787 F.3d 1269 (10th Cir. 2015), and *Hamm v. Commissioner, Alabama Department of Corrections*, 620 F. App'x 752 (11th Cir. 2015), respectively, these courts held that *Martinez* and *Trevino* have no bearing on IATC claims raised in state court, regardless of *how* they were raised there. For instance, in *Hamm*, the court held that an IATC claim raised in state court, no matter how ineffectively, is

"not defaulted and [is] considered on the merits in state court; accordingly, collateral counsel's ineffective assistance is irrelevant to that claim." *Hamm*, 620 F. App'x at 778 n.20; *see also Carter*, 787 F.3d at 1290 n.19 (holding that *Martinez* provides "no relief" for claims raised in state court because they "were not found to be procedurally defaulted").

Put simply, in the Sixth, Tenth, and Eleventh Circuits, *Martinez* and *Trevino* apply only when state habeas counsel is wholly silent as to the underlying IATC claim, and they cannot provide relief to a habeas petitioner whose ineffective state habeas counsel failed to develop an IATC claim with any evidence or particularity at all. And, as in the other circuits, this opposite approach has been recognized and implemented in the district courts. *E.g.*, *Au v. Buss*, 2014 WL 842446, at *8 n.4 (M.D. Fla. Mar. 4, 2014) ("*Martinez* does not support a conclusion that a petitioner should be permitted to expand the factual record in order to bolster ineffective assistance of counsel claims which were raised and rejected in the initial-review state post-conviction proceeding."); *Henderson v. Carpenter*, 21 F. Supp. 3d 927, 933 (W.D. Tenn. 2014) (agreeing with Sixth Circuit in *Moore*, 708 F.3d at 785).

C. Given this disagreement, the question presented is fit for immediate resolution.

As the foregoing demonstrates, the circuit courts are intractably divided on the proposition Justice Breyer articulated in *Gallow*. Where, before, "no United States Court of Appeals ha[d] clearly adopted a position that might give Gallow [or petitioner Smith] relief," 570 U.S. at 933, it is now clear that the Ninth Circuit has done just that, and that its district courts are opening the *Martinez* pathway to habeas

petitioners like Gallow and petitioner here. *See supra* pp.15-18. Other circuits have followed suit, while an equal set of circuits have followed *Pinholster* to an opposite conclusion. In light of this split, defendants today whose state habeas counsel identify their IATC claim but ineffectively fail to substantiate it receive very different treatment in the federal habeas courts depending entirely on where they happen to have been prosecuted. This Court should grant review to resolve this entrenched disagreement.

That is particularly true because, as the lower courts themselves have recognized, this split derives from an inherent difficulty in reconciling two lines of *this* Court's precedent that appear to be at odds. *See, e.g.*, *Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012) ("[W]e do note tension between [applying *Martinez*] and the Supreme Court's jurisprudence in this area, *see, e.g.*, *Cullen v. Pinholster*[.]"); *Creech v. Ramirez*, 2017 WL 1129938, at *9 n.13 (D. Idaho Mar. 24, 2017) ("The [*Pinholster*] Court declined to decide where to draw the line between new claims and claims adjudicated on the merits, but suggested that new evidence brought forward to supplement a claim decided on the merits could present a new claim."). Justice Breyer in *Gallow* likewise identified this question presented as a contest between the *Martinez* and *Pinholster* line of cases. *See* 570 U.S. at 933.

The tension between these precedents is real. The *Pinholster* line of cases makes clear that AEDPA review "is limited to the record that was before the state court that adjudicated the claim on the merits," with no exceptions. 563 U.S. at 181. But *Martinez* allows petitioners to bring forth IATC claims under certain circumstances—circumstances that by their very

definition require producing new evidence. *Martinez*, 566 U.S. 1. The question of what to do with petitioners like Oscar Smith, who sit at the intersection, is one that only this Court, not lower courts, can resolve. This Court should not wait any longer to provide an answer.

II. This Case Presents An Unusually Good Vehicle For The Question Presented.

This case is an unusually good vehicle for addressing the precise question presented, and the Court is unlikely to be presented with others like it. That is so for two principal reasons. First, the lower courts framed and decided the question presented with unusual precision—identifying the precise factual scenario that Justice Breyer addressed in *Gallow*. Second, the district court permitted the creation of a factual record in a circumstance where that record development is rarely permitted, allowing this Court to confront a less hypothetical or counterfactual version of the issue at bar.

1. To begin, the facts and opinions below in this case neatly frame the question presented, in three important respects.

First, the way in which Smith presented his mitigation-related IATC claims demonstrates that they precisely match the issue as Justice Breyer framed it in *Gallow*. Smith's state habeas petition presented his mitigation-case IATC claims with shocking generality and lack of evidence. On their face, they had no chance whatsoever of satisfying the *Strickland* standard because—although his habeas counsel alleged that trial counsel "did not properly investigate" or "introduce all appropriate mitigating evidence," Pet. App. 78a—state

habeas counsel did not even bother to *say* what that evidence would have been, let alone try to produce it himself. (It is worth investigating this page of the appendix to see just how bare it is.) The utter lack of evidence in this regard of course makes a showing of *Strickland* prejudice logically impossible. *See Martinez*, 566 U.S. at 12-13. And it tracks precisely what Justice Breyer had in mind when he observed that an IATC claim presented "without any evidence to support [it]" is essentially "no claim at all." *Gallow*, 570 U.S. at 933.

Second, Smith's state habeas court very helpfully held that his mitigation-case-related claims failed *for lack of evidence*, rather than for lack of legal merit. In the words of the state habeas court, "petitioner has *not presented* mitigation evidence which should have been presented by counsel." Pet. App. 114a (emphasis added). This was in clear contrast to how the same court rejected *on the merits* the guilt-phase IATC claims that were brought forward with at least a modicum of evidence to support them. *See, e.g.*, Pet. App. 101a-103a (rejecting, on the merits, a guilt-phase IATC claim supported by testimony from a forensic pathologist); Pet. App. 103a-104a (rejecting a guilt-phase IATC claim supported by testimony from a linguist). Again, this makes clear that Smith's case neatly presents the question of whether a claim presented without *any* evidence can fall within *Martinez*'s ambit. It also demonstrates that there is an identifiable difference between how courts resolve claims that do not have an evidentiary presentation as compared with those that do.

Third, Smith's federal habeas court did an unusually good job identifying and resolving the question

presented. The court recognized in its initial order that there was an as-yet-unresolved gap between *Martinez* and *Pinholster*, and that choosing between those two doctrines would determine whether or not the court could consider Smith's newly developed evidence of what a constitutionally adequate mitigation case would have looked like. It then resolved that question in its second order—pointing to binding Sixth Circuit precedent—and treated that answer as fully disposing of Smith's federal habeas petition. It is not possible to identify and resolve the *Gallow* question any more precisely than that.

Such a clean presentation of this issue is not a routine feature of habeas cases. Such cases are often presented on spotty state-court records, amidst a host of confounding questions and alternative rationales, or with summary dispositions by the courts below. The *Gallow* question does plainly arise in many cases—including many capital cases. *See infra* p.27. But the important point is that, when it does, it is rarely packaged so neatly in the form of a dispositive question presented, as it is here.

2. The other main reason this case makes for a particularly good vehicle is because the district court here made the unusual decision to permit discovery before ruling on the question presented. As noted above, the court initially determined that this question was still open in the Sixth Circuit, and for that reason, permitted Smith to take provisional discovery on what the evidence would be, should it be admitted. This means that the record before this Court actually *contains* the evidence that motivates and would eventually determine Smith's IATC claims if he is right that *Trevino* permits them (as the Ninth Circuit and others have

held). In virtually every case in the same procedural posture, the district court will have denied an evidentiary hearing entirely out of obedience to *Pinholster*—leaving the record barren of the new evidence the petitioner seeks to rely upon and rendering his claims necessarily hypothetical. Smith's IATC claim, on the other hand, is real, supported, and presented on a concrete record, making this an unusually apt vehicle for resolving the existing circuit split.

To that end—while it is not essential to considering or resolving the question that divides the circuits—it is worth observing that Smith's underlying penalty-phase IATC claim is substantial and meritorious, as is his allegation of ineffective assistance at the state habeas stage. As noted above, his state habeas petition lacked any evidentiary support whatsoever regarding the mitigation case he could have presented. *See supra* p.9. But the record now demonstrates that this mitigation case could have made the difference. Trial counsel simply failed to investigate the compelling evidence of Smith's frontal lobe damage, which already existed at the time of his sentencing. Dist. Ct. Doc. 297-18 (Affidavit of Ruben Gur, Ph.D.). This evidence would have shown that, for physical reasons fully beyond his control, Smith's executive functioning and behavior regulation was operating in the "profoundly impaired range." *Id.* Brain damage is recognized as one of—if not *the*—most powerful mitigating factor at sentencing. *See Sears v. Upton*, 561 U.S. 945, 948-49, 951 (2010) (trial counsel ineffective for not presenting evidence of frontal lobe brain damage and childhood difficulties); *Porter v. McCollum*, 558 U.S. 30, 33-34, 36, 40 (2009) (counsel ineffective for failing to present evidence of severe childhood abuse and brain abnormality

manifesting in impulsive behavior); *Williams v. Taylor*, 529 U.S. 362, 370, 399 (2000) (counsel ineffective for failing to investigate and present evidence of severe childhood abuse, repeated head injuries, intellectual disability, and mental impairment). The absence of this evidence in petitioner's initial sentencing proceeding (and state habeas petition) is inexcusable.

Moreover, additional evidence already available at the time would have shown that Smith's father suffered from depression and paranoia, and was discharged from the military based on a diagnosis of "psychosis [and] mental deficiency," with the mental age of an eight-year-old. Dist. Ct. Doc. 297-20 at 6 (Oscar Earl Smith VA records). Combined with the mental illness that manifested in petitioner and intellectual disability that manifested in petitioner's own father and son, *see id.*, this would have allowed competent trial counsel to make a compelling argument that Smith's behavior was rooted in genetic factors likewise beyond his control. At a minimum, this evidence suggests a reasonable probability that competent counsel undertaking *some* kind of mitigation case could have made a difference at sentencing. *See Strickland*, 466 U.S. at 698.

III. The Question Presented Is Recurring And Important.

This issue merits this Court's immediate attention. The question that divides the courts of appeals arises frequently, it does so most often in the context of capital cases, and the issues have now been fully developed and are unlikely to benefit from further percolation.

As an initial matter, it is clear that this issue arises frequently enough that this Court's intervention is necessary and appropriate. In only five years since *Trevino*, six circuits and numerous district courts have found themselves entrenched in two incompatible views, showing that this is a recurring issue that needs this Court's attention. *See supra* pp.13-19; *see also Lopez v. Ryan*, 2012 WL 1520172 (D. Ariz. Apr. 30, 2012) (challenging state habeas counsel's failure to develop basis of IATC claim); *Franklin v. Robinson*, 2015 WL 409796, at *8 (S.D. Ohio Jan. 29, 2015) (same); *Henderson*, 21 F. Supp. at 933 (attempting to introduce evidence of IATC claim not developed by state habeas counsel); *Au*, 2014 WL 842446, at *8 n.4 (same).

Moreover, this issue arises most frequently in capital cases, given both the recognized problems that have existed in securing adequate counsel for death penalty trials, and the attention these cases typically receive in subsequent habeas proceedings. IATC claims are a recurrent feature of capital litigation, by some accounts arising in over eighty percent of cases. Nancy J. King & Joseph L. Hoffman, *Habeas for the Twenty-First Century* 147-48 & tbl. 8.1 (2011). And ineffective assistance, particularly at the penalty phase, has a unique ability to affect the sentence handed down, particularly when there is evidence of mental impairment and frontal-lobe damage. *See supra* pp.25-26. Indeed, this Court has already been forced to decide multiple cases in which counsel at death penalty trials put on no mitigation case whatsoever. *See, e.g.*, *Porter*, 558 U.S. 30; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). The rule that governs the procedural default of this kind of claim in state habeas is thus of critical importance.

Notably, that is true whether one takes the perspective of capital defendants or the prosecuting States. Law enforcement is a core state prerogative, *see, e.g.*, *United States v. Comstock*, 560 U.S. 126, 179-80 (2010) (Thomas, J., dissenting), and both AEDPA itself and this Court's jurisprudence interpreting it are driven by the instinct that an outsized exercise of the federal habeas power "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting). The practical result of the circuit split, however, is that state court determinations are reexamined and second-guessed by lower federal courts in Arizona in ways that they are not in Tennessee. Regardless of the correctness or incorrectness of that reexamination, this divergence at a minimum disserves "AEDPA's goal of promoting comity," *Carey v. Saffold*, 536 U.S. 214 (2002) (internal quotation marks omitted). What's fair for Arizona should be fair for Tennessee, and vice versa; one way or the other, this Court should clarify *Martinez*'s reach to ensure that states receive equal treatment from the federal courts. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

IV. The Sixth Circuit's Interpretation Of *Martinez* Is Wrong.

Given the square and even divergence of opinion among the courts of appeals, the Court's acknowledged interest in this issue, and the clarity with which the question is presented here, certiorari should be granted without regard to which set of circuits has the better answer. To the extent that inquiry is relevant, however, the Fifth, Eighth, and Ninth Circuits have it right. These circuits have correctly followed Justice

Breyer's intuition from *Gallow*, and the functionalist approach to *Martinez* that was clarified in *Trevino* itself. The Sixth, Tenth, and Eleventh Circuits, by contrast, have rejected *Trevino*'s functional approach to *Martinez*, choosing instead to narrow it in an overly formalistic fashion.

Start with the core premise of *Martinez*: "To present a claim of ineffective assistance at trial in accordance with [certain states'] procedures … a prisoner likely needs an effective attorney." *Martinez*, 566 U.S. at 12. "Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy," *id.* at 11, and, being incarcerated, "the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record," *id.* at 12. *Martinez*'s repeated references to substantiating an IATC claim reveal a basic intuition: The essence of an IATC claim is the *evidence* that should have been presented and that incompetent counsel omitted, and it is simply impossible for a petitioner to develop that evidence in the first instance at the habeas stage without competent counsel. Accordingly, *Martinez*'s exception should be open when incompetent counsel has failed to put *any* of that already-available evidence in front of the state habeas court. In that instance, there is no logical distance between incompetently failing to present a claim that has any chance of prevailing and incompetently failing to present a claim altogether. Or, as Justice Breyer put it, "a claim without any evidence to support it might as well be no claim at all." *Gallow*, 570 U.S. at 933.

Put another way, it is incorrect to think of claims incompetently presented without any evidence as

having been "adjudicated on the merits" at all, for reasons *Martinez* already made clear. As *Martinez* put it, "if the attorney appointed by the State" to pursue an IATC claim "is ineffective, the prisoner has been denied fair process and the opportunity to … *obtain an adjudication on the merits* of his claim." 566 U.S. at 11 (emphasis added). This is particularly easy to see in a situation where the appointed attorney has been so incompetent as to present no evidence *at all* on the IATC claim they needed to pursue. In that case, there can be no adjudication on the merits because there was no presentation of the merits to adjudicate. And that was made particularly evident in this case by the distinction between the way the state habeas court rejected the *merits* of the guilt-phase IATC claims, and how it rejected petitioner's mitigation-case claims for the different reason that they had been merely incanted with no evidence to support them. *See supra* p.9; Pet. App. 114a (state court dismissing because, on these claims, counsel "ha[d] not presented mitigation evidence which should have been presented by [trial] counsel").

The Sixth, Tenth, and Eleventh Circuits' approach also flies in the face of *Trevino*'s pragmatic approach to the *Martinez* exception. Asked whether *Martinez* applied equally to states where there was no formal bar to IATC claims on direct appeal, merely a functional one, the Court wondered: "Does this difference matter?" *Trevino*, 569 U.S. at 423. It found that it did not. Neither should this one. Because an IATC claim ineffectively raised without any evidence has the same chance of success as one ineffectively waived, there is no reason to think that this difference matters any

more than the difference between the two sets of states that was deemed irrelevant in *Trevino*.

Reading *Martinez* and *Trevino* this way is buttressed by the logical and practical consequences of holding otherwise. Consider the odd reality that now faces defendants in the Sixth, Tenth, and Eleventh Circuits: They are better off having worse attorneys. The clients of state habeas lawyers who *completely miss* the underlying IATC claim are eligible for the equitable exception of *Martinez* and *Trevino*, while defendants whose attorneys blurt out the words of an IATC claim but utterly fail to support it are treated as if they had fully presented that claim for adjudication on the merits. This makes no sense. The latter lawyer was just as ineffective as the former in presenting the IATC claim, and equally prejudiced his client's interests—indeed, under the current rule, he has prejudiced them *more*. Yet, for some reason, only the former attorney's performance can be bailed out by the *Martinez* rule.

In both cases, the animating concerns behind *Martinez*'s exception are unaddressed. Because ineffective counsel will more often raise a substantial claim and leave it unsupported than fail to allege it altogether, allowing courts to treat even a fleeting mention of IATC as sufficient to dodge *Martinez* transforms the case from a "narrow exception," *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017), into a mere formality for the vast majority of petitioners. *Martinez* and *Trevino* were decided only a few years ago; it is too soon to essentially cabin them to their precise facts.

Although the rule created by *Martinez* and *Trevino* can appear complicated, it boils down to a very simple intuition that a habeas petitioner should at

least get *one* chance to present an IATC claim through competent counsel. And the obvious truth is that petitioner here got no more chance in that regard than Martinez or Trevino did. For these reasons among others, two Justices—including *Trevino*'s author—have already identified cases like this one as all-but-indistinguishable from *Trevino*. *See Gallow*, 570 U.S. at 933. Whether it was Trevino or Gallow—or for that matter, Smith—each petitioner "failed to obtain a hearing on the merits of his ineffective-assistance-of-trial-counsel claim because state habeas counsel neglected to 'properly presen[t]' the petitioner's ineffective-assistance claim in state court." *Id.* (alteration in original) (quoting *Martinez*, 566 U.S. at 5). So each should be equally allowed to access the relief that *Martinez* makes possible if they can make the exceedingly difficult showing that both their trial and state habeas counsel fell below *Strickland*'s minimal bar.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-5133

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

No. 3:99-cv-0731—Aleta A. Trauger,

District Judge.

OSCAR SMITH,
Petitioner-Appellant,

v.

TONY MAYS, WARDEN,
Respondent-Appellee.

Decided and Filed: Aug. 22, 2018

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

* * *

ORDER

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 convic-

tions and sentences on 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*, 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 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 finger-

print 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. 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 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 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 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 postconviction appellate counsel. See *West v. Carpenter*, 790 F.3d 693, 699 (6th Cir. 2015). Smith 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

s/

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:99-CV-0731

OSCAR SMITH,
Petitioner,

v.

WAYNE CARPENTER, WARDEN,
Respondent.

January 8, 2018

MEMORANDUM

The petitioner, Oscar Franklin "Frank" Smith, was convicted and sentenced to death for the murder of his estranged wife and two stepsons, based on evidence including the following:

> At approximately 11:20 p.m. on Sunday, October 1, 1989, the police received a 911 call from Judy Smith's home. On the tape of that call (later technically enhanced for trial) a victim shouts, among other things, "Frank, no. God, help me!" before the call abruptly ends. Officers arrived at the house five minutes later, heard nothing, received no answer at the front door, and considered it a false call. The following afternoon, the bodies of Judy Smith, Frank Smith's estranged wife, and his two stepsons, Jason and Chad, were found dead. . . .
>
> According to the medical examiner, the three victims died at least twelve hours before

> they were found. . . . Police found a bloody hand print on the sheet next to Judy's body. Sergeant Johnny Hunter, who examined the print, testified that it matched Smith's left hand, which was missing the two middle fingers.

Smith v. Bell, 381 F. App'x 547, 548 (6th Cir. 2010), *cert. granted, judgment vacated sub nom. Smith v. Colson*, 566 U.S. 901 (2012). The petitioner originally sought habeas corpus relief pursuant to 28 U.S.C. § 2254 on August 5, 1999. (DE #1.) The court held an evidentiary hearing on November 24, 2003, on the petitioner's claims that trial counsel was ineffective at the guilt phase of trial in connection with their investigation of the victims' time of death, the bloody hand print on the sheet, and a knife found under the victims' home.[1] (DE ##116, 179.) This court denied the petition on September 30, 2005 (DE ##201, 202), and the United States Court of Appeals for the Sixth Circuit affirmed the denial in June 2010. *Smith v. Bell*, 381 F. App'x 547 (6th Cir. 2010). The case has since been remanded to this court for further consideration in light of the intervening decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which now clearly apply to habeas petitions arising in this state. *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014). The court has permitted limited discovery on the claims that were potentially subject to reconsideration (DE ##250, 265,

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[1] Both the hearing and the court's previous disposition of this case pre-date the Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), by several years.

281, 294), and the parties have fully briefed the remaining issues and the petitioner's request for another evidentiary hearing. (DE ##297, 298, 299.)

The court will deny petitioner's request for an evidentiary hearing and dismiss this matter for the reasons set forth below. It is unnecessary at this stage for the court to repeat its lengthy description of the evidence and legal analysis set forth in its previous memorandum opinion (DE #201), but it does reference and rely on that analysis as necessary below.

I. THE MARTINEZ EXCEPTION

Ordinarily, when a habeas petitioner has failed to fully exhaust a claim in state court and is now unable to do so because of a statute of limitations or other state procedural rule, the claim is considered to be procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991). Except in cases where the petitioner can establish that he is actually innocent, federal habeas review of the merits of defaulted claims is prohibited unless the petitioner demonstrates cause for, and prejudice from, his default. *Alley v. Bell*, 307 F.3d 380, 386 (6th Cir. 2002). At the time the court denied this petition in 2005, "the law [was] firmly settled that ineffective assistance of counsel in state post-conviction proceedings can never establish cause, because there is no constitutional right to effective assistance of counsel in such collateral proceedings in the first place." (DE #201, at 41–42 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), *Coleman*, 501 U.S. at 742–53, and *Ritchie v. Eberhart*, 11 F.3d 587, 590 (6th Cir. 1993)).) This court applied that rule in holding that several of the petitioner's claims were procedurally defaulted and not subject to review on habeas corpus. (DE #201.)

Several years after that decision, the Supreme Court held in *Martinez* that, in certain circumstances, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," and the Sixth Circuit has held that this *Martinez* exception applies in Tennessee. *Martinez*, 566 U.S. at 9; *Sutton v. Carpenter*, 745 F.3d 787, 795–96 (6th Cir. 2014). To overcome default under *Martinez*, a petitioner must show that post-conviction counsel was ineffective during the "initial-review collateral proceeding," *Martinez*, 566 U.S. at 16, and that the underlying ineffective-assistance-of-trial-counsel [IATC] claim is a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id. at 14.

The Sixth Circuit has provided the following framework to evaluate claims under *Martinez*:

> As to these claims, the district court should determine . . . : (1) whether state post-conviction counsel was ineffective, . . . and (2) whether [Petitioner's] claims of ineffective assistance of counsel were "substantial" within the meaning of *Martinez*, *Sutton*, and *Trevino*. Questions (1) and (2) determine whether there is cause. The next question is (3) whether [Petitioner] can demonstrate prejudice. Finally, the last step is: (4) if the district court concludes that [Petitioner] establishes cause and prejudice as to any of his claims, the district court should evaluate such claims on the merits. . . . [E]ven "[a] finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely al-

> lows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Martinez*, [566 U.S. at 17].

Atkins v. Holloway, 792 F.3d 654, 660 (6th Cir. 2015) (some internal citations omitted).

Whether post-conviction counsel was constitutionally ineffective is necessarily connected to the strength of the claim he failed to raise, so "in many habeas cases seeking to overcome procedural default under *Martinez*, it will be more efficient for the reviewing court to consider in the first instance whether the alleged underlying ineffective assistance of counsel was 'substantial' enough to satisfy the 'actual prejudice' prong of *Coleman*." *Thorne v. Hollway*, No. 3:14-CV-0695, 2014 WL 4411680, at *23 (M.D. Tenn. Sept. 8, 2014), *aff'd sub nom. Thorne v. Lester*, 641 F. App'x 541 (6th Cir. 2016).

All federal ineffective-assistance claims are subject to the highly deferential two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which asks: (1) whether counsel was deficient in representing the defendant; and (2) whether counsel's alleged deficiency prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687. To satisfy the first prong, a petitioner must establish that his attorney's representation "fell below an objective standard of reasonableness," and must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" *Id.* at 688, 689. The "prejudice" component of the claim "focuses on the question of

whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The prejudice prong, under *Strickland*, requires showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

II. NEW EVIDENCE AND *MARTINEZ*

A. Claims Not Raised in State Court

The respondent insists that the restrictions on the presentation of new evidence during federal habeas proceedings in § 2254(e)(2)[2] apply to the peti-

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[2] That provision, in context, states:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

tioner's defaulted claims under reconsideration pursuant to *Martinez*, and that this court's review is confined to the state court record. (DE #298, at 4–12.) The respondent devotes much of his brief to arguing that the petitioner's IATC claims are not based on new law or facts that could not have been presented during his post-conviction proceedings. No one disputes those circumstances; indeed, the very nature of the Martinez analysis is that it only applies to claims that post-conviction counsel could have timely raised in state court but failed to.[3]

For Martinez to have any meaning at all, a petitioner seeking to pursue a defaulted IATC claim must

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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

[3] *Martinez* involved IATC claims that had been deemed defaulted because the petitioner's original postconviction attorney had never raised the claims at all, and his later attempt to raise them was rejected as untimely by the state courts. *Martinez*, 566 U.S. at 6. Specifically, the claims Martinez had been barred from pursuing were that his trial counsel should have objected to expert testimony or called an expert witness in rebuttal and should have pursued an exculpatory explanation for his DNA on the victim's nightgown. *Id.* at 7. After determining that attorney error at post-conviction could establish cause for the default of those claims, the Supreme Court remanded for lower courts to decide whether Martinez's postconviction counsel had been ineffective, whether his IATC claims were substantial, and whether he had been prejudiced. *Id.* at 18.

be able to present a federal court with evidence of his post-conviction counsel's ineffectiveness and of the substantial nature of his underlying claim – evidence that, by the very nature of the circumstances, was never presented in state court. Such new evidence goes to the issue of cause and prejudice to overcome the default, and "[w]hen a petitioner asks for an evidentiary hearing on cause and prejudice, neither section 2254(e)(2) nor the standard of cause and prejudice that it replaced apply." *Henry v. Warden, Georgia Diagnostic Prison*, 750 F.3d 1226, 1231–32 (11th Cir. 2014); *accord, e.g.*, *Cristin v. Brennan*, 281 F.3d 404, 413 (3d Cir. 2002) ("We conclude that the plain meaning of § 2254(e)(2)'s introductory language does not preclude federal hearings on excuses for procedural default at the state level, and therefore the District Court did not err in conducting such a hearing in Cristin's case."); *Mitchell v. Hill*, No. CIV 06-844-BR, 2009 WL 2949330, at *3 (D. Or. Sept. 9, 2009) ("Generally, 28 U.S.C. § 2254(e)(2) limits a habeas petitioner's ability to expand the record to the same extent that it limits the availability of an evidentiary hearing. *Holland v. Jackson*, 542 U.S. 649, 652 (2004). However, § 2254(e)(2) does not apply to expansion of the record to overcome a procedural default. *Buckman v. Hall*, 2009 WL 204403 *1 (D.Or. 2009) (citations omitted). In such a case, Rule 7 grants the district court discretion to expand the record. *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986)."). The petitioner's assertion that he can overcome default pursuant to *Martinez* is simply not a "claim" to which § 2254(e)(2) would apply. Rather, it is a procedural matter in which the court has the discretion to determine whether and to what extent to hear new evidence. See *Segundo v. Davis*, 831 F.3d 345, 351

(2016) (holding that the district court did not abuse its discretion in denying a hearing to determine whether claim satisfied *Martinez* because the record contained sufficient facts to make that determination).

None of the cases on which the respondent relies convinces the court otherwise. The Fifth Circuit in *Newbury v. Stephens*, 756 F.3d 850 (5th Cir. 2014), observed that the respondent in that case raised § 2254(e)(2) as a bar to the petitioner's new evidence, but it did not reach that issue. Instead, the Fifth Circuit found that the district court had properly rejected the petitioner's claim even after thorough review of the petitioner's newly presented evidence. *Id.* at 874 ("Because the district court addressed the merits of Newbury's IATC claim, including the evidence presented for the first time in federal court, it is not arguable but that Newbury has already received all of the relief available to him under the authority of *Martinez* and *Trevino*. Considering all of Newbury's evidence, including that presented for the first time in federal court, reasonable jurists would not debate the district court's decision that Newbury's IATC claim lacks merit."). The Tenth Circuit did not even mention § 2254(e) in *Carter v. Bigelow*, 787 F.3d 1269 (10th Cir. 2015). It held that *Cullen v. Pinholster*, 563 U.S. 170 (2011), prevented it from considering new evidence on the petitioner's claim that counsel was ineffective with regard to mitigation evidence and noted that *Martinez* did not apply, because the claim was not defaulted but had been rejected on its merits in state court. *Carter*, 787 F.3d at 1290 n.19. Similarly, in an unreported case on which the respondent relies, the District Court for the Northern District of

Ohio held that Martinez did not entitle the petitioner to further develop the record in a case where the underlying claim was exhausted and rejected on the merits in state court and was not an IATC claim. *Hill v. Anderson*, No. 4:96 CV 00795, 2012 WL 2826973 (N.D. Ohio July 10, 2012). Thus none of these cases supports the respondent's argument that § 2254(e) prohibits new evidence in support of an asserted right to review of a defaulted claim pursuant to *Martinez*.

Of the four cases the respondent cites, only the unreported decision by the District of South Carolina in *Fielder v. Stevens*on, No. 2:12-cv-00412, 2013 WL 593657 (D. S.C. Feb. 14, 2013), actually held that § 2254(e) limits the admission of new evidence in the context of *Martinez* analysis. But even Fielder said that the bar on new evidence applies only to evidence about the underlying claim, and not to evidence that would establish cause and prejudice under *Martinez*. *Fielder* at *3 ("[C]ourts have held that § 2254(e)(2) does not similarly constrain the court's discretion to expand the record to establish cause and prejudice to excuse a petitioner's procedural defaults. In such cases, the court retains its discretion to expand the record to allow a petitioner to establish cause and prejudice to excuse a petitioner's procedural defaults.") (citations omitted). But some evidence about the merit of the underlying IATC claim is necessarily relevant to the Martinez analysis itself, which requires a petitioner to demonstrate that the claim is substantial, "which is to say that the prisoner must demonstrate that the claim has some merit," *Martinez*, 566 U.S. at 14; *Carpenter v. Davis*, No. 3:02-CV-1145-B-BK, 2017 WL 2021415, at *3 (N.D. Tex. May 12, 2017) ("The

evidence required to show . . . that the claim of ineffective assistance of trial counsel is substantial and, therefore, comes within the exception to procedural bar created in *Martinez*, will likely be much of the same evidence needed to prove the merits of the underlying claim."). And again, because the very nature of a claim subject to Martinez analysis is that it was never presented in state court, the Martinez exception would be a farce if a petitioner could succeed in establishing cause and prejudice to overcome the default of a substantial claim but then be barred from proving the claim. Accordingly, to the extent that the petitioner offers new evidence in connection with his never-before-raised IATC claims, the court properly considers that evidence.

B. Claims Raised in State Court

The respondent is correct, however, with regard to claims that were raised in state court, which petitioner essentially seeks to have this court rehear with new evidence. When the court authorized the petitioner to conduct discovery in this case more than two years ago, it commented on a lack of clarity in the case law about whether the *Martinez* exception is limited to claims that were never heard at all in state court, as was the case in *Martinez*, or is broad enough to encompass claims that were raised but then (allegedly) ineffectively prosecuted by post-conviction counsel. (DE #250, at 4–7.) Accordingly, it withheld judgment on that issue and permitted the petitioner to conduct the requested discovery but cautioned that "the court may ultimately agree with the respondent that [such claims] are not subject to reconsideration on the basis of *Martinez*." (Id. at 7.) Today it does so agree, after review of the parties' briefs and of the

current state of the pertinent case law. A federal habeas court's review of "any claim that was adjudicated on the merits in State court proceedings" is limited to the evidence presented in the state proceeding, 28 U.S.C. § 2254(d); *Pinholster*, 563 U.S. at 181–82, and the *Martinez* exception to enable review of procedurally defaulted claims simply does not apply in such circumstances.

There are decisions still standing even within this circuit to the contrary, see *Haight v. White*, No. 3:02-CV-P206-S, 2013 WL 5146200, at *8 (W.D. Ky. Sept. 12, 2013) ("*Martinez* is clear that errors by post-conviction attorneys in collateral proceedings that rise to the level of ineffective assistance of counsel may be sufficient to establish cause for a procedural default of an ineffective assistance of trial counsel claim. That is so whether the post-conviction attorney entirely failed to raise the claim or raised the claim, but did so in a manner that was insufficient to meet prevailing professional standards."), but the court is convinced that the weight of authority, particularly in the Sixth Circuit, is that *Martinez* does not apply to claims that were raised and reviewed on their merits in state court. To his credit, the petitioner concedes that *Martinez* review of such claims is foreclosed in this circuit, citing *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013), but asserts that *Moore* was wrongly decided and that the court should nevertheless apply *Martinez* to allow new evidence and further consideration of the IATC claims he alleges post-conviction counsel presented ineffectively. (DE #297, at 30–31.) The relevant portions of *Moore* are as follows:

Moore claims that trial counsel was ineffective at mitigation because Moore's expert witness gave damaging testimony during cross examination. Moore argues that this would not have happened if trial counsel been prepared and known how the expert was going to testify.

. . .

On direct appeal, proceeding with different counsel before the Ohio Supreme Court, Moore raised the claim that his trial counsel did not prepare adequately based on this exchange. There was no evidence before the state court other than the trial transcript. The court denied his claim, finding that Moore had failed to show deficient performance and failed to show prejudice. On state postconviction relief, Moore asked for an evidentiary hearing and/or discovery, but the court denied his request and denied relief.

. . .

Moore is not asking that we afford a *Martinez* like review of a procedurally defaulted claim, but rather that we turn *Martinez* into a route to circumvent *Pinholster*. Moore's argument is not merely that *Martinez* permits us to review the merits of his claim; we already do that below, albeit through the lens of AEDPA deference, and *Martinez* is irrelevant to that analysis. Instead, he argues that we should remand to allow factual development of his allegation that collateral counsel was ineffective, and then, if collateral counsel is found ineffective on that

> newly developed record, permit that record to inform his ultimate claim for relief regarding whether trial counsel was ineffective. In other words, he wants this Court to grant him permission to obtain new facts to challenge the Ohio Supreme Court's rejection of his ineffective assistance of trial counsel claim. As explained above, though, *Pinholster* plainly bans such an attempt to obtain review of the merits of claims presented in state court in light of facts that were not presented in state court. *Martinez* does not alter that conclusion.

Id. at 778, 779, 785 (citations omitted). As a case in which the petitioner's IATC claim was heard on direct appeal and a post-conviction hearing was denied, *Moore* presented a slightly different circumstance than this case, but it still stands for the proposition that, once a statecourt has heard a claim, no matter how undeveloped it was, *Martinez* does not apply.

The Sixth Circuit's more recent decision in *West v. Carpenter*, 790 F.3d 693 (6th Cir. 2015), is more similar to the facts of this case. Stephen Michael West, another Tennessee death row inmate, sought reconsideration of a previously rejected IATC claim pursuant to *Martinez* and asserted that his post-conviction counsel had been ineffective in handling the claim:

> The first occasion for West to raise his conflict-of-interest ineffective-assistance claim was the initial-review post-conviction proceeding before the Criminal Court of Union County. West argues on appeal that his conflict-of-interest claim was procedurally defaulted at that stage . . . . West does not ar-

> gue that post-conviction trial counsel failed to raise the conflict-of-interest claim. . . . Instead, West contends that post-conviction trial counsel was ineffective because "counsel never advanced the proper federal standard" to analyze a conflict-of-interest claim.
>
> . . .
>
> Post-conviction trial counsel's failure to ask for an inapplicable standard was not ineffective assistance. Second, and more importantly, to the extent that postconviction trial counsel was ineffective, that ineffectiveness at trial could not have caused procedural default. Despite West's oblique presentation of the conflict-of-interest claim, the post-conviction trial court identified the claim and denied it on the merits. Even if the post-conviction trial court had ruled erroneously, and its error were traceable directly to counsel's deficient advocacy, the conflict-of-interest claim would not have been procedurally defaulted at the post-conviction trial proceeding because West retained the right to preserve the claim by appealing.
>
> When the state court denies a petitioner's ineffective-assistance claim on the merits, Martinez does not apply.

Id. at 698–99. *West* does not cite or discuss *Moore*, but it reaches the same conclusion – that *Martinez* does not apply where a claim was raised in state court – this time in a case where the claim was raised at post-conviction.

In West, the allegedly deficient performance by post-conviction counsel concerned his legal argument, but this court is persuaded that the prohibition against using *Martinez* to simply relitigate or reinforce a claim that was rejected in state court applies equally where postconviction counsel failed to submit evidence. In *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014), a capital habeas petitioner argued that the federal court should consider his new evidence in support of a claim that trial counsel failed to investigate and present mitigating evidence pursuant to *Martinez*, because "evidentiary shortcomings" in the state court record were caused by ineffective assistance by his state habeas counsel. *Id.* at 394. State habeas counsel had presented evidence, which the sentencing jury never heard, of the petitioner's troubled and abusive childhood, the negative role models in his family, and his substance abuse problems, but the state court held that he had not established deficient performance or prejudice and rejected the claim on its merits. *Id.* at 385–86, 391. At federal habeas, the petitioner submitted additional evidence of abuse within his family, his extended family's criminal history, and affidavits from two of the jurors who sentenced him and "argued that under *Martinez*, he [was] entitled to present and have a court consider the evidence submitted to the federal habeas court which was not before the state habeas court due to state habeas counsel's failures." *Id.* at 385. The Fifth Circuit rejected that argument:[4]

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[4] It is noteworthy that the Fifth Circuit rejected Escamilla's efforts to present new evidence pursuant to *Martinez*, even

> We conclude that *Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted. Thus, once a claim is considered and denied on the merits by the state habeas court, *Martinez* is inapplicable, and may not function as an exception to *Pinholster's* rule that bars a federal habeas court from considering evidence not presented to the state habeas court.

Id. at 394–95 (internal citations omitted). More recently, the District Court of South Dakota reached the same conclusion under similar circumstances:

> By comparison, Rhines's case bears little resemblance to *Martinez*. Unlike in *Martinez*, Rhines's initial-review collateral proceeding counsel asserted that Rhines's trial attorneys were ineffective. Unlike in *Martinez*, because Rhines's ineffective assistance claims were raised at the necessary time, they were not procedurally defaulted. Unlike in *Martinez*—and perhaps most importantly—Rhines received a state court adjudication on the merits of his ineffective assistance claims. See *Martinez*, 566 U.S. at 10–11 (explaining that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habe-

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though it found the reasonableness of the state court's rejection of the underlying claim was sufficiently debatable to warrant a certificate of appealability. *Escamilla*, 749 F.3d at 391–95.

> as proceeding, no court will review the prisoner's claims."). Thus, the critical rationale for the "narrow exception" of *Martinez* is lacking from Rhines's case. Cf. *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) ("Thus, unlike *Martinez*, Arnold has already had his day in court[.]").
>
> . . .
>
> In substance, Rhines's argument is that his habeas attorneys should have litigated his ineffective assistance claims differently. What Rhines seeks is another opportunity to present his ineffective assistance claims, this time with more evidence and different arguments that could have been made before. But Rhines's position would transform the "narrow exception" of *Martinez* into a limitless chasm that would nullify every purpose Congress had when it enacted AEDPA.

Rhines v. Young, No. 5:00-CV-05020-KES, 2016 WL 614665, at *8 (D.S.D. Feb. 16, 2016); *see also Henderson v. Carpenter*, 21 F.Supp.3d 927, 933 (W.D. Tenn. 2014) (holding that "*Martinez* does not allow Petitioner to circumvent *Pinholster* and allow consideration of evidence that was not developed and presented in the state courts," despite the petitioner's argument that it was "'irrational' to distinguish failing to properly assert a federal claim and failing to properly develop the claim in state court").

Accordingly, the court will not reconsider pursuant to *Martinez* any claims that were adjudicated on the merits in state court or consider any new evidence offered in support of them.

III. APPLICATION TO THE PETITIONER'S CLAIMS

The petitioner groups his claims for *Martinez* relief into four categories of related claims from his Amended Petition, which is how the court will address them.[5] (DE #297, at 10.)

> A. Petitioner's Claim That "Trial Counsel Was Ineffective For Failing To Investigate Fingerprint Evidence And Other Evidence From The House To Secure Oscar Smith's Acquittal And Failed To Effectively cross-examine Prosecution Witness Johnny Hunter (Amended Petition ¶¶8b4, 8c1, 8c5, 8c6, 8c10, 8c11, 8e3)."

In Claim 8b4b of his Amended Petition, the petitioner claimed that trial counsel were ineffective for failing to investigate and present evidence that there were lights on at the victims' home when police arrived around 11:30 p.m. after the 911 call, but the lights were off when the bodies were found the next afternoon, which he said proves that the victims were still alive after the police were there. (DE #18, at 5.) In Claims 8b4c and 8c11, the petitioner alleged that

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[5] In a footnote, the petitioner has also preserved a claim that *Martinez* authorizes reconsideration of several defaulted claims of ineffective assistance of appellate counsel. (DE #297, at 31 n.8.) As the petitioner acknowledges, however, that position is expressly foreclosed by *Davila v. Davis*, 582 U.S. ____, 137 S. Ct. 2058 (2017). See also *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013) ("Under *Martinez*'s unambiguous holding our previous understanding of *Coleman* in this regard is still the law – ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel.").

trial counsel were ineffective for failing to investigate and present proof that the police heard no noise from the house shortly after the 911 call, but a hair dryer was running in the house when the bodies were discovered the next afternoon, which he said also proves that the victims were still alive the morning after the 911 call. (DE #18, at 5, 7–11.) The petitioner raised these same claims at post-conviction, and this court previously addressed their merits as exhausted claims and found that the state court's rejection of them was not unreasonable. (DE #14, Add. 12, Vol. 1, Verified Amended Petition For Post Conviction Relief at 7–8; DE #201, at 23 n.8, 24 n.10, 76–80.) Martinez does not provide any basis to reconsider these exhausted claims, for the reasons explained in section II.B, above.

In Claims 8b4a and 8c10, the petitioner asserted that an alarm clock that was set for 5 a.m. but was not ringing when the bodies were found indicates that the victims were killed sometime after 5 that morning, rather than the previous night, and that trial counsel were ineffective for failing to investigate and present that evidence. (DE #18, at 5.) The court previously determined that these claims were defaulted by not being raised in state court. (DE #201, at 23, 24, 77 n.37.) However, these claims go to the petitioner's overarching argument that counsel should have challenged the prosecution's theory of the time of the victims' death, which was litigated at post-conviction in the context of the claims about the lights and the hair dryer discussed above, and about which this court has already held a full evidentiary hearing. As the court previously held, the petitioner cannot establish that he was prejudiced by counsel's

failure to challenge the time of death, because his own expert medical examiner agreed with the trial testimony of the prosecution's medical examiner to the effect that the condition of the bodies was consistent with death occurring at 11:30 the night of October 1. (DE #201, at 77–78.) Moreover, defense counsel testified at this court's hearing to the effect that he made a strategic decision not to contest the time of death because the defense team believed they could not overcome the persuasiveness of the 911 tape on that point and thought pursuing an alibi defense was the better course. (See DE #201, at 112–113.) This court determined that no prejudice arose from that concession: "[G]iven the impact of the 911 tape, the court concludes that most reasonable jurors would have perceived a challenge to the time of death . . . unpersuasive. . . . From the foregoing, and the record as a whole, the court concludes that, although the defense might have investigated/challenged the prosecution's theory as to the time of death, the petitioner has not demonstrated that he was prejudiced by defense counsels' tactical decision not to do so." (DE #201, at 114.) That conclusion applies equally to the alarm clock claim. Accordingly, the petitioner's underlying claim is without merit and does not warrant further analysis pursuant to *Martinez*.

The petitioner alleged in Claim 8b4d that trial counsel were ineffective for failing to investigate and present evidence that the victims' back door was closed when the police were at the house at 11:30 the night of the 911 call but ajar when the bodies were found the next day, which he said indicates that they were not killed until the morning after the 911 call. (DE #18, at 5–6.) The court has previously deter-

mined that this claim was defaulted by never being raised in state court (DE #201, at 23, 24, 77 n.37), but it is subject to the same analysis and conclusion set forth above regarding the alarm clock claim. The claim does not merit further review pursuant to *Martinez*.

In Claim 8c1, the petitioner alleged that counsel was ineffective for failing to investigate and present evidence of fingerprints not identified as his own that were found at the crime scene. (DE #18, at 6.) The court found in its 2005 ruling that this claim had not been raised in state court and was procedurally defaulted. (DE #201, at 23–24, 79 n.38.) The petitioner now argues that, if counsel had conducted a thorough investigation of the latent print evidence at the crime scene, they could have demonstrated that the prosecution's fingerprint witness, Johnny Hunter, was unreliable and could have shown that the presence of prints that were not his own "show[ed] someone else's guilt." (DE #297, at 12–17.) The court has reviewed the petitioner's new evidence – the fingerprint analysis report of Kathleen Bright-Birnbaum – and disagrees with the petitioner's conclusions.

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. (DE #12, Add. 1, Bk. 6 of 9, Vol. XIV, pp. 2009–2010, 2023.) 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. (*Id.*, pp. 2016–2018.) 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. (*Id.*, pp. 1993, 2021–2024.) Bright-Birnbaum disagrees with Hunter's conclusions about several of those prints. She says that two prints identified as those of one resident victim were actually made by another resident victim and that several of the prints Hunter found insufficient for comparison were actually identifiable but did not match any known individual. (DE #297-1.) She also identified two additional prints left by resident victims and several prints of the officers who investigated the crime scene. (*Id.*) But establishing that the victims and others were in their own home at some point does nothing to show someone else's guilt, as the petitioner suggests, so none of the disagreements between Bright-Birnbaum and Hunter about the latent fingerprint evidence would have had any impact on the outcome of the petitioner's case. *Carter v. City of Detroit*, No. 11-15322, 2016 WL 319514, at *4 (E.D. Mich. Jan. 27, 2016), *aff'd*, 678 F. App'x 290 (6th Cir. 2017) (because unidentified prints do not preclude a defendant's presence at the same location, such evidence "is not exculpatory because it cannot be said that such evidence is inconsistent with the prosecution's case or [that it] tends to support the defendant's case").

The only print that was material to the petitioner's conviction was his bloody handprint on the

sheet,[6] which neither Bright-Birnbaum's report nor any other evidence offered by the petitioner disputes. The petitioner argues that disputing the accuracy of Hunter's analysis of the latent prints could have resulted in excluding him from testifying at trial. Even accepting that leap, the fact that an expert that defense counsel consulted about the bloody handprint agreed that it was the petitioner's, *see Smith v. State*, 1998 WL 345353, at *15, 16, and the petitioner's inability to date to produce any conflicting expert opinion about that print suggest that the prosecution could easily have called another expert to testify that the bloody handprint belonged to the petitioner. Because the petitioner cannot establish any prejudice in connection with his underlying IATC claim about the latent prints, the claim lacks the merit required for further consideration under *Martinez*.

The petitioner alleged in Claim 8c5 that trial counsel were ineffective for failing to investigate and present evidence about unidentified foot prints and shoe prints on the ground outside the victims' house. (DE #18, at 7.) The court previously found this claim was not raised in state court and was therefore procedurally defaulted. (DE #201, at 23–24, 79 n.38.) Although the petitioner lists Claim 8c5 several times among the claims for which he seeks *Martinez* review (DE #297, at 10, 24, 25), he does not discuss the foot/shoe prints anywhere in his brief or submit any evidence that would establish that the underlying

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[6] Indeed, counsel for the petitioner argued in this court in 2003 that "[t]he palm print was the most important piece of evidence presented to the jury." (DE #179, at 203.)

claim is substantial or that postconviction counsel performed deficiently by not raising it. The petitioner has failed to establish that this claim warrants further review.

In Claim 8c6, the petitioner alleged that a broken knife found under the house after the murders would have created reasonable doubt about his guilt and that counsel was ineffective for failing to investigate and present evidence about the knife at trial. (DE #18, at 7.) This claim was exhausted and rejected by the TCCA in post-conviction proceedings in state court. *Smith v. State*, No. 01C01-9702-CR-00048, 1998 WL 345353, at *21–22 (Tenn. Crim. App. June 30, 1998.) Moreover, the court has already held a hearing and permitted the petitioner to offer new evidence pertaining to this claim, reached its own conclusion based on all of the evidence that the claim failed on its merits, and ruled that the TCCA's rejection of the claim was not unreasonable. (DE #201, at 80, 118–20.) *Martinez* does not authorize any reconsideration of this claim.

The petitioner alleged in Claim 8e3 that counsel were ineffective for failing to secure the services of a criminologist to develop evidence for use in cross-examining Sergeant Johnny Hunter about the omission from a crime scene drawing of a telephone that was off the hook in the victims' house.[7] (DE #18, at 9.)

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[7] To the extent that the petitioner alleged more generally that trial counsel was ineffective for not using a criminologist to challenge the prosecution's theory of the crime scene or cross-examine Hunter about other matters, that claim was exhausted and rejected by the TCCA in post-conviction proceedings, *State*

The court previously determined that this claim was procedurally defaulted. (DE #201, at 24, 83 n.40.) Sergeant Hunter acknowledged at trial that the telephone was not indicated on the diagram and testified that some of the crime scene was just photographed, rather than being included in the diagram. (DE #12, Add. 1, Bk. 6 of 9, Vol. XIV, pp. 1945, 1957.) He later testified about the condition and location of the telephone, as depicted in at least two photographs. (Id. at 1965, 1966–67.) Despite listing 8e3 among the claims on which he seeks relief, the petitioner does not mention the crime scene drawing or the telephone anywhere in his brief and does not offer any evidence suggesting that the omission of the telephone from the drawing had any impact on the outcome of his case. He has failed to establish that this claim warrants further review.

B. Petitioner's Claim That "Trial Counsel Ineffectively Failed To Present Exculpatory Evidence That Someone Else Committed The Offense, And That The Offense Was Drug-Related (Amended Petition ¶¶8a2, 8a3)."

The petitioner alleged in Claims 8a2 and 8a3 that trial counsel was ineffective for failing to investigate and present evidence that "a Black male was the perpetrator" and that "the murders were drug-related and/or motivated by robbery." (DE #18, at 3–4.) He relies on two pieces of evidence in support of

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v. Smith, at *23–24, and this court previously found that that ruling was not unreasonable. (DE #201, at 84–85.) The *Martinez* exception for procedurally defaulted claims has no impact on that determination.

these claims. First, he cites a police report indicating that a witness reported seeing a black male run from the victims' front yard to a nearby corner, where he stopped as if he was waiting for a bus, and that the same witness had seen the same man catch the bus at that corner about two weeks earlier. (DE #297-16.) Second, he cites a second police report about a statement from a confidential informant that Judy Smith had recently stolen a car from a black male known as "Dead Leg," with whom Smith allegedly "had some type drug dealings or association" and who had been looking for her home, but that the informant did not know whether Dead Leg had ever found her home. (DE #297-17.)

The petitioner has not submitted any proof that further investigation of either of these facts would have led to additional exculpatory facts that could have been admitted at either trial or post-conviction, or any evidence about whether trial counsel or post-conviction counsel conducted that investigation, or why they omitted these facts from their presentations in state court. The petitioner has the burden of demonstrating that his counsels' actions were not the product of informed strategy. *Strickland*, 466 U.S. at 688–89. He has not carried that burden, nor has he submitted anything to indicate that he would be able to do so at a hearing.

Moreover, even if the court assumed deficient performance by counsel, neither of these new facts themselves would make a different outcome a reasonable likelihood in the petitioner's case. A victim's alleged dispute with another man, her alleged association with drugs, and a man's apparent dash to catch a bus simply do not compare to the enormous weight

of the evidence against the petitioner, including: his threats to kill the victims and attempt to hire their murder; his bloody palm print next to one of the bodies; the 911 call in which a victim is heard in the background pleading with the petitioner by name; and strong circumstantial evidence that a leather-working awl found at the scene and likely used in the murders belonged to him. *See State v. Smith*, 868 S.W.2d 561, 565–67 (Tenn. 1993). The petitioner cannot demonstrate any prejudice arising from his counsel's alleged ineffectiveness in Claims 8a2 and 8a3, so these claims do not merit further review pursuant to *Martinez*.

C. Petitioner's Claim That "Trial Counsel Ineffectively Failed To Object To Improper Jury Instructions (Amended Petition ¶¶8k1–8k4, 12c)."

In Claims 8k1–4 of his Amended Petition, the petitioner alleged that trial counsel was ineffective for failing to object to the trial court's guilt-phase jury instructions regarding the credibility of witnesses (8k1), the definitions of premeditation and deliberation (8k2), the evaluation of expert witnesses (8k3), and reasonable doubt (8k4). In claim 12c, he alleged that trial counsel was ineffective for failing to object to the sentencing-phase jury instructions regarding the "heinous, atrocious, or cruel" aggravating circumstance (12c1), the effect of mitigating evidence (12c2), the felony-murder aggravating circumstance (12c3), reasonable doubt (12c4), expert witnesses (12c5), the credibility of witnesses (12c6), the burden of proof to show mitigating circumstances (12c7), and the requirement of a unanimous verdict (12c8). (DE #18, at 11, 21.)

The court is perplexed by the petitioner's blanket assertion that "[t]hese particular ineffectiveness claims now raised in these proceedings are subject to *Martinez*, as they were never raised by post-conviction counsel." (DE #297, at 26.) With the apparent exception of Claim 12c2, the court's 2005 memorandum opinion found most of these claims to be exhausted and addressed and rejected the merits, even of those it found to be defaulted. (DE #201, at 89–107.) Those determinations, therefore, do not require reconsideration pursuant to *Martinez*.

The court did previously conclude that Claim 12c2, that counsel failed to object to an erroneous instruction about the effect of mitigation evidence, had not been raised in state court and was therefore procedurally defaulted. (DE #201, at 28.) The petitioner did not expressly include that instruction on his list of instructions to which he claimed at post-conviction that trial counsel was ineffective for failing to object. (DE #14, Add. 12, Vol. 1, Verified Amended Petition at 9–10.) But he did allege that the trial court violated his federal constitutional rights by giving the instruction at issue (*id.*, Verified Amended Petition at 13), and the TCCA expressly considered counsel's effectiveness in connection with this instruction as well as others:

> Next, the petitioner contends that counsel was ineffective for failing to object to certain jury instructions given during the guilt and sentencing phases of the trial. Although the petitioner contends the jury instructions warrant reversal, he has failed to cite any relevant case law specifically holding these instructions erroneous. Below is a summary of

> the contested instructions, all of which have been upheld by the Tennessee Supreme Court: heinous, atrocious, or cruel aggravating circumstance, reasonable doubt, assessing credibility of witnesses, effect of mitigating evidence, premeditation and deliberation, expert testimony, elements of underlying felony in felony murder. Accordingly, counsel's performance in this respect was adequate.

Smith v. State, No. 01C01-9702-CR-00048, 1998 WL 345353, at *26 (Tenn. Crim. App. June 30, 1998) (emphasis added; internal citations omitted).

Moreover, the petitioner's claim fails even under a de novo review. By the time of the court's previous ruling, it was clear that the petitioner's position was that the instruction in question was objectionable because it only allowed consideration of mental or emotional disturbance as a mitigating factor if it was "extreme." (DE #201, at 28.) The trial court instructions to the jury prior to its sentencing deliberations included the following:

> In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt-finding phase or the sentencing phase or both.
>
> . . .
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated, any mitigat-

> ing circumstances which shall include, but not be limited to the following:
>
> . . .
>
> (2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> . . .
>
> (4) Any aspect of the defendant's character or record or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

(DE #14, Add. 13, Ex. 13, Tr. at 3266, 3279–80.)

The United States Supreme Court has rejected the claim that reference to a statutory mitigating factor for extreme mental or emotion disturbance precludes consideration of lesser degrees of disturbance:

> The trial judge gave the jury examples of mitigating circumstances that it was entitled to consider, essentially the list of factors contained in § 9711(e). Among these, the judge stated that the jury was allowed to consider whether petitioner was affected by an "extreme" mental or emotional disturbance, whether petitioner was "substantially" impaired from appreciating his conduct, or whether petitioner acted under "extreme" duress. Petitioner argues that these instructions impermissibly precluded the jury's consideration of lesser degrees of disturbance, impairment, or duress. This claim bears scant relation to the mandatory aspect of Pennsylvania's statute, but in any event we reject it. The judge at petitioner's trial made clear to

> the jury that these were merely items it could consider, and that it was also entitled to consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense." App. 12–13. This instruction fully complied with the requirements of *Lockett* [*v. Ohio*, 438 U.S. 586 (1978)] and *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)].

Blystone v. Pennsylvania, 494 U.S. 299, 308 (1990). As in *Blystone*, the instructions in this case made clear that the statutory mitigating factor of extreme disturbance was just one of a non-exclusive list of potential factors and that the jury was free to consider any other mitigating fact that appeared from the record. Because this claim clearly fails on its merits, no further consideration of the *Martinez* factors is required.

D. Petitioner's Claim That "Trial Counsel Ineffectively Failed To Investigate And Present Evidence At Sentencing (Amended Petition ¶12a)."

Petitioner asserted in Claim 12a of his Amended Petition that trial counsel were ineffective at sentencing "[f]or failing to fully investigate and present evidence of Oscar Smith's mental health, including full exposition of available mitigating evidence and mental health problems in his family," including five specific examples of actual or potential mental health problems experienced by the petitioner, his father, his brother and his son. (DE #18, at 20–21.)

In his Verified Amended Petition for Post Conviction Relief filed through counsel on May 1, 1996, in

the Criminal Court for Davidson County, the petitioner asserted that counsel had been ineffective at sentencing for failing to "seek a mitigation specialist . . . to present to the jury all necessary mitigation evidence" (Claim II.C), failing to "properly investigate [his] background in order to find all appropriate mitigation evidence" (Claim II.D), and failing to "introduce all appropriate mitigating evidence necessary for the jury in rendering its decision in this case" (Claim II.E). (DE #14, Add. 12, Vol. 1, Verified Amended Petition at 10.) After a lengthy evidentiary hearing, the post-conviction trial court denied relief on the merits of that claim:

> Petitioner alleges that counsel was ineffective in not properly investigating petitioner's background to find all appropriate mitigation evidence. Mr. Newman and Mr. Dean [the petitioner's trial counsel] both testified that petitioner did not want counsel to raise mental health or family background issues, although Mr. Newman testified that petitioner ultimately changed his mind as to the use of family background. The Court is of the opinion that petitioner has not presented mitigation evidence which should have been presented by counsel and which would likely have changed the result of the trial, and this ground is without merit.

(DE #14, Add. 12, Vol. 1, Order at 11.) The petitioner appealed the denial of post-conviction relief but did not challenge the ruling on the IATC-mitigation claim. (DE #14, Add. 14, Vol. 2, Brief and Argument of Appellant). Accordingly, this court dismissed

Claim 12a as procedurally defaulted. (DE #201, at 28, 37, 42–43.)

Because this claim was defaulted on post-conviction appeal, rather than as the result of ineffective assistance at the initial-review stage of post-conviction proceedings, *Martinez* does not authorize any reconsideration of it. *West v. Carpenter*, 790 F.3d 693, 698–99 (6th Cir. 2015.) Relying on Ninth Circuit precedent, the petitioner argues that Claim 12a is actually a new claim that was never raised in state court "[a]s [it] is currently presented." (DE #297, at 29–30.) But it is in fact the same claim litigated at the post-conviction hearing – that trial counsel ineffectively failed to investigate and present available mitigation evidence – with new facts raised in support of it. Like Pinholster, West, Escamilla and Rhines – and unlike Martinez – the petitioner had his day in court on this claim. As the Sixth Circuit instructed in *West*, even if the failure to assert these particular facts on that day resulted in the rejection of a potentially meritorious claim for reasons "traceable directly to counsel's deficient advocacy," that deficiency did not cause the default of the claim in order to trigger *Martinez*'s application. *West*, 790 F.3d at 698–99. The default occurred when the petitioner failed to appeal the rejection of his claim, which is a stage of proceedings to which *Martinez* does not apply: "The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial review collateral proceedings[.]" *Martinez v. Ryan*, 566 U.S. 1, 16 (2012) (emphasis added). In essence, the petitioner is attempting to do the same thing that the Supreme Court held Pinholster was prohibited from doing – add new mitigation

evidence that trial counsel was allegedly ineffective for failing to present[8] – but with the added twist that he also defaulted the original claim on post-conviction appeal. He is not entitled to relief on either basis.

IV. CONCLUSION

As discussed above, it is clear from the evidence in the record that all of the claims raised in the petitioner's brief (DE #297) are either too lacking in merit to warrant relief pursuant to *Martinez* or are not subject to *Martinez* review at all. The petitioner clearly felt free to submit new evidence in the form of exhibits to his brief (DE ## 297-1–297-29), which the court has considered except as otherwise noted above. Because the petitioner has not identified any additional evidence that could only be developed at a hearing, the court finds that no such hearing is required to resolve this matter. *See Segundo v. Davis*, 831 F.3d 345, 351 (2016) (holding that the district court did not abuse its discretion in denying a hearing to determine whether claim satisfied *Martinez* because the record contained sufficient facts to make

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[8] At Pinholster's state habeas proceeding, his counsel asserted that trial counsel had been ineffective at sentencing by failing to adequately investigate and present mitigating evidence, but the state court denied that claim on its merits. *Pinholster*, 563 U.S. at 177. Pinholster reasserted the exhausted penalty-phase IATC claim in his federal habeas petition, and this time presented the testimony of two new medical experts who testified to diagnoses of the petitioner that had not been presented in state court. *Id.* at 179. The Supreme Court held that it was error for the federal court to consider that new evidence because AEDPA limits the review of exhausted claims to the state-court record. *Id.* at 181–82.

that determination). The court will deny the requested relief and dismiss this action.

s/

Aleta A. Trauger
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:99-CV-0731

OSCAR SMITH,
Petitioner,

v.

WAYNE CARPENTER, WARDEN,
Respondent.

January 8, 2018

ORDER

The court denied habeas relief to the petitioner, Oscar Franklin "Frank" Smith, a state prisoner on death row at Riverbend Maximum Security Institution in Nashville, Tennessee, on September 30, 2005 (DE ##201, 202), and the United States Court of Appeals for the Sixth Circuit affirmed the denial in June 2010. *Smith v. Bell*, 381 F. App'x 547 (6th Cir. 2010). The case is back before the court for further consideration of certain claims in light of *Martinez v. Ryan*, 566 U.S. 1 (2012).

The court **DENIES** the petitioner's request for relief and request for a new evidentiary hearing pursuant to *Martinez*, for the reasons set forth in the court's contemporaneously entered Memorandum. This matter is again **DISMISSED** with prejudice.

The court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Gov'g § 2254 Cases. A petitioner may not take an appeal unless a district or circuit judge issues a COA. 28

U.S.C. § 2253(c)(1); Fed. R.App. P. 22(b)(1). A COA may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2). A petitioner makes a "substantial showing" when he demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations and internal quotation marks omitted). "[A] COA does not require a showing that the appeal will succeed," but courts should not issue a COA as a matter of course. *Id.* at 337.

Reasonable jurists could not debate whether the petitioner is entitled to the relief he seeks. Accordingly, the court **DENIES** a COA. The petitioner may still seek a COA directly from the Sixth Circuit Court of Appeals. Rule 11(a), Rules Gov'g § 2254 Cases.

IT IS SO ORDERED.

s/
Aleta A. Trauger
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:99-CV-0731

OSCAR SMITH,
Petitioner,

v.

WAYNE CARPENTER, WARDEN,
Respondent.

[July 28, 2015]

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR DISCOVERY

Pending before the court is Petitioner's Motion For Discovery (ECF No. 239) pursuant to Rule 6(a) of the Rules Governing § 2254 Cases (Habeas Rules), to which the respondent has responded in opposition (ECF No. 248), and the petitioner has replied in support (ECF No. 249). The motion is now ripe for review.

The court has the discretion to permit discovery under Rule 6(a) for "good cause," which the Supreme Court has found to exist "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908 (1997). This standard does not require a district court to permit "a fishing expedition masquerading as discovery." *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001).

I. Background

This court denied the petition in this case on September 30, 2005 (ECF Nos. 201, 202), and the United States Court of Appeals for the Sixth Circuit affirmed the denial in June 2010. *Smith v. Bell*, 381 F. App'x 547 (6th Cir. 2010). In March 2012, the United States Supreme Court granted certiorari, vacated the judgment and remanded to the Sixth Circuit for further consideration in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (ECF No. 213.). Finding that *Martinez* was inapposite to the issues it considered in this case, the Sixth Circuit reinstated its June 2010 judgment. (ECF No. 214.) Petitioner again petitioned for certiorari, and in June 2013 the Supreme Court again granted certiorari and vacated the judgment, this time for further consideration in light of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). (ECF No. 217.) The Sixth Circuit promptly remanded the case to this court to conduct that reconsideration. (ECF No. 218.)

The sea change in federal habeas corpus review effected by *Martinez*, applicable in Tennessee by virtue of *Trevino* and *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), relates to the review of procedurally defaulted claims. As the court explained more fully in its previous memorandum (ECF No. 201, at 20–22), when a habeas petitioner has failed to fully exhaust a claim in state court and is now unable to do so because of a statute of limitations or other state procedural rule, the claim is considered to be procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991). Except in cases where the petitioner can establish that he is actually innocent, federal habeas review of the merits of defaulted

claims is prohibited unless the petitioner demonstrates cause for, and prejudice from, his default. *Alley v. Bell*, 307 F.3d 380, 386 (6th Cir. 2002). At the time the court denied this petition in 2005, "the law [was] firmly settled that ineffective assistance of counsel in state post-conviction proceedings can never establish cause, because there is no constitutional right to effective assistance of counsel in such collateral proceedings in the first place." (ECF No. 201, at 41–42 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), *Coleman*, 501 U.S. at 742–53, and *Ritchie v. Eberhart*, 11 F.3d 587, 590 (6th Cir. 1993)).) This court applied that rule in holding that several of the petitioner's claims were procedurally defaulted and not subject to review on habeas corpus.

Seven years after this court rejected those claims as defaulted, and two years after the Sixth Circuit affirmed, the Supreme Court held in *Martinez* that the ineffective assistance of post-conviction counsel *can* establish "cause" to excuse the procedural default of a defendant's substantial claim of ineffective assistance at trial, but only where state procedural law prohibits defendants from raising such claims on direct appeal and requires defendants to raise the claims for the first time in post-conviction proceedings. *Martinez*, 132 S.Ct. at 1318–19. Less than a year later, the Supreme Court in *Trevino* extended *Martinez* to apply to cases where, although state procedural law might permit defendants to raise ineffective-assistance claims on direct appeal, a state's "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful

opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921.

Applying *Trevino*, the Sixth Circuit Court of Appeals has recognized that "Tennessee defendants, too, are highly unlikely to have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Sutton v. Carpenter*, 745 F.3d 787, 792 (6th Cir. 2014). The court therefore held, based on *Martinez* and *Trevino*, that "ineffective assistance of post-conviction counsel can establish cause to excuse a Tennessee defendant's procedural default of a substantial claim of ineffective assistance at trial." *Id.* at *7 (citations omitted).

II. Completely Defaulted Ineffective-Assistance-of-Trial-Counsel Claims

On remand, therefore, the court in this matter must determine whether the petitioner can demonstrate cause and prejudice under *Martinez* in connection with his ineffective-assistance claims that were previously rejected as defaulted. To the extent that his claims fall within the scope of *Martinez*, therefore, the petitioner is entitled to investigate and discover any evidence tending to establish the ineffectiveness of post-conviction counsel and the substantiality of his underlying claims. *See Sanders v. White*, No. 03-455-ART, 2015 WL 4394169, at *6 (E.D. Ky. July 15, 2015) (granting in part Rule 59 motion and allowing petitioner to "proceed to fact development to determine whether he can prevail on [*Martinez*] argument").

Petitioner's ineffective-assistance-of-trial-counsel claims that this court previously rejected on the basis of default included the following:

- Claim 8.a.2) and 3) – Trial counsel were ineffective at the guilt phase by failing to investigate and present evidence that a black male was the perpetrator and that the murders were drug- and/or robbery-related. (ECF No. 18, at 2–4; ECF No. 201, at 22– 23, 42–43.)
- Claim 8.b.4)(a) and (d) – Trial counsel were ineffective at the guilt phase by failing to challenge the alleged time of death and support the petitioner's alibi by investigating and presenting evidence that an alarm clock set for 5:00 was not ringing when the bodies were discovered, indicating that they had been killed after waking that morning, and evidence that the back door had been closed at 11:30 the previous night but was found ajar on the afternoon that the bodies were discovered. (ECF No. 18, at 4–6; ECF No. 201, at 23, 42–43.)
- Claim 8.b.4)(a) and (d) – Trial counsel were ineffective at the guilt phase by failing to challenge the alleged time of death and support the petitioner's alibi by investigating and presenting evidence that an alarm clock set for 5:00 was not ringing when the bodies were discovered, indicating that they had been killed after waking that morning, and evidence that the back door had been closed at 11:30 the previous night but was found ajar on the afternoon that the bodies were discovered. (ECF No. 18, at 4–6; ECF No. 201, at 23, 42–43.)

- Claim 8.c.5) – Trial counsel were ineffective at the guilt phase by failing to conduct forensic investigation and present evidence regarding unidentified foot and shoe prints (and casts created from them) found outside the house. (ECF No. 18, at 6–7; ECF No. 201, at 23–24, 42–43.)

Accordingly, the petitioner's Discovery Requests 1, 2, 4, and 5, each of which relates to one or more of the defaulted ineffective-assistance claims identified above, are **GRANTED**.

III. Allegedly Ineffectively Handled Ineffective-Assistance

Petitioner's Discovery Request 3, however, is in a different category. This request relates to Claims 8.b.4)(c) and 8.c.11), which allege that trial counsel were ineffective at the guilt phase for failing to challenge the time of death and bolster the petitioner's alibi by investigating and presenting evidence that a hair dryer was running when the bodies were found but had not been heard by police at 11:30 the previous night. Unlike the defaulted claims at issue in *Martinez*, *Trevino* and *Sutton*, this claim *was* raised by post-conviction counsel and simply found by the state courts to be without merit:

> The petitioner also testified that his attorneys did not inquire, upon the petitioner's request, how long a hair dryer could run before turning off from overheating when a hair dryer was found running near Jason's body.
>
> * * *

> Newman [testified that he] did not investigate the fact that a hair dryer was running when the bodies were found, but he testified that this did not affect their defense.
>
> * * *
>
> The petitioner claims that conceding the time of death affected counsel's ability to investigate other circumstances of the crime scene. The petitioner challenges counsel's failure to investigate whether or not a hair dryer that was found at the scene was turned on or off. The petitioner states that the officers responding to the 911 call did not hear any noise coming from the house, but notes that the person who discovered the bodies supposedly heard a hair dryer. The petitioner does not suggest, however, how this played into his defense. The petitioner does not even argue why defense counsel was ineffective for failing to investigate this. There is nothing in the record to indicate the condition of the hair dryer could have bolstered the alibi defense or changed the outcome of the trial.

Smith v. State, No. 01C01-9702-CR-00048, 1998 WL 345353, at *12, 15, 21 (Tenn. Ct. Crim. App. June 30, 1998). Accordingly, this court did not reject these claims as procedurally defaulted, but reviewed their merits with the deference to the state judgments required by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and concluded that the state court's "determination that defense counsels' representation was not deficient . . . was not

contrary to, or an unreasonable application of, clearly established federal law." (ECF No. 201, at 79, 80.) The court therefore found the claims were without merit. (*Id.*)

The petitioner acknowledges that "*Martinez* itself only speaks directly to a complete procedural default of an ineffectiveness claim during post-conviction proceedings," but he argues at length that *Martinez* "applies with equal force to a post-conviction ineffectiveness claim that may have been presented in the post-conviction trial court, but which post-conviction counsel ineffectively presented or ineffectively failed to prove during those proceedings." (ECF No. 249, at 6.) Indeed, a careful reading of *Martinez* reveals that the post-conviction ineffectiveness to which it refers is never expressly limited to failure to raise a claim but appears to encompass the entirety of "[i]nadequate assistance of counsel at initial-review collateral proceedings" with respect to a claim of ineffective assistance of trial counsel. *Martinez*, 132 S. Ct. at 1315. And to be sure, the consequences for a petitioner are the same, regardless of whether his post-conviction counsel ineffectively fails to raise a claim or ineffectively fails to support the claim on initial review. The petitioner's argument thus has some force purely as a matter of logic. As a matter of law, however, the petitioner does not cite any post-*Martinez* case law (a minority dissent from the denial of certiorari notwithstanding) in support of his position. And the court is mindful that the entire point of *Martinez* was the establishment of cause to overcome the bar of procedural default, which is not in issue when a

claim has been raised and decided on its merits in state court.

The Sixth Circuit has not yet addressed this particular question, and courts considering this issue have come out on both sides. *Compare, for example, Haight v. White*, No. 3:02-CV-P206-S, 2013 WL 5146200, at *8 (W.D. Ky. Sept. 12, 2013) ("*Martinez* is clear that errors by post-conviction attorneys in collateral proceedings that rise to the level of ineffective assistance of counsel may be sufficient to establish cause for a procedural default of an ineffective assistance of trial counsel claim. That is so whether the post-conviction attorney entirely failed to raise the claim or raised the claim, but did so in a manner that was insufficient to meet prevailing professional standards."); *and Horonzy v. Smith*, No. 1:11-cv-00235-EJL, 2013 WL 3776372, at *2 (D. Idaho July 16, 2013) (noting that, if "initial post-conviction counsel . . . failed to adequately develop the facts and seek an evidentiary hearing," this failure "would be within the *Martinez* exception"); *with Henderson v. Carpenter*, 21 F. Supp. 3d 927 (W.D. Tenn. 2014) (rejecting the petitioner's argument that "it is 'irrational' to distinguish failing to properly assert a federal claim and failing to properly develop the claim in state court" and holding that *Martinez* does not apply "where post-conviction counsel failed to develop the evidentiary basis for a claim of ineffective assistance during the initial review proceedings")[1]; *and Dorsey v. Denney*, No.

[1] Like the present action, this *Henderson* decision was issued upon remand for reconsideration in light of *Martinez* and in-

4:08-CV-2005 (CEJ), 2013 WL 451642, at *2 (E.D. Mo. Feb. 6, 2013) (where the petitioner argued under *Martinez* that "post-conviction motion counsel was ineffective for raising petitioner's claim of ineffective assistance of trial counsel, but then failing to fully develop the record regarding this claim at the evidentiary hearing," holding that *Martinez* did not apply because, "[i]n this case, there was no procedural default of the claim. While the record was not developed as thoroughly as petitioner desired, the claim was raised."). Instruction from the Sixth Circuit on this question may be forthcoming in the pending appeal in *Henderson*, with the Sixth Circuit having recently granted a motion to expand the certificate of appealability to include the claims that the district court ruled were outside the scope of *Martinez*. *See Henderson v. Carpenter*, Nos. 12-5028/14-5911 (6th Cir. April 14, 2015) (order re: COA).

The court is not prepared to rule on this open question at this stage of the renewed proceedings in this matter and will expect the parties to address it in their briefs. Consequently, it is not prepared to preclude the petitioner from developing his claim. While the court may ultimately agree with the respondent that the petitioner's Claims 8.b.4)(c) and 8.c.11) are not subject to reconsideration on the basis of *Martinez*, the petitioner's offer of proof in connection with those claims will preserve the record

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volved a dispute about whether certain claims were included in *Martinez*'s scope. *Henderson*, 21 F. Supp. 3d at 930, 933.

on the issue for any further review. The petitioner's Discovery Request 3 is therefore **GRANTED**.

IV. Remaining Claims

The petitioner's Discovery Request 6, however, is **DENIED**. This request is based on Claims 12.d (trial counsel were ineffective at sentencing for failing to object to improper arguments), 13 (the prosecution engaged in improper arguments) and 24 (appellate counsel was ineffective for failing to raise "all meritorious issues on direct appeal," now ostensibly including that raised in Claim 13). This court has found that the state court's denials of these claims were "not contrary to, or an unreasonable application of, clearly established law" and that the claims were "without merit" on habeas review. (ECF No. 201, at 107–111.)

Only one of these claims – 12.d – alleges ineffective assistance of trial counsel. The petitioner raised this claim on post-conviction. The state court determined that trial counsel's decision not to object was not ineffectiveness, but instead a matter of trial strategy, and further that the prosecutor's statements in question did not require reversal in light of the overwhelming evidence against the petitioner. *Smith v. State*, No. 01C01-9702-CR-00048, 1998 WL 345353, at *26 (Tenn. Ct. Crim. App. June 30, 1998). Because the petitioner does not allege any ineffectiveness of post-conviction counsel in the handling of this claim in state court, he cannot argue that *Martinez* requires any reconsideration of it.

Instead, the petitioner argues that he is entitled to reconsideration of the closely related Claims 13 and 24, apparently on the basis that post-conviction

counsel ineffectively defaulted claim 24 specifically with the issue raised in claim 13. To clarify, although post-conviction counsel did raise issues of ineffective assistance of appellate counsel, he did not specifically assert that appellate counsel was ineffective for failing to raise the issue of improper arguments. The petitioner therefore argues that post-conviction counsel's ineffective failure to raise that ineffective-assistance-of-appellate-counsel claim constitutes cause for default and requires reconsideration under *Martinez*.[2]

In the abstract, the argument that *Martinez* should apply to defaulted claims of ineffective assistance of appellate counsel makes sense. After all, the initial post-conviction proceeding is obviously the first opportunity to raise a claim of ineffective assistance of appellate counsel; so, such a claim is no different than a claim of ineffective assistance of trial counsel in that it is defaulted forever if not raised in that proceeding – unless *Martinez* applies. But as petitioner acknowledges, the Sixth Circuit has expressly rejected the argument that *Martinez* applies to any claims other than claims for ineffective assistance of trial counsel: "We will assume that the Supreme Court meant exactly what it wrote." *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013) (holding that ineffective assistance of post-conviction counsel

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[2] The court observes that habeas counsel made an omission similar to the one for which he now faults appellate counsel, by failing to include the improper arguments in the list of issues that appellate counsel allegedly should have raised. *See* ECF No. 18, at 30–31; ECF No. 201, at 109 n.52.

did not excuse default of substantive mental-competence claim or of ineffective-assistance-of-appellate-counsel claim).

The petitioner thus lacks any argument in support of reconsideration of this group of claims that is viable in this circuit. Moreover, the particular discovery requested – the deposition of the prosecutor alleged to have delivered the objectionable arguments – would do nothing to support the petitioner's claims, even in an offer of proof. This court has determined that, even assuming the statements at issue were deliberate on the part of the prosecutor, the remarks "did not prejudice the petitioner or undermine the fundamental fairness of the trial." (ECF No. 201, at 109.) No amount of new information about the prosecutor's state of mind would have any bearing on that conclusion.

V. Conclusion

For the reasons set forth above, the petitioner's Motion for Discovery (ECF No. 239) is **GRANTED** with respect to Discovery Requests 1 through 5 and **DENIED** with respect to Discovery Request 6.

IT IS SO **ORDERED**.

s/
Aleta A. Trauger
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-5133

OSCAR SMITH,
Petitioner-Appellant,

v.

WAYNE CARPENTER, WARDEN,
Respondent-Appellee.

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

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

s/

Deborah S. Hunt, Clerk

APPENDIX F

CRIMINAL COURT
FOR THE DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE DIVISION II

No. 89–F–1773

OSCAR FRANK SMITH,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

[May 1, 1996]

VERIFIED AMENDED PETITION FOR POST CONVICTION RELIEF

Comes the Petitioner, Oscar Frank Smith, by and through his attorneys, Richard McGee and Robert Mendes, pursuant to T.C.A. § 40-30-101 et seq. and submits this Verified Amended Petition for Post Conviction Relief.

PRELIMINARY INFORMATION

1. Petitioner's full name is Oscar Frank Smith, Jr. His address is No. 136424, Unit 2, Riverbend Maximum Security Institution, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee, 37209.

2. Petitioner is incarcerated at RMSI.

3. This petition challenges the constitutional validity of the judgment and sentence entered under indictment number 89-F-1773. Pursuant to that indictment, the Criminal court of Davidson County, Tennessee, convicted the Petitioner of three counts of first degree premeditated murder and sentenced him to death.

4. At Petitioner's jury trial, court appointed counsel, Karl Dean and J. Paul Newman, of the Metropolitan Davidson County Public Defender's Office represented him. The court entered its sentence of death on July 27, 1990.

5. Petitioner timely appealed his conviction and sentence to the Tennessee supreme Court. In that appeal, Petitioner raised the following issues:

> a. Did the Trial Court err in overruling the Defendant's motion to suppress statement and further err in admitting at trial evidence relating to the statement which was not considered at the suppression hearing?
>
> b. Did the Trial Court err in denying the Defendant's motion to suppress evidence obtained during a search of his residence pursuant to a search warrant?
>
> c. Did the Trial Court err in admitting hearsay statements from the father of· one of the victims regarding the victim's fear of the Defendant?
>
> d. Did the Trial Court err in admitting numerous hearsay statements into evidence through the testimony of prosecution witness Teresa Zastrow?
>
> e. Did the Trial Court err in admitting inflammatory and prejudicial photographs of the victims during the guilt-innocence phase of the trial?
>
> f. Did the Trial Court err in overruling the Defendant's objection to the expert qualifications and testimony of the sergeant Johnny Hunter re-

garding the "alternate light source" technique of the fingerprint identification?

g. Did the Trial Court err in overruling the Defendant's objection to hearsay testimony from prosecution witness Billy Fields regarding the victim Judy Smith's alleged fear of the Defendant and her request that fields not come to her residence on October 1 because the Defendant would be there?

h. Did the Trial Court err in admitting tape recordings and a purported transcript of a 911 emergency telephone call allegedly made from the victims' residence just prior to the murders?

i. Did the Trial Court err in admitting evidence that the Defendant had been charged with aggravated assault against two of the victims?

j. Did the Trial Court err in admitting evidence that the Defendant attempted to solicit others to kill the victims?

k. Did the Trial Court err in admitting hearsay testimony from prosecution witness Sheila Gunther concerning the victim Judy Smith's future plans, and further err in admitting testimony from Ms. Gunther that the Defendant threatened the victims several months prior to the murders?

l. Did the Trial Court err in overruling the Defendant's objection to the testimony of a prosecution witness concerning a comment allegedly made by the Defendant regarding the "McDonalds's Massacre" in California?

m. Did the Trial Court err in allowing the State to cross-examine the Defendant concerning

details of his prior employment in the "killing room" of a meat packing plant?

n. Is the evidence presented at trial sufficient to convince a rational trier of fact that the Defendant is guilty of three counts of murder in the first degree beyond a reasonable doubt?

o. Did the Trial Court err in admitting certain photographs of two of the victims during the penalty phase of the trial?

p. Did the Trial court err in denying the Defendant's motion for a judgment of the acquittal as to the "heinous, atrocious or cruel" statutory aggravating circumstance?

q. Did the Trial Court err in denying the Defendant's motion for a judgment of acquittal as to the "interfering with arrest" statutory aggravating circumstance?

r. Did the Trial Court err in denying the Defendant's motion for a judgment of acquittal as to the "felony-murder" statutory aggravating circumstance?

s. Did the Trial Court err in denying the Defendant's motion to strike and motion for a judgment of acquittal as to the "mass murder" statutory aggravating circumstance?

t. Did the Trial Court err in overruling the Defendant's motion to exclude death as a possible punishment due to the unconstitutionality of Tennessee's death penalty statute?

6. On November 18, 1993, the Tennessee Supreme Court affirmed Petitioner's conviction and sentence. 868 S.W.2d 561 (Tenn. 1993). A petition to re-

hear was denied on January 5, 1994. A Petition for Certiorari was timely filed with the United States Supreme court. That petition was denied on October 31, 1994.

7. On February 8, 1995, a pro se Petition for Post Conviction Relief was filed. Attorney Richard McGee was appointed to represent him. Subsequently, attorney Robert Mendes was appointed as co-counsel in this case.

I. Petitioner's trial counsel provided ineffective assistance of counsel to the prejudice of Petitioner at the Guilt/Innocence Phase of the trial in violation of Article 1, § 9 of the Tennessee Constitution and the Sixth Amendment to the United States Constitution as well as in violation of Article I, §§ 6, 8, and 16 of the Tennessee Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. Trial counsel failed to request expert services as provided for by T.C.A. § 40-14-207(b); Tennessee Supreme Court Rule 13. 2; the Sixth, Eighth, and Fourteenth Amendments to the United states Constitution; Article 1, §§ 6, 8, 9, 10, 11, 14, 16, and 17 of the Tennessee Constitution. Specifically, counsel did not seek the services of the following necessary expert witnesses:

> (1) Forensic Pathologist. The assistance of a forensic pathologist was essential to the preparation and defense in this case. The testimony of the medical examiner presented by the prosecution in this case was crucial to both the prosecution and the defense as the time of death was es-

tablished by this witness. The failure of Petitioner's trial counsel to seek the expert services of a forensic pathologist to assist in the preparation of the cross-examination of the medical examiner clearly denied him ineffective assistance of counsel. The entire cross-examination of the State's medical examiner consisted of nine questions. This cross-examination was fully ineffective and a product of counsel's refusal to request the services of an expert to properly prepare and present the cross-examination of this key witness. Likewise, no evidence was introduced on behalf of the Petitioner regarding time of death due to counsel's failure to seek the services needed for the discovery and presentation of this evidence. As Petitioner's defense was one of alibi, time of death was crucial to both the Defendant and the State.

(2) Homicide reconstructist. Counsel for the Defendant did not seek the services of a homicide reconstructionist to either assist him in the cross-examination of the State's experts or for the purpose of introducing evidence on behalf of the Petitioner. Counsels' failure to seek the services of a reconstructionist prevented the Defendant from effectively confronting the testimony that was presented and contradicting the theory advanced by the state as to how the murder were committed and as to the time of death of the victims.

(3) Linguist. Counsel for the Defendant did not seek the services of a linguist to either assist him in the cross-examination of the State's witnesses or for the purpose of introducing evidence

on behalf of the Petitioner. This omission was critical as the State introduced evidence and argued to the jury that the Defendant's use of the past tense when speaking of his wife and his step-children when he was interrogated by law enforcement officers established that he was the murderer and knew the fate of the victim's before he was ever questioned by the officers. In fact, a linguist would have assisted counsel in both the cross-examination of the police officers who introduced the statement and in the explanation for the jury of why the use of the past tense did not mean that the Defendant was the killer;

(4) Audio analysis expert. Counsel for the Defendant did not seek the services of an independent audio analysis expert to either assist him in the cross-examination of the State's expert or for the purpose of introducing evidence on behalf of the Petitioner on the question of the reliability of the transcript of the 911 call. Likewise, the jury was not presented with any evidence on behalf of the Defendant addressing the "enhancement" of the original 911 tape which clearly did not contain the word 'Frank'.

(5) Hair Fiber Expert. Counsel for the Defendant did not seek the services of a hair fiber expert to either assist him in the cross-examination of the State's expert or for the purpose of introducing evidence on behalf of the Petitioner even though one of the victims had hair in his hand which was not the Defendant's. Clearly, counsel needed to establish the identity of hair as a potential suspect other than the Defendant.

(6) Serologist. Counsel for the Defendant did not seek the services of a serologist to either assist him in the cross-examination of the State's expert or for the purpose of introducing evidence on behalf of the Petitioner.

B. Jury Instructions

Trial counsel failed to object to jury instructions which were given by the Trial Judge during the Guilt/Innocence phase of the trial. As a result of counsel's failure and the prejudice to Petitioner, the Petitioner was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution. Specifically, counsel failed to object to the following:

(1) Trial counsel did not object to the "presumption of malice" instruction;

(2) Counsel did not object to the "premeditation and deliberation" jury instruction;

(3) Trial counsel did not object to the "reasonable doubt" jury instruction;

(4) Trial counsel did not object to the "expert witness" jury instruction; and

(5) Trial counsel did not object to the "credibility of the witness" jury instruction.

C. Specific Instances of Ineffective Assistance of Counsel. The following non-tactical omissions of counsel during trial deprived the Petitioner of the right to effective assistance of counsel:

(1) Trial counsel failed to introduce evidence of a bloody knife that was found at the scene of the crime which did not belong to the Petitioner;

(2) Trial counsel did not object to the introduction of the testimony and argument by the State of a "holster" nor contradict testimony of the State's witnesses that the "holster" was for a .22 caliber revolver;

(3) Trial counsel failed to contradict the assertion of the State that the Petitioner was the beneficiary of $88,000 in life insurance proceeds which established, in part, the Petitioner's motive to commit the crime;

(4) Trial counsel did not object to the use by the prosecuting attorney of leading questions during one of the most critical phases of the entire trial: to wit, the direct testimony of Dr. Harlan relating to the time of death. As result of counsel's failure to object, the attorney for the State was able to ask leading questions which not only established the State's theory, but totally repudiated the alibi defense asserted by Mr. Smith;

(5) Trial counsel failed to introduce evidence through either cross-examination or direct examination establishing that the patrol officers who responded to the 911 call had given inconsistent statements regarding their activity. This omission was critical as the length of time that elapsed between when the 911 call occurred and when the officers arrived at the scene of the victim's residence was critical to both the prosecution and defense theories;

(6) Trial counsel failed to introduce evidence developing other suspects as the potential murderer in this case, including Billy Fields. Further, counsel failed to properly develop the improbabil-

ity of Mr. Fields' testimony regarding his arrival at the home of the victims in the early morning hours and his not entering the house even though the hair dryer was operating and the back door was opened which clearly indicated that there were persons inside;

(7) Trial counsel failed to introduce evidence regarding the weather conditions between Nashville and Morehead, Kentucky, the night of the murders in order to substantiate the Defendant's claim regarding the time it took to drive the route;

(8) Trial counsel failed to properly investigate the case, which included the use of the least experienced criminal investigator in the Public Defender's Office. This decision by trial counsel led to a totally inadequate investigation for a capital case;

(9) Trial counsel did not develop fully the evidence regarding the bloodless glove found in the diaper box and the improbability that this glove, alleged by the state to have been worn by the Defendant while he committed the murders, could somehow have remained totally spotless while every other item in the room was blood splattered; and

(10) Trial counsel did not fully develop the contradiction between the testimony of the officers responding to the 911 call that they heard nothing whatsoever and the testimony of the first witness who arrived at the scene that he heard the hair dryer. This testimony was crucial in conjunction with the fact that the back door of the

residence was open and the officers' responsibility in response to the 911 call having been to check all of the doors, there clearly was evidence that there had been a subsequent entry into the home after the 911 response had been made.

D. Jury selection.

(1) Trial counsel failed to properly attempt to rehabilitate jurors who were excused for cause by the Trial Court because they indicated initially they were opposed to the death penalty. Under the Supreme Court decisions in Witt it is the responsibility of counsel to rehabilitate these witnesses in order to ensure that there is not a completely death-prone jury seated in this case.

(2) Trial counsel did not object to exclusion of jurors who were disqualified due to their general opinion in opposition to the death penalty; and

(3) Trial counsel failed to challenge for case jurors who were such strong proponents of the death penalty that it would have been impossible for them to have voted for a sentence of life imprisonment once they had determined that the Defendant was guilty of premeditated murder.

E. To the extent that this Court concludes that Petitioner's counsel did not present these claims, or any portion of these claims, in prior proceedings, Petitioner has not knowingly and understandably failed to present these claims or portions of claims in a prior proceeding, including any appeal. None of Petitioner's previous attorneys a) consulted with petitioner concerning the facts and law constituting this claim; b) advised Petitioner about their opinion as to the propriety of presenting this claim to the courts

before which they represented Petitioner; or c) solicited Petitioner on whether he desired to present this claim to the courts before which they represented Petitioner. The failure of Petitioner's attorneys to act precluded Petitioner from being in a position to knowingly and understandingly fail to present these claims to previous courts. Petitioner does not have a college education, let alone a legal one. As such, without appropriate consultation with counsel, Petitioner was unaware a) of the law in support of the claims he here presents; b) of facts necessary to present in support of these claims; and c) of the viability of these claims. For the foregoing reasons, Petitioner has never made a deliberate, informed, considered, tactical choice not to present this claim, or any portion of it, at prior proceedings. Petitioner, therefore, has not knowingly and understandingly failed to do so.

II. Trial counsel provided ineffective assistance of counsel to the prejudice of Petitioner at the sentencing Phase in violation of Article I, § 9 of the Tennessee Constitution and the Sixth Amendment to the United States Constitution as well as in violation of Article I,§§ 6, 8, and 16 of the Tennessee Constitution and the Fifth, Eighth and Fourteenth Amendments to the united states constitution.

A. Trial counsel failed to object to jury instructions which were given by the Trial Court during the sentencing hearing in this case, which resulted in a denial of the Petitioner's rights to due process of law and to be protected from cruel and unusual punishment as guaranteed by the Eighth Amendment to the

United States Constitution an Article I, § 16 of the Tennessee Constitution. Specifically:

(1) Trial counsel failed to object to jury instructions which shifted the burden of proof to the Petition to show the existence of mitigating circumstances;

(2) Trial counsel failed to object to jury instructions that clearly had the effect upon the jury to require that they find unanimously the existence of mitigating circumstances;

(3) Trial counsel failed to object to the jury instructions regarding the definition of reasonable doubt;

(4) Trial counsel failed to object to the "expert witness" jury instruction at the sentencing phase;

(5) Trial counsel failed to object to the "credibility of the witness" jury instruction;

(6) Trial counsel failed to object to the "heinous, atrocious, and cruel" aggravating instruction; and

(7) Trial counsel failed to object to the court's instruction regarding the felony-murder, aggravating circumstance. Specifically, the trial court failed to define the underlying felonies and counsel did not object.

B. Trial counsel failed to request jury instructions which were essential to the Petitioner's constitutional rights during the sentencing hearing. Specifically:

(1) Trial counsel failed to request a jury instruction informing the jury of the effect of their inability to agree on a sentence; and

(2) Trial counsel failed to request a jury instruction explaining to the jury that they could consider a mitigating circumstance without the jury unanimously agreeing to its finding.

C. Trial counsel's failure to seek a mitigation specialist deprived the Petitioner an opportunity to present to the jury all necessary mitigation evidence.

D. Trial counsel did not properly investigate the Defendant's background in order to find all appropriate mitigation evidence necessary for the jury in rendering his decision in this case.

E. Trial counsel did not introduce all appropriate mitigating evidence necessary for the jury in rendering its decision in this case.

F. Trial counsel did not object to the improper argument of the District Attorney during the sentencing phase of the trial.

(1) The District Attorney's personal opinion regarding how "horrible" the case was;

(2) The District Attorney's opinion that they had made a decision that the present case was one in which the death penalty should be sought;

(3) The District Attorney's statements regarding the impact the murder had upon the community;

(4) The District Attorney's statements regarding the impact the murder had upon the families of the victim;

(5) The statement's of the District Attorney that a life sentence is not a life sentence, which was

reiterated when the District Attorney stated, "I don't think so" while arguing that a life sentence is not a sentence of life imprisonment;

(6) The District Attorney's argument that mitigation was nothing more than a "justification not to give the death penalty.";

(7) The District Attorney's statement to the jury in which he said, "There's no way to compare your values to this man."

G. To the extent that this Court concludes that Petitioner's counsel did not present these claims, or any portion of these claims, in prior proceedings, Petitioner has not knowingly and understandably failed to present these claims or portions of claims in a prior proceeding, including any appeal. None of Petitioner's previous attorneys a) consulted with petitioner concerning the facts and law constituting this claim; b) advised Petitioner about their opinion as to the propriety of presenting this claim to the courts before which they represented Petitioner; or c) solicited Petitioner on whether he desired to present this claim to the courts before which they represented Petitioner. The failure of Petitioner's attorneys to act precluded Petitioner from being in a position to knowingly and understandingly fail to present these claims to previous courts. Petitioner does not have a college education, let alone a legal one. As such, without appropriate consultation with counsel, Petitioner was unaware a) of the law in support of the claims he here presents; b) of facts necessary to present in support of these claims; and c) of the viability of these claims. For the foregoing reasons, Petitioner has never made a deliberate, informed, considered, tactical choice not to present this claim, or any por-

tion of it, at prior proceedings. Petitioner, therefore, has not knowingly and understandingly failed to do so.

III. The Trial court's instructions at the Guilt/Innocence phase of the trial violated Article I, §§ 6, 8, and 16 of the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

(1) The Trial Court's definition of reasonable doubt unconstitutionally deprived the Defendant of due process of law;

(2) The Trial Court's instructions regarding premeditation and deliberation deprived the Defendant of due process of law;

(3) The Trial Court's instruction regarding the presumption of malice unconstitutionally shifted the burden of proof to the Defendant in violation of due process provisions of the United States and Tennessee Constitutions;

(4) The court's instruction regarding "expert witness" testimony and why that testimony was to be received with caution violated the Defendant's right for due process of law; and

(5) The Court's instructions regarding the "credibility of the witness" violated the Defendant's right to due process of law.

IV. The Trial Court's instructions at the Sentencing Phase of the trial violated Article I, §§ 6, 8, 10, 16, and 17 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. The following issues exist in connection with the Sentencing Phase of the trial:

(1) The reasonable doubt jury instruction given to the jury violated the Defendant's right to due process of law;

(2) The court's jury instruction which shifted the burden of proof to the Petitioner to show the existence of mitigating circumstances;

(3) The Court's jury instruction had the effect upon the jury of requiring that they find unanimously the existence of mitigating circumstances thereby denying the Defendant due process of law;

(4) The Court's instruction regarding expert witness testimony;

(5) The Court's instructions regarding the credibility of witnesses;

(6) The Trial Court erroneously instructed the jury regarding the definition of heinous, atrocious and cruel aggravating circumstance;

(7) The Trial Court erred in instructing the jury that they were required to return a sentence of death if they found that aggravating circumstances out-weighed mitigating circumstances;

(8) The Trial Court erred in refusing to give the mercy jury instruction as requested by the defense;

(9) The Trial Court erred in refusing to instruct the jury that a sentence of life imprisonment meant a sentence of life imprisonment. This was especially egregious due to the fact that the Dis-

trict Attorney in his final argument told the jury that a life sentence was not a life sentence;

(10) The Trial court erred in refusing to give the Defendant's proposed instructions regarding the definition of mass murder;

(11) The Trial Court erred in refusing to give the lingering doubt jury instruction as requested by trial counsel;

(12) The Trial Court erred in not instructing the jury that mitigation evidence was not a defense or justification or excuse. This error was compounded by the District Attorney's improper argument that mitigation evidence was merely justification;

(13) The Trial Court erred in refusing to give the requested jury instruction of trial counsel which further defined the balancing of aggravating and mitigating circumstances as required by law. This error was compounded by the improper final argument of the District Attorney during the sentencing phase of the trial;

(14) The Trial Court erred in refusing to instruct the jury specifically that based upon the evidence presented during the hearing that the Defendant's cooperation with law enforcement officers would be an appropriate mitigating circumstance;

(15) The Trial Court erred in refusing to instruct the jury as requested by the Defendant that the Defendant's mental or emotional disturbance could be considered as a mitigating circumstance without the qualification of the word "extreme"; and

(16) The Trial Court erred in not defining the felonies presented to the jury during the definition of the felony murder aggravating circumstance.

V. The Defendant received ineffective assistance of counsel to his prejudice on appeal in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § 8, 9, 10, 16, and 17 of the Tennessee constitution.

A. Counsel on appeal failed to object to the following unconstitutional jury instructions:

(1) That sympathy could not be considered;

(2) That mercy could not be considered;

(3) The reasonable doubt jury instruction given both during the Guilt/Innocence and Sentencing Phase of the trial;

(4) The presumption of malice jury instruction given during the Guilt/Innocence Phase of the trial;

(5) The expert witness jury instruction given during both the Guilt/Innocence and sentencing phase of the trial; and

(6) The credibility of the witnesses jury instruction given both during the Guilt/Innocence and Sentencing Phase of the trial.

B. Counsel on appeal failed to object to the Trial court's refusal to instruct the jury as requested by trial counsel on the following questions:

(1) The Court's jury instruction which shifted the burden of proof to the Petitioner to show the existence of mitigating circumstances;

(2) The Trial Court erred in refusing to give the mercy jury instruction as requested by the defense;

(3) The Trial Court erred in refusing to instruct the jury that a sentence of life imprisonment meant a sentence of life imprisonment. This was especially egregious due to the fact that the District Attorney in his final argument told the jury that a life sentence was not a life sentence;

(4) The Trial Court erred in refusing to give the lingering doubt jury instruction as requested by trial counsel;

(5) The Trial Court erred in not instructing the jury that mitigation evidence was not a defense or justification or excuse. This error was compounded by the District Attorney's improper argument that mitigation evidence was merely justification;

(6) The Trial Court erred in refusing to give the requested jury instruction of trial counsel which further defined the balancing of aggravating and mitigating circumstances as required by law. This error was compounded by the improper final argument of the District Attorney during the sentencing phase of the trial;

(7) The Trial Court erred in refusing to instruct the jury specifically that based upon the evidence presented during the hearing that the Defendant's cooperation with law enforcement officers would be an appropriate mitigating circumstance; and

(8) The Trial Court erred in refusing to instruct the jury as requested by the Defendant that the

Defendant's mental or emotional disturbance could be considered as a mitigating circumstance without the qualification of the word "extreme".

C. Counsel on appeal failed to adequately raise questions regarding the constitutionality of the Tennessee Death Penalty statute. Specifically, counsel on appeal was duty bound to address all issues regarding the unconstitutionality of the statute including the following:

(1) T.C.A. § 39-13-203(f)(g) provides insufficient guidance to the jury concerning who has the burden of proving whether mitigation outweighs aggravation and what standard of proof the jury should use in making that determination in violation of the Eight and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8 and 16 of the Tennessee Constitution;

(2) T.C.A. § 39-13-203 does not sufficiently limit the exercise of the jury's discretion because, once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8 and 16 of the Tennessee Constitution;

(3) T.C.A. § 39-13-203, allows the jury to accord too little wait to nonstatutory mitigating factors and limits the jury's options to impose the sentence of life in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8 and 16 of the Tennessee Constitution;

(4) T.C.A, § 39-13-203 does not require the jury to make the ultimate determination that death is appropriate in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8 and 16 of the Tennessee Constitution;

(5) T.C.A. § 39-13-203, does not inform the jury of its ability to impose a life sentence out of mercy in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8 and 16 of the Tennessee Constitution;

(6) T.C.A. § 39-13-203(h), prohibits the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, §§ B, 9, 10 and 16 of the Tennessee Constitution;

(7) The imposition of the sentence of death pursuant to T.C.A. § 39-13-203 violates the Eighth and Fourteenth Amendments to the United states Constitution and Article 1, §§ 8 and 16 of the Tennessee Constitution because it has been imposed discriminatorily in this state on the basis of race, sex, geographic region in the state, economic and political status of the Defendant;

(8) The proportionality of the arbitrariness review conducted by the Tennessee Supreme Court pursuant to T.C.A. § 39-13-205 is inadequate and inefficient in violation of the Eighth and Fourteenth Amendments to the United States Consti-

tution and Article 1, §§ 8 and 16 of the Tennessee Constitution;

(10) T.C.A. § 39-13-203(c) permits the introduction of relatively unreliable evidence in the State's proof of aggravation or rebuttal of mitigation and thus violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, §§ a, 9 and 16 of the Tennessee Constitution; and T.C.A. § 39-13-203(d) allows the State to make final closing arguments to the jury in the penalty phase in violation of the Defendant's right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8 and 9 of the Tennessee Constitution.

D. Counsel on appeal failed to address the issue of the improper final argument of the District Attorney during the sentencing phase of the trial.

E. To the extent that this Court concludes that Petitioner's counsel did not present these claims, or any portion of these claims, in prior proceedings, Petitioner has not knowingly and understandably failed to present these claims or portions of claims in a prior proceeding, including any appeal. None of Petitioner's previous attorneys a) consulted with petitioner concerning the facts and law constituting this claim; b) advised Petitioner about their opinion as to the propriety of presenting this claim to the courts before which they represented Petitioner; or c) solicited Petitioner on whether he desired to present this claim to the courts before which they represented Petitioner. The failure of Petitioner's attorneys to act

precluded Petitioner from being in a position to knowingly and understandingly fail to present these claims to previous courts. Petitioner does not have a college education, let alone a legal one. As such, without appropriate consultation with counsel, Petitioner was unaware a) of the law in support of the claims he here presents; b) of facts necessary to present in support of these claims; and c) of the viability of these claims. For the foregoing reasons, Petitioner has never made a deliberate, informed, considered, tactical choice not to present this claim, or any portion of it, at prior proceedings. Petitioner, therefore, has not knowingly and understandingly failed to do so.

VI. The Prosecution engaged in misconduct in violation of Article I, §§ 6, 8, · 9, 10, and 16 of the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

(1) The presentation of evidence and argument of the District Attorney regarding the amount of insurance proceeds was inaccurate and intentionally misleading to the jury;

(2) The District Attorney failed to divulge to the Petitioner's trial counsel pretrial the inconsistencies and the evidence that they had received regarding the sound of the hair dryer. This issue needed to be developed well in advance of trial by the defense counsel, but they were unable to due so as this evidence was not presented to them in an appropriate time frame;

(3) The District Attorney failed to notify the Defendant pre-trial that the officers responding to

the 911 call indicated they had went to the side of the house and made an effort to determine the presence of persons inside;

(4) The District Attorney improperly questioned the Defendant regarding ·his work in a "slaughter house";

(5) The District Attorney's questioning of Dr. Harlan during the Guilt/Innocence Phase of the trial was improper. The use of leading questions on direct by the prosecuting attorney is inappropriate, particularly on an issue as critical in this case as time of death. Further, the District Attorney elicited an answer through the use of an inappropriate leading question which was inconsistent with previous statements of the medical examiners office and which were not divulged to counsel for the Defendant prior to trial;

(6) The argument of the District Attorney during the sentencing phase of the trial was inappropriate. Specifically, the following statement were made and clearly violated Defendant's right to due process of law:

(a) The minimized regarding penalty; District Attorney's argument the jury responsibility the imposition of the death;

(b) The personal opinion regarding how "horrible" the facts of this particular case were was inappropriate;

(c) The statement of the District Attorney that they had reviewed the case and determined that it was an appropriate one for the imposition of the death penalty;

(d) The District Attorney's argument that a life sentence is not a life sentence was clearly inappropriate. This point was reemphasized in the concluding arguments of the District Attorney who stated "I don't think so," when stating to the jury that in his personal opinion, the Defendant would not serve the remainder of his life in prison if he received a sentence of life imprisonment;

(e) The inappropriate argument to the jury that, "There's no way to compare your values to this man.";

(f) The District Attorney's argument that the mitigation evidence of the Defendant was being introduced as a mere justification not to give him the death penalty, was a gross misstatement of the law of mitigation evidence and clearly intended to mislead the jury;

(g) The District Attorney's argument regarding the Defendant's prior criminal record including arrests; and

(7) The District Attorney's presentation and argument to the jury that the holster seized from the Defendant's home was for a .22 caliber pistol which was identical to the weapon that was used to commit the homicides was clearly false.

VII. There was insufficient evidence introduced at the Guilt/Innocence Phase to establish premeditation and deliberation, thus, the Defendant's conviction was obtained in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 6, 8, 9, 10, 16, and 17 of the Tennessee Constitution.

VIII. The Tennessee Death Penalty statute, T.C.A. § 39-13-204, et seq., violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8, 9, 16 and 17 and Article II, § 2 of the Tennessee Constitution.

A. Death by electrocutiory in Tennessee's electric chair violates Article I, §§ 13, 16, and 32 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution for the following reasons, among others.

(1) Electrocution is extremely painful due to the direct stimulation of nerves, the direct and indirect contraction of virtually all of the skeletal muscles in the body, the contraction of intestinal and other smooth muscle, and the intense pain associated with electrical burns;

(2) Electrical currents applied during execution do not induce instantaneous anesthesia, analgesia, unconsciousness, or death;

(3) Death is caused primarily by suffocation due to paralysis of the respiratory muscles and by thermal heating of the brain;

(4) The minimum voltage and current and duration of this voltage and current required to execute a particular individual by electrocution are unknown and will vary substantially from individual to individual;

(5) As designed, Tennessee's electric chair exacerbates the above problems and produces cooking while minimizing direct neurological effects; and

(6) Tennessee's electric chair does not function properly.

B. T.C.A. §§ 39-13-203 (f) and (g) provides insufficient guidance to the jury concerning who has the burden of proving whether mitigation outweighs aggravation and what standard of proof the jury should use in making that determination in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

C. T.C.A. § 39-13-203 does not sufficiently narrow the population of defendants, convicted of first degree murder, who are eligible for a sentence of death in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

D. T.C.A. § 39-13-203 does not sufficiently limit the exercise of the jury's discretion because, once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

E. T.C.A. § 39-13-203, insufficiently limits the exercise of the jury's discretion by mandatorily requiring the jury to impose a sentence of death if it finds the aggravating circumstances to outweigh the mitigating circumstances in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

F. T.C.A. § 39-13-203, allows the jury to accord too little weight to non-statutory mitigating factors

and limits the jury's options to impose the sentence of life in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

G. T.C.A. § 39-13-203, does not require the jury to make the ultimate determination that death is appropriate in violation of the Eighth and Fourteenth Amendments to the United States constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

H. T.C.A. § 39-13-203, does not inform-the-jury of its ability to impose a life sentence out of mercy in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

I. T.C.A. § 39-13-203, provides no requirement that the jury make findings of facts as to the presence or absence circumstances, thereby preventing effective review on appeal under T.C.A. § 39-13-205(c) in violation of the Defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

J. T. C.A. § 39-13-203 (h), prohibits the jury from being informed of the consequences of its failure to reach unanimous verdict in the penalty phase in vioiation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8, 9, 10 and 16 of the Tennessee Constitution.

K. The imposition of the sentence of death pursuant to T.C.A. § 39-13-203 is cruel and unusual and thus in violation of the Eighth and Fourteenth Amendments to the United States Constitution and

Article I, §§ a, 9, 10 and 16 of the Tennessee Constitution.

L. The imposition of the sentence of death pursuant to T.C.A. § 39-13-203 violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution because it has been imposed discriminatorily in this state on the basis of race, sex, geographic region in the state, economic and political status of the defendant.

M. The proportionality of arbitrariness review conducted by the Tennessee Supreme Court pursuant to T.C.A. § 39- 13-205 is inadequate and deficient in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Tennessee Constitution.

N. T.C.A. § 39-13-203{c) permits the introduction of relatively unreliable evidence in the State's proof of aggravation or rebuttal of mitigation and thus violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ s, 9 and 16 of the Tennessee Constitution.

O. T.C.A. § 39-13-203(d) allows the State to make final closing arguments to the jury in the penalty phase in violation of the Defendant's right to due process of law and effective assistance of counsel as guaranteed by of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, § 8 and 9 of the Tennessee Constitution.

IX. Issues raised on direct appeal.

Petitioner acknowledges that these issues were already addressed by the appellate courts. However, to preserve these issues for review in other forums,

these issues are respectfully raised again this petition.

(1) Did the Trial Court err in overruling the Defendant's motion to suppress statement and further err in admitting at trial evidence relating to the statement which was not considered at the suppression hearing?

(2) Did the Trial Court err in denying the Defendant's motion to suppress evidence obtained during a search of his residence pursuant to a search warrant?

(3) Did the Trial Court err in admitting hearsay statements from the father of one of the victims regarding the victim's fear Defendant?

(4) Did the Trial Court err in admitting numerous hearsay statements into evidence through the testimony of prosecution witness Teresa Zastrow?

(5) Did the Trial Court err in admitting inflammatory and prejudicial photographs of the victims during the guilt-innocence phase of the trial?

(6) Did the Trial Court err in overruling the Defendant's objection to the expert qualifications and testimony of the sergeant Johnny Hunter regarding the "alternate light source" technique of the fingerprint identification?

(7) Did the Trial Court err in overruling the Defendant's objection to hearsay testimony from prosecution witness Billy Fields regarding the victim Judy Smith's alleged fear of the Defendant and her request that fields not come to her

residence on October 1 because the Defendant would be there?

(8) Did the Trial Court err in admitting tape recordings and a purported transcript of a 911 emergency telephone call allegedly made from the victims' residence just prior to the murders?

(9) Did the Trial Court err in admitting evidence that the Defendant had been charged with aggravated assault against two of the victims?

(10) Did the Trial Court err in admitting evidence that the Defendant attempted to solicit others to kill the victims?

(11) Did the Trial Court err in admitting hearsay_ testimony from prosecution witness Sheila Gunther concerning the victim Judy Smith's future plans, and further err in admitting testimony from Ms. Gunther that the Defendant threatened the victims several months prior to the murders?

(12) Did the Trial court err in overruling the Defendant's objection to the testimony of a prosecution witness concerning a comment allegedly made by the Defendant regarding the "McDonalds's Massacre" in California?

(13) Did the Trial Court err in allowing the State to cross-examine the Defendant concerning details of his prior employment in the "killing room" of a meat packing plant?

(14) Is the evidence presented at trial sufficient to convince a rational trier of fact that the Defendant is guilty of three counts of murder in the first degree beyond a reasonable doubt?

(15) Did the Trial Court err in admitting certain photographs of two of the victims during the penalty phase of the trial?

(16) Did the Trial Court err in denying the Defendant's motion for a judgment of the acquittal as to the "heinous, atrocious or cruel" statutory aggravating circumstance?

(17) Did the Trial court err in denying the Defendant's motion for a judgment of acquittal as to the "interfering with arrest" statutory aggravating circumstance?

(18) Did the Trial Court err in denying the Defendant's motion for a judgment of acquittal as to the "felony-murder" statutory aggravating circumstance?

(19) Did the Trial Court Defendant's motion to judgment of acquittal statutory aggravating err in denying the strike and motion for a as to the "mass murder" circumstance?

(20) Did the Trial Court err in overruling the Defendant's motion to exclude death as a possible punishment due to the unconstitutionality of Tennessee's death penalty statute?

WHEREFORE, Petitioner, Oscar Franklin Smith, requests this Court:

1. Accept this Amendment to the original Petition.

2. Order the Respondent, state of Tennessee, to answer this Amended Verified Petition.

3. Grant Petitioner an evidentiary hearing on the claims presented in this petition and/or any factual matter raised by way of defense.

4. Declare unconstitutional Petitioner's conviction and sentence; and

5. Grant such other relief as this Court deems just.

Respectfully submitted,

s/
Richard McGee, No. 6181
Attorney for Petitioner
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Nashville, TN 37201
(615) 254–1471

s/
Robert J. Mendes, No. 17120
Attorney for Petitioner
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209 10th Avenue South, Suite 511
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(615) 244–2445

Certificate of Service

I hereby certify that a true and exact copy of the foregoing Amended Petition for Post Conviction Relief has been forward to the Honorable Cheryl Blackburn and Tom Thurman, Assistant District Attorney General's Office, 222 Second Avenue North, Washington Square Two, Fifth Floor, Nashville, Tennessee, 37201.

On this the 1st day of May, 1996.

s/ _____
Richard McGee

Affidavit

Oscar Frank Smith, being duly sworn, states as follows:

1. My present address is Unit #2, Riverbend Maximum Security Institution (RMSI), 7475 Cockrill Bend Industrial Road, Nashville, Tennessee 37209. I am the Petitioner in the above- styled action.

2. I have reviewed the above Petition for Post Conviction Relief. The matters set out therein are true and correct to the best of my information and belief.

FURTHER AFFIANT SAITH NOT.

s/_____
Oscar Frank Smith

APPENDIX G

CRIMINAL COURT
FOR THE DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE DIVISION II

No. 89–F–1773

OSCAR FRANK SMITH,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ORDER

This cause came to be heard on July 1, 2, 3, and 5, 1996, on the Verified Amended Petition for Post-Conviction Relief. At the hearing, petitioner was represented by attorneys Rich McGee and Robert Mendes, and the State was represented by Assistant District Attorneys General Tom Thurman and Cheryl Blackbum.

The facts in this case are as follows:

Petitioner was convicted, after a jury trial, on July 25, 1990, of three (3} counts of first degree murder for the deaths of Judith Lynn Smith, petitioner's wife, and Jason and Chad Burnett, Mrs. Smith's sons. On July 26, 1990, the jury sentenced the defendant to death on all three (3) counts.

The Tennessee Supreme Court affirmed petitioner's conviction and sentence on November 18, 1993. 868 S.W.2d 561 (Tenn. 1993}. A petition to rehear was denied on January 5, 1994. The United States Supreme Court denied the Petition for Certiorari on October 31, 1994.

At the hearing on the Verified Amended Petition for Post Conviction Relief, the Court heard the testimony of the following witnesses:

Dr. Kris Sperry, forensic pathologist;

Karl Dean, trial counsel;

Terry McElroy, Detective, Metropolitan Nashville Police Department;

Dr. Bethany Dumas, linguist;

Dr. Dale Nute, homicide reconstructionist;

Tim Smith, brother of petitioner;

Dr. Ralph Ohde, speech pathologist;

Jeff DeVasher, appellate counsel;

Oscar Frank Smith, petitioner;

Dr. Charles Harlan, former Medical Examiner for Davidson County;

Paul Newman, trial counsel;

W. Alan Barrett, fingerprint expert.

The principal ground for relief presented by petitioner is his claim of ineffective assistance of trial counsel, Mr. Karl Dean and Mr. Paul Newman, at both the guilt/innocence and sentencing phases of the trial; and he has cited numerous examples of the conduct of counsel which he argues demonstrates the ineffectiveness of his representation. He also seeks relief on claims of unconstitutional jury instructions, prosecutorial misconduct, insufficient evidence as to premeditation and deliberation, all issues raised on direct appeal, ineffective assistance from his appellate attorney, Jeff DeVasher, on direct appeal, and the constitutionality of the Tennessee death penalty statute.

I.

Dr. Sperry testified that if he had been contacted prior to the trial, he would have been prepared to consult with counsel in preparation for cross-examination of State's witnesses and to testify for the defendant. Dr. Sperry testified that he wquld have addressed the amount of time between the notification of the Medical Examiner's. Office and the viewing of the bodies by Dr. Harlan and the accuracy of Dr. Harlan's testimony that all of the medical evidence was consistent with a time of death of 11 :30 p.m. He also indicated he would have questioned the length of time that the victims lived after sustaining their injuries, and the amount of pain suffered by the victims after the infliction of injuries but before death. He further testified that he would have addressed the issue of whether Jason Burnett's body had been turned before or after his death, whether it was possible that he turned himself, and the issue of the amount of transfer blood found near the body of Judith Smith.

Mr. Dean testified there were several factors that were considered in deciding not to challenge Dr. Harlan's estimation of the time of death. He testified that he had made a tactical decision, based on the evidence in the case, to use an alibi defense. The petitioner also testified that he wanted to use an alibi defense, in that he was not present at the crime scene. Mr. Dean testified that while he recognized that there was not a strong alibi defense, he did not feel that he had any other option under the facts. Mr. Dean testified that he did not focus on challenging the time of death findings because it would not affect the alibi defense, inasmuch as the defendant's theory

was that he was driving to Kentucky at the time of the murders. Mr. Newman, co-trial counsel, also testified that the decision was made with petitioner to accept the proposed time of death, because challenging it could have hurt the alibi defense.

Mr. Dean also testified that another factor that he considered in the decision to not challenge the time of death, was the 911 call and the time that it was made. He testified that he was operating under the assumption that the 911 call was contemporaneous with the assaults and deaths. He testified that he felt "locked in" to accepting Dr. Harlan's time of death because of the 911 tape. Mr. Newman testified that arguing that the time of death of the victims could have been as much as three hours after the 911 call, in order to support a claim of factual impossibility based on the alibi, would run the risk of losing all credibility with the jury.

Mr. Dean also recalled the testimony of Dr. Gretel Harlan regarding the 911 tape and the presence of food in the victims' stomachs, as they related to her determination of the time of death of the victims. Mr. Newman testified that he never considered consulting another medical expert, because his trial strategy was to not cross-examine Dr. Harlan in depth, and to try to focus as little attention on the injuries as possible. He testified that he even attempted to stipulate Dr. Harlan's testimony.

In connection with the medical testimony, the petitioner also alleges that counsel was ineffective in failing to challenge the findings of pain sufficient to establish the enhancement factor that the crime was heinous, atrocious, and cruel. Dr. Sperry testified that he would have been able to challenge Dr. Har-

lan's estimation of the amount of pain suffered by the victims, on the grounds that they probably would have been rendered unconscious by their injuries, and went on to say that Jason Burnett would not have experienced pain in having his intestines hanging out of the laceration in his abdomen, because intestines do not have nerve endings to transmit signals of pain. Mr. Dean testified that it would have been difficult to argue Dr. Sperry's information to a jury. The Court is of the opinion, in light of the testimony presented and the photographs of the victims introduced at the trial, that this proffered testimony of Dr. Sperry would have been questionable, if not incredulous and would have almost certainly destroyed any credibility that petitioner's attorneys were trying to maintain with the jury.

II.

Petitioner alleges that counsel was ineffective in failing to consult with a linguist regarding petitioner's use of the past tense in his statement to the police when referring to the victim Judy Smith, prior to the police informing him of her death. In support of this ground, petitioner presented the testimony of Dr. Bethany Dumas, who was qualified to testify as an expert in linguistics. Dr. Dumas testified regarding alternative explanations for petitioner's use of the past tense several times in his statement to the police. She testified that the only way to know what petitioner meant would be to analyze his speaking style and habits, but she acknowledged that such analysis would possibly be biased, given the criminal charges against him, rendering the results basically useless. Mr. Dean testified that he would not have necessarily rejected the use of a linguist, but that it had not oc-

curred to him to do so. Having heard the testimony on this issue, the Court is of the opinion that counsel's failure to consider the use of a linguist does not amount to ineffective assistance, particularly since the Court does not find that such information would likely have produced a different result at trial.

III.

Petitioner next alleges that counsel was ineffective in failing to consult with a speech pathologist regarding the effect on a jury of reading a transcript while listening to a tape from which the transcript is taken. In support of this ground, petitioner presented the testimony of Dr. Ralph Ohde, who was qualified to testify as an expert on speech pathology and speech perception. Dr. Ohde testified that providing the written transcript to the jurors while playing the tape would create an expectation that could influence their perception of the content of the tape, that this could create a potential bias as to its content, and that the only way to avoid that bias would have been to play the tape before the jury heard any information about the case, including petitioner's name. Dr. Ohde testified that the preceding testimony is what he would have advised counsel if he had been consulted prior to the trial. The Court is of the opinion that counsel's failure to consult with an expert, such as Dr. Ohde, on this area does not constitute ineffective assistance, as it would not have produced a different result. The issue regarding the use of a transcript was raised at the trial and was addressed by the Tennessee Supreme Court on direct appeal. At the trial, the "911" tape was introduced at the proper time and through the proper witness, a transcript was provided to the jury, and the proper jury instruc-

tion was given regarding the consideration of the tape as the evidence, and not the transcript. The Supreme Court ruled that the transcript was admissible and that the Court's instruction to the jury was sufficient to protect petitioner's right to consider only the evidence in the case. State v. Smith. 868 S.W.2d 561 (Tenn. 1993).

As to the "911" tape, petitioner further alleges that counsel was ineffective in failing to address the enhancement of the original tape by law enforcement and by a local radio station and by not requiring the State to prove chain of custody and overcome any hearsay objection. Mr. Dean testified that he did challenge the use of the tape and transcript, and that he had consulted with a private detective regarding the tape. He also testified that he had someone check the tape to see if it had been edited, and it had not been. He testified that he was confident that the State would have overcome a hearsay objection on the ground that the tape qualified as an excited utterance, and the tape was contemporaneous with the crime. He testified that based on that, he did not feel that he would have had any other basis for a hearsay objection. The Court is of the opinion that petitioner has not presented any evidence to show that but for counsels' decisions regarding these issues, a different result would have been reached.

IV.

Petitioner alleges that counsel was ineffective in failing to consult with a homicide reconstructionist to assist in evaluating the State's theory of the events of the crime and the analysis of the crime scene. In support of this ground, petitioner presented the testimony of Dr. Dale Nute, who was qualified to testify as

an expert in homicide reconstruction. He testified extensively regarding his estimation of the amount of time required for the events at the crime scene to have occurred according to the theory presented by the State at trial.

Dr. Nute testified that if he had been consulted on this case, he would have advised counsel to challenge the investigation of the crime scene, the State's theory of the length of time in which the crime occurred, and to explore the issue of who moved Jason Burnett's body and what bearing the knife found under the house had, if any, on these crimes.

Mr. Dean testified that petitioner's decision to rely on the alibi defense played a role in the decision to not challenge the crime scene investigation or the State's theory as to the time or the sequence of events in the homicides. Mr. Dean also testified that a factor in that decision was that he did not have any evidence which he felt would have been helpful in challenging those areas of the State's case.

Testimony was presented at the hearing regarding the movement of Jason's body. Dr. Sperry testified that based on the blood patterns on and around the body, the length of time required for the blood to dry, and the length of time that he believed Jason would have lived after the inflection of the wounds, Jason could not have moved himself, and based on the State's theory, petitioner would have left the scene prior to the bod_y being moved. Dr. Harlan testified that in his opinion it was possible that Jason mov~d himself. Mr. Dean testified that at defendant's request, he was presenting an alibi defense to the jury. In light of this, the Court is of the opinion that it was not ineffective assistance for him to not raise this

issue, since his argument was that defendant was not there at the time, and not that the murder could not have occurred as the State theorized. Mr. Dean testified that pursuit of the alibi defense made it unnecessary to challenge the crime scene investigation or the State's theory of the crime. Mr Newman testified that he had noticed the movement of Jason's body, but did not see the significance of arguing the issue, particularly since he made a decision to have as little medical evidence before the jury as possible. The Court is of the opinion that this ground is without merit.

V.

Dr. Nute further testified that he would have advised counsel to investigate the importance of a knife found under the house and the circumstances surrounding its discovery. Mr. Newman testified that, before the trial, he saw a knife in the property room that had been found under the house several weeks after the initial crime scene investigation. He testified that it was his understanding that someone involved in the case had talked to Dr. Harlan and that he indicated that it was not the type of weapon used in the murder. At the hearing, Dr. Charles Harlan testified that some, but not all of the injuries could have been caused by a weapon similar to the knife which is exhibits 398 and 39C.

Mr. Newman testified that he did not want to have the knife tested because the State would be aware of the testing, and he was concerned that the results could have been unfavorable to petitioner He testified that even if the results had indicated that someone else had handled the knife, he did not feel that would have been very helpful in the case, because he would expect that the two pieces of the knife

would have been broken where they had been found, which was underneath the house. The Court notes that while counsel for petitioner has referred to the knife as a "bloody knife", there was only a few small drops of some substance which has never been scientifically identified as blood. The Court is of the opinion that this ground is without merit.

VI.

Petitioner alleges that counsel was ineffective at the jury selection phase of the trial by failing to attempt to rehabilitate jurors excused for opposition to the death penalty, failing to object to the dismissal of those jurors disqualified for opposition to the death penalty, and failing to challenge for cause jurors who were proponents of the death penalty. Mr. Dean testified that his primary objective, given the strength of the State's case, was to secure a penalty of life imprisonment and that part of his strategy for achieving this was to get a hung jury in the sentencing phase, which would result in a life sentence. Mr. Dean and Mr. Newman both testified that on the first round of jury selection, they had a juror on the panel that they felt would be favorable to the defense, based on her expressed reservations about the death penalty. Mr. Newman testified that it was a strategic decision to use no preemptory challenges on the first round, because the State generally does not use one on the first round in order to save challenges, assuming that the defense will use one. He further testified that by not using a challenge, the defense would be able to force the State to have a jury that it did not want, with a juror that the defense was happy with and who the State would probably have excused on the next round. Both attorneys testified that they

discussed this with petitioner and that he agreed with the strategy, although petitioner denied having any input as to the selection of the jury. This issue is without merit.

VII.

References were made at the hearing regarding the failure of trial counsel to retain the services of a fingerprint expert. Mr. Dean and Mr. Newman testified that they did consult Alan Barrett, an attorney who had previously worked as a fingerprint examiner for the FBI and former T.B.I. Agent, and asked him about the possibility of the palmprint having been planted at the crime scene. Mr. Newman testified that after talking with Mr. Barrett, who said that the palmprint belonged to petitioner, he made the strategic decision to not further consult a fingerprint expert. He also testified that he decided to deal with Sergeant Hunter's palmprint testimony by seeking to suppress it, because he felt that attacking it in front of the jury would not help. The Court notes that although petitioner had the opportunity, at. the hearing on this petition, to present testimony of a fingerprint expert to show what testimony, if any, could have been introduced at trial that would have been beneficial to the petitioner on this issue, it was not done. The Court is of the opinion that there was nothing ineffective about petitioner's counsel at trial in this area.

VIII.

Petitioner alleges that counsel was ineffective based on a failure to properly investigate the case. In support of this claim, petitioner alleges that the use of Lisa Freeman as an investigator was inappropriate

based on her lack of experience. Mr. Dean testified that he selected her for the job based on her high level of energy, as is required in a capital case, and her performance on a previous case for him. Mr. Dean testified that Ms. Freeman and another investigator, Steve Allen, had driven the route described by petitioner in his alibi, as had Mr. Newman and Mary Parsons on another occasion, and had otherwise conducted an appropriate and thorough investigation in this case. The Court is of the opinion that petitioner has not presented evidence to support the claim that the case was inadequately investigated.

IX.

Petitioner alleges that counsel was ineffective by failing to contradict information regarding the life insurance policies where he was the beneficiary. Petitioner testified that he wanted proof presented at the trial to show the full insurance picture and to show that he was not the beneficiary under all of the policies. Mr. Newman testified that someone from the office spoke with an insurance agent regarding the insurance policies, and no testimony presented at the trial surprised the defense on this issue. Mr. Newman did testify that proof of the policy wherein the petitioner was the insured may have had some relevance to the overall insurance picture. Mr. Dean testified that he did not feel that the State's argument that life insurance proceeds were part of the motive was as strong as their argument that the personal relationship between petitioner and the victims, particularly his estranged wife, led to the homicides. The Court is of the opinion that petitioner has failed to demonstrate that the manner in which this issue was

dealt with at trial by petitioner's counsel prejudiced him, so as to deny his right to a fair trial.

X.

Petitioner next asserts that counsel did not properly address the issues of the holster or the bloodless glove. The Court is of the opinion that petitioner has not demonstrated that but for counsel's failure to respond to these issues as petitioner has suggested, a different result would have been reached.

XI.

Petitioner alleges that counsel was ineffective in failing to impeach Billy Fields, an initial suspect, particularly by using the statements of Officers Crockett, Robinson, or Miller. Mr. Newman testified that he did attempt to implicate Mr. Fields by raising questions about his testimony at trial, and thereby create a reasonable doubt as to petitioner's guilt, but without apparent success.

Petitioner alleges that the officers' statements (exhibits 25B, C, and D) should have been used to contradict Mr. Fields' testimony, particularly as to the issue of which lights were on at approximately three o'clock in the morning when he was at the crime scene. Having reviewed exhibit 25, the Court is of the opinion that further cross-examination of Mr. Fields, based on the officers' observations of certain lights being on at approximately eleven-thirty p.m. of that same night, would not have likely produced a different result at the trial. In so finding, the Court finds that the statements of the officers and Mr. Fields are not necessarily contradictory, given the

three (3) hour time span in which the lights could have been turned off. This ground is without merit.

XII.

Petitioner alleges that counsel was ineffective in not properly investigating petitioner's background to find all appropriate mitigation evidence. Mr. Newman and Mr. Dean both testified that petitioner did not want counsel to raise mental health or family background issues, although Mr. Newman testified that petitioner ultimately changed his mind as to the use of family background. The Court is of the opinion that petitioner has not presented mitigation evidence which should have been presented by counsel and which would likely have changed the result of the trial, and this ground is without merit.

XIII.

Petitioner alleges that counsel was ineffective by failing to object at numerous stages in the trial, including during the State's examination of witnesses, State's argument to the jury and the Court's instructions to the jury at both the guilt/innocence and the sentencing phase. Mr. Dean testified that he did not make any strategic decision before the trial to not object at all, although he did state that he does not usually make many objections during closing argument. He testified that he had no legal basis to object to the Court's instructions to the jury. Petitioner has not convinced the Court that counsel's failure to make numerous objections during the trial prejudiced his right to a fair trial, under the totality of the circumstances in this case.

XIV.

Petitioner also asserts that counsel was ineffective for failing to request special jury instructions regarding the effect of an inability to agree on a sentence, and the ability to consider a mitigating circumstance without an unanimous finding as to it. As to a jury instruction on the ability to consider a mitigating circumstance without an unanimous finding, this instruction was included and is a part of the instructions given by the Court. As to a special jury instruction regarding the effect of an inability to agree on a sentence, petitioner has not carried the burden of showing that not requesting such instruction constitutes conduct that is outside of the range of competence required in a criminal trial.

XV.

Petitioner alleges that the Court's instructions to the jury at the guilt/innocence and the sentencing phase violated his constitutional rights. The Court is of the opinion that this allegation should have been raised on appeal, and as it was not, it is presumed to have been waived. T.C.A. §40-30-112. Petitioner claims that he had instructed counsel to raise every issue on appeal and that counsel did not consult him about the law regarding those issues, and that as a result, he did not knowingly and understandingly fail to present those claims. Mr. DeVasher, appellate counsel, testified that he spent over two hundred (200) hours preparing the appeal and met with petitioner four (4) times during the course of that preparation. He also testified that petitioner was adamant about raising issues from the guilt/innocence phase, but ultimately left the responsibility of raising issues with counsel. The Tennessee Supreme Court has held

that waiver is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. House v. State. 911 S.W.2d 705 (Tenn. 1995). Accordingly. the Court is of the opinion that petitioner has not overcome the presumption of waiver of this issue, and the issue is beyond the scope of review. T.C.A. §40-30-111 and 40-30- 112.

XVI.

Petitioner alleges that the prosecution engaged in misconduct which violated his constitutional rights. The Court is of the opinion that this issue should have been raised on direct appeal. and failure to do so constitutes waiver of the issue.

XVII.

Petitioner alleges that he was convicted. in violation of his constitutional rights; based on insufficient evidence to establish premeditation and deliberation. The Court is of the opinion that this ground was addressed on direct appeal, State v. Smith, 868 S.W.2d 561 (Tenn 1993), and is beyond the scope of review because it has been previously determined. T.C.A.§40-30-111 and 40-30-112. 12

XVIII.

Petitioner has also incorporated all grounds raised in the direct appeal. The Court is of the opinion that those issues are also beyond the scope of review, as they have been previously determined. T.C.A. §40-30-111 and 40-30-112.

Petitioner, through his attorneys, Mr. McGee and Mr. Mendes, has presented many allegations in the petition and at the four (4) day hearing, which he contends violated his constitutional rights and are

grounds for relief. In handling the petition, Mr. McGee and Mr. Mendes have been resourceful and zealous advocates for petitioner, raising every conceivable issue, presenting the testimony of various experts, cross-examining the State's witnesses and arguing for the petitioner to have the opportunity to have a fair trial where he is represented by competent defense counsel.

The Court well recalls the trial of petitioner in this case where he was convicted of three counts of premeditated first degree murder and was sentenced to death by a jury on all three counts. The Court recalls the medical testimony which showed that petitioner's estranged wife and her two sons had been brutally shot and stabbed to death. The Court recalls the tape of the 911 phone call where a young boy begged for his life. The Court recalls the alibi testimony which allowed time for petitioner to commit the murders and still travel to Kentucky. The Court recalls the bloody handprint, found on the sheet beside Judy Smith's body, which matched petitioner's hand, which was missing two fingers.

Additionally, the Court recalls the vigorous and highly competent representation provided by Karl Dean and Paul Newman of the Public Defender's Office, at all stages of the trial proceedings. Mr. Dean testified that he alone spent over two hundred ninety-four (294) hours on out of court preparation and over one hundred thirty-five (135) hours in court. This does not include the time spent by attorneys Paul Newman, Joan Zeigler, Mary Parsons, Ross Alderman and Bill Schulman of the Public Defender's Office, who assisted in this case, as well as investigator Lisa Freeman.

The Court recognizes that certain aspects of the case could have been handled differently, including the opportunity to consult with experts in various fields prior to the trial. The Court is not convinced, however, that failure to consult w.ith experts or to handle the case differently prejudiced defendant, particularly when the proffered testimony is considered in light of the powerful and credible evidence presented at the trial.

This Court will not second-guess trial counsels' tactical and strategic choices unless those choices were uninformed because of inadequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The Court is of the opinion that both Mr. Dean and Mr. Newman were, at the time of the trial, very experienced and competent attorneys who worked diligently in this case, and whose representation of petitioner was well within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner has not shown that counsel was inadequately prepared and has not overcome the presumption that counsel's decisions were sound or that but for the decisions a different result might have been reached. Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, the Court rejects the claim of ineffective assistance of counsel at trial.

XIX.

Petitioner also alleges that he received ineffective assistance of counsel at the appellate level. The Court is of the opinion that this claim should be reviewed by the panel of original review and therefore

should be addressed to the Tennessee Supreme Court. State, v. Clark, 774 S.W.2d 634 (Tn. Cr. App. 1989).

XX.

Petitioner challenges the constitutionality of the Tennessee Death Penalty Statute T.C.A. §39-13-204, et. seq. The Court is of the opinion_ that this issue was addressed prior to the trial and on direct appeal. This Court and the Tennessee Supreme Court have both ruled adversely to petitioner's contention on this issue. Accordingly, petitioner's claim on this ground is outside of the scope of review because it has been previously determined. T.C.A. §40-30-111 and 40-30-112. Further, any claim that appellate counsel was ineffective in not sufficiently raising this issue on appeal should be addressed to the panel of original review, namely the Tennessee Supreme Court, as stated earlier. State v. Clark. 774 S.W.2d 634 (Tenn. Cr. App. 1989).

For the reasons set forth above, it is hereby ORDERED, ADJUDGED, and DECREED that the Verified Amended Petition for Post-Conviction Relief be respectfully denied.

Entered this 15th day of October, 1996.

s/_____
Judge J. Randall Wyatt, Jr.