No. 18-1132

In The
Supreme Court of the United States

OSCAR FRANKLIN SMITH,

Petitioner,

v.

TONY MAYS, WARDEN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

During state-court collateral review of his convictions, the petitioner claimed that trial counsel provided ineffective assistance by failing to present appropriate mitigation evidence during the penalty phase of his capital trial. The state court denied the claim under the proof presented. Thereafter, the petitioner elected not to raise the claim on appeal. On habeas corpus review, the district court concluded that the claim was procedurally defaulted because the petitioner failed to exhaust state-court remedies, and that *Martinez v. Ryan*, 566 U.S. 1 (2012), did not apply because the default occurred during the collateral-review appeal.

Petitioner now argues that his ineffective-assistance-of-sentencing-counsel claim was deficiently prosecuted on initial collateral review and asserts that under *Martinez* he should be able to present a federal court with evidence of his post-conviction counsel's ineffectiveness, and of the substantial nature of his under-lying claim – evidence that, by the very nature of the circumstances, was never presented in state court. Pet.'s Br. at 12-13, 16-17. These facts present the following question:

Does the narrow equitable qualification set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012) apply to a procedurally defaulted ineffective-assistance-of-sentencing-counsel claim which was presented during state post-conviction proceedings and adjudicated on the merits, but abandoned on appeal, solely because state-court collateral-review counsel could have litigated the ineffective-assistance claim differently?

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STATEMENT OF THE CASE

In 1989, the petitioner shot and killed his estranged wife, Judy Smith, and her two sons, 16-year-old Jason Burnett, and 13-year-old Chad Burnett. The jury sentenced the petitioner to death for all three murders, finding two aggravating circumstances with respect to the murder of Judy Smith, and four aggravating circumstances with respect to the murders of Jason and Chad Burnett. *State v. Smith*, 868 S.W.2d 561, 565 (Tenn. 1993). On direct appeal, the Tennessee Supreme Court affirmed the petitioner's convictions and sentences for crimes that were "intentional, senseless, brutal, gruesome and violent killing of three helpless people." *Id.* at 583.

The petitioner filed a *pro se* petition for post-conviction relief on February 8, 1995. Pet.'s App. at 69a. Following the appointment of additional post-conviction counsel, the petitioner filed an amended petition raising, *inter alia*, sixty-nine claims of ineffective assistance of counsel, twenty-one claims pertaining to alleged defects in the jury instructions, and thirteen claims of prosecutorial misconduct. Pet.'s App. at 69a.

As for his challenge to counsel's performance in presenting mitigating evidence during the penalty phase of trial, the petitioner claimed that counsel provided ineffective assistance by failing to: (1) "present to the jury all necessary mitigation evidence"; (2) "properly investigate [his] background in order to find all appropriate mitigation evidence"; and (3) "introduce all appropriate mitigating evidence necessary

for the jury in rendering its decision in this case." Pet.'s App. at 78a. A "lengthy" evidentiary hearing was held in state court on July 1 through July 5, 1996, during which the court heard testimony from twelve witnesses. Pet.'s App. at 102a. Both of the petitioner's trial counsels testified about the proof presented during the penalty phase of the petitioner's trial, at which fifteen witnesses – including a pediatric neurologist, a psychiatrist, and a clinical psychologist – testified. *Smith v. Bell*, No. 3:99-cv-0731, 2005 WL 2416504, at *10 (M.D. Tenn. Sept. 30, 2005). Both trial counsels specifically testified "that petitioner did not want counsel to raise mental health or family background issues" during mitigation, although one of the petitioner's counsel stated that the petitioner "ultimately changed his mind as to the use of family background." Pet.'s App. at 114a.

Following that lengthy evidentiary hearing, the state post-conviction court reviewed each of the petitioner's claims and denied relief. With regard to the petitioner's ineffective-assistance-of-sentencing-counsel claim, the court concluded:

> 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.

Pet.'s App. at 114a.

The petitioner appealed the denial of post-conviction relief, but did not challenge the trial court's ruling on his sentencing-counsel claim. Pet.'s App. at 44a. The Tennessee Court of Criminal Appeals affirmed the trial court's denial of the petitioner's petition, *Smith v. State*, No. 01C01-9702-CR-00048, 1998 WL 345353 (Tenn. Crim. App. June 30, 1998), *perm. app. denied* (Tenn. Jan. 25, 1999), and the Tennessee Supreme Court denied permission to appeal.

After the conclusion of his state-court proceedings, the petitioner filed a petition for a writ of habeas corpus relief in federal district court, raising a multitude of claims, including the same ineffective-assistance-of-sentencing-counsel claim that was raised in the initial-review collateral proceeding. Pet.'s Br. App. at 45a ("[The petitioner's sentencing counsel claim] 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."). After an evidentiary hearing on four of his claims, the district court dismissed the petition as meritless and denied a certificate of appealability as to all claims. *Smith v. Bell*, No. 3:99-0731, 2005 WL 2416504 (M.D. Tenn. Sept. 30, 2005). On appeal, the Sixth Circuit affirmed the district court's

judgment. *Smith v. Bell*, 381 F. App'x 547 (6th Cir. 2010).

Ultimately, the case was remanded to the district court for further consideration in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). On remand, the district court considered a number of the petitioner'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). The court found that *Martinez* fails to save any of the petitioner's claims either because they were not substantial or because they were raised in his state post-conviction petition, but abandoned on appeal. In particular, the district court found that the *Martinez/Trevino* exception did not save the petitioner's claim that sentencing counsel was ineffective for failing to investigate and present available mitigation evidence because the petition had abandoned that claim on appeal. Pet.'s App. at 43a-46a. The district court denied a certificate of appealability. Pet.'s App. at 46a.

The Sixth Circuit denied the petitioner's motion to grant a certificate of appealability, finding, in pertinent part, that the petitioner's ineffective-assistance-of-sentencing-counsel claim was raised during state post-conviction proceedings, but abandoned on appeal. Thus, it was not saved by the *Martinez/Trevino* exception. Pet.'s App. at 10a-11a.

REASONS THE WRIT SHOULD BE DENIED

THIS CASE DOES NOT MERIT FURTHER APPELLATE REVIEW BECAUSE THE PETITIONER'S PROCEDURALLY DEFAULTED INEFFECTIVE-ASSISTANCE-OF-SENTENCING-COUNSEL CLAIM WAS PRESENTED ON INITIAL COLLATERAL REVIEW, BUT ABANDONED ON APPEAL, AND *MARTINEZ'*S NARROW EQUITABLE EXCEPTION DOES NOT APPLY TO CLAIMS DEFAULTED DUE TO THE INEFFECTIVE ASSISTANCE OF POST-CONVICTION APPELLATE COUNSEL.

The petitioner argues that *Martinez*'s narrow equitable exception applies to his procedurally defaulted federal habeas claim of ineffective-assistance-of-sentencing-counsel, which was presented on initial collateral review and adjudicated on the merits, but thereafter abandoned on appeal, because state post-conviction counsel allegedly failed to produce sufficient factual evidence to support the claim during the initial-review collateral proceedings. Pet.'s Br. at 12-13, 16-17. But, given *Martinez*'s clear holding and narrow equitable qualification, claims defaulted in the post-conviction appeal fall outside the ambit of *Martinez*. For that reason, further review is not warranted in this case.

This Court has long held that "there is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (internal citations omitted). In 2012, however,

this Court recognized a narrow equitable qualification to that rule when it decided *Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez* held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance [of counsel] at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 566 U.S. at 17. This narrow exception was necessary because, "[w]hen an attorney errs in initial-review collateral proceedings [by failing to raise an ineffective-assistance-of-trial-counsel claim], it is likely that no state court at any level will hear the prisoner's claim. . . . And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id*. at 10-11. *Martinez* specifically emphasized, however, that "[t]he rule of *Coleman* governs in all but the limited circumstances recognized here. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Id*. at 16.

In *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court expanded the *Martinez* exception to apply where, although state procedural law does not expressly prohibit a defendant from raising an ineffective-assistance claim on direct appeal, the 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." 569 U.S. at 429. Because Tennessee's procedural framework directs defendants to file ineffective-assistance claims in post-conviction proceedings rather than on direct appeal, a Tennessee case may be subject to the *Martinez/Trevino* exception to *Coleman* if that exception is applicable in that case. *Sutton v. Carpenter*, 745 F.3d 787, 795-96 (6th Cir. 2014).

But the *Martinez/Trevino* exception does not apply in this Tennessee case. In this case, the petitioner presented an ineffective-assistance-of-counsel claim before the district court on federal habeas review alleging that his sentencing counsel failed to present mitigating evidence of his background and personal history. Pet.'s App. at 43a-45a. It is undisputed that the petitioner raised this same claim during his state post-conviction proceedings, where the trial court denied it. Pet.'s Br. at 9; Pet.'s App. at 114a. In rejecting the claim on its merits, the state court made specific findings about the proof presented in support of the claim during the petitioner's evidentiary proceedings, noting that two separate witnesses testified that "petitioner did not want counsel to raise mental health or family background issues." *Id*. The state court found that the newly proffered evidence did not demonstrate a likelihood that the result of the trial would have been different. *Id*.

It was not until after the state post-conviction court rejected the petitioner's claim on the merits that the default occurred. The petitioner's post-conviction

appellate counsel failed to bring forward the claim on appeal before the state appellate court. Pet.'s App. at 10a. In other words, the default of the petitioner's claim occurred only after the state court had already rejected the claim on the merits during initial-review collateral proceedings.

Martinez does not aid the petitioner in excusing the default of his claim under these circumstances; its narrow exception to *Coleman* is limited to claims that were never heard in state court. *Martinez*, 566 U.S. at 10-11. That chief concern – that no state court at any level heard the petitioner's claims – is absent here. In this case, the state court could, and did, consider the claim during initial-review collateral proceedings. And contrary to the petitioner's assertions, the court did not dismiss the petitioner's claim because state post-conviction counsel "utterly failed to investigate, develop, or substantiate" the claim, Pet.'s Br. at 9, but rather the court specifically recognized the proof presented during evidentiary proceedings in support of the claim, yet ultimately found that the proof failed to show that the result of the trial would have been different. Pet. App. at 114a.

Given these undisputed facts, there is no doubt that the state courts had an initial opportunity to pass upon and correct the same alleged constitutional violation that the petitioner raised in his federal habeas proceedings, and the petitioner's argument that his ineffective-assistance-of-sentencing counsel claim somehow escaped review altogether is simply incredible. *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) (*Martinez*

was concerned that a claim of trial error – specifically, ineffective assistance of trial counsel – might escape review in a State that required prisoners to bring the claim of the first time in state post-conviction proceedings rather than on direct appeal.").

Since the foundation of *Martinez* is its concern for avoiding a system in which "it is likely that no state court at any level will hear" the prisoner's claim of trial error," *Martinez*, 566 U.S. at 10, 22, and that concern is unfounded in this case, there is no colorable rationale to support the petitioner's argument that *Martinez*'s limited holding broadly encompasses claims of ineffective-assistance-of-counsel that were raised during post-conviction proceedings, but abandoned on appeal, even if, as the petitioner alleges, those claims were poorly prosecuted by post-conviction counsel.

Furthermore, even if the post-conviction trial court ruled erroneously, and its error were traceable directly to counsel's allegedly deficient advocacy, the claim would not have been procedurally defaulted at the post-conviction trial proceeding because the petitioner retained the right to preserve the claim by appealing. But, unlike in *Martinez*, the default occurred only after the petitioner failed to appeal that denial before the Tennessee Court of Criminal Appeals. However, attorney error at state post-conviction appellate proceedings cannot excuse procedural default under the *Martinez/Trevino* framework. *Martinez*, 566 U.S. at 16 ("The rule of *Coleman* governs in all but the limited circumstances recognized here. . . . It does not extend to attorney errors in any proceeding beyond the first

occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons."); *see also Davila*, 137 S. Ct. at 2061 (*Martinez*'s underlying rationale does not support extending its exception to appellate-ineffectiveness claims."). Under these circumstances, *Martinez*'s clear holding and narrow equitable exception provide the petitioner no relief.

In substance, the petitioner argues that his state-court collateral-review counsel should have litigated his ineffective-assistance claim differently. What the petitioner seeks is another opportunity to present his procedurally defaulted claim, this time with evidence and arguments that could have been made before. But the petitioner's position would transform the "narrow exception" of *Martinez* into a limitless chasm that would nullify every purpose Congress had when it enacted AEDPA and 28 U.S.C. § 2254(d).[1] Nothing in

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[1] 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 under 28 U.S.C. § 2254(d) and *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). *Pinholster* emphasized the binding nature of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) as a restriction on the courts themselves: "[AEPDA] sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." 563 U.S. at 181. Congress's intent in AEDPA was "to channel prisoners' claims first to the state courts." *Id*. at 182. In support of this intent *Pinholster*'s holding was unequivocal: "We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id*. at 181. *Pinholster*'s well-settled holding bans any attempt to obtain review of the

Martinez's narrow holding indicates that it was intended to subsume existing procedural default jurisprudence, and the dictates of AEDPA, by allowing a petitioner to relitigate, or reinforce, a claim that was rejected in state court, even if, as the petitioner alleges, his post-conviction counsel failed to submit evidence.

Finally, while the petitioner argues that this "is a recurring issue that needs this Court's attention" because it "divides the courts of appeals [] frequently," Pet.'s Br. at 27, the circuit courts of appeals, in general, have applied *Martinez* and *Trevino* in a uniform manner and not expanded *Martinez* beyond what this Court intended it would cover, specifically ineffective-assistance-of-trial-counsel claims which were never raised during initial collateral proceedings. *See*, *e.g.*, *West v. Carpenter*, 790 F.3d 693 (6th Cir. 2015); *Carter v. Bigelow*, 787 F.3d 1269 (10th Cir. 2015); *Hamm v. Comm'r, Alabama Dep't of Corr.*, 620 F. App'x 752, 778 (11th Cir. 2015); *Bolton v. Akpore*, 730 F.3d 685 (7th Cir. 2013); *Ibarra v. Thaler*, 687 F.3d 222, 224 (5th Cir. 2012); *and Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). Since the petitioner here litigated his ineffective-assistance-of-trial-counsel claim in state post-conviction proceedings, his procedural default at the appellate level fails to invoke the split that the petitioner now asks this Court to address.

merits of claims presented in state court in light of facts that were not presented in state court, and *Martinez* does not alter that conclusion.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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