

No.

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD KARR,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Indiana Supreme Court correctly concluded that Indiana's procedures governing claims of ineffective assistance of trial counsel raised on direct appeal conflict with *Trevino v. Thaler*, 569 U.S. 413 (2013) when an ineffective assistance of counsel claim is summarily denied.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court
are as follows:

Donald Karr, Petitioner

State of Indiana, Respondent

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a writ of certiorari issue to review the Denial of his Petition to Transfer by the Indiana Supreme Court on April 24, 2018. Underlying, the Indiana Supreme Court's Denial of Discretionary Review is the Opinion Denying Donald Karr's direct appeal that was entered in this case on January 31, 2018.

OPINIONS BELOW

The April 24, 2018, Decision of the Indiana Supreme Court, which decision is herein sought to be reviewed, was not published, but is reprinted in the appendix. *See, Appx.* p 1-2. The Opinion of the Court of Appeals of Indiana, dated January 31, 2018, was not reported, and is reprinted in the appendix. *See, Appx.* p. 3-39. The Opinion and Order Denying the Motion for New Trial of the Superior Court of Hamilton County, Indiana, made September 20, 2016, was not reported, and is reprinted in the appendix. *See, Appx.* p. 45-46. The Opinion and Order Granting the State's Motion for Summary Denial of the Superior Court of Hamilton County, Indiana, made June 13, 2017, was not reported, and is reprinted in the appendix. *See, Appx.* p. 40-44.

BASIS FOR JURISDICTION IN THIS COURT

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Martinez v. Ryan, 566 U.S. 1 (2012) holding that a federal habeas court may excuse a procedural default on an ineffective-assistance of trial counsel claim when state law requires that claim to be raised in a collateral proceeding and the claim was not preserved properly, but the prisoner had only ineffective counsel during the initial-review collateral proceeding.

Trevino v. Thaler, 569 U.S. 413, 428 (2013), holding that when, as here, 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 on direct appeal a claim that his trial counsel provided ineffective assistance, the good cause exception recognized in *Martinez v. Ryan* applies.

The Sixth Amendment of the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Donald Karr, proceeded to trial on four (4) counts criminal conduct. Karr was alleged to have battered and sexually assaulted A.P., his live-in girlfriend: Count (1): Domestic Battery; Count (2) Rape; Count (3) Rape; and Count (4) Strangulation. Karr was found not guilty on strangulation, and a

prior intimidation count was dropped. *Appx.* p. 4. Karr proceeded to trial and on August 5, 2016 was convicted on all four (4) counts. On November 4, 2016, the trial court sentenced Karr to fifteen (15) years in the Indiana Department of Corrections with five (5) years suspended on Counts (1) – (3). *Appx.* p. 27.

Karr, by and through new post-trial counsel, Jane Ruemmele, Esq., filed a motion for new trial following the judgment and sentence. In the motion for new trial, Karr alleged, *inter alia*, multiple claims of ineffective counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), including but not limited to: (1) failure of trial counsel to impeach the alleged victim, A.P., on her drug consumption, (2) failure of trial counsel to impeach A.P. on her request for drugs at the ER on the night of the reported abuse, (3) failure to call exculpatory witness, Gisele Karr, (4) failure of trial counsel to request a mistrial when the State referenced inadmissible evidence during trial. *Appx.* p. 30.

On September 19, 2016, Karr was provided a hearing on his Motion for New Trial which included the ineffective assistance of counsel claims. *Appx.* p. 37.

On September 20, 2016, the Superior Court for Hamilton County, the Honorable William Hughes, presiding, denied the Motion for New Trial on the basis following the hearing. *Appx.* p. 45. Karr filed a timely notice of appeal on November 15, 2016. Later, during the pendency of his appeal, on January 6, 2017,

Karr filed a Verified Petition For Return Of Case To Trial Court For The Purpose Of Pursuing Post-Conviction Relief, a “*Davis* Petition” under *Davis v. State*, 267 Ind. 152, 368 N.E.2d 1149 (1977), requesting remand or dismissal of the appeal to pursue post-conviction remedies. *Appx.* p. 67. The Indiana Attorney General representing the State of Indiana did not object. The Court of Appeals granted the order and dismissed the appeal.

On March 3, 2017, Karr, by and through Post-Trial and Appellate Attorney, Jane Ruemmele, filed the Verified Petition for Post-Conviction Relief. In that Verified Petition, Karr raised seven (7) grounds, not four (4), as originally raised in his Motion for New Trial. In addition, Karr added a claim of actual innocence, stating: “Trial counsel committed ineffective assistance of counsel [...] resulting in the conviction of an innocent man.” *Appx.* p. 53. Karr also added several more issues such as failure of trial counsel to use exculpatory phone records provided by the State during trial, failure of trial counsel to use text message between the alleged victim and the defendant regarding the victim’s use of narcotics or anesthesia in the hours prior to the alleged criminal conduct of the defendant, Karr. *Appx.* p. 56.

The State filed its Answer on March 17, 2017. On May 30, 2017, the State filed its Motion for Summary Denial of Post-Conviction Relief, arguing that the Defendant's claim of ineffective assistance of trial counsel has already been litigated and ruled upon. The State of Indiana added that doctrine of *res judicata* is

"fully applicable to post-conviction proceedings." *Clark v. State*, 648 N.E.2d 1187, 1190 (Ind. Ct. App. 1995) "[...] Once raised on direct appeal, a defendant may not argue ineffective assistance of trial counsel in post-conviction proceedings. *Thomas v. State*, 797 N.E.2d 752, 754 (Ind. 2003)." *Appx.* p. 5.

Karr responded to the Motion for Summary Denial on June 5, 2017, arguing that in the *Davis* Petition filed with the Court of Appeals, Petitioner acknowledged that some but not all issues of ineffective assistance of counsel had been pursued at the trial level, but other issues required the development of the evidence, thus necessitating a dismissal of the appeal to pursue PCR remedies. *Appx.* p. 52.

The trial court granted summary judgement on the basis of *res judicata* on June 14, 2017. *Appx.* p. 53. The order stated that evidence was heard during two hearings on Karr's motion for a new trial that alleged ineffective assistance of counsel, and the post-conviction court's order further stated, in part:

Although the Petitioner has abandoned two grounds of alleged ineffectiveness of counsel originally raised in the trial court, the allegations now raised in the Petitioner's Petition for Post-Conviction Relief are otherwise the same. All of the grounds alleged in the pending Petition were directly argued, were available to be argued from the evidence and/or were available to be raised at the time of the hearing on Petitioner's Motion for a New Trial.

In his Motion for a New Trial, the Petitioner sought to have his convictions for Domestic Battery and Rape vacated based upon the alleged ineffective assistance of counsel. This is the exact same relief requested in the Petitioner's Petition for Post- Conviction Relief, and that relief is sought based upon the exact same grounds that were raised or could have been raised and determined under Petitioner's Motion for a New Trial.

Finally, and most obviously, the parties to the controversy in the current matter are the same as those who were the parties to the original criminal case.

A court may grant a motion by either party for summary disposition of a petition for post-conviction relief when it appears that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

In this case, there is no genuine issue of material fact because the evidentiary issues now raised by the Petitioner have already been heard and decided against Petitioner in the original trial court. *Appx.* p. 19-20.

Karr filed a Motion to Reconsider on June 21, 2017, which was denied the same day. On July 10, 2017, Karr filed another notice of appeal, challenging the summary denial of his post-conviction claims.

In his direct appeal, Karr contended that the Post-Conviction court erred in granting summary denial of Karr's Petition For Post-Conviction Relief on the basis of *res judicata*. Karr contended that the Superior Court erred in its summary denial of his Verified Petition for Post-Conviction Relief.

The Court of Appeals of Indiana denied Petitioner's appeal holding:

A petitioner seeking post-conviction relief bears the burden of establishing grounds for relief by a preponderance of the evidence. Post-Conviction Rule 1(5). A post-conviction court is permitted to summarily deny a petition for post-conviction relief if the pleadings conclusively show the petitioner is entitled to no relief. P-C.R. 1(4)(f). "An evidentiary hearing is not necessary when the pleadings show only issues of law; [t]he need for a hearing is not avoided, however, when a determination of the issues hinges, in whole or in part, upon facts not resolved." *Kuhn v. State*, 901 N.E.2d 10, 13 (Ind. Ct. App. 2009) (quoting *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), trans. denied). On appeal, "A petitioner who is denied post-conviction relief appeals from a negative judgment, which may be reversed only if the evidence as a whole lead unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Collins v. State*, 14 N.E.3d 80, 83 (Ind. Ct. App. 2014). *Appx.* p. 35.

The Court of Appels of Indiana based its decision on the argument that the post-conviction court determined that these issues were litigated at the two hearings on Karr's motion for a new trial and were barred by claim preclusion. The Court of Appels of India agreed, stating: "*Res judicata*, whether in the form of claim preclusion or issue preclusion (also called collateral estoppel), aims to prevent repetitious litigation of disputes that are essentially the same, by holding a prior final judgment binding against both the original parties and their privies." *M.G. v. V.P.*, 74 N.E.3d 259, 264 (Ind. Ct. App. 2017) (quoting *Becker v. State*, 992 N.E.2d 697, 700 (Ind. 2013)). *Appx.* p. 36.

"Claim preclusion applies when the following four factors are present: (1) the former judgment was rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies." *Id.* (quoting *Dawson v. Estate of Ott*, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003)). *Appx.* p. 36-37.

The Court of Appeals denied Karr's appeal on the basis that his claimed of ineffective assistance of counsel were previously raised in his Motion for New Trial.

Petitioner promptly sought to transfer review of his case before the Indiana Supreme Court. In that

Petition to Transfer, Karr argued that the Court of Appeals erred by affirming the post-conviction court's order granting summary judgment based on *res judicata*. *Appx.* p. 47. Karr added that the Indiana Supreme Court should remand the matter for an evidentiary hearing before the lower tribunal on all of Karr's claims of ineffective assistance of counsel. In that regard, Karr argued, "[...] [t]he necessity of an evidentiary hearing is avoided when pleadings show only issues of law, but the need for a hearing is not avoided when a determination of the ultimate issues hinges, in whole or in part, upon unresolved factual questions of a material nature." *Appx.* p. 53. Since the trial court did not conduct an evidentiary hearing on Karr's post-conviction claims under *Strickland v. Washington*, the summary denial was improper.

On April 24, 2018, the Indiana Supreme Court denied Petitioner's request to transfer review of his case. *Appx.* p. 1-2.

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DECISION OF THE INDIANA SUPREME COURT OF APPEALS CONFLICTS WITH THE CLEAR PURPOSE *MARTINEZ V. RYAN*.

This Court should accept this Petition because the Indiana Supreme Court's decision incorrectly con-

strued and applied an important issue of uniform national law under *Martinez v. Ryan*. Karr contends that the *Davis-Hatton* process mechanism for expedited collateral review violate due process. The structure and operation of the *Davis-Hatton* procedure make it virtually impossible to raise ineffective assistance claims under *Strickland v. Washington*, 466 U.S. 668, (1984)

Karr contends that the *Davis-Hatton* process leads to both ineffective assistance of trial counsel claims and ineffective assistance of appellate counsel claims under *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013). In this case, the *Davis-Hatton* process now bars Karr from exhausting his state remedies for post-conviction relief because of appellate counsel decided to proceed via *Davis/Hatton* rather than exhaust Karr's direct appellate rights.

Karr claims that *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017) support his argument that the Indiana procedure under *Davis/Hatton* does not provide for a meaningful review of ineffective counsel claims. In *Brown*, the Seventh Circuit Court of Appeals held that the *Martinez-Trevino* doctrine applied to post-conviction relief proceedings under Indiana law. Stated otherwise, the Seventh Circuit held that, for Indiana prisoners, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.*

If Karr desires to proceed to federal habeas review under 28 U.S.C. §2254, Karr must now contend that trial counsel and post-trial counsel-(including possibly his appellate counsel)-were all ineffective. Nevertheless, Karr claims the Indiana Supreme Court's denial of his *Davis/Hatton* claims based on res judicata violated his federal constitutional due process rights.

Karr was denied a meaningful opportunity to bring an ineffective assistance of counsel claim on direct appeal. Indiana courts provide both an opportunity to assert ineffective assistance claims in a direct appeal opening brief and a specially designed procedure to halt direct appeal proceedings so that defendants can establish a more thorough record before presenting those claims combined with the direct appeal. In this case, Karr was not permitted to fully develop a record on his ineffective counsel claims based on the summary denial and the Indiana Supreme Court's affirmation of the summary denial.

The opportunity afforded to Karr is insufficient to satisfy the standard of *Martinez-Trevino*. The Court should grant the petition and reverse to provide states with a model of how to provide criminal defendants with a meaningful opportunity to bring ineffective assistance of counsel claims on both direct appeal and state post-conviction review.

1. *Federal Habeas Review.*

A federal court generally may not review on habeas a claim not addressed by a state court because of a procedural default by the petitioner. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding that 28 U.S.C. § 2254 precludes federal review of procedurally defaulted state claims). In *Coleman v. Thompson*, this Court held that a petitioner can overcome procedural default if he can show cause for the default and prejudice from a violation of federal law. 501 U.S. 722, 750 (1991).

Martinez v. Ryan applied *Coleman* in the context of ineffective assistance of counsel claims, holding that “[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.” 566 U.S. 1, 9 (2012). The Court explained that if a State channels initial review of ineffectiveness claims into collateral proceedings, a lawyer’s failure to raise such a claim during those collateral proceedings could deprive a defendant of any consideration of that claim on the merits. *Id.* at 10 (“When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim.”). Because Arizona required claims of ineffective assistance of counsel at trial to be raised in a collateral proceeding, the Court held that inadequate assistance of counsel in that collateral proceeding provided the “cause” necessary to empower a federal habeas court to address the merits of the claim of ineffective assistance of counsel at trial. *Id.* at 4, 9.

The year after its ruling in *Martinez*, the Court in *Trevino v. Thaler* held that the *Martinez* rule applies not only to those jurisdictions that prohibit claims of ineffective assistance of trial counsel from being raised on direct review, but also to a jurisdiction that “in theory grants permission” to present on direct review ineffective assistance of counsel at trial but, “as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so.” 569 U.S. 413, 429 (2013). The Court determined that the *Martinez* rule applies to ineffective assistance claims in Texas because the “structure and design of the Texas system in actual operation” made it “virtually impossible” for an ineffective assistance claim to be raised on direct appeal. *Id.* at 417.

2. Indiana’s Procedures for Raising Ineffective Assistance of Counsel Claims.

Indiana permits defendants to raise claims of ineffective assistance of trial counsel on either direct or collateral review. The Indiana Supreme Court has stated that “a post-conviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim.” *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998). Ineffective assistance of trial counsel claims raised on direct appeal are subject to several significant procedural constraints.

First, the defendant is limited to the trial record—he or she may not use a motion to correct error to supplement the record in support of an ineffectiveness claim. *Woods*, 701 N.E.2d at 1216-1217.

Second, the defendant may not split ineffectiveness claims, raising record-based claims on direct appeal while reserving for collateral review those claims that require additional factual development. *Woods*, 701 N.E.2d at 1220 (“The specific contentions supporting the [ineffectiveness] claim, however, may not be divided between the two proceedings.”). If the defendant raises any ineffective assistance of trial counsel claim on direct appeal, “the issue will be foreclosed from collateral review.” *Ibid.*

Indiana law provides that post-conviction collateral challenges may be instituted in two ways: either (1) by initiating a collateral review proceeding after the direct appeal is concluded; or (2) by requesting that the Court of Appeals dismiss or suspend the direct appeal and remand the case to the trial court so that a collateral review proceeding may be instituted prior to disposition of the direct appeal, with the trial court’s decision in the collateral review proceeding considered by the appellate court in tandem with the direct appeal. *Woods*, 701 N.E.2d at 1219. The Indiana Supreme Court has stated that the second option is “not to be used as a routine matter in adjudicating the issue of trial counsel’s effectiveness.” *Woods*, 701 N.E.2d at 1220.

This second option—labeled the “*Davis-Hatton*” procedure after the relevant Indiana Supreme Court decisions—is initiated by filing a motion with the state court of appeals requesting that the defendant’s direct appeal be suspended or dismissed and that the case be remanded to the trial court. *Slusher v. State*, 823

N.E.2d 1219, 1222 (Ind. Ct. App. 2005) (“[T]he *Davis/Hatton* procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel’s motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court.”).

“The appellate court preliminarily screens the motions and remands to the trial court those cases in which an arguably meritorious motion is sought to be made.” *Davis v. State*, 368 N.E.2d 1149, 1151 (Ind. 1977); *see also Thompson v. State*, 671 N.E.2d 1165, 1168 n.2 (Ind. 1996) (“Finding that the appellant had failed to make any showing that his claim of ineffective assistance of counsel has a substantial likelihood of success at trial, we denied his [*Davis-Hatton*] petition, and this appeal ensued.”).

If the court of appeals grants the *Davis/Hatton* petition, the case is remanded to the trial court, where the defendant then files his or her petition for post-conviction relief. *Woods*, 701 N.E.2d at 1219. The defendant must raise all available grounds for post-conviction relief in this original post-conviction petition. Ind. Rules of Post-Conviction Remedies, § 8.

If, after a full evidentiary hearing, the petition for post-conviction relief is denied, “an appeal from that post-conviction denial and the original direct appeal will be consolidated but evaluated under separate standards of review.” *Appx.* p. 35. In particular, a defendant wishing to appeal claims raised in the petition for post-conviction relief “faces the rigorous burden of

showing that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the court.” *Peaver v. State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010) (quotation marks, brackets, and citation omitted).

The *Davis/Hatton* procedure is rarely used. Karr contends that he was denied due process and a fair review of his ineffective counsel claims because he was denied a full evidentiary hearing on the merits of his Verified Petition under *Davis/Hatton*.

Karr is barred from exhausting state remedies because of the Indiana Supreme Court’s ruling that Karr’s claims are barred because he brought them previously in a Motion for New Trial. Karr submits that the standard of review under *Strickland v. Washington* was not fully applied at the Motion for New Trial hearing and that Karr was not provided a meaningful opportunity to present, and for the trial court to rule on, ineffective assistance of trial counsel claims. Karr argues that since the standard of review for denying a Motion for New Trial is less onerous than the standard of review for denying a motion for post-conviction relief under *Strickland v. Washington*, Karr was prejudiced by appellate counsel bringing a motion for ineffective counsel claim on direct appeal knowing that such a claim may waive any rights Karr would have following a direct appeal to pursue review before a trial court during a full post-conviction hearing or review process. Karr contends the *Davis/Hatton* procedure is immensely flawed and the Indiana Supreme Court should have allowed Karr to expand the record,

remanding the matter for an evidentiary hearing on his ineffective assistance of trial counsel claims. In this regard, such claims almost always require evidentiary development beyond the trial record. *Woods*, 701 N.E.2d at 1215. In addition, an ineffective assistance of counsel claim decided on direct appeal is res judicata as to all other ineffectiveness claims, and thus forecloses all other possible ineffectiveness claims that might be discovered during a thorough post-appeal post-conviction investigation. *Id.* at 1220

The default or summary denial in this case was external to Karr's control, and his defense was impeded by the Indiana Supreme Court. Karr, therefore, does not need to show actual constitutional disadvantage because effective assistance of counsel is a Sixth Amendment guarantee that counsel will preserve claims for appeal and habeas corpus proceedings. The summary denial of Karr's claims prevented him from developing a record to support his *Strickland* claim.

The Indiana Supreme Court's determination that it lacked subject-matter jurisdiction over Karr's petition pursuant was incorrect and should be reversed and vacated. As a result, the Petitioner requests this Honorable Court grant the Petition.

CONCLUSION

This Court can reverse the decision of the Indiana Supreme Court, releasing him on the basis that the Motion for New Trial should have been granted. The *Davis/Hatton* procedures of Indiana do not provide meaningful review of ineffective assistance of counsel claims, especially when such claims are summarily denied without an evidentiary hearing.

Respectfully submitted,

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