ORIGINAL

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

CELESTINO QUINTANA— PETITIONER

vs.

MATTHEW HANSEN— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THEUNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Celestino Quintana, CDOC # 47199

Sterling Correctional Facility (SCF)

12101 State Highway 61, PO BOX 6000

Sterling, Colorado 80751

QUESTION PRESENTED

I. Whether violation of Colorado's limited State-created right to postconviction counsel can constitute "cause" excusing procedural default in a 28 U.S.C. § 2254 action, and under the Court's holding in *Trevino v. Thaler*, 569 U.S. 413 (2013);

II. Whether a State-created right to postconviction counsel can constitute "cause" excusing procedural default for postconviction claims which are not based on ineffective assistance of trial counsel.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____court appears at Appendix _____to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was May 7, 2018.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions relate to this case:

- U.S. Const. Amend. VI, right to effective assistance of counsel;
- U.S. Const. Amend. XIV right to due process of law in state courts;
- 28 U.S.C. § 2254;
- 28 U.S.C. § 2253;
- Colorado Revised Statutes § 21-1-104(1)(b)(" When representing an indigent person, the state public defender, only after the conditions of section 21-1-103 have been met, shall. . . [p]rosecute any appeals or other remedies before or after conviction that the state public defender considers to be in the interest of justice. . .")

STATEMENT OF THE CASE

On January 1, 2010, the Petitioner, Mr. Quintana attended a house party of an acquaintance, and in the early morning hours, he and another attendee got into an argument. When the attendee left the house he was attacked by someone with a knife. Party guests summoned the police, and upon their arrival told them that Quintana had slit the victim's throat. The guests then directed police to Quintana's trailer, located in the home's backyard. Police went to the trailer, knocked, and announced their presence. Police opened the trailer's unlocked door and seized

Quintana, who was standing in the doorway. Two officers conducted a brief protective sweep of the trailer, during which they recovered two knives in plain view. Later, the police obtained a search warrant for the trailer. DNA testing revealed the victim's DNA on one of the knives.

Colorado then charged Quintana with first degree assault with a deadly weapon in violation of C.R.S. § 18-3-202(1)(a) and five habitual-criminal counts. Quintana moved to suppress evidence of the knives and DNA associated with them, but the trial court denied his motion. A jury found him guilty of first-degree assault with a deadly weapon. The trial court judge sentenced him to 64 years imprisonment. Quintana appealed his conviction, but the Colorado Court of Appeals affirmed. On December 23, 2013, Quintana then petitioned for a writ of certiorari, which the Colorado Supreme Court denied.

Mr. Quintana—who has a long history of serious mental issues—with substantial assistance from other prisoners, filed a "Motion to Appoint Conflict Free Counsel Pursuant to Rule 35(c)," on May 4, 2014. Within that motion, he asked for a "continuance granting [him] time to procure and submit [a] previously neglected post-conviction 35{c} [sic] motion." State R. at 338. On May 7, 2014, the state district court denied this motion, concluding that Quintana had "fail[ed] to state any grounds for post-conviction relief." *Id.* at 342. The court also stated Quintana could "re-file his motion in accordance with Rule 35(c) stating specific

grounds for relief." *Id.*

On October 27, 2014, (again with substantial assistance from other prisoners) Quintana filed his second post-conviction motion under Rule 35(c) of the Colorado Rules of Criminal Procedure. In that motion, he alleged that his trial counsel provided ineffective assistance by "fail[ing] to argue and demand that the courts original order of a mental [] evaluation be performed by means of a minimum thirty (30) day stay at the Colorado State Mental Hospital and by un-biased and outside mental health professionals." State R. at 349. He also alleged that his trial counsel had a conflict of interest, that his mental-health evaluations were deficient, and that the trial court judge violated the Colorado Code of Judicial Conduct. The district court denied the motion.

Quintana then appealed to the Colorado Court of Appeals, but while the appeal was pending the prisoner then helping him died. Based on the advice of another prisoner, he sought a limited remand to allow the district court to consider a fourth claim, that the prosecution had violated an agreement not to pursue habitual-criminal charges. The Colorado Court of Appeals denied his motion for a limited remand, and on October 15, 2015, Quintana moved to dismiss his own appeal, which the Colorado Court of Appeals granted.

On October 30, 2015, Quintana filed his third Rule 35(c) post-conviction motion. He argued that the district court lacked jurisdiction to try him as a

habitual criminal because in exchange for waiving his preliminary hearing, the prosecutor had promised not to file any habitual-criminal counts. The trial court dismissed the motion as successive on grounds that Quintana could have brought the same claim in his original Rule 35(c) motion, and also on grounds that the claim lacked merit. The Colorado Court of Appeals then affirmed the trial court's order because the petition was a successive motion barred by Colo. Crim. P. Rule 35(c)(3)(VII).

On June 12, 2017, Quintana filed a habeas petition alleging three claims: (1) that the prosecution violated his due-process rights by failing to honor an agreement not to file habitual-criminal charges if he waived his right to a preliminary hearing; (2) that the police violated his Fourth Amendment rights by their protective sweep, requiring suppression of all evidence obtained from that search; and (3) that he received ineffective assistance of counsel when his trial counsel didn't ensure that mental-health professionals evaluated his competency over a 30-day period.

On September 12, 2017, the District Court of Colorado dismissed claims one and three as procedurally barred under Rule 35(c)(3)(VII) of the Colorado Rules of Criminal Procedure, and on November 7, 2017, the district court denied Quintana's § 2254 habeas petition and declined to issue a certificate of appealability under 28 U.S.C. § 2253(c) on his remaining Fourth Amendment

claim, relying on *Stone v. Powell*, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), to foreclose that claim. In this regard, the court concluded that Colorado had given Quintana a full and fair opportunity to litigate that claim. On November 20, 2017, Quintana appealed.

On May 7, 2018, the Court of Appeals for the Tenth Circuit affirmed the district court's denial of his habeas corpus claims, and refused to issue a certificate of appealability. Specifically, the court found that denial of a State created right to post-conviction counsel cannot constitute grounds excusing procedural default, and that Mr. Quintana had not presented sufficient evidence establishing mental health problems which would excuse his procedural defaults.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit Wrongly Concluded that denial of Colorado's State-Created Right to Post-conviction Counsel Cannot Constitute Grounds Excusing Procedural Default in Federal Habeas Review.

As noted above, the lower federal courts ruled that Mr. Quintana's claims were procedurally defaulted in State court, and that, therefore, they were not entitled to habeas review. Mr. Quintana argued that he had a State-created right to post-conviction counsel which was violated, and which actually caused the procedural default. The Tenth Circuit, citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), ruled that since a federal right to post-conviction counsel does not exist the denial of a State-created right

cannot constitute cause for procedural default. At least with respect to ineffective assistance of counsel claims, this Court has explicitly ruled contrary to the Tenth Circuit.

In *Martinez v. Ryan*, the Court found that *Coleman* permitted federal habeas courts to find cause excusing procedural default when (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding." 566 U.S. 1, 14, 17 (2012).A year later, in *Trevino v. Thaler*, 569 U.S. 413 (2013), the Court extended its holding in *Martinez* to instances where "state 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". *Id* at 429.

Mr. Quintana's third habeas claim was a substantial ineffective assistance of counsel claim. Further, Colorado's procedural framework is materially indistinguishable from that at issue in *Trevino*. While it is technically permissible

to raise an ineffective assistance of trial counsel claim in direct appeal proceedings, the procedural framework effectively precludes it. The Colorado Supreme Court has explicitly found that:

> [Ineffective assistance and direct appeal claims] serve different purposes and each requires an independent, fact-specific analysis. The direct appeal addresses whether the prejudice resulted from the trial court's acts or omissions, while the ineffective assistance claim examines whether prejudice resulted from counsel's acts or omissions. Moreover, a direct appeal and an ineffective assistance of counsel claim ask the court to assess substantially different errors in the context of different due process rights. The direct appeal analysis examines whether an error deprived the defendant of his constitutional right to trial, while an ineffective assistance analysis looks at whether an error deprived the defendant of his constitutional right to effective assistance of counsel. Because the two claims serve different purposes and each requires an independent, fact-specific analysis, the respective analyses should remain separate.

Hagos v. People, 2012 CO 63, ¶ 20.

Prior to *Hagos* the Colorado Supreme Court repeatedly ruled ineffective assistance claims should be presented in post-conviction proceedings rather than on direct appeal. E.g., *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003)("In light of the considerations potentially involved in determining ineffective assistance, defendants have regularly been discouraged from attempting to litigate their

counsels' effectiveness on direct appeal."); *People v. Thomas,* 867 P.2d 880, 886 (Colo. 1994)("[T]his court has expressed a preference for having ineffective assistance of counsel claims brought in Crim. P. 35(c) proceedings."). And the Tenth Circuit itself has noted such a preference. *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (recognizing that "in rare instances an ineffectiveness of counsel claim may need no further development prior to review on direct appeal").

Further, Colorado's post-conviction rule explicitly provides that ineffective assistance claims should be raised through that mechanism. See, Colo. Crim. P. Rule 35(c)(3)(VIII)("[T]he court shall not deny a postconviction claim of ineffective assistance of trial counsel on the ground that all or part of the claim could have been raised on direct appeal.)

Mr. Quintana was not afforded post-conviction counsel in his post-conviction proceedings—though he had a statutory right to it. See, *Silva v. People*, 156 P.3d 1164, 1168 (Colo. 2007)(citing C.R.S. § 21-1-104).

Based on the foregoing, the Tenth Circuit's ruling was clearly erroneous. At the very least, a certificate of appealability should have been granted because, based on Mr. Quintana's cause and prejudice arguments (which were first raised to the federal district court), reasonable jurists could debate whether the federal district court's ruling barring habeas review were correct. *Slack v. McDaniel*, 529

U.S. 473, 484 (2000).

This Court should grant review in order to clarify for the Tenth Circuit its rulings regarding cause and post-conviction counsel, and to examine whether Colorado's procedural framework is the type to which *Martinez* and *Trevino* apply.

II. The Court Should Find that When a State Creates a Right to Postconviction Counsel, Violation of That Right May Constitute Grounds For a Finding of "Cause" Under *Coleman v. Thompson*.

As noted above, in *Martinez v. Ryan* the Court ruled that ineffective assistance of postconviction counsel can constitute grounds for a finding of "cause" under the Court's cause and prejudice standard announced in *Coleman v. Thompson*. The Court's holding in *Martinez* was limited to ineffective assistance of trial counsel claims, based on the Court's finding that many States forbid such claims from being raised in direct appeal proceedings. In making this ruling the Court likened "initial review collateral proceedings" for ineffective assistance claims to direct appeal proceedings for other types of claims. *Martinez v. Ryan*, 566 U.S. 1, 8-9 (2012).

While the Court briefly noted that it was an open question whether there is a constitutional right to counsel in initial review collateral proceedings, it declined to resolve the case based on that issue. The Court also did not consider how a State-created right to effective assistance of postconviction counsel might

tie in with the Court's cause and prejudice analysis established in *Coleman v. Thompson*.

The Court should grant *certiorari* in this case in order to examine and provide guidance on this issue now. Most States have provided, through legislation or court rule, a limited right to postconviction counsel. The Petitioner is not an attorney, but through his cursory research he's found at least fifteen states that have explicitly found such rights.[1] Additionally, most states to have provided such rights have also provided that the assistance rendered must be reasonably effective. E.g., *Silva v. People*, 156 P.3d 1164, 1168 (Colo. 2007)(collecting cases).

Since the implementation of these State-created rights greatly effects the extent to which a criminal defendant's constitutional claims are appropriately and fairly litigated in the state courts, it is reasonable to find that whether they are complied with is relevant to a finding of "cause" under *Coleman v. Thompson*. The federal courts already extensively examine other aspects of state

[1] Ark. R. Crim. P. Rule 37.5(Arkansas); *Iovieno v. Comm'r of Corr.*, 242 Conn. 689, 699 A.2d 1003 (Conn. 1997); Del. Super. Ct. Crim. R. 61(e)(Delaware); *Steele v. Kehoe*, 747 So. 2d 931, 934 (Fla. 1999); *People v. Suarez*, 224 Ill. 2d 37, 42 (Ill. 2007); *Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994); *Brown v. State*, 278 Kan. 481, 483, 101 P.3d 1201 (2004)(Kansas); Md. Criminal Procedure Code Ann. § 7-108(Maryland); *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006); R.R.S. Neb. § 29-3004 (Nebraska); *Rippo v. State*, 368 P.3d 729, 740-41 (Nev. 2016); Ohio Rev. Stat. Ann. § 2953.21(I)(1); *Commonwealth v. Priovolos,* 552 Pa. 364, 715 A.2d 420 (Pa. 1998); Tenn. Code Ann. § 40-30-107(a), (b)(1); *Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480 (Utah 2006); *State v. Peterson,* 757 N.W.2d 834, 838 (Wis. App. 2008)

postconviction rules when making such determinations. E.g., *Coleman v. Thompson*, 501 U.S. 722, 729–32, 735 (1991)(examination of whether state procedural rule is "adequate" and "independent"); *cf.*, *Beard v. Kindler*, 558 U.S. 53, 60 (2009) ("The question whether a state procedural ruling is adequate is itself a question of federal law.")

For instance, federal courts already find that a state procedural rule is not "adequate" to bar federal habeas review if, on its face or as applied, it did not allow " 'a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by the state court'." *Michel v. Louisiana*, 350 U.S. 91, 93 (1955)(quoting *Parker v. Illinois*, 333 U.S. 571, 574 (1948)). The same rationale should be applied to the state-created procedural right to counsel in postconviction proceedings.

This is an area of federal habeas law that has become increasingly important as more states have created such procedural rights to counsel. Additionally, ineffective assistance of counsel claims are not the sole type of federal claim which must be raised in postconviction proceedings. For instance, in Colorado any claim based on a new ruling of constitutional law by the United States Supreme Court which is retroactive is primarily raised in postconviction proceedings. See, Colo. Crim. P. Rule 35(c)(3)(VI)(b) and (VII)(c).

This is an area of federal habeas law that has become increasingly

important as more states have created such procedural rights to counsel. The Court should grant *certiorari* and find that when a State creates such a right it becomes a federal issue for which a finding of cause is permissible..

CONCLUSION

For the above reasons, the Court should grant certiorari in this case.

Respectfully submitted,

Date: July 10, 2018

C Quintana