CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FARRIS GENNER MORRIS,

Petitioner

vs.

TONY MAYS, Warden

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

---

* Paul R. Bottei
Jerome C. Del Pino
Assistant Federal Public Defenders
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

1. When *Martinez v. Ryan*, 566 U.S. 1 (2012) was decided during the pendency of a petitioner's initial federal habeas corpus proceeding, is the petitioner entitled to application of *Martinez* by some court to substantial, procedurally defaulted, claims of ineffective assistance of trial counsel?

2. Where the equitable rule of *Martinez* is intended to protect the right to federal habeas review of a substantial ineffective-assistance-of-trial-counsel claim, does *Martinez* allow consideration of evidence that is essential to such a claim, where post-conviction counsel ineffectively failed to investigate or present such evidence in state court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit denying a certificate of appealability is unreported. *Morris v. Mays*, No. 16-6661 (6th Cir. Mar. 9, 2018), App. 1a-4a. The order of the United States District Court for the Western District of Tennessee denying Morris's petition for writ of habeas corpus is also unreported. *Morris v. Colson*, W.D.Tenn. No. 1:07-1084, R. 75 (Oct. 5, 2016); App. 5a. The order of the United States District Court denying Morris's motion to alter or amend judgment is also unreported. *Morris v. Westbrooks*, W.D. Tenn. No. 1:07-1084, R. 85 (Mar. 13, 2017); App. 6a-40a. The Sixth Circuit's original opinion in this initial habeas proceeding is reported. *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015); App. 41a-60a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254. The Sixth Circuit denied a certificate of appealability on March 9, 2018. On May 30, 2018, Justice Kagan granted an extension of time, up to and including August 6, 2018, within which to file a petition for writ of certiorari. *Morris v. Mays*, No. 17A1321 (May 30, 2018) (Kagan, J.).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On April 4, 2007, Morris filed a *pro se* petition for habeas corpus relief in the Western District of Tennessee. *Morris v. Bell*, No. 07-1084 (W.D.Tenn.), R. 1.[1] On January 11, 2008, acting through appointed counsel, Morris filed an amended petition. *Morris v. Bell*, R. 12. In his amended petition, Morris raised several claims for ineffective assistance of trial counsel. These included that trial counsel failed to investigate and present evidence of his chronic mental illness in the guilt and penalty phases of trial; failed to raise a *Batson* challenge to the State's use of a peremptory challenge against the one African American venire-member not removed for cause; failed to challenge jury instructions that unconstitutionally relieved the prosecution of its burden under *Sandstrom v. Montana*, 442 U.S. 510 (1979); and failed to challenge the discriminatory appointment of the grand jury foreperson, which under Tennessee law is an additional voting position appointed by a judge outside the random selection process. *See Tenn. R. Crim. P. 6.*

The District Court granted Morris sentencing-phase relief on his claims of ineffective assistance based on trial counsel's failure to develop and present evidence of Morris's mental illness. *Morris v. Bell*, R. 58. However, the court ruled other of Morris's ineffective assistance of trial counsel claims procedurally defaulted. *Id.* at 25-26. The State appealed the District Court's grant of sentencing

[1] For the sake of clarity, citations to the District Court record herein will be designated with the original caption of the case naming the then-warden, *Morris v. Bell*. Citations to the appellate court record will be designated by the caption of the Court of Appeals decision, *Morris v. Carpenter*.

relief, and Morris cross-appealed the denial of guilt-phase ineffective assistance relief. *Morris v. Bell*, R. 60, 63.

On March 1, 2012, Morris filed in the court of appeals an application for a certificate of appealability (COA) on his guilt-phase ineffective assistance claims. *Morris v. Carpenter*, No. 11-6323[2] (6th Cir.), R. 36. The Court of Appeals granted in part Morris's motion, allowing an appeal on Morris's claim that counsel was ineffective at the guilt phase of trial for failing to present mental health evidence in support of a *mens rea* defense (R. 48-2), and denied a petition for rehearing. *Morris v. Carpenter*, No. 11-6323, R. 74.

On May 28, 2013, this Court issued its decision in *Trevino v. Thaler*, 569 U.S. 413 (2013), which made the *Martinez* equitable exception to procedural default for ineffective assistance of trial counsel claims applicable to jurisdictions that channeled such claims into post-conviction review.[3] Within 60 days of the decision in *Trevino*, Morris filed a motion to remand his case to the District Court for application in the first instance of *Martinez* to his defaulted ineffective assistance of trial counsel claims. *Morris v. Carpenter*, 6th Cir. No. 11-6323, R. 84. Without any reasoning or explanation, the court of appeals denied Morris's motion. *Id.*, R. 101.

On appeal, the Sixth Circuit then affirmed the District Court's denial of guilt-phase relief and reversed the grant of sentence relief for ineffective assistance of

---

[2] Because both the State and Morris appealed the District Court's judgment, there are two case numbers in the Sixth Circuit, 11-6322 and 11-6323. Case number 11-6323 is the more complete docket report.

[3] The Sixth Circuit subsequently determined that, under the rubric of *Trevino v. Thaler*, the equitable exception for procedural default of ineffective assistance of trial counsel claims recognized in *Martinez v. Ryan* applies to Tennessee habeas petitioners. *Sutton v. Carpenter*, 745 F.3d 747 (6th Cir. 2014).

counsel. *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015). In denying relief, the Sixth Circuit held that *Martinez* did not apply to allow consideration of evidence that Morris had presented in the first instance in federal court (including neuroimaging studies and expert reports) that supported the ineffectiveness claims that were before the court of appeals. *Morris*, 802 F.3d at 844.

Morris filed a petition for certiorari, this Court called for the record, but then denied the petition. *Morris v. Westbrooks*, No. 15-9002. The day after this Court denied Morris's petition, the District Court entered an order denying the writ pursuant to the Court of Appeals' mandate. *Morris v. Bell*, No. 07-01084, R. 75. Morris's initial habeas proceeding thus concluded without any court reviewing his defaulted trial ineffectiveness claims under the equitable exception that this Court recognized in *Martinez*.

Having been denied any application of *Martinez* to a number of his substantial ineffectiveness claims, Morris filed a motion to alter or amend judgment, seeking again to have *Martinez* applied to various claims of ineffective assistance of trial counsel that the District Court ruled defaulted. *Morris v. Bell*, No. 07-01084, R. 77. He showed that his defaulted claims are substantial, where counsel failed to make a winning *Batson* objection, failed to object to discrimination in selection of the grand jury foreperson, and failed to object to unconstitutional jury instructions. *See* R. 77, pp. 6-8. The District Court denied Morris's motion as being outside the mandate of the court of appeals. Morris has appealed the dismissal of his petition and has been denied a certificate of appealability. Pet. App. 1a-4a.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Refusal To Allow Application Of This Court's Decision In *Martinez v. Ryan* In Morris's Federal Habeas Proceeding Contravenes The Fundamental Principles Governing Federal Habeas Corpus And The Decisions Of This Court

"[I]f 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." *Martinez v. Ryan*, 566 U.S. 1, 10–11 (2012) (emphasis added). This reasoning has led this Court to recognize an exception to the procedural default rule for substantial claims of ineffective assistance of trial counsel. It is this very same tenet that the Sixth Circuit repudiated by denying Morris any opportunity to have his procedurally defaulted Sixth Amendment claims reviewed under the *Martinez* rule. This Court should not abide the withholding of the Constitutional safeguard against execution of a person sentenced to death in violation of the law. *Harrington v. Richter*, 562 U.S. 86, 91 (2011).

"[T]he importance of adequate review on a first (and presumably, only) federal habeas petition" filed by a capital petitioner is undisputed. *Gosch v. Johnson*, 522 U.S. 1142 (1998) (Souter, J., concurring). But the Court of Appeals has repeatedly denied Morris application of *Martinez*. The Sixth Circuit's dismissal of Morris's petition without any review of his defaulted trial counsel ineffectiveness claims under the *Martinez* equitable exception flouts this Court's instruction that "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking

injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

For these reasons, this Court has granted review in other habeas cases where a lower court has failed to review a petitioner's claims by applying the applicable holdings and standards enunciated by this Court. In *Williams v. Johnson*, 573 U.S. ___ (2014) (per curiam), for example, this Court granted certiorari, vacated and remanded so that the lower courts could adjudicate a Sixth Amendment claim raised by Williams in her initial habeas petition, where Williams had not yet received an adjudication of that claim under the proper standard of review. *See Williams v. Johnson*, 720 F.3d 1212 (9th Cir. 2013) (noting that Williams' claims had not yet been adjudicated on the merits). Likewise, in *Corcoran v. Levenhagen*, 558 U.S. 1 (2009) (per curiam), this Court concluded that a court of appeals could not ignore serious or substantial claims made in a capital habeas petitioner's initial federal habeas petition. In *Corcoran*, the Seventh Circuit failed to adjudicate claims which Corcoran raised in his federal habeas petition that were never fully adjudicated in any federal court. This Court thus reversed the Seventh Circuit where it had erred by disposing of Corcoran's unadjudicated claims "without explanation of any sort." *Id.*

Yet that is exactly what the Sixth Circuit has done here. Farris Morris raised substantial ineffective-assistance-of-counsel claims that were procedurally defaulted but subject to the rule set forth in the intervening decision in *Martinez v. Ryan*. After *Martinez* was decided, he requested that the court of appeals allow the

District Court to apply *Martinez* in the first instance, so that he would receive what he is entitled to in these initial habeas proceedings, namely "the protections of the Great Writ." *Lonchar v. Thomas*, 517 U.S. at 324. Instead, without explanation, the Sixth Circuit refused to provide him an adjudication of his ineffectiveness claims through application of *Martinez*.

This Court has been attuned to the need for *Martinez* to claims that are subject to the decision in *Martinez*. In fact, this Court has taken the same protective measures with *Martinez,* even granting certiorari ***after*** the initial federal habeas proceedings had concluded, to ensure *Martinez*'s application to procedurally defaulted ineffective-assistance claims. *Ayestas v. Thaler*, 569 U.S. 1015 (2013) (granting certiorari, vacating denial of relief, and remanding for further consideration in light of *Martinez* and *Trevino*); *Haynes v. Thaler*, 568 U.S. ___ (2012) (Sotomayor, J., respecting grant of stay of execution) (stay granted where lower courts failed to apply *Martinez* to defaulted ineffectiveness claims in proceedings under Fed.R.Civ.P. 60(b)(6)); *Haynes v. Thaler*, 569 U.S. 1015 (2013) (granting certiorari, vacating lower court judgment, and remanding for further proceedings).

A fortiori, *Martinez* must apply to Morris's claims, where *Martinez* was decided during the pendency of his *initial* federal habeas proceedings, and where this present petition for writ of certiorari involves Morris's initial federal habeas corpus proceedings.

Ultimately, the Sixth Circuit's decision cannot, and does not, survive in light of the fundamental principles governing federal habeas and this Court's case law. *Martinez* was decided during the pendency of Morris's federal habeas proceedings. It is axiomatic that he is entitled to application of *Martinez* to his claims. It is also clear that he has been denied any application of *Martinez* to his substantial claims. Consequently, he has been denied any adjudication of his ineffectiveness claims under *Martinez*, a result that simply cannot be squared with the fundamental principles governing initial habeas proceedings as set forth by this Court in *Lonchar, Williams*, and *Corcoran*.

Having refused to allow application of the intervening decision in *Martinez* to Farris Morris' procedurally defaulted ineffective-assistance claims, the Sixth Circuit has contradicted the principles and holdings of *Lonchar*, *Williams, Corcoran*, and *Haynes*.

To ensure that Farris Morris receives the application of *Martinez* to which he is entitled in his initial habeas proceedings, this Court should grant certiorari, hold that Farris Morris is entitled to application of *Martinez* and remand for further proceedings. As in *Williams*, this Court should enter an order granting certiorari, vacating the judgment below, and stating that "the case is remanded for consideration of petitioner's" procedurally defaulted ineffective-assistance-of-counsel claims "under the standard set forth in" *Martinez*. *Williams*, 573 U.S. at ___ (slip op. at 1).

II. This Court Should Grant Certiorari Where The Sixth Circuit's Failure To Apply *Martinez* To Substantial Ineffectiveness Claims Conflicts With Remand Orders From Other Circuits

In denying Farris Morris a remand for application of *Martinez* to his procedurally defaulted ineffectiveness claims, the Sixth Circuit has likewise created a conflict with the Third, Fifth, and Ninth Circuits, who have remanded under identical circumstances, that is, when *Martinez* was decided after the District Court dismissed a petitioner's defaulted ineffectiveness claims.

As stated in *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014), when a petitioner has presented substantial, defaulted ineffectiveness claims, but *Martinez* was decided after a district court dismissed such claims, a court of appeals should remand so that the District Court may properly apply *Martinez* in the first instance: "[W]here it is necessary to consider whether a procedural default should be excused under *Martinez* in a case where the district court's holding that there had been a procedural default preceded *Martinez*, and the result is uncertain, we should remand the matter to the district court to let it conduct such a review in the first instance." *Id.* at 376.

The Third, Fifth, and Ninth Circuits have faithfully applied this rule, remanding for application of *Martinez* when a petitioner has presented debatable, yet defaulted, ineffective-assistance-of-counsel claims that have never been reviewed under *Martinez*. *Smith v. Kerestes*, 2016 U.S.App.Lexis 1508 (3d Cir. 2016); *Butler v. Stephens*, 2015 U.S.App.Lexis 16231 *47-48 (5th Cir. 2015) (remanding to district court where "no court has yet considered the merits of the [ineffectiveness] claim or whether Butler can show cause and prejudice under *Martinez* and *Trevino* [*v. Thaler*,

570 U.S. ___ (2013)]"); *Neathery v. Stephens*, 746 F.3d 227 (5th Cir. 2014); *Trevino v. Stephens*, 740 F.3d 378 (5th Cir. 2014); *Cantu v. Thaler*, 682 F.3d 1053, 1053-1054 (5th Cir. 2012) (remanding for district court to decide "in the first instance the impact of *Martinez v. Ryan* on Cantu's contention that he had cause for his procedural default"); *Ayestas v. Stephens*, 553 Fed. Appx 422 (5th Cir. 2014); *Rayford v. Stephens*, 552 Fed. Appx. 367 (5th Cir. 2014) (remanding for review of ineffectiveness claim in light of *Martinez* and *Trevino*); *Rogers v. McDaniel*, 793 F.3d 1036, 1045 (9th Cir. 2015) (remanding where *Martinez* was decided after district court denied relief); *Woods v. Sinclair*, 764 F.3d 1109-1140 (9th Cir. 2014); *Clabourne v. Ryan*, *supra*; *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014)(en banc).

Unfortunately for Farris Morris, his case arises in the Sixth Circuit, which summarily refused to apply the governing rule employed by these other circuits. Where the Sixth Circuit's decision thus conflicts with the decisions of the other circuits, this Court should grant certiorari, and order a remand for some application of *Martinez* to Morris's procedurally defaulted ineffectiveness claims.

III. Where *Martinez v. Ryan* Recognizes That Investigation And Development Of Evidence Is Essential To Raising Claims Of Ineffective Assistance Of Trial Counsel, The *Martinez* Procedural Default Equitable Exception Must Extend To Admit Evidence In Federal Habeas Corpus Proceedings That Collateral Review Counsel Failed To Present In Support Of Substantial Claims

In his federal habeas proceeding, Morris offered expert scientific reports and brain scans as evidence of the mental illness and cognitive impairments that trial counsel failed to develop. *See e.g.*, *Morris v. Bell*, W.D.Tenn. No. 07-1084, R. 50-1 (psychiatric report of Dr. J. Arturo Silva, M.D.); R. 50-3 (neuropharmacology report

of Dr. Paula Lundberg-Love, Ph.D.); R. 50-7 (MRI of Farris Morris); R. 50-8 (PET Scan images of Farris Morris); R. 50-11 (PET report of Dr. Andrew Newberg, M.D.); R. 50-12 (Neuropsychological report of Dr. Ruben Gur. Ph.D.). Though collateral review counsel asserted trial counsel's failure to investigate and present evidence as showing ineffective assistance, post-conviction counsel failed to offer any of this evidence in support of any ineffectiveness claim that was before the state courts.

When Morris argued in his federal habeas appeal that his new scientific and expert evidence should be considered under *Martinez*, the Sixth Circuit ruled that because claim of ineffective assistance of counsel had been raised in state court, his claim (even without this critical evidence) had been "adjudicated" on the merits by the state court, and thus *Martinez* did not apply to his current claim. *Morris v. Carpenter*, 802 F.3d at 844; App. 59a. Of course, because the evidence critical to his claims in federal court was never presented to the state courts, the state courts never "adjudicated" any claim involving that evidence, and certainly did not adjudicate the ineffectiveness claims that Morris has ultimately presented in federal court.

Even so, the Sixth Circuit has not allowed consideration of Morris's new evidence – even though *Martinez* indicates that it should be considered if it was not presented in state court because of the ineffectiveness of post-conviction counsel.

In *Martinez*, this Court observed that just as effective counsel is necessary to litigate claims of error on direct appeal from a conviction, "[w]ithout the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial

ineffective assistance of trial counsel claim. Claims of ineffective assistance at trial often require *investigative work* . . . ." *Martinez*, 566 U.S. at 12 (emphasis added). The Court's statement that there is an investigative component to litigating substantial claims of ineffective assistance of trial counsel acknowledges that such claims cannot be merely raised but must also be developed with supporting evidence.

Central to defending every capital case is developing a social history of the client and expert analysis of any mental infirmities that history presents. *Sears v. Upton*, 561 U.S. 945, 951 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 378, 393 (2005); *Wiggins v. Smith*, 539 U.S. 510, 515, 537 (2003); *Williams v. Taylor*, 529 U.S. 362, 369 (2000); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). This is the very evidence that Morris's trial counsel failed to develop and offer to the jury that sentenced him to death. Thus, the very same kind of evidence was essential to a collateral review claim for that deficient representation to show what trial counsel failed to develop and the reasonable probability of a different outcome to Morris's sentencing, i.e. prejudice.

By failing to present expert scientific evidence demonstrating Morris's mental illness and cognitive impairments, post-conviction counsel effectively procedurally defaulted that component of Morris's ineffective assistance claim. "[A] petitioner like [Morris] is in a situation indistinguishable from that of a petitioner like

Trevino: Each of these two petitioners 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. A claim without any evidence to support it might as well be no claim at all." *Gallow v. Cooper*, 570 U.S. 933 (2013) (Breyer, J., respecting the denial of certiorari), *quoting Martinez v. Ryan*, 566 U.S. at 4.

For this reason, *Martinez* must extend to post-conviction counsel's failure to present expert scientific evidence of Morris's mental impairments in support of his claims that trial counsel failed to do so. Without that evidence, Morris might as well have had no claim at all. The Sixth Circuit cannot be permitted to use *Martinez*—which is intended to protect to the enforcement the Sixth Amendment right to counsel—to hobble Morris's enforcement of that right.

In fact, the Fifth Circuit and Ninth Circuits have recognized that where (as here) new evidence in support of an ineffectiveness claim either raises the substantial possibility of habeas relief or alters a sentencing-ineffectiveness claim previously presented in state court, *Martinez* does apply and allows the consideration of that new evidence in federal court. *Newbury v. Stephens*, 756 F.3d 850, 871 (5th Cir. 2014); *Dickens v. Ryan*, 740 F.3d 1302, 1318-1322 (9th Cir. 2014)(en banc). *See also* Comment, *Something's Got To Give: The Anomaly And Doctrinal Tension In The Wake Of Pinholster And Martinez*, 52 Hous. L.Rev. 1497, 1524-1525 (2015) (*Martinez* must apply to all situations where a petitioner's

"opportunity to vindicate her ineffective-assistance claim" was denied because the claims was "raised but poorly presented" by post-conviction counsel).

As suggested by Justice Breyer in *Gallow*, this Court should grant Morris's petition to address the implications of *Martinez* for collateral review counsel's failure to introduce evidence in support of a substantial claim of ineffective assistance of trial counsel. Certiorari is also warranted where the Sixth Circuit's ruling conflicts with the decisions of the Fifth and Ninth Circuits in *Newbury* and *Dickens*.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

/s/ *Paul R. Bottei*
Paul R. Bottei *
Jerome C. Del Pino

Assistant Federal Public Defenders
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

* Counsel of Record

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari and appendix were served via first-class mail upon Jennifer Smith, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this 6th day of August, 2018.

/s/ *Paul R. Bottei*