NO. 18-5505

IN THE
SUPREME COURT OF THE UNITED STATES

FARRIS GENNER MORRIS,
Petitioner,

v.

BRUCE WESTBROOKS, Warden,
Respondent.

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

RESPONDENT'S APPENDIX
PAGES 1-16

HERBERT H. SLATERY III
Attorney General & Reporter
State of Tennessee

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JENNIFER L. SMITH
Associate Solicitor General
Counsel of Record

301 6th Ave. North
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3486

Counsel for Respondent

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FARRIS GENNER MORRIS,	)	
	)	
Petitioner-Appellee/	)	
Cross-Appellant	)	Nos. 11-6322/11-6323
	)	**Capital Case**
vs.	)	
	)	
WAYNE CARPENTER, Warden	)	
	)	
Respondent-Appellant	)	
Cross-Appellee	)	

MOTION TO REMAND

Since Appellant filed his opening brief, this Court has now granted two motions to remand in Tennessee capital cases based on the new decision in Trevino v. Thaler, 569 U.S. ____ (2013), which addresses the proper application of Martinez v. Ryan, 566 U.S. 1 (2012). See Burns v. Heidle, No. 11-5214 (6th Cir. July 18, 2013)(Exhibit 1)(granting motion to remand); Smith v. Colson, No. 05-6653 (6th Cir. June 25, 2013)(Exhibit 2)(same). As in *Burns* and *Smith*, Farris Morris can also show "cause" for the default of substantial ineffective assistance of counsel claims under *Martinez*, including, for example, claims that trial counsel: (a) failed to object to jury instructions that relieved the prosecution of proving *mens rea* beyond a reasonable doubt;[1] and (b) failed to challenge stark race and gender discrimination in the selection of the grand jury foreperson.[2] Thus, as in *Burns* and *Smith*, this Court should also remand for further proceedings in light of *Trevino* and *Martinez*.

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[1] These claims are closely related to a claim on which this Court has already granted Farris Morris a certificate of appealability: Whether trial counsel ineffectively failed to present evidence of intoxication and mental illness negating *mens rea*.

[2] In *Burns*, this Court has granted a certificate of appealability on a similar underlying challenge to the selection of the grand jury foreperson. See Burns, No. 11-5214 (6th Cir. Feb. 8, 2013)(discrimination against women in selection of foreperson).

In support of this motion, Farris Morris states:

1. **Martinez v. Ryan, 566 U.S. 1 (2012)**:

a. In *Martinez v. Ryan*, the Supreme Court has held that, in federal habeas corpus proceedings, a petitioner who asserts that he was denied the effective assistance of trial counsel can establish "cause" for defaulting such a claim by establishing that post-conviction counsel was ineffective in failing to raise the claim in state court.

b. *Martinez* overruled a long line of cases that concluded that ineffective assistance of post-conviction counsel could never provide "cause" for the default of an ineffective-assistance-of-trial-counsel claim. Abdus-Samad v. Bell, 420 F.3d 614, 632 (6th Cir. 2005).

c. As the Supreme Court explained in *Martinez*, when an ineffective-assistance-of-trial-counsel claim can only be raised for the first time in post-conviction proceedings, counsel is necessary for "vindicating a substantial ineffective-assistance-of-trial-counsel claim." Martinez, 566 U.S. at ____ (slip op. at 8). "To present a claim of ineffective assistance at trial . . . a prisoner likely needs an effective attorney." Id. at ____ (slip op. at 9).

d. Thus, "counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." Id. at ____ (slip op. at 10).

e. This conclusion derives from principles of equity:

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors . . . caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

Id. at ____ (slip op. at 11).

f. To show "cause" under *Martinez* for failing to raise an ineffectiveness claim in state court, a habeas petitioner must show the following:

> [A] prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U.S. 322 (2003)(describing standards for certificates of appealability to issue).

Martinez, 566 U.S. at ____ (slip op. at 11).

g. While *Martinez* only specifically discussed its applicability to ineffective-assistance-of-trial-counsel claims, the holding of *Martinez* is not so limited. As Justice Scalia has explained, it applies as well to any claims where initial collateral review provided "the first opportunity for a particular claim to be raised." Martinez, 566 U.S. at ____ (slip op. at 2)(Scalia, J., dissenting). Such claims would include *Brady* claims and "claims asserting ineffective assistance of appellate counsel." Id.

2. **Trevino v. Thaler, 569 U.S. ____ (2013)**:

a. In *Trevino*, the Supreme Court has held that *Martinez* applies when a federal habeas petitioner did not "have a meaningful opportunity to raise of claim of ineffective assistance of trial counsel on direct appeal." Trevino, 569 U.S. at ____ (slip op. at 14).

b. In addition, *Trevino* provides that *Martinez* applies if the state courts have "directed defendants to raise claims of ineffective assistance of trial counsel on

collateral, rather than direct review" and/or informed petitioners that they "should not raise an issue of ineffective assistance of counsel on direct appeal, but rather in collateral review proceedings." Trevino, 569 U.S. at ____ (slip op. at 11)(internal quotations omitted).

c. Given the holding in *Trevino*, it quite clearly appears that *Martinez* applies to Farris Morris' case:

1) First, Morris had no "meaningful opportunity to raise of claim of ineffective assistance of trial counsel on direct appeal" (Trevino, 569 U.S. at ____ (slip op. at 14)) because he was represented on appeal by trial counsel, who as appellate counsel suffered from "a clear conflict of interest" and could not challenge their own ineffectiveness at trial. See Frazier v. State, 303 S.W.3d 674, 682-683 (Tenn. 2010)(attorney cannot ethically challenge own ineffectiveness). This fact alone means that *Martinez* applies to Farris Morris' case.

2) Second, exactly as in *Trevino*, *Martinez* applies because like Texas law in *Trevino*, Tennessee law "so strongly discourage[s] defendants from" presenting ineffectiveness claims on direct appeal (Trevino, 569 U.S. at ____ (slip op. at 12)):

a) Indeed, Tennessee courts have for decades instructed defendants not to raise ineffectiveness claims on direct appeal given the inadequacy of any remedy on direct appeal, but to await post-conviction proceedings to raise such claims. See e.g., State v. Sluder, 1990 Tenn.Crim.App.Lexis 222.

b) As the Tennessee courts have stated: "[C]laims of ineffective assistance of counsel are generally more appropriately raised in a petition for post-conviction relief rather than on direct appeal." State v. Haynes, 2006

Tenn.Crim.App.Lexis 275 *5, *citing* State v. Carruthers, 35 S.W.3d 516, 551 (Tenn. 2000). See State v. Brandon, 2002 Tenn. Crim.App.Lexis 864 *4 ("[I]neffective assistance of counsel claims should normally be raised by petition for post-conviction relief."); State v. Turner, 1997 Tenn. Crim. App. Lexis 552.

c) The Tennessee courts have likewise declared: "The better practice is to reserve the issue for a post-conviction proceeding in the event the direct appeal is unsuccessful." State v. Haynes, 2006 Tenn.Crim.App.Lexis 275 *5, *citing* State v. Brandon, 2002 Tenn. Crim.App.Lexis 864 *2.

d) Because Tennessee courts, like the Texas courts in *Trevino,* "so strongly discourage defendants from" presenting ineffectiveness claims on direct appeal (Trevino, 569 U.S. at ____ (slip op. at 12)), under *Trevino*, Morris' first "meaningful opportunity" to present his ineffectiveness claims occurred during post-conviction proceedings. Thus, the "holding in *Martinez* applies." Id. at ____ (slip op. at 14).[3]

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[3] In fact, Tennessee courts have routinely refused to consider ineffectiveness claims raised on direct appeal, pretermitting their consideration until post-conviction proceedings. See e.g., State v. Allen, 2011 Tenn.Crim.App. Lexis 260 *23 ("We agree that it would be inappropriate for us to consider the issues" of ineffective assistance of trial counsel on direct appeal); State v. Roberts, 2011 Tenn.Crim.App.Lexis 240 *12 ("[W]e decline to consider this issue."); State v. Johnson, 2010 Tenn.Crim.App. Lexis 143 *23 ("We . . . decline to consider the claim on direct appeal."); State v. Gerhardt, 2009 Tenn.Crim. App. Lexis 523 *58 (because no hearing had been held on issue, it "is inappropriate for us to consider" ineffectiveness claim on direct appeal); State v. Lones, 2007 Tenn.Crim.App.Lexis 206 *15 (it was "inappropriate for us to consider this issue" on direct appeal); State v. Holloway, 2003 Tenn.Crim.App.Lexis 797 *24 (on direct appeal, vacating lower court ruling on *pro se* ineffectiveness claims raised *pro se* to allow petitioner "his right to file, at the appropriate time, a post-conviction petition."); State v. McCann, 2001 Tenn.Crim.App.Lexis 840 *42 (where defendant was "in no position to present proof of his lawyer's performance" before direct appeal, "it is inappropriate for us to consider the issue."); State v. Belcher, 1997 Tenn. Crim. App. Lexis 1185 * 16 (Court of Criminal Appeals held that "it is inappropriate for us to consider the issue" of ineffective assistance of trial counsel raised on direct appeal. (continued...)

d. In sum, therefore, given the holding in *Trevino*, *Martinez* applies to Morris' case given both appellate counsel's conflict of interest on direct appeal (which prevented the raising of ineffectiveness claims at that stage), as well as Tennessee law's clear admonition to defendants/appellants to raise their ineffectiveness claims in post-conviction proceedings where a hearing could be held – not on direct appeal when such a hearing is not available.[4]

3. **Post-*Trevino*, This Court Has Remanded To The District Court For Application Of *Martinez* In The First Instance:**

a. Following the decision in *Trevino*, this Court has remanded the two Tennessee capital cases seeking a remand for application of *Martinez*.

b. In both Burns v. Heidle, No. 11-5214 (6th Cir. July 18, 2013) and Smith v. Colson, No. 05-6653 (6th Cir. June 25, 2013), this Court has granted motions to remand, concluding that in light of the intervening decision in *Trevino*, *Trevino* and

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[3](...continued)
"Nevertheless, our abstention from considering the issue does not deprive the defendant of an opportunity to have this issue reviewed in an appropriate post-conviction proceeding if he so desires."); State v. Madkins, 1997 Tenn.Crim.App.Lexis 808 *13 (refusing to consider, on direct appeal, allegation of ineffective assistance of counsel raised for the first time on direct appeal, but "the defendant's right to litigate the issue of ineffective assistance of counsel in a post-conviction suit should be preserved."); State v. Blye, 1990 Tenn.Crim. App.Lexis 846 *6 ("We will not consider the issue now."); State v. Tilley, 1990 Tenn.Crim. App.Lexis 845 *5 ("[W]e will not consider this issue."); State v. Fletcher, 1990 Tenn.Crim.App.Lexis 830; State v. Sluder, 1990 Tenn.Crim.App.Lexis 222.

[4] Elsewhere, the Warden has claimed that Tennessee law allowed or encouraged defendants to raise ineffectiveness claims on direct appeal, yet none of the cases cited by the Warden existed at the time of Morris' direct appeal in 1998-1999. At that time, as Morris has noted here, Tennessee authority manifestly directed that ineffectiveness claims not be raised on direct appeal. See ¶1C2 & n. 1, *supra*. In fact, as late as 2011, Tennessee courts have refused to consider ineffectiveness claims on direct appeal.

Martinez should be applied in the first instance by the District Court. Both *Burns* and *Smith* were decided after the opening brief was filed in Farris Morris' case.

c. As Burns explained in seeking a remand, application of *Trevino* and *Martinez* involves mixed questions of law and fact, requiring factfinding and a case-by-case assessment of whether an individual petitioner had a "meaningful opportunity" to present ineffectiveness claims on direct appeal. Any such assessment requires determination of any number of factual issues, including (for example) the identity of trial and appellate counsel and the existence of counsel's conflict of interest on direct appeal, and what trial and appellate counsel understood the law to be concerning the raising of ineffectiveness claims on direct appeal.

4. **As in *Smith* and *Burns*, This Court Should Remand For Application Of *Trevino* And *Martinez* In The First Instance:**

a. This Court should therefore remand for application of *Trevino* and *Martinez* in the first instance, as it has done in the intervening cases of *Burns* and *Smith*.

b. Where it is clear that Morris' trial and appellate counsel were the same -- such that Morris had no "meaningful opportunity" to raise his ineffectiveness claims until post-conviction proceedings -- there is little question that *Martinez* applies to his case, and that, as in *Burns* and *Smith*, the District Court should apply *Martinez* in the first instance.

c. Moreover, in accordance with *Martinez*, Morris presents substantial ineffective-assistance-of-trial-counsel claims that have been procedurally defaulted, but claims for which he can establish "cause" under *Martinez*.

d. For instance, post-conviction counsel ineffectively failed to raise claims that trial counsel were ineffective for failing to challenge the constitutionality of more than

one guilt-phase jury instruction that would have entitled Morris to relief had such challenges been raised:

1) As Morris has maintained, the jury was unconstitutionally instructed that it could find the essential element of "intent" by merely finding that Morris intended to engage in conduct which caused the death of Erica Hurd: "A person acts intentionally with respect to the nature of his conduct **or** to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct **or** cause the result." See R. 21, Add 1(E), Vol. 13, p. 110. This instruction presents a classic violation of Sandstrom v. Montana, 442 U.S. 510 (1979), because first-degree murder in Tennessee requires specific intent to kill (State v. Vaughn, 279 S.W.3d 584, 608 (Tenn. Crim. App. 2008)), but the instruction allowed mere intent *to act* to supply specific intent to kill. The merit of this claim is underlined by the fact that at least one court has found a virtually identical instruction to be improper. Cook v. State, 884 S.W.2d 485 (Tex. Crim. App. 1994). Because Morris' mental state was heavily disputed at trial, this instruction was highly prejudicial. Yet post-conviction counsel ineffectively failed to recognize or raise any ineffectiveness-of-trial-counsel-claim based upon this improper instruction, which has been raised in habeas by Morris. See R. 12, ¶¶ 9K & 21B (challenge to instruction and related ineffectiveness claim); Exhibit 3, ¶ 6: Declaration of Paul J. Morrow, Esq.). Morris can thus establish "cause" under *Martinez*.

2) Also, the jury was instructed that Morris could only be acquitted if he lacked the "capacity" to premeditate[5] or "could not" possess the requisite *mens rea*,[6]

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[5] "The mental state of the accused at the time he allegedly decided to kill must be (continued...)

rather than allowing acquittal if there was a reasonable doubt whether, in fact, he actually premeditated the death of the victim and possessed the *mens rea* required by Tennessee law. These instructions likewise violated *Sandstrom*, because evidence "that a defendant lacks the capacity to form *mens rea* is to be distinguished from evidence that the defendant actually lacked *mens rea*."[7] Yet post-conviction counsel overlooked the infirmity in these instructions and likewise failed to raise related ineffectiveness-of-trial-counsel claims raised in habeas. See R. 12, ¶¶ 9K & 21B & 21C (unconstitutional instructions and related ineffectiveness-of-trial-counsel claims); Exhibit 3, ¶6. Again, under *Martinez*, Morris can show "cause" for the procedural default of such ineffectiveness claims.

e. In addition, Morris' habeas petition presents a substantial, yet procedurally defaulted, claim that trial counsel was ineffective for failing to challenge unlawful discrimination against women and African-Americans in the selection of the grand jury foreperson in Madison County, Tennessee. See R. 12, ¶¶9P & 27. In Tennessee, the grand jury foreperson is specifically selected by a judge as a voting member of the grand jury, such that discrimination in the selection of the foreperson states a valid constitutional claim. Rose v. Mitchell, 443 U.S. 545 (1979). Here, there was significant discrimination against women and African-Americans in the selection of forepersons, as not one woman

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[5](...continued)
carefully considered in order to determine whether the accused was sufficiently free from excitement and passion *to be capable of premeditation*." R. 21, Add. 1(E), Vol. 13, p. 111.

[6] "If you find that the defendant was intoxicated to the extent that *he could not have possessed the required mental state*, then he cannot be guilty of the offense charged." R. 21, Add. 1(E), Vol. 13, p. 116.

[7] United States v. Wescott, 83 F.3d 1354, 1358 (11th Cir. 1996).

or African-American ever served as foreperson for the twenty years up until the time Morris was indicted. See R. 50-19 (Affidavit Gaye Nease: Between 1975 and 1994, Madison County, only white males served as foreperson of the grand jury)(Attached as Exhibit 4). This, even though women comprised more than half of Madison County's population, and African-Americans more than 30%. See Exhibit 5 (R. 50-20, Madison County, Tennessee, Population Statistics). Despite this stark discrimination, trial counsel did not investigate or challenge this discrimination, nor did post-conviction counsel ever challenge trial counsel's failure to raise such a claim. Where it appears that post-conviction counsel simply overlooked this ineffectiveness claim (See Exhibit 3, ¶4: Declaration Of Paul Morrow, Esq.), Morris can ultimately establish "cause" under *Martinez* on this substantial ineffectiveness claim. Thus, a remand is warranted.

f. Post-Conviction counsel also failed to raise a now-defaulted *Brady* claim alleging that the District Attorney withheld evidence establishing that pathologist O.C. Smith (who testified for the prosecution) was a highly biased witness at trial, one who was actually working to get Morris convicted and sentenced to death by helping the prosecution prepare the cross-examination of Morris' expert mental health witness, Dr. Parker. See Amended Petition, R. 12, ¶13B. Because this *Brady* claim is based upon newly-discovered evidence that could not have been presented until post-conviction proceedings (See ¶1g, *supra, citing* Martinez, 566 U.S. at ____ (slip op. at 2)(Scalia, J., dissenting)), but because post-conviction counsel failed to recognize this claim (Exhibit 3, ¶5), Morris has "cause" for the default of this claim as well under *Martinez*.

5. **This Court Should Remand**: Suffice it to say, because *Trevino* indicates that *Martinez* applies to Farris Morris' case, because Morris presents substantial

procedurally defaulted claims that are subject to *Martinez* and that go to the heart of his case, and because it likewise appears that post-conviction counsel was ineffective for failing to raise such claims during post-conviction proceedings (Exhibit 3), Morris has viable *Martinez* claims that need to be addressed in the first instance by the District Court. As this Court has just done in the intervening decisions in *Burns* and *Smith*, this Court should remand to the District Court for application of *Trevino* and *Martinez* in the first instance, while retaining jurisdiction over the pending appeals in this case. Once the District Court resolves the *Martinez* issues, those issues, as well as the issues now pending on appeal, can all proceed forward in this Court.

CONCLUSION

This Court should remand for further proceedings under *Trevino* and *Martinez*.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing motion was filed electronically by means of this Court's electronic filing system, which will send a copy to counsel for respondent, Mr. Andrew H. Smith, Associate Deputy Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243, on this the 24th day of July, 2013.

/s/ Paul R. Bottei
Paul R. Bottei

Nos. 11-6322/6323

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FARRIS GENNER MORRIS,

Petitioner-Appellee Cross Appellant,

v.

ROLAND COLSON, Warden, Riverbend Maximum Security Institution

Respondent-Appellant Cross-Appellee.

ORDER

Farris Morris, a Tennessee prisoner under sentence of death, moves the court to remand this appeal to the district court for further proceedings in light of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The state has filed a response. Warden Roland Colson appealed the district court order granting Morris's petition for a writ of habeas corpus in part and vacating his death sentence on the basis of ineffective assistance of counsel at sentencing. Morris cross-appealed the district court's decision to deny his claims of ineffective assistance of counsel in the guilt phase.

Upon review, the motion to remand is denied. The clerk is directed to take the briefing schedule out of abeyance.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 11-6322/6323

FILED
Sep 23, 2015
DEBORAH S. HUNT, Clerk

FARRIS GENNER MORRIS,
Petitioner - Appellee/Cross - Appellant,

v.

WAYNE CARPENTER, Warden,
Respondent - Appellant/Cross - Appellee.

Before: BOGGS, SILER, and CLAY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Westerm District of Tennessee at Jackson.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, VACATED IN PART, and the case is REMANDED to the district court for the denial of the writ of habeas corpus in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 11-6322/11-6323

Filed: October 04, 2016

FARRIS GENNER MORRIS

Petitioner - Appellee/Cross-Appellant

v.

BRUCE WESTBROOKS, Warden

Respondent - Appellant/Cross-Appellee

MANDATE

Pursuant to the court's disposition that was filed 09/23/2015 the mandate for these cases hereby issues today.

COSTS: None

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

FARRIS GENNER MORRIS,

Petitioner,

CASE NUMBER: 1:07-cv-1084-JDB-egb

v.

ROLAND COLSON, Warden
Riverbend Maximum Security
Institution,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 10/5/2016, the habeas petition filed on behalf of Petitioner Farris Genner Morris is DENIED. Judgment shall be entered for the Respondent.

APPROVED:

s/J. Daniel Breen
Chief United States District Judge

THOMAS M. GOULD
CLERK

BY: s/ Evelyn Cheairs
DEPUTY CLERK

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Appendix has been sent by first class mail, to counsel for the petitioner: Jerome C. Del Pino, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, on the 5th day of November 2018. I further certify that all parties required to be served have been served.

Jennifer L. Smith

JENNIFER L. SMITH
Associate Solicitor General