No.

IN THE

SUPREME COURT OF THE UNITED STATES

TYRONE PULLEY

Petitioner,

V.

THE STATE OF CALIFORNIA

Respondent.

On Petition for Writ of Certiorari

To California Supreme Court

PETITION FOR WRIT OF CERTIORARI

California Attorney General

300 South Spring Street

Los Angeles, CA. 90013

ATTORNEY FOR THE RESPONDENT

Tyrone Pulley

21517 E. Lords Ct.

Queen Creek, AZ. 85142

PETITIONER

QUESTION PRESENTED

1. Does the rule established in *Martinez V. Ryan*, 132 S.CT. 1309 (2012) and Trevino V. Thaler 133 S. CT 1911, 1921 (2013) that ineffective state appellate counsel can be seen as cause to overcome the procedural default of substantial ineffective assistance of trial counsel. Claim also applies to procedurally defaulted, but substantial, ineffective assistance of appellate counsel claims.

2. *Martinez v. Ryan* held that its exception to the *Coleman v. Thompson* rule was limited to claims of ineffective assistance of trial counsel and that Coleman would govern in all other circumstances, which necessarily includes claims of ineffective assistance of appellate counsel. Should *Martinez* be overruled to the extent of that limitation, thereby extending its exception? To appellate counsel claims?

PARTIES

All parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

ARGUMENT: FOR GRANTING THE PETITION

I. Does the rule established in Martinez v. Ryan, 132 S.Ct. 1309 (2012) and Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013), that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim, also apply to procedurally defaulted, but substantial, ineffective assistance of appellate counsel claims?

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

CASES **Page**

CITED AUTHORITIES

CASES

Page

Statutes

Constitution Provision

RULES

Other Authorities

PETITION OF WRIT OF CERTIORARI

Petitioner Tyrone Pulley respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second District.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. la).

JURISDICTION

The judgment of the court of appeals was entered on August 30th 2012. Pet. App. la.

The California Supreme Court denied review on June 27,2018 Pet. App.1b. This petition is being filed within 90 days after entry of that judgment, pursuant to Supreme rule 13.1 and 13.2. This Court has Jurisdiction under 28 U.S.C. 1254 (2).

REVENANT CONSITUTION & STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . To have the assistance of counsel for his defense." The Fourteenth Amendment to provides in part, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law ..."U.S. Const. amend XIV

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) The factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) The facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

I. State Court Proceedings

A. Evidence Presented at Trial

1. Petitioner was charged in a single count of information with forcible rape Penal Code section 261, subdivision (a)(2). Following a jury trial, petitioner was found guilty and charged on May 25, 2011. The State's argument was that Petitioner had a single sexual encounter with his Chiropractic patient, Beronica B.

2. Beronica B. testified she treated with Petitioner for back injuries in 2005 to 2006 then returned in 2010; during a treatment session in 2010 Petitioner Sexually assaulted her. After, the alleged rape of Beronica was disclosed, Beronica was examined by sexual assault nurse, who examined her and opined there was no medical findings corroborating her accusation of vaginal trauma.

3. Prior to and during Petitioner's trial prosecution sought to introduced evidence of allegations of a uncharged 2002 purported (sexual assault) of a past patient of Petitioner named Maria S. at Petitioner's Preliminary hearing. The prosecution argued the prior sexual misconduct Evidence was admissible under Evidence Code sections 1101, subdivision (b) and1108 to show appellant's propensity to commit sexual acts against his patients And the evidence was more probative than prejudicial under Evidence Code Section 352. (2 RT 302-304.)

4. It is the position of the Petitioner, that the allowance of a 2002 Uncharged Sexual offense, in which both the 1 year Statute of Limitation) has elapsed as well As Petitioner, not having been arrested nor found guilty in a Court of law for said 2002, incident, Preliminary hearing and trial counsel of record failed the Petitioner, by not advancing as a matter of the record the fact that the Legislative Intent of The California Penal Code forbids instances of using (Statutorily Time Barred Allegations) of crimes in which there has not been no formal complaint let alone any criminal conviction, violated both the Sixth and Fourteenth Amendment Rights assured Petitioner of one's right to a fair reasonable and impartial trial..

5. For instance a criminal defendant who has been timely charged with a felony offense may, pursuant to Cal. Penal Code 805(b), assert the statute of limitations as a defense to prevent conviction of a time-barred lesser included misdemeanor offense. Logically, a defendant who has been timely charge with a felony offense may assert the statue of limitations as a defense to prevent conviction of another wise time-barred transitionally related offense added to information based upon preliminary hearing evidence.

Penal Code 805(b). In *People v. Terry*, 127 Cal. App. 4th 750; also Id at p. 767 *People v. Terry*, Supra.

6. It is also to note that the incident stemming from the August 31, 2010, reported crime, placed the Petitioner, in the position of being sentenced to (8yrs or more in state prison). Thus in certain situations when a criminal defendant is faced with the possibility, of being sentenced to 8yrs or more mandates that there is a Prescribed [S]tatutory [T]ime line.

7. California Penal Code 800. Offenses punishable by imprisonment for eight years or more states: except as provided in section 799, prosecution for an offense punishable by imprisonment in state for eight years or more or by imprisonment pursuant to subd(h) of 1170 For more shall commence within six years after commission of the offense.

8. Bringing in the now disputed (prejudicial/Statutorily time Barred) 2002 incident constitutes ineffective assistance of counsel. *U.S. v. Cronic* 466 US 648, Id at P.p 656-657, and 659-66,Fn.25.

9. Petitioner's Sixth and Fourteenth Amendment rights to a fair trial have been violated by the trial court based on the Court having committed a "Structural Error", by allowing the Prosecution to use testimonial evidence derived from a 2002 [U]charged prior bad act that never led to any formal arrest or subsequent conviction.

10. Not only did it lessened the prosecutions burden of proof on the actual charged crime the prosecution relied heavily upon the testimony of the purported witness Maria S. which also prejudiced the Petitioner before the juror(s)? *Arizona v. Fulminante* 499 U.S. 279. Id. At P. 309. See: *People v. Kelley,* 66 Cal.2d 232. Id. at P.239.

11. The statue of limitation for sexual battery was/is the maximum punishment allowed which is four years? The trial court's use of California Evidence Code 1108, and Cal. Penal Code 352, violated Petitioner's right to a fair trial. During both the preliminary hearing and trial the 2002 incident which so to speak technically was statutorily time-barred, based solely on the year the crime was committed offends The U.S. Federal Constitutional provision *Ex Post Factor In Article I , 10 clauses 1.*

12. The statue of limitations governing prosecutions at the crime was actually committed was/is set a (4yrs) four years limitation period. Based on a criminal action wasn't commenced within a (1yr) one year time-frame, it is the position of the Petitioner, in all fairness the parameters of (*Ex post facto 's* assurances). has in essence been violated. Once a crime has been committed and no criminal action has been commenced within a certain frame, certain (Laws), prohibit criminal actions from being advanced.

13. Our nation's High Court, has previously declared statutorily time –barred criminal acts contrary to the U.S. Constitution. See: Stogner v. California, 539 U.S. 607. All though facts are distinguished from Petitioner's Stogner is premised on Ex post factor, violation such as Petitioners. See: also: *Calder v. Ball* 3 DALL 386, Id at P.p. 390 thru 391. California penal Code 801; 803 et. Seq. 804; *People V. Kelley* , 66 Cal. 2d 232, Id at P. 239, prejudicial effect of introduction of uncharged offence.

Petitioner, hereby respectfully, points out the following facts:

1. Jury instructions on prior [U]ncharged [O]offenses may violate due process where they lessen the prosecution's burden of proof.

2. In these situations certain [J]ury [I]ntructions lead the jury to believe that a criminal defendant committed the uncharged offense by a [p]reponderance of the evidence.

3. This in turn leads a jury to infer that a criminal defendant has committed the actual charged acts. In the instant cause of action this is exactly what has taken place. Ref: to Transcripts **Rt. P.p**. 1269-1271

For instance in the Prosecution's (closing Arguments), it was to the detriment of The Petitioner, that the Prosecutor, stated all of the following: " [I]f you find by a Preponderance of the evidence that a sexual battery occurred with Maria Alverez [sic], you can find that the defendant had a disposition to commit the crime against Ms. Benito, same thing on August 10th she got out of there. She was compliant. He told you he couldn't control the urge", and [I]t's demonstrated he did it before with and I think I was talking about, couldn't control himself then couldn't control himself with Ms. Benito on August 10^{th} , and definitely couldn't control himself with Ms. Benito on August 31^{st}, when he forcibly penetrated her against her will.

a jury may, however, infer that defendant committed the charged crime based on previous, uncharged crimes, as log as those previous offenses were proven beyond a reasonable doubt. *Gibson v. Ortiz*, F.387 F. 3d 812. Id at P. 822

II. Direct appeal counsel failed to raise the jury charge claim.

1 . Petitioner' s appellate counsel of record has rendered ineffective assistance of counsel with respects to failing to federalize the exact Constitutional nature of Petitioner, having been denied his Constitutional right to a fair trial. Thus Petitioner's Fourteenth Amendment right to effective assistance of appellate counsel has been violated as establish by the United States Supreme court's decisional Cases: *Evitts V. Lucey* 469 U.S. 387.

2. Exhaustion of state remedies is a prerequisite to a federal court's consideration of claims sought to be presented by a state prisoner in federal habeas corpus . 28 U.S.C. 509. Id at P.515. In the instant cause of action (Appellate Counsel of Record) in fact failed to established as a matter of the record on behalf of petitioner, the federal nature of Petitioner's constitutional right to a fair trial was violated, in accordance with clearly established federal law and or the decisional law of the United States Supreme Court.

3 . For instance a claim has not been fairly presented unless the prisoner has described in the state court proceedings both the operative facts and the federal legal theory on which his contention is based. *Gray v.Netherland*, 518 U.S. 152. Id. at P.p 162-163.

4. Indeed, "fair presentation" requires that a petitioner expressly alert the State's highest court to the federal basis of the claim by "citing in conjunction with the claim the federal source of the law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "FEDERAL". *Baldwin v. Reeve*, 541 U.S. at P. 32.

5. Furthermore, the citation of a reverent federal constitional provision in relation to another claim does not satisfy the exhaustion requirement. *Baldwin v. Reeve*, 541 U.S. at P. 33. See: *Gary v. Netherland* 518 U.S. 152 failure to expound on both operative facts and (Federal Legal Theory), constitutes a failure to exhaust.

6. Petitioner, respectfully refer the reviewing Court(s) attention to pages 20 thru 21 of the Petition for Review, which unequivocally supports the Petitioners reasoning that Petitioner's appellate counsel of record, rendered ineffective assistance of counsel as a matter of Petitioners (First appeal of right).

7. As illustrated by way of the Petition of Review. at no point did appellate Counsel, establish the requisite (Federal Legal Theory) in regards to [E]xhausting Petitioner's position on being denied his federally assured right of a fair trial.

8. Basically when such instances take place [O]ur Nations High court holds as Follows: In *Coleman v. Thompson*, 501 U.S. 722. The Coleman Court establish that The cause and prejudice standard will be applied "[I]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate procedural rule. " Id at 501 U.S. 722, P.750.

Petitioner, respectfully directs the reviewing Court's immediate attention to The (Factual Findings of the Second Appellate District Court of Appeal Division # Two.) Pet: App.1a

Petitioner has taken the liberty to point out just how said Court discovered that Petitioner's appellate counsel of record failed to [E]ffectively represent Petitioner's interest as a matter of the record. As illustrated on page (s) 1 of 7, namely pages 4 of 7 and 5 of 7. The [F]actual [F]indings are made readily apparent. For instance counsel in question Daniel G.

Koryn, erroneously argues that CALJIC No. 2.50.01, as read to the jury in this case, Incorrectly states the law and violated his right to due process.

1. However and nonetheless appellate counsel subsequently then concedes that having considered the identical language in CALJIC No. 2.50.01, our Supreme Court has held that It correctly states the law and does not violate due progress. See: Pet: App.1a August 30,2012 (Unpublished opinion).

2. Furthermore, on page 3 of 7, and 4 of 7, here is where the most disturbing [F]actual [F]inding are contained. appellate counsel in question once again failed Petitioner, by not according to the court pointing out The Federal Constitional Argument, said Court, refused to entertain [Petitioner's Constitutional Issues]. It is also of significance that Counsel in question utterly failed to as matter of the record put forth a [Statutory / [S]tate [G]rounds, that establish error under state law pages 3 & 4.... See: *People v. Thorton* 41 Cal 4th 391. Because [a] party cannot argue the court erred in failing to conduct an analysis it was not asked To conduct the constitutional claims are, in all but one instance, forfeited. The sole exception is defendant's due process claim, for it mere asserts that the trial court's ruling, Insofar as wrong on grounds actually presented to that court, had the additional legal consequence of violating the Constitution. Id. P.443.

III. Federal Habeas Corpus proceeding

1. Petitioner filed a Petition for a Federal Writ of Habeas Corpus on July 8, 2016, pursuant to 28 U.S.C. §§ 2241(a) and 2254(a). Id. Petitioner motion requesting Stay & Abeyance, in support of the Equitable tolling being warranted due to ineffective assistance of post-conviction Habeas Counsel, to which he was entitled under the United States Constitution. Id.; Habeas Pet. at 67-83, 87-94. 2. On August 15, 2016 The Attorney General request for dismissal of the habeas However, it was recorded in their report that the instruction to the jury on *CALJIC* No. 2.50.01 was unexhausted because Petitioner, did not present the California Supreme Court with the federal nature of the claim. On January 13, 2013, the District Court issued an order denying the petition solely on the ground that Petitioner's claim was procedurally defaulted.

ARGUMENT: REASON FOR GRANTING THE WRIT

I. DOES THE RULE ESTABLISHED IN MARTINEZ V. RYAN, 132 S.CT. 1309 (2012) AND TREVINO V. THALER, 133 S. CT. 1911, 1921 (2013), THAT INEFFECTIVE STATE HABEAS COUNSEL CAN BE SEEN AS CAUSE TO OVERCOME THE PROCEDURAL DEFAULT OF A SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM, ALSO APPLY TO PROCEDURALLY DEFAULTED, BUT SUBSTANTIAL, INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS?

A. *Martinez* and *Trevino* apply to procedurally default ineffective assistance of appellate counsel claims. The Ninth Circuit has stated the issue squarely: "The Court in *Martinez* did not distinguish between trial-counsel and appellate-counsel I.A.C." *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013). Professors Hertz and Liebman concur:

Although *Martinez* concerned a claim of ineffective assistance of trial counsel, and thus the court's discussion was limited to claims of this sort . . . the court's reasoning logically extends to other types of claims that, as a matter of state law or of factual or procedural circumstances, could not be raised before the post conviction Stage.

Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 26.3[b] (6th ed. Supp. 2013).

Indeed, Justice Scalia recognized as much in Martinez when he explained that ineffective assistance of appellate counsel claims, as well as Brady claims and those of newly discovered exculpatory evidence, are indistinguishable from ineffective trial counsel claims for the purposes of the new exception:

[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised . . .

Martinez, 132 S. Ct. at 1321 (Scalia, J., dissenting)

That Martinez and Trevino necessarily apply to ineffective assistance of appellate counselclaims are not surprising based upon the reasoning behind those decisions. this is because, as the district court recognized, such claims "do not exist to be raised on appeal" and "are logically raised.

The principles underlying Martinez lead to the conclusion that ineffective assistance of state habeas counsel establishes cause for a failure to raise an ineffective appellant counsel claim at the state court level. This court has identified three factors which compel the conclusion that ineffective state habeas counsel excuses a procedural default for the failure to raise ineffective trial counsel claims. "First, the right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . Indeed, the right to counsel is the Foundation for our adversary system." *Trevino v. Thaler*, 133 S. Ct. 1911 at 7 (U.S. 2013) (quotations omitted). Second, taking into account that ineffective counsel on direct appeal is cause, it only makes sense that ineffective assistance of habeas counsel should be cause for claims that cannot be raised on direct appeal. Id. Third, where a state channels review of certain claims into collateral proceedings, the Lawyer's failure to raise those claims at the state Habeas level could deprive a person of any review at all. Id. at 7-8. All three factors apply straightforwardly to ineffective appellate counsel claims. This Court held over thirty years ago That "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an Attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

B. A Circuit-Split Has Arisen

Even the most powerful ineffective appellate counsel claim when state habeas counsel failed to raise the claim. The rationale behind *Martinez* and *Trevino* apply straightforwardly to finding cause and prejudice in the instant case. This was the same analysis used by the Ninth Circuit When they decided that *Martinez* and Trevino necessarily apply to ineffective assistance of counsel claims. *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013).

Following *Martinez*, the circuit courts have split on the extension of *Martinez* and Trevino to defaulted ineffective assistance of appellate counsel claims: The Fifth, Sixth, Seventh, Eighth, And Tenth Circuits held that Martinez cannot be used to excuse ineffective assistance of appellate counsel claims in addition to ineffective trial counsel claims. *Long v. Butler*, 809 F.3d 299, 315 (7th Cir. 2015); *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *Hodges v. Colson*, 727 F.3d 517, 530-31 (6th Cir. 2013); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012) (same); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012) (same), rev'd on other Grounds, 133 S. Ct. 2767 (2013). By contrast, as previously noted, the Ninth Circuit held that Martinez can be used to excuse the default of ineffective assistance of appellate counsel claims. *Nguyen, v. Curry* 736 F.3d 1287, 1289-90 (9th Cir2013). It should also be noted that the Supreme Court denied certiorari to address the Ninth Circuit's extension of Martinez. *Hurles v.Ryan*, 135 S. Ct. 710 (2014).

This Court should grant Certiorari.

This Court should grant Pulley's petition for Certiorari because the first question presented was: "can Post-conviction counsel's ineffectiveness provide cause to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim, or is Martinez limited to excusing only the default of a claim of ineffective assistance of trial counsel?" 20 ineffective state habeas counsel's performance can be seen as cause to overcome the procedural default of a substantial ineffective assistance of appellate counsel claim is also "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Indeed, without this Court's guidance petitioners in both direct appeal and during their initial Collateral Proceedings will literally have no forum to raise substantial claims of ineffective assistance of appellate Counsel. *Evitts v. Lucy* was decided upon the intersection of the due process clause found in the Fourteenth Amendment and the Sixth Amendment is right to effective counsel. 105 S.Ct. 830, 835-36 (1985). It is hard to imagine two more "bedrock principles" in our criminal justice system than due process and the right to counsel. Surely the legal parameter, to say nothing of desideratum, that we do not convict a man, without due process of law is a bedrock principle in America. Second, seeing as ineffective assistance of appellate counsel is cause to excuse a procedural default, and seeing as it is literally impossible for someone other than state habeas counsel to raise this issue in the first instance, it only makes sense that ineffectiveness of habeas counsel should excuse a Petitioner's failure to raise his Ineffective appellate counsel claim in state habeas proceedings. Indeed, if ineffectiveness of State habeas counsel is not cause, and then quite literally, no court would ever be able to review.

CONCLUSION

This Court should grant the Petition and order merit review

Respectfully, submitted this 24th day of September 2018

By

TYRONE PULLEY

(Petitioner)