

18-6944
No. _____

In the Supreme Court of the United States

JOSE LUIS VIZCAINO-RAMOS,

Petitioner,

v.

CHERRY LINDAMOOD, Warden

Respondent.

ORIGINAL

Supreme Court, U.S.
FILED

OCT 26 2018

OFFICE OF THE CLERK

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTION PRESENTED

- I. Whether under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), a prisoner confined pursuant to a Tennessee Judgment may assert ineffective assistance of initial-collateral-review counsel as cause to excuse the procedural default of a substantial claim of ineffective assistance of trial counsel when Tennessee's procedural rules consider the initial-collateral-review-proceeding complete only upon exhausting the IATC claims through the TCCA and initial-collateral counsel failed to properly exhaust this substantive IATC claim?

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceeding other than those listed in the style of the case. Petitioner is Jose Luis Vizcaino-Ramos. Respondent is Cherry Lindamood, Warden.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jose Luis Vizcaino-Ramos respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, rendered and entered in case number 18-5199 in that court on June 25, 2018, *Jose Luis Vizcaino-Ramos v. Cherry Lindamood, Warden*,¹ which affirmed the final order of the United States District Court for the Western District of Tennessee for the Eastern Division denying relief under 28 U.S.C. § 2254.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Sixth Circuit, *Jose Luis Vizcaino-Ramos v. Cherry Lindamood, Warden*, 18-5199 (6th Cir. 2018), appears at Appendix_A, which affirmed the final Order from the United States District Court for the Western District of Tennessee for the Eastern Division, appearing at Appendix_B_1-20. The Opinion from the Tennessee Court of Criminal Appeals wherein it was determined the IATC claim was waived, appears at Appendix_C_1-11. The Tennessee Supreme Court Order Denying Application for Permission to Appeal, appears at Appendix_D_1-2.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on June 25, 2018 and

¹ See Attached Appendix_A.

rehearing was denied on August 8, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 2253(c)(2) in light of the district court's denying a certificate of appealability.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners intend to rely upon the following Constitutional provision:

II. U.S. CONST. AMEND. V

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law.

III. U.S. CONST. AMEND. VI

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to.....to have the Assistance of Counsel for his defense.

IV. FEDERAL STATUTORY PROVISIONS

28 U.S.C. § 2254 provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 1254 provides in relevant part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to

any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2253 provides in relevant part:

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;.....

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

V. STATE STATUTORY PROVISIONS

T.C.A. § 40-30-101 provides in relevant part:

This part shall be known and may be referred to as the "Post-Conviction Procedure Act."

T.C.A. § 40-30-106(e) provides in relevant part:

If a petition amended in accordance with subsection (d) is incomplete, the court shall determine whether the petitioner is indigent and in need of counsel. The court may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition. Counsel may file an amended petition within thirty (30) days of appointment.

VI. STATE INITIAL-COLLATERAL-REVIEW PROVISIONS INVOLVED

Tenn. Sup. Ct. R. 39 – Exhaustion of Remedies provides in relevant part:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tenn. Code Ann., § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Tenn. Sup. Ct. R. 28 § 6 provides in relevant part:

(3) In the event a colorable claim is stated, the judge shall enter a preliminary order which:

(a) appoints counsel, if petitioner is indigent;

Tenn. Sup. Ct. R. 28 § 2 provides in relevant part:

(F) Post-Conviction Proceeding – A post-conviction proceeding is a proceeding filed and adjudicated in accordance with these rules of post-conviction procedure.

Tenn. Sup. Ct. R. 28 § 4 provides in relevant part:

(A) Manner of Commencing – A post-conviction proceeding is commenced by filing a petition as defined in Section 2 in the court in which petitioner was convicted or sentenced, if the court was a court of record, or, if the conviction or sentence was not in a court of record, by filing a petition as defined in Section 2 in the court of record having criminal jurisdiction in which the conviction occurred or the sentence was imposed.

Tenn. Sup. Ct. R. 28 § 10 provides in relevant part:

(A) Dismissals or Denials of Petition – An appeal from the dismissal or denial of a post-conviction petition shall be in accordance with the Tennessee Rules of Appellate Procedure.

Tenn. Sup. Ct. R. 13 § 1 provides in relevant part:

(A) to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel;.....

(G) to meet the standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996.

Tenn. Sup. Ct. R. 14 provides in relevant part:

Permission for leave to withdraw as counsel for an indigent party after an adverse final decision in the Court of Appeals or Court of Criminal Appeals and before preparation and filing of an Application for Permission to Appeal in the Supreme Court must be obtained from the intermediate appellate court by filing a motion with the Appellate Court Clerk not later than fourteen (14) days after the intermediate court's entry of final judgment.

STATEMENT OF THE CASE

Petitioner Jose Luis Vizcaino-Ramos State prisoner serving a Life sentence for first-degree murder, sought to vacate his conviction under

28 U.S.C. § 2254 Petition for Writ of Habeas Corpus raising several grounds supporting the claim of ineffective assistance of trial counsel.

On March 6, 2004, the victim, Mary Graves, was fatally shot by her former boyfriend, Vizcaino-Ramos, the Petitioner. The victim's five-year-old son, C.G.², was present in the victim's car when the shooting occurred.

The Petitioner fled to Mexico after the shooting and the case remained dormant for several years. The Petitioner was extradited to Tennessee, and the trial began on January 13, 2010. C.G., eleven years old at the time of trial, testified that the Petitioner and the victim had an argument while they were in the victim's car. C.G. observed the Petitioner, whom he called "dad," shoot his mother. When the shooting occurred, C.G. was in the back seat of the victim's car, the victim was in the driver's seat, and he was in the passenger seat. The shooting occurred in front of the Petitioner and victim's house. Special Agent Nathan Bishop of the Tennessee Bureau of Investigation testified at trial that the victim lived with Petitioner.

C.G. testified that after the shooting, the Petitioner dragged the victim's body out of the car and placed it by her house. C.G. was taken inside the victim's house by the Petitioner and left alone that night.

Trial counsel presented the argument that Petitioner was not thinking rationally when he shot the victim, that he was distraught, but that it was not to the point that he was incompetent or insane. Trial counsel had in her possession a non-contact order based upon the Petitioner having previously acted in a state of passion produced by

² Due to the age of the victim's son, the State referred to him by his initials.

adequate provocation from the argument between Mary and himself. The Petitioner acting in a state of passion shot into an unoccupied vehicle, that was produced by adequate provocation that was produced from the verbal argument between himself and Mary.

Trial counsels testimony during the initial-collateral evidentiary hearing, explained that it was her strategic choice to not present evidence of the non-contact order to the jury. She believed that if the jury knew that a no-contact order existed, the door would be opened for the jury to hear that the order was issued because Petitioner fired shots at the victim prior to the event in question.

However, this was a erroneous determination of the facts surrounding the reasons why the no contact order was issued.

Petitioner challenged, among other things, trial counsel's failure to introduce evidence regarding the fact that Petitioner was acting during a state of passion produced by adequate provocation as a result of the argument between himself and Mary at the time of the shooting and thus could not be guilty of first-degree premeditated murder but rather voluntary manslaughter. Specifically Petitioner presented the no-contact order during the initial-collateral evidentiary hearing.

However, initial-collateral-proceeding counsel failed to properly exhaust the substantive IATC claim in order to have it reviewed by the State court.

The Petitioner raised the substantive IATC claim in the district court, showing "cause" for the procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012). However, the district court concluded the default occurred during the appellate stage, as seen by the following:

A hearing on Claim 8(a) is not warranted, primarily, because development of the factual basis for the claim would be futile. Petitioner does not dispute that Claim 8(a) is procedurally defaulted, and the record shows that the default is not excused. The claim was raised by post-conviction counsel in the amended petition (ECF No. 20-9 at 49), and litigated at the evidentiary hearing (ECF No. 20-9 at 67; 20-10 at 41-43, 113, 120). However, in his appeal from the denial of his post-conviction claims, Vizcaino-Ramos did not raise the issue of trial counsel's failure to introduce evidence of the no-contact order (see ECF No. 20-11), and thus procedurally defaulted the claim. See Tenn. Code Ann. § 40-30-106(g) ("A ground for relief is waived if the petitioner . . . failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.") The default is unexcused because "post-conviction appellate counsel's ineffective assistance cannot serve as cause to excuse a procedural default." *Young v. Westbrooks*, No. 16-5075, ___ F. App'x ___, 2017 U.S. App. LEXIS 12694, 2017 WL 2992222, at *3 (6th Cir. July 14, 2017). See Appendix B_11 of 20 *Vizcaino-Ramos v. Lindamood*, Case No. 1:14-cv-01230-STA-egb (Nov. 7, 2017)

Petitioner timely sought appeal by way of filing a COA to the Sixth Circuit Court of Appeals, which subsequently denied Petitioner's COA. Although, when the Petitioner sought a rehearing en banc the Sixth Circuit issued an Order referring the petition to the full panel, on which the deciding judge did not sit. After review of the petition, the panel issued an order announcing its conclusion that the original application was properly denied.

Petitioner presented the substantive IATC claim, based upon trial counsel failure to properly understand the relevant facts surrounding the relationship between Petitioner and Mary. This failure resulted in trial counsel making an erroneous strategic decision to not put the no-contact before the jury. Had trial counsel properly investigated and assessed the material facts surrounding the reasons why the no-contact order was placed, there is a reasonable probability that the jury would have

recognized that at the time of the shooting, Petitioner shot Mary while in a state of passion produced by adequate provocation from the ongoing argument sufficient to lead a reasonable person to act in an irrational manner.

Thus the record clearly reflects that trial counsel testified that the defensive strategy was to show that the Petitioner had acted in an irrational manner.³ However, trial counsel failed to present the very evidence that would have shown the jury Petitioner's state of mind when arguing with Mary, wherein he would act in an irrational manner. This is clear and convincing evidence that trial counsel fell below the demanded norm, when trial counsel failed to support her very own defensive strategy with readily available evidence, resulting in prejudice to the Petitioner.

The evidence presented to the jury by trial counsel, as testified in her own words, "said that she tried to argue at trial that he was not thinking rationally when he shot the victim, [and] that 'he was distraught[,] [b]ut [that] it was not to the point that he was incompetent or insane.'" *Vizcaino-Ramos v. State*, 2013 Tenn. Crim. App. LEXIS 1019, [WL] at *3. What trial counsel failed to mention is that her attempt to argue this strategy was unsupported by her own admission for failing to put forth any facts or evidence to the jury.

Putting this into context, the TCCA in its opinion on direct appeal states:

We are compelled to observe the extent of defense counsel's argument in support of this issue. It is confined to the following sentence: "Mr. Vizcaino-Ramos asserts that, in light of his mental state,

³ See Attached Appendix_C_7 of 11.

it would be impossible for him to form the mental state necessary to commit first degree murder." The brief does not explain what is meant by the phrase "in light of his mental state." It is equally unclear how his mental state made it "impossible" to commit premeditated murder. This issue is waived because it was not properly supported by argument. See Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). See Appendix F_9 of 10 *State v. Vizcaino-Ramos*, No. W2010-01325-CCA-R3-CD (Aug. 3, 2011).

Clearly revealing that absolutely nothing existed in the record for which counsel could even point the TCCA too, where it revealed that Petitioner's mental state, nevertheless implied that it would be impossible for him to for the mental state necessary to commit first-degree murder. Trial counsel's performance fell below the demanded norm, when the defensive strategy being relied upon by trial counsel was based upon counsel's own erroneous determination of the facts surrounding the no-contact order. Trial counsel completely failed to offer any evidence as to the Petitioner's state of mind at the time of the shooting. Which in turn the trial court during the initial-collateral-proceeding evidentiary hearing gave deference to trial counsels strategic decision, in light of the fact that this flawed defensive strategy was unable to obtain the desired result regarding Petitioner's state of mind at the time of the shooting, without trial counsel putting one shred of evidence of Petitioner state of mind before the jury.

The facts were that Petitioner and the victim had an argument while they were in the victim's car, which was observed by C.G. Had the jury heard the fact that whenever the Petitioner and Mary argued, the Petitioner would reach a state of passion based upon adequate

provocation by Mary, that would cause him to act in an irrational manner. Which is so easily supported by the facts surrounding the no-contact order, and a reasonable probability that, these facts if properly assessed would have supported trial counsels defensive strategy and Petitioner habeas relief.

REASONS FOR GRANTING THE WRIT

- 1. The Court should Grant the Petition to Clarify whether a Tennessee Prisoner may assert ineffective assistance of initial-collateral-review counsel as "cause" to excuse the procedural default of a substantial claim of ineffective assistance of trial counsel under *Martinez v. Ryan*.**

In March of 2012, in *Martinez v. Ryan*, the U.S. Supreme Court announced a new type of cause under the cause-and-prejudice exception to procedural default in federal habeas cases. This new type of cause allowed federal courts to review a subset of claims that had been procedurally defaulted in State habeas proceedings due to the ineffectiveness of post-conviction counsel. The parameters of that subset were the source of a heated debate on the Supreme Court. The majority, limiting its analysis to the facts before it, claimed that the new cause excused only claims of ineffective assistance of trial counsel (IATC). The dissent, however, argued that the new cause would apply to other claims as well. The application of *Martinez* to excuse procedurally defaulted claims of ineffective assistance of appellate counsel (IAAC) was recently the subject before this Court in *Davila v. Davis*, 137 S.Ct. 2058 (2017), which the Court declined to extend *Martinez* to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner's State post-conviction

counsel provided ineffective assistance by failing to raise that claim.

What the Petitioner is urging this Court to address is distinctive, in that it asks for this Court to expressly clarify that *Martinez* exception applies to Tennessee prisoners raising a substantial IATC claim during an initial-collateral-review-proceeding, when Tennessee's State procedural rules consider this complete only after being presented to the State's highest court, which is the Tennessee Court of Criminal Appeals (hereinafter TCCA).

A. Like Arizona and Texas, Tennessee channels claims of Ineffective Assistance of Trial Counsel to Collateral Review

Tennessee's statutes, rules, and practices for prisoners raising ineffective assistance of trial counsel claims ascribe different functions to direct appeals and post-conviction proceedings. Under those procedures, Tennessee law suggest, asserting an IATC claim prior to an initial-collateral-proceeding, is fraught with peril⁴ and thus the proper time and place for Vizcaino-Ramos to challenge his conviction on the ground of trial counsels ineffectiveness was via the State Post-conviction Procedure Act⁵. See T.C.A. § 40-30-101 et seq.

B. Tennessee's Procedural Rules Clarifying that Initial-Collateral-Review-Proceeding Counsel Must be Familiar with the Specific Requirements of AEDPA for The Purposes of Exhaustion

This result is a function of two relevant commands: (1) the explicit directive of State court of last resort⁶, TCCA; and (2) the

⁴ *Thompson v. State*, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997).

⁵ Petitioner will refer to this as either the [initial-collateral proceeding] or [post-conviction proceeding] interchangeably.

⁶ Tennessee Supreme Court's promulgation of Tenn. Sup. Ct. R. 39 Exhaustion of Remedies, clarified that litigants need not appeal criminal convictions or post-conviction relief actions to the Tennessee Supreme Court to exhaust their appeals.

statutory duties and the prevailing standards of care for prisoner's raising constitutionally substantive IATC claims, which require: (i) initial-review counsel to be appointed for the purposes of post-conviction proceedings; See T.C.A. § 40-30-106(e) Also Tenn. Sup. Ct. R. 28 § 6(B)(3)(a); and (ii) this initial-review counsel is obligated to have a sufficient degree of familiarity with, the requirements of AEDPA for the purposes of exhaustion, and conduct a comprehensive investigation of the possible constitutional violations alleged by the Petitioner, raising only the non-frivolous constitutional grounds warranted by existing law or good faith argument for the extension, modification, or reversal of existing law which Petitioner has. See Tenn. Sup. Ct. R. 28 § 6(C)(2)(3).

The reasoning behind initial-collateral counsel having the required duty to be familiar with the requirements of AEDPA for the purposes of exhaustion, is the fact that initial-collateral counsel must raise the constitutional claims in the post-conviction petition, during the evidentiary hearing, and also to the TCCA. It does not require initial-collateral proceeding counsel to present these constitutional claims to the Tennessee Supreme Court.

Tennessee's statutes and procedural rules explicitly charge initial-review counsel with the responsibility of not only raising and developing the substantial IATC claims in the post-conviction petition but being familiar with the specific requirements of AEDPA, for the purposes of exhaustion. Meaning that initial-review counsel having raised the non-frivolous Constitutional IATC claim, is required, for the purposes of exhaustion, to raise that identical claim to the State court of last resort in Tennessee, which is the TCCA.

C. Tennessee's Procedural Rules Clarifying the initial-collateral-review-proceeding Time Period Is Not Completed Until The Constitutional Claims Raised in the Petition Are Presented to the TCCA

Tennessee's procedural rules define specifically what an initial-collateral-proceeding (post-conviction proceeding) consist of as set forth under Tenn. Sup. Ct. R. 28⁶ § 2(F). Specifically, a post-conviction proceeding is a proceeding filed and adjudicated in accordance with these rules of post-conviction procedure.

These rules also define when this initial-collateral-proceeding commences, as set forth under Tenn. Sup. Ct. R. 28 § 4(A). A post-conviction proceeding is commenced by filing a petition as defined in Section 2 in the court in which petitioner was convicted or sentenced, if the court was a court of record, or, if the conviction or sentence was not in a court of record, by filing a petition as defined in Section 2 in the court of record having criminal jurisdiction in which the conviction occurred or the sentence was imposed. Further, the Tennessee rules under Tenn. Sup. Ct. R. 28 § 10(A) consist of Appeals, this necessarily conveys that the appeal process is considered part of the post-conviction proceedings.

D. Tennessee Prisoners Should Be Allowed To Assert Ineffective Assistance of Initial-Collateral-Review Counsel As "cause" To Excuse The Procedural Default of a Substantial Claim of Ineffective Assistance of Trial Counsel Under *Martinez v. Ryan*

When Petitioner's post-conviction counsel filed a certificate of counsel, it unequivocally meant that initial-collateral counsel had "thoroughly investigated the possible constitutional violations alleged by Petitioner, specifically the IATC claim in relation to the strategy to not present the no-contact order to the jury. It meant unequivocally that

initial-collateral counsel had "discussed other possible constitutional grounds with Petitioner"; had "raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law which Petitioner has"; and that he explained to the Petitioner any ground "not raised would be forever barred, which he admittedly explained this to Petitioner". Meaning that initial-review counsel having raised the non-frivolous IATC claim, was required, for the purposes of exhaustion, to raise the claim to the the TCCA as part of the post-conviction proceeding.

Clarifying under Tenn. Sup. Ct. R. 13 § 1(e)(5) appointed counsel is obligated to represent the indigent party until a court allows counsel to withdraw. This is specifically accomplished only after receiving an adverse final decision in the Court of Appeals or Court of Criminal Appeals and before preparation and filing of an Application for Permission to Appeal in the Supreme Court must be obtained from the intermediate appellate court by filing a motion with the Appellate Court Clerk not later than fourteen (14) days after the intermediate court's entry of final judgment. See Tenn. Sup. Ct. R. 14.

Thus when initial-review counsel – Not appellate counsel who would have filed an Application for Permission to Appeal – fails to investigate and present a IATC claim to the TCCA, for exhaustion purposes, that failure results in a procedural bar in a federal court, in order to have satisfied the exhaustion requirements set forth in the Antiterrorism and Effective Death Penalty Act of 1996.

These are precisely the circumstances that led this Court in

Martinez v. Ryan, to recognize a narrow exception to the procedural default doctrine under which the ineffective assistance of counsel in an initial-collateral-review-proceeding may provide "cause" to excuse the default of a substantive claim of ineffective assistance of trial counsel. Shortly afterward, in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Court expanded *Martinez*'s holding to include cases in which States *allow* ineffective assistance of counsel cases to be brought on direct appeal, but do not provide a meaningful opportunity for litigants to do so. As in *Martinez* and *Trevino*, the Tennessee system makes the State post-conviction proceedings the first occasion for prisoners to develop the record necessary to establish ineffective assistance of trial counsel. It was only the ineffective assistance of Vizcaino-Ramos initial-collateral counsel that prevented him from complying with those procedures.

Tennessee's requirement to initial-collateral counsel to meet the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, relating to exhaustion, when raising an IATC claim, as clarified above, define Tennessee's definition of the initial-collateral-review-proceedings as understood under *Martinez* and *Trevino*. Tennessee's definition of its initial-collateral-review-proceedings specifically defines these proceedings up to and through the TCCA review.

The reasoning why *Martinez* applies in Tennessee cases is the fact that the procedural default doctrine rests on "respect for State procedural rules" *Coleman v. Thompson*, 501 U.S. 722, 747 (1991), including those that "channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently", *Murray v. Carrier*, 477 U.S. 478,

Here, as in Arizona and Texas, Tennessee has made a deliberate choice to channel inmates ineffective assistance of trial counsel claims outside of the direct appeal process and into collateral proceedings, specifically requiring the initial-collateral counsel to be knowledgeable of the exhaustion requirements relating to the Antiterrorism and Effective Death Penalty Act of 1996. Meaning that initial-collateral counsel must present, as part of the initial-collateral proceedings, the substantial IATC claim to the TCCA to have completed their duty as presenting a Tennessee prisoners claims during the initial-collateral-review-proceeding.

This Court should apply its procedural bar rules and the exception recognized in *Martinez* and *Trevino* in the manner that reinforces that choice. Holding *Martinez* inapplicable in Tennessee cases would encourage Tennessee prisoners to do exactly what the Tennessee courts and legislature have said they should not do: direct their ineffective assistance of trial counsel to appellate courts on direct appeal. Or alternatively it could suggest to Tennessee prisoners to simply file a colorable claim regarding anything other than a substantial IATC claim. Therein the initial-collateral counsel, who is not constitutional required, could then be shown by the Tennessee prisoner to have provided the ineffective assistance of counsel, thereby "cause" for the procedural default in failing to argue the substantial IATC claim, which would then be properly before the federal court.

The equitable rationales underlying *Martinez* and *Trevino* accordingly apply to Tennessee cases. This Court should clarify the

Martinez and *Trevino* narrow exception to procedural default under which the ineffective assistance of counsel in an initial-collateral-review-proceeding may provide "cause" to excuse the default of a substantive claim of ineffective assistance of trial counsel, when State's such as Tennessee, procedural mechanisms defines its initial-collateral-review-proceedings to include the TCCA.

CONCLUSION

Whereas the above premise being considered, this Court should grant the instant Writ of Certiorari to the Court of Appeals for the Sixth Circuit and reverse the judgment below, remanding the case to permit Vizcaino-Ramos to pursue his ineffective assistance of trial counsel claim under the standards set forth in *Martinez*.

Respectfully Submitted,

Jose Luis Vizcaino Ramos
JOSE LUIS VIZCAINO-RAMOS

October 2018