

No. _____

In the
Supreme Court of the United States

JASON UNDERWOOD,
Petitioner,
v.

SHAWN PHILLIPS, WARDEN,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court’s decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) held that state prisoners whose states prevented them from raising an ineffective assistance of trial counsel claim on direct appeal were not procedurally defaulted from raising the ineffective assistance of trial counsel claim in a § 2254 petition, if they were unrepresented or had ineffective assistance of counsel during state post-conviction relief proceedings. Relying on its recent decision in *Martinez*, this Court held in *Trevino* that “the failure to consider a lawyer’s ineffectiveness during an initial-review collateral proceeding as a potential ‘cause’ for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim.” 133 S. Ct. at 1921. In the decision below, App. 7a-8a, the District Court incorrectly found Underwood’s claims of ineffective assistance of post-conviction counsel were meritless and could not be the basis for habeas corpus relief.

This case presents the following questions:

1. Whether the District Court properly interpreted Underwood’s *Martinez v. Ryan* claims when his state post-conviction counsel and trial counsel were ineffective.
2. Whether the Sixth Circuit erred in affirming the decision of the District Court and denying Underwood a Certificate of Appealability.

PARTIES TO THE PROCEEDINGS

1. Petitioner Jason C. Underwood, a prisoner serving a capital sentence at the South Central Correctional Facility, was the Petitioner-Appellant in the Court of Appeals.

2. Respondent Shawn Phillips, current Warden of the South Central Correctional Facility, was the Respondent-Appellee in the Court of Appeals.

3. Respondent Cherry Lindamood, former Warden of the South Central Correctional Facility, was the Respondent-Appellee in the District Court.

LIST OF THE PROCEEDINGS

Underwood v. Phillips

U.S. Court of Appeals

Sixth Circuit

Case No. 19-5405

Decision Date: September 12, 2019

Underwood v. Lindamood

U.S. District Court

Eastern District of Tennessee

Case No. 1:15-CV-331-HSM-SKL

Decision Date: March 19, 2019

State v. Underwood

Supreme Court for the State of Tennessee

Case No. 2007-SC-000392-MR

Decision Date: January 21, 2010

Underwood v. State
Circuit Court for Bedford County
Shelbyville
Case No. 11978
Decision Date: March 7, 2014

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PETITION FOR A WRIT OF CERTIORARI

Jason C. Underwood respectfully petitions for a *Writ of Certiorari* to review the judgment of the District Court for the Eastern District of Tennessee denying federal habeas relief and a certificate of appealability, as affirmed by the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Sixth Circuit declining to issue a certificate of appealability is unpublished. App. 1a – 6a. The opinion of the District Court denying the Petitioner federal habeas relief can be found as *Underwood v. Lindamood*, 1:15-cv-331-HSM-SKL, 2019 WL 1261116, at *1 (E.D. Tenn. March 19, 2019). App. 7a – 54a.

JURISDICTION

The Sixth Circuit entered its judgment on September 12, 2019. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2254(d)(1)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States

STATEMENT OF THE CASE

In 2006, Petitioner Jason C. Underwood was found guilty of two counts of first degree murder and one count of theft of property at a trial by jury and sentenced to two life sentences without parole. App. 1a. Underwood's arrest and conviction stem from the morning of Monday, October 25, 2004, when the bodies of Anthony Baltimore and his live-in girlfriend, Rebecca Ray, were discovered inside their residence. *Id.* at 8a. The bodies of both victims bore multiple stab wounds, with blood found throughout the residence. *Id.* Baltimore's 1993 GMC pickup was also missing from the residence. *Id.*

Detectives dispatched to the crime scene noticed no sign of forced entry to the door. *Id.* at 9a. No suspects were identified from the initial investigation of the crime scene. *Id.* at 11a. During the course of investigation, detectives on the case learned that the victims were both involved in drugs, and that they had "stuffed" people in drug transactions. *Id.* At trial, a witness revealed that the victims were known to use cocaine and marijuana. *Id.* It was also revealed that Baltimore worked for a roofing company and was physically strong, while Ray would often "get physical" with both men and women and "didn't back down from anybody." *Id.* at 11a.

Authorities also learned through their investigation that the victims might have purchased drugs from an individual named “OD” and/or a man named Greg Marlin. *Id.* OD’s house was three-tenths of a mile from the location where Baltimore’s stolen pickup truck was found. *Id.* at 11a. DNA recovered from beer cans at the crime scene matched that of a man named Charles Oldfield. *Id.* at 11a.

On November 10, 2004, law enforcement connected the homicide to Underwood when Darrin Shockey, a forensic scientist for the Tennessee Bureau of Investigation, purported to match a latent print found in blood on a doorknob at the crime scene to Underwood’s App. 12a. Shockey testified that he also matched three fingerprints from a coffee mug found on the living room table at the crime scene to Underwood. *Id.* at 13a. Shockey stated that he used detailed photos of a hand print preserved in blood on Ray’s left calf and compared it with Underwood’s latent palm print, concluding that Underwood had touched Ray’s calf. *Id.* at 13a. Shockey conceded, however, that this was his first time analyzing latent fingerprints preserved in blood from a human body. App. 13a. Shockey was further unable to match the latent prints on Baltimore’s stolen pickup to either the victims or Underwood. *Id.* at 13a.

Following a five-day jury trial, the jury found Underwood guilty on all counts and unanimously sentenced him to imprisonment for life without the possibility of parole on both counts of first-degree murder. *Id.* at 18a. The trial court ordered the sentences to run consecutively. *Id.* at 18a.

A. Tennessee Court of Criminal Appeals

After his motion for a new trial was denied, Underwood appealed his convictions and sentences. *Id.* at 19a. On December 10, 2008, the Tennessee Court of Criminal Appeals affirmed. *State v. Underwood*, No. M2006-01826-CCA-RS-CD, 2008 WL 5169573, at *1 (Tenn. Crim. App. Dec. 10, 2008). Underwood did not seek permission to appeal that decision. *Id.* at 19a.

Underwood filed a pro se petition for State habeas corpus relief, which was dismissed on July 30, 2008. App. 19a. Counsel was appointed to assist Underwood on December 21, 2009, and privately retained counsel Russell Leonard was substituted on May 17, 2010. App. 19a. On July 23, 2010, newly-retained counsel filed a writ of error *coram nobis* and an amended petition for post-conviction relief on July 26, 2010. App. 19a. On September 24, 2010 and November 15, 2010, an evidentiary hearing was held on the motions, along with a motion for DAN analysis. App. 19a.

At the evidentiary hearing, Underwood's initial counsel, Fannie Harris, testified that she was a criminal defense attorney whose firm was briefly retained to represent Underwood, and that she met with her client, police officers, and the ADA on February 25, 2005, where Underwood gave a statement to officers *Id.* She stated that she did not invoke the protections of Rule 11 prior to that meeting, which would have protected the statements as confidential statements made during plea negotiations, and that she did not ask that Underwood receive immunity or protections from any statement he gave *Id.* at 19a-20a. Harris eventually withdrew as counsel after

Underwood's mother filed a complaint against her with the Board of Professional Responsibility ("BPR") *Id.* at 20a. Harris acknowledged that the BPR had censured her after she incorrectly responded to the complaint that she had not allowed Underwood to give an interview with the ADA on February 25, 2005, but she maintained that she had never seen the tape of the interview and believed at the time she responded to the complaint that the interview had not occurred *Id.* Harris testified that she received the State's discovery at the conclusion of the interview, conceding that she had not seen it prior to setting up the meeting *Id.* Harris stated that she gave all discovery in the case to her investigator, who had never returned it but who had proven "diligent" in working with other attorneys in the law firm. *Id.*

Harris testified that she had known Underwood prior to this crime, and that she agreed to set up a meeting with Underwood, the police, and the ADA, where Underwood could tell the truth about what had happened the night of the murders. *Id.* She stated that she believed Underwood's steadfast declaration of innocence that he had only confessed out of fear, and that he wanted to tell the police who committed the murders. App. 20a-21a. While testifying, Harris recalled that she did attempt to request Rule 11 protections prior to the meeting, but that the ADA refused to offer any protections. App. 21a. Harris stated that, eventually, an understanding was reached that Underwood would tell the truth, the ADA would investigate it and see if he could corroborate it, and perhaps the information would help Underwood when they reached the stage of plea negotiations. *Id.* at 21a.

Harris testified that she would not have set up the meeting if she had thought that Underwood was going to make incriminating statements. *Id.* at 21a.

Pre-trial counsel, Hershell Koger, represented Underwood after Harris withdrew. *Id.* Koger testified that he remembered watching the February 25, 2005, video of Underwood's meeting and seeing the State hand over the initial discovery at the end of the meeting. *Id.* He filed a motion to suppress Underwood's statement from the interview, recalling that one of the bases was ineffective assistance of counsel, as Harris had scheduled the interview before receiving discovery from the District Attorney's office. *Id.* He stated it was "almost always a bad idea" to let a defendant talk to the District Attorney. *Id.* Koger stated that there was some "clever defense thinking" on the part of trial counsel for deciding not to pursue the motion to suppress the February 25, 2005 statement, although he could not recall what the strategy was. *Id.*

Trial counsel, Robert Marlow, testified that he did not pursue the motion to suppress the February 25, 2005 statement because it would have raised an issue of ineffective assistance of counsel, which is generally improper to raise during trial or on direct appeal. App. 22a. Marlow stated that during the February 25, 2005 interview, Underwood claimed to have been present at the scene with other participants but denied touching Ray's body. *Id.* Marlow stated that Underwood claimed that he had no open wounds and could not have left his blood at the scene, conceding that there were "major inconsistencies" between Underwood's statements during the February 25, 2005

interview and the scientific evidence. *Id.* Marlow maintained that it would have been ineffective not to try to have the February 25, 2005 conversation covered under Rule 11 but admitted he had never asked the ADA to consider an interview with a defendant under Rule 11. *Id.*

Following Marlow's testimony, the post-conviction hearing was continued to November 15, 2010. Underwood testified on that date. *Id.* at 22a. He stated that he had been wrongfully convicted, and that others were responsible for the murders. *Id.* He stated he did not testify at trial because his family was threatened by the actual perpetrators of the crime. *Id.*

Following the hearing, the trial court orally denied the writ of error *coram nobis*, the motion for DNA analysis, and the petition for post-conviction relief. *Id.* On January 14, 2011, the post-conviction court entered a written order containing factual findings to support the denials. App. 22a-23a.

On January 27, 2014, three years after the post-conviction court entered its order denying relief, Underwood moved to file an untimely appeal that was later accepted. App. 23a. On June 5, 2015, the Tennessee Court of Criminal Appeals affirmed the post-conviction court's denial of relief. *Underwood v. State*, No. M2014-00159-CCA-R3-PC, 2015 WL 3533718, at *2 (Tenn. Crim. App. June 5, 2015), *perm. app. denied* (Tenn. Sept. 17, 2015) ("*Underwood II*").

B. Tennessee Supreme Court

On September 17, 2015, the Tennessee Supreme Court denied Underwood's application for permission to appeal. App. 23a.

C. Eastern District of Tennessee

On December 7, 2015, Underwood filed a pro se petition for federal habeas relief that this Court subsequently ordered Underwood to amend. App. 23a. Underwood filed his amended petition on or about February 16, 2016, raising the following grounds for relief, as paraphrased by the Court:

Claim 1: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to (a) subpoena and present exculpatory witnesses, and (b) debunk and rebut the prosecutor's theory.

Claim 2: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to (1) challenge the State's suppression of evidence, and (b) diligently investigate the State's *Brady* violation.

Claim 3: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to (a) properly obtain crime scene evidence experts, and (b) utilize and develop exculpatory expert evidence regarding the blood splatter.

Claim 4: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to properly obtain an expert to challenge the

voluntariness and admissibility of Underwood's confessions.

Claim 5: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to put on adequate supporting evidence and argue that Underwood was entitled to lesser-included offense instructions.

Claim 6: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to properly argue that the evidence was insufficient to establish first-degree murder.

Claim 7: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to put on adequate supporting evidence and argue that the admission of prior bad acts violated Underwood's due process rights.

Claim 8: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to properly challenge the admissibility of Underwood's incriminating statements.

Claims 9-10: The trial court erred in "dismissing" appointed counsel, Hershell Koger, instead of having him assist the counsel retained by Underwood's family.

Claims 11-12: Pre-trial counsel, Fannie Harris, rendered ineffective assistance of counsel when she failed to provide adequate protections to Underwood during his February 25, 2005, interview with the Assistant District Attorney.

Claim 13: Trial counsel, Robert Marlow, rendered ineffective assistance of counsel when he failed to properly challenge the court's "disqualification" of Counsel Koger and the failure to appoint counsel.

Claims 14-15: The trial court erred in denying Underwood's request for a continuance.

Claims 16-17: The trial court erred in denying Underwood's request for funds to hire expert witnesses.

Id. at 23a-26a. The District Court found Underwood's claims to be without merit, denying both habeas relief and a certificate of appealability. *Id.* at 7a-54a.

D. U.S. Sixth Circuit Court of Appeals

The Sixth Circuit affirmed the District Court's denial of a certificate of appealability based upon an erroneous application of *Martinez v. Ryan*, 566 U.S. 1 (2012). App. 3a. The Sixth Circuit agreed with the District Court's determination that Underwood's claims "were meritless and without factual support and therefore could not be the basis for habeas corpus relief." *Id.* at 3a.

This petition for writ of certiorari arises from the error of both the District Court and the Sixth Circuit of incorrectly applying this Court's jurisprudence in *Martinez v. Ryan*, 566 U.S. 1 (2012).

REASONS FOR GRANTING THE PETITION**I. THE DISTRICT COURT'S DENIAL OF UNDERWOOD'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *MARTINEZ V. RYAN*.**

In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), this Court has held that state prisoners, whose states prevented them from raising an ineffective assistance of trial counsel claim on direct appeal were not procedurally defaulted from raising the ineffective assistance of trial counsel claim in a § 2254 petition, if they were unrepresented or had ineffective assistance of counsel during state post-conviction relief proceedings. Relying on its recent decision in *Martinez*, this Court in *Trevino* held that “the failure to consider a lawyer’s ineffectiveness during an initial-review collateral proceeding as a potential ‘cause’ for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim.” 133 S. Ct. at 1921. Accordingly, the Court found that the Petitioner had not procedurally defaulted and was not barred from bringing the § 2254 petition. *Id.*

In this case, the District Court correctly found that although the claims raised by Underwood in Claims 1-7, and partially Claim 13, were never raised in any State-court proceeding, they were to be analyzed

pursuant to the *Martinez* exception.¹ App. 32a-33a. Although the District Court correctly recognized that *Martinez* applied to Underwood’s claims, the court erred in its subsequent analysis of those claims by holding that his claims must satisfy the requirements of an unpublished case from the Middle District of Tennessee, *Thorne v. Holloway*², rather than the traditional *Martinez* analysis. *Id.*

The District Court determined that, pursuant to *Thorne*, it was “more efficient for the [district] court to consider in the first instance whether the alleged underlying ineffective assistance of counsel was ‘substantial’ enough to satisfy the ‘actual prejudice’ prong of *Coleman*,” because the issue of whether post-conviction counsel rendered ineffective assistance is “necessarily connected to the strength of the argument that trial counsel’s assistance was ineffective.” App. 33a. Accordingly, the District Court’s analysis of Underwood’s *Martinez* claims strayed completely from the framework set forth in *Martinez* and instead focused entirely on the prejudice of the ineffective assistance of trial counsel. Such analysis directly conflicts with this Court’s decision in *Martinez* and

¹ In support, the District Court cited *Sutton v. Carpenter*, 745 F.3d 787, 795-96 (6th Cir. 2014), in which the court held that the *Martinez* exception is applicable in Tennessee because defendants are directed to file ineffective assistance claims in post-conviction rather than on direct appeal.

² No. 3:14-CV-0695, 2014 WL 4411680, at *23 (M.D. Tenn. Sept. 8, 2014), *aff’d sub nom. Thorne v. Lester*, 641 F. App’x 541 (6th Cir. 2016).

served only to deny Underwood of his rights under the Sixth Amendment.

Further, the District Court held, and the Sixth Circuit affirmed, that Underwood's claims that survived the incorrect application of *Martinez* were to be dismissed as they did not have merit. This is again a gross misapplication of established federal law.

Underwood's § 2254 petition included claims of ineffective assistance of counsel related to improper jury instructions, lesser included offenses, and jury confusion. These claims were again improperly denied by the District Court based upon an erroneous application of *Martinez* and a complete disregard for this Court's decision in *Middleton v. McNeil*, 541 U.S. 433 (2004). In *Middleton*, this Court held that, "in a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." *Id.* at 437. Although not every deficiency in jury instruction rises to the level of a due process violation, "the question is whether the ailing instruction so infected the entire trial that the resulting conviction violates due process." *Id.* "A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Id.*

Here, a review of the totality of the circumstances at trial shows that the jury in Underwood's case was not sufficiently aware of the mens rea required for complicity or murder. *Id.* In light of the prosecutor's closing argument at trial, the error in jury instructions was not harmless and resulted in confusion of the jurors. In *Middleton*, this Court found that federal law

does not prohibit a state appellate court from assuming that a prosecutor's argument clarifies an ambiguous jury charge. *Id.* at 483. Here, Underwood can show that the prosecutor's closing argument altered the decision of the jury and provided the wrong analysis for the fact that, at best, there may have been the elements of manslaughter, but there was no showing of the requisite intent.

Given the differences in the District Court's application of *Martinez* and *Thorne*, as well as the court's failure to recognize *Middleton*, this Court should grant certiorari to clarify the appropriate standard and rectify the constitutional errors of the District Court.

II. THE SIXTH CIRCUIT INCORRECTLY ANALYZED UNDERWOOD'S REQUEST FOR CERTIFICATE OF APPEALABILITY TO UPHOLD THE ERRONEOUS DECISION OF THE DISTRICT COURT.

In its evaluation of Underwood's request for a certificate of appealability, The Sixth Circuit uniformly found that Underwood's claims of ineffective assistance were procedurally defaulted due to post-conviction counsel's failure to raise them in the post-conviction proceeding. Further, the Sixth Circuit supported its findings of procedural default by stating that Underwood's claims could not be saved from default because he did not show prejudice. The Sixth Circuit's decision is based on an incorrect application of the legal standard.

To show that a Certificate of Appealability should issue under 28 U.S.C. § 2253(c), Underwood need only make a substantial showing that jurists of reason could disagree with the District Court's resolving his constitutional claims. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003). Courts of Appeal ask only if the District Court's decision was debatable. *Id.*; *see also Bradshaw v. Estelle*, 463 U.S. 880, 893 n.4 (1983). A determination related to a Certificate of Appealability is a separate proceeding, one distinct from the underlying merits. *See Miller-El*, 537 U.S. at 342, *citing Slack v. McDaniel*, 529 U.S. 473, 481 (2000).

To cross this low threshold, Underwood need not show that his "appeal will succeed," and the Sixth Circuit should not deny him a certificate of appealability just because the court might believe he will not show he is entitled to relief under § 2254. *See Miller-El*, 537 U.S. at 337. Underwood needed only to demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Instead, the Sixth Circuit repeatedly rejected Underwood's claims based on its determination that the claims would not succeed on appeal. App. 2a-6a. As such, this Court should grant Underwood's petition for writ of certiorari to rectify the lower court's erroneous analysis of his *Martinez v. Ryan* claims.

According to *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), when there is a reasonable probability that the decision to deny the certificate of appealability rests upon a premise that the lower court would reject if given the opportunity for further consideration and where it appears that such a redetermination may

decide the ultimate outcome of the litigation, then the petition may be granted, and the judgment vacated and remanded to consider if *Martinez v. Ryan* gives “cause” to excuse the procedural default. This question was addressed in the District Court, but the application for a certificate of appealability failed, without explanation, to consider that Petitioner’s *Martinez v. Ryan* claims constituted a denial of a constitutional right. In addition, *Miller-El v. Cockrell*, 537 U.S. 322 (2003) describes the standards for denying a certificate of appealability. Pursuant to *Miller-El* a certificate of appealability should be granted when a substantial showing can be made “by demonstrating that jurists of reason could disagree with the District Court’s resolution ... or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” The District Court erred in failing to provide such analysis when it denied Petitioner’s certificate of appealability. The Sixth Circuit placed a heavy burden on Petitioner that did not follow the procedures of 28 U.S.C. § 2253(c)(2). According to the Sixth Circuit the Petitioner the Petitioner failed to make the ultimate showing that his claim is meritorious. However, this does not logically mean that the Petitioner failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court-(like the Sixth Circuit)-inverts the statutory order of operations and ‘first decides the merits of an appeal, . . . then justifies its denial of a COA based on its adjudication of the actual merits,’ it has placed too heavy a burden on the prisoner at the COA stage. *Miller-El*, 537 U. S., at 336–337. *Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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