

No.

**19-7748**  
IN THE

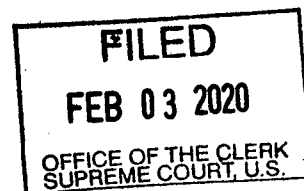
Supreme Court of the United States

Kevin Souffrant,  
Petitioner

v.

**ORIGINAL**

Kevin Kauffman,  
Superintendent Huntingdon SCI,  
Ronald Eisenberg,  
Attorney General of Pennsylvania,  
Andrew J. Gonzalez,  
District Attorney of Lancaster County,  
Respondents



On Petition For Writ Of Certiorari  
To The (United States Court of Appeals for the Third Circuit)

**PETITION FOR WRIT OF CERTIORARI**

Kevin Souffrant  
Pro se,  
SCI-Huntingdon  
1100 Pike Street  
Huntingdon, PA 11654-1112

## **QUESTION[S] PRESENTED**

I. Whether petitioner should be Granted Certiorari, where his claim not only affect him, but also hundreds of others?

II. Whether the United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter, or has decided an important Federal question in a way that conflicts with relevant decisions of this Court.

### **LIST OF PARTIES**

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Andrew J. Gonzalez, Esq.  
Lancaster County Office of District Attorney  
50 North Duke Street  
Lancaster, PA 17602

Ronald Eisenberg, Esq.  
Office of Attorney General of Pennsylvania  
1600 Arch Street  
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Philadelphia, PA 19103

### **RELATED CASES**

Souffrant v. Kauffman, et al., No. 18-cv-02848, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered January 30, 2019.

Souffrant v. Kauffman, et al., No. 5:18-cv-02848, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered April 18, 2019.

Souffrant v. Kauffman, et al., No. 19-2156, U.S. Court of Appeals for the Third Circuit. Judgment entered November 13, 2019.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at C.A. No. 19-2156; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at E.D. Pa. Civ. No. 5:18-cv-02848; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 11-13-19.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Pennsylvania Constitution Article 5, § 9 guarantees a direct appeal as of right, a failure to file or perfect such an appeal results in a denial so fundamental as to constitute prejudice per se. See **Commonwealth v. Lantzy**, 558 Pa. 214, 736 A.2d 564, 571 (1999) (PCRA provides the exclusive remedy for post-conviction claims seeking restoration of appellate rights due to counsel's failure to perfect a direct appeal). The Pennsylvania Supreme Court has not decided whether the accused has a right to counsel in state collateral proceedings under the Pennsylvania Constitution. See **Commonwealth v. Priovolos**, 552 Pa. 364, 715 A.2d 420 (1998).

In the state of Pennsylvania, the state law expressly requires prisoners to bring these claims of ineffective assistance of trial counsel on collateral review, **Martinez v. Ryan**, 566 U.S. 1, 16-17, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), which the state's procedural system effectively deprives, prisoners of a meaningful opportunity to litigate the claims on direct appeal. **Trevino v. Thaler**, 569 U.S. 413, 133 S. Ct. 1911, 1921, 185 L. Ed. 2d 1044 (2013). The state high Court has said that post-conviction review is the preferred forum and method for raising a claim of ineffective assistance of trial counsel, which is why Petitioner concedes the default claims, but asks that this Court hold the Pennsylvania prisoners, may use the *Martinez-Trevino* gateway to obtain review of defaulted claims of ineffective assistance of trial counsel.

## **STATEMENT OF THE CASE**

On March 28, 2016, petitioner filed a pro se motion for Post-Conviction Relief Act (PCRA) and thereafter on April 22, 2016, Mr. Christopher Lyden, Esquire was appointed to represent the petitioner. Mr. Lyden filed an amended petition, which included the claim that trial counsel was ineffective. On September 23, 2016, in the Common Pleas Court of Lancaster County of Pennsylvania, an evidentiary hearing was held on the matter raised. During that hearing, the trial court denied hearing the claims of petitioner's pro se amended PCRA petition, which petitioner had clearly informed the PCRA court that his claims were not being raised by Mr. Lyden and wished to have his claims preserved. N.T. 9/23/16 at 3-6<sup>1</sup>. The court accepted for filing appellant's amended pro se petition, informed petitioner that those claims were not going to be considered during the PCRA hearing, which denied petitioner a fair opportunity to argue and raise his claims during the hearing, and gave petitioner no opportunity to develop the facts and evidence of his claims, but instructed appointed counsel to review those claims after the hearing and notify the court if counsel believed any of the new claims raised pro se by petitioner had merit. See N.T. 9/23/16 at 3-6, 40-42. On November 29, 2016, court appointed counsel filed a Memorandum of Law in support of only the claims originally raised by counsel and none of petitioner's pro se amended claims were raised or mentioned within counsel's memorandum of law. On January 10, 2017, the trial court denied the PCRA, and following an appeal to the Superior Court filed by counsel the Superior Court affirmed the lower court's denial of the PCRA petition. On September 20,

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<sup>1</sup> N.T. 9/23/16, at 3-6 denotes Notes of Testimony given on 9/23/16, at appellant's PCRA Evidentiary Hearing, and its page(s).

2017, counsel filed a petition for Allowance of Appeal to the Pennsylvania Supreme Court. On February 14, 2018, the Pennsylvania Supreme Court denied the petition for allowance of appeal. For the above-mentioned and following reasons petitioner claims should not be barred for being procedurally defaulted. When in fact, there it was when the initial-review collateral procedural was the first designated proceeding is equivalent of a prisoner's direct appeal as to the claim because the state habeas corpus court decides the claims merits, no other court has addressed the claim, and defendants "are generally ill equipped to represent themselves" where they have no brief from counsel and no court opinion addressing their claim. Halbert v. Michigan, 545 U.S. 605, 617, 125 S. Ct. 2582, L. Ed. 2d 552. As in Coleman v. Thompson, 501 U.S. 722, 111, as *Coleman* recognized an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default. For if, the attorney appointed by the state to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain adjudication on the merits of his claims. See 501 U.S., at 745, 11 S. Ct. 2546, 115 L. Ed. 2d 640; Evitts v. Lucy, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Douglas*, supra, at 457-358 S. Ct. 814, 9 L. Ed. 2d 811. On July 6, 2018, petitioner filed a timely Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania. On April 18, 2019, the United States District Court for the Eastern District of Pennsylvania entered an Order denying petitioner's petition for writ of habeas corpus. On May 15, 2019, petitioner filed a request for a Certificate of Appealability to the United States Court of Appeals for the Third Circuit. On November 13, 2019, petitioner's request for a Certificate of Appealability was denied.

## **REASONS FOR GRANTING THE PETITION**

Petitioner argues that the rule established in **Martinez v. Ryan**, 566 U.S. 1, 16-17, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) and **Trevino v. Thaler**, 569 U.S. 413, 133 S. Ct. 1911, 1921, 185 L. Ed. 2d 1044 (2013), applies to § 2254 cases in Pennsylvania so that petitioner may try to overcome the procedural default of his claim for ineffective assistance of trial counsel. The Court of Appeals and the District Court erred by relying on a rigid rule because § 2254 proceedings are civil, there is no constitutional right to counsel and thus no ability to challenge the effectiveness of one's § 2254 counsel. Those two decisions however, have changed how courts should view claims of ineffective assistance of counsel at initial-review collateral proceedings. See **Ramirez v. United States**, 799 F.3d 845, 853 (7<sup>th</sup> Cir. 2015). The error is consequential, however, because the district court did not find that the petitioner had adequately present his arguments in his initial § 2254 motion and the Court did not address each of those arguments petitioner concedes the default but ask that this Court hold the Pennsylvania prisoners may use the *Martinez-Trevino* gateway to obtain review of defaulted claims of ineffective assistance of trial counsel. Petitioner's rights were violated by PCRA counsel's failure to brief the issues raised in petitioner's pro se amended PCRA petition. See **Serrano v. Fischer**, 412 F.3d 292, 295 (2<sup>nd</sup> Cir. 2005), cert. denied, 126 S. Ct. 1357, 164 L. Ed. 2d 68 (U.S. 2006). The PCRA Court erred in denying hearing petitioner's pro se amended PCRA petition, which petitioner had clearly informed the PCRA Court of his claims that they were not being raised by counsel and wished to have those claims preserved. The Court accepted for filing petitioner's

amended pro se petition, informed petitioner that those claims were not going to be considered during the PCRA hearing, which denied petitioner a fair opportunity to argue and raise claims during the hearing, and gave petitioner no opportunity to develop the facts and evidence of his claims. The Court instructed appointed counsel to review the claims after the hearing and to notify the Court if counsel believed any of the new claims raised pro se by petitioner had merit. The PCRA petition here is a first PCRA petition. A convicted defendant has a right under the rules of criminal procedure to the assistance of counsel on a first PCRA petition. Pa.R.Crim.P. 904(c); *Cherry*, 155 A.3d at 1082; **Commonwealth v. Robinson**, 970 A.2d 455, 457 (Pa. Super. 2009) (en banc). "The indigent petitioner's right to counsel must be honored regardless of the merits of his underlying claims, even when those claims were previously addressed on direct appeal, so long as the petition in question is his first." *Cherry*, 155 A.3d at 1082 (quoting **Commonwealth v. Powell**, 787 A.2d 1017 (Pa. Super. 2001)). PCRA counsel should have filed a sufficient no-merit letter, and advise PCRA petitioner copies of the no-merit letter, and advise the PCRA petitioner of his right to proceed pro se or with privately retained attorney. **Commonwealth v. Walters**, 135 A.3d 589, 591 (Pa. Super. 2016); **Commonwealth v. Rykard**, 55 A.3d 1177, 1184 (Pa. Super. 2012). The no-merit letter must set forth: 1) the nature and extent of counsel's review of the case; 2) each issue that the petitioner wishes to raise on appeal; and 3) counsel's explanation of why each of those issues is meritless. **Commonwealth v. Pitts**, 981 A.2d 875, 876 n.1 (Pa. 2009); *Turner*, 544 A.2d at 928-29; *Rykard*, 55 A.3d at 1184; **Commonwealth v. Glover**, 738 A.2d 460, 464 (Pa. Super. 1999). PCRA counsel did not file a no-merit

letter and did not discuss all of the issues that petitioner has raised in a first PCRA petition nor did he explain why they lack merit, which does not satisfy these mandatory requirements and a no-merit letter is a deprivation of the right to counsel on the PCRA petition. **Commonwealth v. Karanicolas**, 836 A.2d 940, 945-47 (Pa. Super. 2003); *Glover*, 738 A.2d at 464-65; **Commonwealth v. Mosteller**, 636 A.2d 615, 617-18 (Pa. Super. 1993). Even when a pro se first PCRA petition appears on its face to be meritless, the defendant is entitled to representation by counsel before that determination is made. **Commonwealth v. Ramos**, 14 A.3d 894, 895-96 (Pa. Super. 2011); **Commonwealth v. Stout**, 978 A.2d 984, 988 (Pa. Super. 2009). Instead, on November 29, 2016, PCRA counsel filed a Memorandum of Law only in support of the only claim raised by counsel and none of petitioner's pro se amended claims. Pennsylvania state law expressly requires prisoners to bring claims of ineffective assistance of trial counsel only on post-conviction collateral review (PCRA). A defendant, including an indigent defendant, has a Constitutional right to effective assistance of counsel on appeal, and by Supreme Court rule, a right to effective assistance of counsel on the first PCRA petition. In **Brown v. Brown**, 847 F.3d 502 (2018). Examining Texas Law, Trevino observed that even though Texas did not require a defendant to raise an ineffective assistance of trial counsel claim in state collateral review proceedings, the 'structure and design of the Texas system in actual operation' worked effectively as a ban on claims on direct review. *Id.* at 1915. Unlike Texas, Pennsylvania always requires prisoners to bring claims for ineffective assistance of trial counsel only on collateral review. In 2012, however, the Supreme Court recognized a

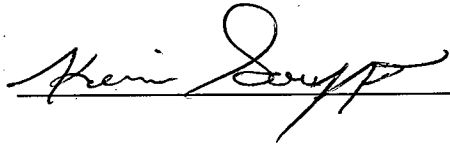
new form of cause for overcoming procedural default in *Martinez*: "Where, under state law claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S. Ct. at 1315, 1320. The Court explained that this route was needed to protect a prisoner with "a potentially legitimate claim of ineffective assistance of trial counsel on collateral review. Id. If post-conviction counsel in the initial round of collateral review, it is unlikely that any state court at any level will hear the claim. Id. at 1316. The next year, the court expanded the *Martinez* form of "cause" in *Trevino*, holding that "a distinction between **(1) a state that denies permission to raise the claim on direct appeal and** (2) a state that in theory grants permission, but as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference." *Trevino*, 133 S. Ct. at 1921. The Panel Majority held that *Martinez-Trevino* applies to defaulted *Strickland* claims by Indiana prisoners. **Brown v. Brown**, 847 F.3d 502, 51-13 (7<sup>th</sup> Cir. 2017). Just as it should apply to Pennsylvania prisoners, because the state Court should not have denied petitioner the opportunity to raise the claims on direct appeal and PCRA counsel should have given reasons why those claims were not being raised.

**WHEREFORE**, for those reasons mentioned-above petitioner respectfully request this Court to Grant petitioner a Writ of Certiorari.

**CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,



A handwritten signature in black ink, appearing to read "Kevin Dwyer", is written over a horizontal line.

Date: February 3<sup>rd</sup>, 2020