

20-6016

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE A CHRISTIAN JR -- PETITIONER

ORIGINAL

vs.

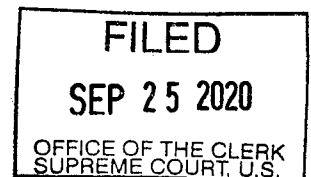
THE STATE OF OKLAHOMA -- RESPONDENT (S)

PETITION FOR WRIT OF CERTIORARI

APPEAL FROM OKLAHOMA COURT OF CRIMINAL APPEALS, CASE  
NO. CF-2011-1583

GEORGE A. CHRISTIAN JR.

(Your Name)



(Address)

P.O. Box 260

(City, State, Zip Code)

Lexington OK 73051

(Phone Number)

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## CONSTITUTIONAL PROVISION AND STATUTES§

United States Constitution, Amendment XIV.

Okla. Const Art, II §§ 6 and 7

28 U.S.C. § 2254

28 U.S.C. § 2244 (d)(1)

Rule 10

Rule 13

OCCA Rules 3.11(B)(3)(b)

## **QUESTION PRESENTED**

Whether the State's denial of the post-conviction relief establish cause for any procedural default to be excused and considered on this issue anew in light of *Martinez*.

## **PARTIES TO THE PROCEEDING**

### **Petitioner, *pro se*:**

George A. Christian Jr. # 276900, P.O. Box 260, Lexington, OK, 73051.

### **For Respondents: The State of Oklahoma,**

Jennifer M. Hinsperger Assistant District Attorney 320 Robert S. Kerr Ave. Ste 505. Oklahoma City, OK 73102.

## **OPINION BELOW**

The following opinions and orders below are pertinent here, all of which are unpublished:

[1] Opinion on direct appeal by the Oklahoma Court of Criminal Appeals, affirming Petitioner's conviction and sentence (3/22/13); [2] First Application for Post-Conviction Relief was filed on (4/12/13) and (10/13/15) the second Application for Post-Conviction Relief was filed and on (11/6/15) petitioner filed a instant Amended Application for Post- Conviction Relief in case no. CF-2011-1583, district court denied second (APCR) on (5/2/16), the OCCA affirmed the district court's denial of Petitioner's amended application for post-conviction relief. *See Christian v. State*, PC-2016-425 (July 8<sup>th</sup>, 2016). [3] Report and Recommendation to deny writ of habeas corpus (1/13/17) [4] United States District Judge issues the Order Adopting Report and Recommendation (3/22/17) [5] Order Denying Certificate of Appealability (7/7/17) [5] Petition for Rehearing (9/5/17) [6] Memorandum Opinion and Order (2/6/19); [7] Order Dismissing Third Application For Post-Conviction Relief (5/5/20); [8] Order dismissing duplicate filing and directing court to return petitioner's documents and barring petitioner from filing any further

requests for post-conviction relief in Oklahoma County District Court Case No. CF-2011-1583 and issuing directive to clerk to notify court administrator of frivolous action (7/17/20).

### JURISDICTION

The District Court of Oklahoma and the Oklahoma Court of Criminal Appeals denied petitioner Application for Post-Conviction Relief on a claim of Ineffective Assistance of Trial Counsel in light of *Martinez v. Ryan*, 132 S.Ct. 1309 (March 20, 2012), pursuant to 28 U.S.C. § 1257(a), the United States Supreme Court has jurisdiction by U.S. Sup.Ct. Rules 10(c) and 13(1) on certiorari, to review a denial of a Post-Conviction Claim denied by a state's highest court any procedural default to be excused and considered on this issue anew in light of *Martinez*.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of a state prisoner to seek certiorari is guaranteed in 28 U.S.C § 2254. The standard for relief under "AEDPA" is set forth in 28 U.S.C. § 2254(d)(1).

United States Constitution, Amendment XIV.

Okla. Const Art, II §§ 6 and 7

### STATEMENT OF THE CASE

COMES NOW, George A. Christian, the Petitioner is a layman in law appearing and proceeding pro se<sup>1</sup> moves the court for an Order vacating and setting aside the judgment entered in this action and all subsequent proceedings thereon, and to vacate under *Martinez v. Ryan*, 132

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<sup>1</sup> **Haines v. Kerner**, 404 U.S. 519 (1972) holding a Pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. In **Hall v. Bellmon**, 935 F.2d 1106, 1110 (10th Cir. 1991) the Court stated "we believe this [Haines pro se litigant] means that if the court can reasonably read the pleadings to state a valid [Certiorari civil action] claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion with various legal theories, his poor syntax and sentence construction or his unfamiliarity with pleading requirements. Id....and the Plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him, should be allowed to amend his complaint.

S.Ct. 1309 (March 20, 2012), pursuant to and in accord with the applicable provisions of **Rule 10** is grounds for relief on certiorari and just terms, the court may relieve a party or its legal representative from a denial of a Application for Post-Conviction Relief, final judgment, order, or proceeding entered in this action on [ July 17<sup>th</sup>, 2020], denying him relief on certain claims contained in the petition for the following reasons separate but equal *Plessy v. Ferguson* 163 U.S. 537 16 S.Ct. 1138 (1896) *Brown v. Board of Ed. of Topeka Shawnee Kan.* 347 U.S. 483 74 S.Ct. 686 (1954) anew in light of *Martinez*.

Petitioner *pro se*, George A. Christian Jr., was found guilty of count 1) Manslaughter in the first degree; Count 2) Pointing a Firearm at another; and Count 3) Possession a firearm After Former Conviction of a Felony on September 29<sup>th</sup> 2011 in case #**CRF-11-1583**, following a jury trial the jury recommended petitioner be sentenced to count 1) 36 years, count 2) 25 years on, and count 3) 20 years, and the trial judge sentenced accordingly ordering 36yrs., 25yrs., and a 20 year sentence to run and to be served concurrently in case **CRF-11-1583**. In *Christian v. State*, case no. F-2001-957 (unpublished)(March 22<sup>nd</sup>, 2013), the Court of Criminal Appeals affirmed Appellant's conviction. After OCCA affirmed the conviction, Petitioner timely filed a application for Post-Conviction Relief in district court on April 12<sup>th</sup>, 2013 in case no. CF-2011-1583, district court denied (APCR) on June 6<sup>th</sup> 2013. On October 17<sup>th</sup>, 2013, See *Christian v. State*, PC-2013-583 the OCCA affirmed the district court's denial of Petitioner's application for post-conviction relief. On December 17<sup>th</sup>, 2013, Petitioner timely filed CIV-13-1325-M, petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a person in state custody pursuant to 28 U.S.C. § 2244 (d)(1) petitioner raises eight claims the first two were raised and denied in his direct appeal, and the remaining six were raised and denied in his application for post-conviction relief, the petitioner exhausted his claims, that was later denied on July 7<sup>th</sup> 2017.

On October 13<sup>th</sup>, 2015 petitioner filed a second Application for Post-Conviction Relief and on November 6<sup>th</sup> 2015 petitioner filed a instant Amended Application for Post- Conviction Relief in case no. CF-2011-1583, district court denied (APCR) on May 2<sup>nd</sup> 2016, the OCCA affirmed the district court's denial of Petitioner's amended application for post-conviction relief. *See Christian v. State*, PC-2016-425 (July 8<sup>th</sup>, 2016).

On August 5<sup>th</sup> 2016 Petitioner timely filed a petition for writ of certiorari Case No. 16-5538, the U.S. Supreme Court, denied writ of certiorari on October 11<sup>th</sup>, 2016.

However, Petitioner objected to all of the claims before the district court adopted the magistrate judges report and recommendation and denied his habeas petition and was later denied a COA, *See Christian v. State*, PC-2013-583. in light of *Martinez*.

On January 13<sup>th</sup> 2017 Report and Recommendation to deny writ of habeas corpus.

On March 22<sup>nd</sup> 2017 the United States District Judge issues the Order Adopting Report and Recommendation.

On April 13<sup>th</sup> 2017, District Judge Robin J. Cauthron denied Notice of Appeal as a Request for Certificate of Appealability, and denied his Application to proceed in Forma Pauperis, also on April 20<sup>th</sup> 2017 the District Court by Order denied Motion for leave to Supplement Application for Certificate of Appealability from District Court; and Statement of Reason in support as moot.

On July 7<sup>th</sup> 2017 Order Denying Certificate of Appealability.

On September 5<sup>th</sup> 2017, the Tenth Circuit denied petition for rehearing.

On February 6<sup>th</sup> 2019 Memorandum Opinion and Order.

On May 5<sup>th</sup>, 2020 District Court Dismissing Third Application for Post-Conviction Relief of Ineffective Assistance of Counsel at Trial.



On July 17<sup>th</sup>, 2020 OKLAHOMA COURT OF CRIMINAL APPEALS agreed with the Oklahoma County District Court and issued its order, **IT IS THE ORDER OF THIS COURT** that Petitioner has **EXHAUSTED** his State remedies regarding the issues raised in his various applications for post-conviction relief, challenging his conviction in Oklahoma County Case No. CF-2011-1583. Subsequent application attempting to collaterally appeal Petitioner's conviction in this matter is **BARRED**, and the Clerk of this Court is direct to accept **NO FURTHER FILINGS** from Petitioner in Oklahoma County Case No. CF-2011-1583. without prepayment of filing fees. See, Rule 5.5, *Rules of the Oklahoma court of Criminal Appeals*, Title 22, Ch.18, App. (2020).

### **REASON FOR GRANTING WRIT**

#### **Argument**

However, the certiorari for relief from this court to reconsider its prior ruling on procedural default under *Martinez* is properly brought under Federal Rule of Civil Procedure 10(c), now that the Supreme Court has established that ineffective assistance of post-conviction counsel, while not amounting to a separate Sixth Amendment claim, can nevertheless establish cause for the default, this Court should reconsider its ruling and permit Christian to present evidence to support his claim that there was cause for default. Christian's appellate counsel's default in failing to raise the issue of ineffective assistance of counsel be excused because his appellate counsel was from the same office as his trial counsel. *Lambright v. Stewart*, 220 F.3d 1022 (9<sup>th</sup> Cir. 2000).

This court held, as did the Tenth Circuit, that the claim of ineffective assistance during the combined post-conviction and appealing proceedings were properly defaulted under the state

default rule established *Paz v. State*, 852 P.2d 1355, 1357 (1993). However, the Supreme Court in *Martinez* has shown that this rule, requiring as it does that the petitioner himself be able to recognize potential errors in the post-conviction process, must be reconsidered as a valid rule of procedural default.

Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-counsel claim. Claims of ineffective assistance at trial often require investigative work and understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or paper work of an attorney addressing that claim. *Halbert*, 545 U.S., at 619, 125 S.Ct. 2582, 162 L.Ed. 2d 552. To present a claim of ineffective assistance at trial in accordance with the state's procedures, then, a prisoner likely needs an effective attorney.

The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. Cf., e.g., *id.*, at 620-621, 125 S.Ct. 2582, 162 L. Ed. 2d 552 (describing the educational background of the prison population). While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record *Martinez*, 132 S.Ct. at 1317.

In this case, because of the failures of appellate counsel claims relating to trial counsel's acts and omissions were not fully developed in the state court proceedings. These claims include issues regarding the presentation of evidence at both the guilt and penalty phase. For example, trial counsel employed no self-defense experts prior to trial and did not present potentially

significant expert evidence regarding the unlawful entry at the scene. In addition, neither trial counsel nor direct appeal counsel challenged the erroneous instructions on the presumption of innocence, reasonable doubt and alibi. While this Court held that the instructions were not erroneous and agreed with OCCA ruling.

In addition, under the rules in effect at the time of Mr. Christian's direct appeal petition, he was not able to raise any issues of ineffective assistance of counsel on appeal because appellate counsel's default in failing to raise the issue of ineffective assistance of counsel be excused on direct appeal because his appellate counsel was from the same office as his trial counsel.

*Lambright v. Stewart*, 220 F.3d 1022 (9<sup>th</sup> Cir. 2000). Because his post-conviction petition was decided by the state district court, appellate counsel claims relating to trial counsel's acts and omissions were not fully developed in the state court proceedings. Under OCCA **Rules 3.11(B)(3)(b)** When a allegation of ineffective assistance of trial counsel is predicated upon an allegation of failure of trial counsel to properly utilize available evidence or adequately investigate to identify evidence which could have been made available during the course of the trial, and a proposition of error alleging ineffective assistance of trial counsel is raised in the brief-in-chief of Appellant, appellate counsel may submit an application for an evidentiary hearing, together with affidavits setting out those items alleged to constitute ineffective assistance of trial counsel. The proposition of error relating to ineffective assistance of trial counsel can be predicated on either allegations arising from the record or outside the record or a combination thereof. See *Dewberry v. State*, 1998 OK CR 10, 954 P.2d 774. This court will utilize the following procedure in adjudicating applications regarding ineffective assistance of trial counsel based on evidence not in the record:

This court should have found reversible error on the merits of the instructional claims and denying relief on the ineffective assistance of counsel claims on procedural grounds, it is appropriate for the Court to now permit reconsideration of the claims in this case based upon *Martinez*. The Ninth Circuit has vacated the judgment of the district court and remanded for consideration of previously defaulted claims in light of *Martinez*, and directed the district court to afford the petitioner an evidentiary hearing “if the district court determines that one is warranted.” See, *Lopez v. Ryan*, No. 09-99028, Order Dated April 26<sup>th</sup>, 2012.

Mr. Christian seeks similar relief in this case, to permit this Court to reconsider its prior denial of the petition on procedural default grounds. The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion. *McCleskey v. Zant*, 499 U.S. 467, 490, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); see also *Coleman*, *supra*, at 730-731, 111 S.Ct. 2546; *Sykes*, 433 U.S., at 83, 97 S.Ct. 2497; *Reed v. Ross*, 468 U.S. 1, 9, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); *Fay v. Noia*, 372 U.S. 391, 430, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), overrule in part by *Sykes*, *supra*. These rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Reed*, *supra*, at 16, 104 S.Ct. 2901. Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors ( or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a

prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for a certificate of appealability to issue).

Under established Supreme Court jurisprudence “[f]ederal habeas courts reviewing the constitutionality of a state prisoner’s conviction and sentence are guided by rules, [including]... the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule.” *Id.* at 1316.

In *Martinez*, the Supreme Court acknowledged that prisoner’s who fail to present their ineffective assistance of trial counsel claims during their direct\initial review collateral proceedings in the state court would be barred from doing so in a subsequent state collateral proceedings, and that absent a showing of cause and prejudice, such ineffective assistance of trial counsel claims would be barred from federal habeas review under the procedural default doctrine. *Id.*

Previous to *Martinez*, district and appellate federal court’s universally understood the Supreme Court’s decision in *Coleman v. Thompson*, 501 U.S. 722 (1991). To hold that the

negligence of a prisoner's post-conviction lawyer would not qualify as cause to excuse such a procedural default. *Smith v. Baldwin*, 510 F.3d 1127, 1146-1147 (9<sup>th</sup> Cir. 2007) (under Coleman, attorney ineffectiveness in the post-conviction process is not considered cause for the purpose of excusing the procedural default at that stage): *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9<sup>th</sup> Cir. 1996). Nevertheless, as the Supreme Court clarified in *Martinez*, its decision in Coleman, did not [actually] present the occasion to... determined whether attorney errors in the initial-review collateral proceedings may qualify as cause for a procedural default, "Id. at 1316, and accordingly as a matter of first impression, the court held that ineffective assistance of counsel at initial review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel at initial review collateral proceedings may establish cause for a default, a petitioner would be required to establish (1) that his initial review post-conviction lawyer (which in this instance would be direct review appellate attorney on direct appeal that was appointed by the same office that the trial attorney was appointed from) was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) that "the underlying ineffective-assistance of trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Id.* at 1318-1319. With respect to this latter requirement to establish that the underlying ineffective assistance claim is substantial, the court cited to the minimal showing needed for a certificate of appealability to issue. *Id.* It follows for all the reason that the Supreme Court's ruling in *Martinez* applies to Mr. Christian's habeas corpus proceeding. *Martinez* provides a road map for Christian to show cause that will excuse his direct review attorney failures to bring or develop the factual basis of claims concerning the ineffective assistance of trial counsel. In Oklahoma direct review is "the first

occasion [at which] to raise a claim of ineffective assistance of counsel at trial. *Martinez*, 132 S.Ct. at 1315. See IC§ 19-2719.

Christian was barred from developing in the federal court proceedings any of his claims that trial and appellate counsel provided ineffective assistance of counsel because of the application of the the existing rules of procedural default. As a result of the district court ruling in 1996, he was un able to develop the full evidentiary basis for these claims or seek an evidentiary hearing in federal court under pre-AEDPA standard, as set fourth in *Townsend v. Sain*, 372 U.S. 293 (1963).

Now that the Supreme Court has established that ineffective assistance of post-conviction counsel, while not amounting to a separate Sixth Amendment claim, can nevertheless establish cause for the default, this Court should reconsider its prior ruling and permit Christian to present evidence to support his claim that there was cause for default.

Christian should be permitted to engage in further discovery on the issue of post-conviction counsel's representation during the state consolidated collateral review and appeal proceedings. For example, a review of the state proceedings on post-conviction demonstrates that counsel appears to have engaged no investigators or experts. Nor did she raise any of the issues addressed in Christian's federal petition. Certiorari is the proper method for applying *Martinez v. Ryan* in the case the United States Supreme Court issued a opinion in *Martinez v. Ryan*, 132 S.Ct. 1309 (March 20, 2012), Mr. Christian petition for Certiorari was denied in the Supreme Court on January 16<sup>th</sup> 2018 almost six years after the decision was rendered in *Martinez*. In *Martinez*, the Court qualified its holding in *Coleman v. Thompson*, 501 U.S. 722 (1991), which held that an attorney's errors in post-conviction proceeding typically do not qualify as cause to excuse a default, by recognizing an exception which had not been squarely addressed in

*Coleman*: “Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s default of a claim of ineffective assistance at trial.” *Id.* 1315. The Supreme Court’s decision in *Martinez* dramatically impacts the resolution of Mr. Christian’s petition for a writ of habeas corpus filed in this court filed on December 17<sup>th</sup> 2013. Denied March 22<sup>nd</sup> 2017, as well as the proper consideration of certain ineffective assistance of trial counsel claims, which in view of *Martinez*. In contrast, Mr. Christian petition is final at this time, and he has actively pursued his remedies to date. He has raised the issue of cause and prejudice throughout his appeal. Therefore, since his case was incorrectly decided on post-conviction and from denial of his habeas petition, his case is controlled by *Martinez*, and this court should consider the question of cause and prejudice on the claims previously defaulted.

Ineffective assistance of post-conviction counsel claim for failure to appoint counsel during PCRA in relation to his trial counsel ineffectiveness claim, To overcome default under *Martinez* a petitioner must show that post-conviction counsel was ineffective during initial review (direct review) collateral proceeding.” *Martinez*, 566 U.S. at 16, 132 S. Ct. 1309 (which in this instance would be appellate counsel on direct review when she refused to address Mr. Christian’s claims of IAC on Direct Appeal) and that the underlying ineffective-assistance-of-counsel[IATC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. “ *Id.* at 132 S.Ct. 1309.

The Sixth Circuit has provided the following framework to evaluate claims under *Martinez*. The Supreme Court held “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 the proceeding was ineffective, 566 U.S. at 17, 132 S.Ct. at 1320, 182 L.Ed.2d at 288. In doing so, the court recognized the right to the effective



assistance of trial counsel is a bedrock principle in our justice system, “and acknowledged applicants” “confined to prison” and “unlearned in the law” often have difficulty complying with procedural rules in a PCR case 566 U.S. at 12 132 S.Ct. at 1317 182 L.Ed. 2d at 284.

The state of Oklahoma has violated appellant’s due process rights under *Martinez v. Ryan* and, Appellant Habeas Corpus Brief was timely filed pursuant to 28 U.S.C.A. 2244(d)(1), and Appellant have exhausted administrative remedies and exhausted judicial remedies. herewith attached order from OCCA.

Petitioner’s Federal and State Constitutional rights to due process of law has been violated and should be granted relief on certiorari pursuant to Rules 14 and 10(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court and the Federal Rules of Appellate Procedure were violated to the U.S. Constitutions Fifth, Sixth, and Fourteenth Amendments and Okla. Const. Art. II §7, Okla. Const. Art. II §21.

However, an appellate advocate may deliver deficient performance and prejudice by omitting a dead-bang winner, even though counsel may have presented strong but unsuccessful claims on appeal. “*Cook*, 45 F.3d at 394-95 (citing *Page v. United States*, 884 F2d 300, 302 (7<sup>th</sup> Cir. 1989)). In this case Mr. Christian’s trial counsel and appellate counsel failed to utilize the available evidence to raise the ineffective assistance of trial counsel claim or the brady claim *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) *Napue v. Illinois*, 360 U.S. 264 (1959) Here counsel was ineffective for two reasons: 1) failing to properly utilize available evidence or adequately investigate to identify evidence which could have been available during the course of trial and 2) failing to question any of her witnesses she subpoenaed

to develop a factual record during the initial post-conviction relief proceedings; and should afford Christian an evidentiary hearing if the district court determines that one is warranted. The district court should enter a new judgment. Previous to *Martinez*, district and appellate federal courts universally understood the Supreme Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), to hold that the negligence of a prisoner's post-conviction lawyer would not qualify as cause to excuse such a procedural default. *Smith v. Baldwin*, 510 F.3d 1127, 1146-1147 (9<sup>th</sup> Cir. 2007) (under *Coleman*, attorney ineffectiveness in the post-conviction process is not considered cause for the purpose of excusing the procedural default at that stage); *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9<sup>th</sup> Cir. 1996).

Nevertheless, as the Supreme Court clarified in *Martinez*, its decision in *Coleman*, did not [actually] present the occasion to ... determine whether attorney errors in initial collateral proceedings may qualify as cause for a procedural default," *Id.* at 1316, and accordingly, as a matter of first impression, the court held that ineffective assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default claim of ineffective assistance of counsel at trial. *Id.* at 1315. The Court went on to hold that to demonstrate cause for a default, a petitioner would be required to establish (1) that his initial review post-conviction lawyer was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) that "the underlying ineffective-assistance of trial-counsel claim is a substantial one, which is to say the prisoner must demonstrate that the claim has some merit." *Id.* at 1318-1319. With respect to this latter requirement to establish the underlying ineffective assistance claim substantial, the Court cited to the minimal showing needed for a certificate of appealability to issue. *Id.* The court's gave *Martinez* himself retroactive benefit of its decision, *Id.* at 1321 (remanding to the court of appeals to determine the application of the decision to the petitioner

Martinez), the decision must be given retroactive effect in all other courts where the application for habeas relief is still pending. See *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 90, 96 (1993) (“[W]e hold that this Court’s application of a rule of federal law to the parties before the Court every court to give retroactive effect to that decision.”) Martinez provides a road map for Mr. Christian to show cause that will excuse his post-conviction attorney’s failure to bring or develop the factual basis of claims concerning the ineffectiveness of his trial counsel. Therefore, this Court must determine whether the failures of the post-conviction counsel establish cause for any procedural default and consider this issue anew in light of *Martinez*.

Mr. Christian "is in custody in violation of the Constitution or laws or treaties of the United States." See U.S.C. § 2254(a), and the "cause for the default and actual prejudice as a result of the alleged violation of federal law" or that a "fundamental miscarriage of justice" will result from dismissal of the claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Absence the effectiveness of counsel on post-conviction the ineffectiveness of counsel claim has been exhausted and meritorious. See *Rodriguez v. Carpenter*, 916 F.3d 885, 904-905 (10th Cir. 2019). The cause standard requires a petitioner to "show that some objective factor external to the defense impeded ... efforts to comply with the state's procedural rules." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Factors supporting "cause" include previously unavailable evidence, a change in the law, and interference by state officials. *Id.* The "fundamental miscarriage of justice" exception only applies where petitioner proffers evidence of actual innocence. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). Petitioner has stated and that the issues raised are debatable among jurists, that could resolve the issues differently, or that the questions deserve encouragement to further proceedings. *Buck v. Davis*, No. 15-8049, 2017 WL 685534, at \*11 (Feb. 22, 2017) (quoting *Miller-El v. Corkrell*, 537 U.S. 322, 336-38 (2003)); *Slack v.*

McDaniel, 529 U.S. 473, 483-84 (2000) a jurists could debate whether (or, for that matter, agree that) claim(s) issuable for COA. The state of Oklahoma has violated appellant's due process rights, and his Habeas Corpus Brief was timely pursuant to **28 U.S.C.A. 2244(d)(1)**, and Appellant have exhausted administrative remedies and exhausted judicial remedies, and his original Post-Conviction falls under *Martinez*.

### CONCLUSION

For these reasons, it is respectfully requested that this Court grant relief for Certiorari and order full briefing, reverse the judgment barring the Application for Post-Conviction Relief to CF-2011-1583 and remand the matter to the district court for an evidentiary hearing, and/or grant the writ requested for appeal purpose.

George A. Christensen 7-25-2020  
#226900, Pro-se