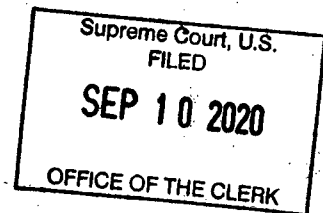


No. **20-6416**

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Devon M. Byrd — PETITIONER
(Your Name)

vs.
Harold W. Clarke — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals For The 4th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Devon M. Byrd #1440584
(Your Name)

P.O. Box 1759
(Address)

Big Stone Gap, VA 24219
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- 1.) Can I show cause and prejudice using Martinez v. Ryan 566 U.S. 1 (2012), to excuse my procedurally defaulted claims?
- 2.) Does Martinez has applicability to cases barred by § 2244(d)?
- 3.) Are the opinions set forth in Martinez and Prohney v. Wilson 916 F.3d 1254 (2019), binding precedents in the "Fourth" Circuit?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	N/A
STATEMENT OF THE CASE	APP. C
REASONS FOR GRANTING THE WRIT	APP. D
CONCLUSION.....	

INDEX TO APPENDICES

- APPENDIX A - Opinion of the U.S. Court of Appeals for the Fourth Circuit
- APPENDIX B - Opinion of the U.S. District Court for the Eastern District of Virginia
- APPENDIX C - Statement of the Case
- APPENDIX D - Reasons for Granting the Writ
- APPENDIX E
- APPENDIX F

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 _____; 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☒ is unpublished.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 _____; 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☒ is unpublished.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 June 19, 2020

☒ 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).

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Martinez v. Ryan 566 U.S. 1 (2012)	1, 2, 3, 21
Hodney v. Filson 916 F.3d 1254 (2019)	1, 3,
U.S. v. Ash 413 U.S. 300, 309 (1973)	4,
U.S. v. Cronie 466 U.S. 648, 658 (1984)	5, 12,
Tang v. Comm. 2018, VA. App. Lewis 296 (2018)	7,
Prosek v. Bell, 130 F.3d 1161 (6th Cir. 1997)	12, 19
Boyd v. French, 147 F.3d 319, 328-29 (4th Cir. 1998)	14,
Amchair v. Conway, 601 F.3d 66, 72-77 (2d. Cir. 2010)	17,
U.S. v. Escalante-Reyes, 689 F.3d 415, 423-24 (5th Cir. 2012)	17,
Johnson v. U.S. 520 U.S. 461, 468 (1997)	18,
Brown v. Comm. 284 VA. 538 (2012)	18,
U.S. v. Meinhardt 357, F.3d 521, 530-31 (5th Cir. 2004)	18,

OTHER

Statement Of The Case

5

First, I hereby argue that the deciding "District and Circuit" courts erred when they ruled that Martinez v. Ryan 566 U.S. 1 (2012), has no precedent over their court. I disagree with the mentioned courts for the following reason. Martinez is a "U.S Supreme Court" case. Therefore, Martinez has precedent over all lower courts, regardless of the district or circuit.

Secondly, I argue that my trial attorney completely denied me the opportunity to present a fair defense by 1.) failing to develop a defense for trial. 2.) Failing to object to improper statements made by prosecutor. 3.) Allowing witnesses to remain in the courtroom. 4.) Failing to present mitigating evidence at sentencing. Because of these errors, the trial court only heard evidence from the "Comm. Attorney." Therefore, I hereby argue that my 6th and 14th Amendment has been violated.

Appendix C

Issue 1

On March 31, 2020, The District Court denied my § 2254 petition stating "I failed to demonstrate entitlement to equitable tolling or a belated commencement. In Martinez v. Ryan 566, U.S. 1 (2012), The SCOTUS established an equitable exception for prisoners who have "Ineffective Assistance of Counsel" (IAC) claims that are procedurally defaulted. "SCOTUS in Martinez ruled that the absence of IAC-at-an-initial-review-proceeding, can establish cause to excuse a petitioner's procedural default of substantial claims. In Martinez, the court requires a petitioner to show (1) that petitioner's IAC at trial claim is substantial (2) that petitioner had no counsel during his state-collateral-review-proceeding, (3) that the state-collateral-review proceeding was the "Initial review proceeding with respect to the IAC-at-trial claim, and (4) that state law requires IAC-at-trial claims to be raised in initial review collateral proceedings.

The District Court claimed that I failed to suggest how Martinez, entitles me to a belated commencement of the limitation period under § 2244(d). However using the guidelines set forth in the above paragraph, I showed the District Court why they should excuse my procedural default.

In Rodney v. Filson 916 F.3d 1254 (9th Cir. 2019), the panel explained that because Rodney was not represented

by counsel during his "state-habeas-corpus", Rodney need only show that his IAC claims are substantial in order to excuse the procedural default.

Now, to satisfy rule (1) of the guidelines set forth in Martinez, I will show how my IAC-at-trial claims are substantial in respect to the deficient-performance prong of Strickland. I like to direct this court's attention to my §2254 petition, dated: Jan 12, 2015. In that petition's "Final Order," they ruled that Claim (A)(5) satisfied the "performance" prong, but failed to satisfy the "prejudice" prong. (However, in Rodney, the panel couldn't conclude that Rodney's IAC claims were meritless with respect to the performance prong, therefore, they concluded that "Remand" was required.) In my case, the record shows that my claims are substantial, and the District Court still dismissed my petition without holding a hearing. Secondly, to satisfy rule (2) of the Martinez guidelines, I again direct this court attention to my §2254 petition dated: Jan 12, 2015. There you will find that I filed my §2254 petition "pro se," I even asked the state court to appoint me an attorney. Lastly, to satisfy rule (3) & (4), I ask this court to review the "Virginia State laws." The court will find that Virginia Law requires all petitioners to raise IAC-at-trial claims for the first time at Habeas Corpus proceedings. Not direct appeal.

Conclusion, Since I have satisfied every rule set forth by the "SCOTUS" in the Martinez case, I ask this court to allow me to appeal the district court ruling. The district court misintepeted the Martinez totally, and stated "Martinez has no applicability to cases barred by §2244(d)". I respectfully ask this court to review the "Rodney v. Elson case. In that case, the court applied the Martinez law to Rodney's case, even after Rodney was time barred by §2244(d).⁽¹⁾ I understand that since my petition was dismissed for procedural reasons, a certificate of appealability will only be issued if reasonable jurors could debate whether (1) a constitutional violation occurred, and (2) the district court correctly dismissed my petition. I believe that the Acts shows an conflict of interest between the "SCOTUS" and the District Court of Virginia. "SCOTUS" will fully disagree with the decision handed down by the district court. Therefore, I ask that my "Certificate of Appealability" be granted.

Note :

"The district court also stated "SCOTUS" in Martinez explained that Ineffective Assistance of Counsel-at-initial-review-collateral proceedings, may establish cause to excuse a procedural default. This is not true, The "SCOTUS" in Martinez clearly states "When a state requires a prisoner to raise an IAC-at-trial claim in Habeas Corpus proceedings, a prisoner may establish"

cause in two circumstances. The first, is where the state court did not appoint counsel in the initial-review proceeding for the claim of IAC-at-trial. The second is where appointed counsel in the initial-review proceeding, was ineffective under the Strickland standards.

Issue 2

I was denied effective assistance of counsel during trial, which violates both my 6th & 14th Amendment, in which is guaranteed to me by the U.S. Constitution.

(Requirement that Assistance be Effective)

The 6th Amendment requires not merely the provision of counsel to the accused in an criminal prosecution, but assistance which is to be for his defense, and thus, the core purpose of the counsel guaranty is to assure assistance at trial when the accused is confronted with both the intricacies of the law and the advocacy of the prosecutor. If no actual assistance for the accused's defense is provided, then the Constitutional guaranty has been violated. (SEE U.S. v. Ash 413 U.S. 300, 309 (1973))

(Meaningful Adversarial Testing)

The adversarial process protected by the 6th Amendment requires that the accused have counsel acting in the role of an advocate, and the right to the effective assistance of counsel is thus the right of the accused to

pg 4 of 27

require the prosecution's case to survive the crucible of meaningful adversarial testing. When a free adversarial criminal trial has been conducted, even if the defense counsel may have made demonstrable errors, the kind of testing envisioned by the 6th amendment has occurred, but if the process loses its character as a confrontation between adversaries, the constitutional guaranty is violated. (SEE U.S. v. Cronk 466 U.S. 648, 658 (1984))

ISSUE 2-A

I was denied effective assistance at trial when my trial counsel failed to conduct an adequate pre-trial investigation.

I will now show how my trial counsel made no effort whatsoever to evaluate the legal and factual realities of my case. I have a complete file of all my lawyer's handwritten notes and correspondence. After reviewing the file, you will see that my lawyer did no investigation, besides interviewing me. I was convicted based off circumstantial evidence. The Circuit Court convicted me of the robbery of "McMichael's³ Stabler," simply because they testified that the suspect was wearing a gray jacket, and just so happen, at the time of my arrest, I was wearing a gray jacket. Now, I will lay-out evidence that could've been discovered had my lawyer

Conducted an pre-trial investigation.

1) My lawyer should've obtained and reviewed all three victims "911 recordings" and "Police reports". All (3) robberies happened at different times & locations. Instead, my lawyer only reviewed (Christopher McMichael) 911 recordings. My lawyer never obtained none of the police reports. Up until this day, I still don't know what my lawyer factors were, for not obtaining the police reports or reviewing the other two 911 tapes. My lawyer had plenty opportunities to obtain some form of pre-trial statements made by the victims, so that they may be used as impeachment evidence.

2) My lawyer "would've discovered" that when "Det. Hughes" performed a "search warrant" on my personal property. Det. Hughes did not find a gray jacket. The which, that was his one and only reason for conducting the search. The Det. Hughes affidavit, Hughes stated "It is believed that the clothing used/worn in the series of robberies, can be found." Sadly, nothing used or worn in the robberies was found. Therefore my lawyer could've used this evidence. For, it shows that the gray jacket did not personally belong to me, regardless if I was wearing a gray jacket at the time of my arrest or not. The gray jacket was stored in its rightfully owner property.

Now I will demonstrate how failing to conduct an investigation, deprived my lawyer from effectively representing me.

1.) At beginning of my trial, my lawyer requested that all witnesses be excluded from the courtroom. At the Commonwealth's objections, the Judge excluded every witness except the three victims.

Due to my lawyer's unpreparedness, my lawyer had no objections. My lawyer should've argued that by leaving the victims in the courtroom, it would deprive me of a fair trial, because we had no impeachment material. Therefore, we had no way of knowing if the second victim would shape his testimony to correspond to that of the first victim testimony. Which is why "VA. Code Ann § 19.2-265.1" was put in place.

(SEE *Huang v. Comm* 2018 VA. App. LEXIS 296 (2018))

Instead, my lawyer proceeded to trial without any of the mentioned evidence. When has this court ever seen a defense lawyer proceed to trial without even obtaining the police reports?

2.) The gray jacket plays a major role in the Commonwealth's case, but the gray jacket could've also played a major role in my defense. I admitted to my trial counsel that I in fact did commit the robbery of "Michael Payne" (Mr. Payne is the last victim of the crime spree.) Mr. Payne was the only victim that identified me as one of the guys who robbed him. But Mr. Payne also testified that I was not wearing a gray jacket. Therefore, by Mr. Payne stating that I wasn't wearing a gray jacket, we can say that there is a strong possibility that I wasn't wearing a gray jacket until after all the robberies are over.

Conclusion, had my lawyer obtained the police reports

she would've knew that I wasn't wearing a gray jacket until after the spree was over. Mr. Payne testimony corroborated my side of the story, because I told my lawyer that I did not have on gray jacket until after the robbery of Mr. Payne. (This is documented in my lawyer's handwritten notes)

Issue 2-B

I was denied effective assistance when my trial lawyer failed to develop a defense.

I will point out key points during my trial that proves that my lawyer wasn't properly prepared and did not prepare a defense strategy.

Throughout all of our pre-trial meetings, I constantly told my lawyer that I didn't actually commit the first two robberies (McMichael & Stabler). Therefore, my lawyer trial tactics should've at least included trying to eliminate me as one of the guys who robbed McMichael & Stabler. This should've started with cross-examining both victims effectively.

- 1.) While cross-examining "McMichael", my lawyer ^{never} asked him if he could describe the suspects physical description. (Height, Weight, Etc. Etc.) Even after victim stated that he saw what the suspects was wearing and where the suspects came from. McMichael had to been able to give some kind of description. This would've played a major role, because it was 3 other guys in the car. In which all 3 guys ~~was~~ ^{were} at least
- pg 8 of 217

twenty pounds heavier than me, and at least four inches taller than me. (For I'm a very small guy.) Next, McMichael testified that he heard the voice of the guy wearing the gray jacket. Still my lawyer never asked him if he could recognize the voice if he ~~had~~ heard it again. (Let's keep in mind, I have a L1's tongue, so I have a distinctive voice.) Just because McMichael stated that he never saw the suspects face, doesn't mean that there were no other ways to identify someone. Still my lawyer made no attempts at all to exclude me as a suspect.

2.) While cross-examining "Stabler," again my lawyer never asked if Stabler could describe the suspect. For this victim stated he and the guy in the gray sweater was very close to each other. Stabler never mentioned that suspect had anything covering his face. Again my lawyer failed to even try to exclude me. Instead, my lawyer asked questions that in fact, hurt my case.

During the cross-examination of "McMichael," my lawyer asked a bunch of irrelevant questions. During "Stabler" examination, my lawyer asked a total of seven questions. This proves that my lawyer did not prepare a trial tactic and she pursued my case with no effort at all. As verified by trial trans. pg. 87, after the Commonwealth rested their case, my lawyer failed to present any evidence or testimony. My lawyer didn't have a defense prepared for me at all. My lawyer never intended to put the "Commonwealth's" case to a meaningful test. Instead, she made comments such as "Commonwealth has a very good case, and you

pg 9 of 27

are unlikely to prevail at trial." When I tried to tell her that my co-defendants were willing to testify on my behalf, she told me "not to talk to them and it don't matter what they say. Even after she interviewed one of my co-defendants, she still failed to take down any notes during the interview. ~~no competent lawyer would interview their clients "co-defendant" and not take down notes.~~ All of this is verified by her own handwritten case file. Had I known that I wasn't going to be able to tell my side of the story, I would've never went to trial. During "Closing Arguments" my lawyer spoke on some valuable points, but she failed to present evidence that could've corroborated those points. This was due to the fact that she wasn't prepared, every thing that she said during closing argument was everything that had been uncovered during trial. Defenses that could've been produced are also layed out on pg. 7 of this petition (Briet).

In conclusion, the Commonwealth argument was simply this, "because I was wearing a gray jacket at the time of my arrest" this automatically means that I was wearing gray jacket during the robbery of "Michael S. Stobler." Commonwealth stated that ~~at~~ time of my arrest, I was wearing the gray jacket that I had been robbing everyone in. This is false, because Mr. Payne testified that I wasn't wearing a gray jacket. My lawyer ^{could've} used Commonwealth own words against her. Instead my lawyer

Pg. 10 of 27

doesn't correct or rebuttal those misleading statements. My lawyer could've combated those statement by stating "If my client was wearing the gray jacket all night, then he mustn't rob 'Mr. Payne,' Or If my client was wearing black or tan jacket, like Mr. Payne stated, then he mustn't rob McMichael or Stabler." There was several ways my lawyer could've raised "reasonable doubt" in regards to the robberies of Stabler and McMichael. There was no direct evidence that proved that I was wearing gray jacket during the course of those robberies, let's is to say that I didn't start the night off driving the car. Who is to say that Michael Brooks, Japorium Slaughter didn't start the night off in the back seat. There are several possibilities for who was where in the car and who was wearing what. For the only facts of this case, that was proven by direct evidence, was the fact that I wasn't wearing gray jacket until after the robbery of "Payne." That defense alone would raised reasonable doubt. The Commonwealth Based her whole case on speculations. The only robbery that I was convicted on based off direct evidence, is the robbery of "Mr. Payne." In which I told my lawyer that I was guilty of that robbery. Let's keep in mind, I wasn't wearing a gray jacket. My lawyer stated to me prior to trial, that just because I didn't actually commit the robberies of McMichael, Stabler, doesn't mean I can't still face the same charges. I understand that, but on the flip side, how is it that Michael Brooks (The Uncharged Suspect) was never charged with a crime. Even after all three victims stated that 4 people were in the car. Even though it is clear that I was present during the robberies, it is not clear, whether I was a principle in the first degree or if I was an "accessory after the fact" This question plays a major role in my both my conviction and sentencing. For we know that "Accessory after the fact" carries a lighter sentence. This is also important because I was sentenced to twenty-three years. Which is, seven time more than one co-defendant and three times more than the other co-defendant.

pg 11 of 27

My lawyer totally failed to investigate my case, and due to her failure to investigate, my lawyer failed to develop a defense. For regardless if my lawyer believed I was guilty, my lawyer still had a duty to investigate & develop a defense, in order to test the Commonwealth's case. For the said reasons, I ask this court to use both "Strickland & Cronk Standards. (SEE U.S. v. Cronk 466 U.S. 648, 658 (1984)) For the court ruled that if trial counsel fails to develop a defense, conduct a pre-trial investigation and present mitigating evidence during sentence. Counsel's performance is so deficient, that it failed to subject the prosecution's case to meaningful adversarial testing. Therefore, it is unnecessary to demonstrate prejudice. (SEE Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997)) The Virginia Supreme Court never asked my trial lawyer to submit an affidavit or testify in open court, to explain her trial tactics. I ask this court to do so, for that will be the only way we can come to an conclusion without speculating.

ISSUE 3

I was denied effective assistance of counsel during my sentencing

I now argue that my lawyer was ineffective during my sentencing. I will show how my lawyer was ineffective in her preparation and presenting mitigating evidence. Little evidence was presented in mitigating the offense, and of the punishment, despite its availability. My lawyer failed to call family members as witnesses, who could've presented mitigating evidence. My then spouse "Simone Henney, in which I had been in a relationship with for years prior to my arrest, was willing to testify. Simone would've testified to the fact that I was a wonderful man, that I help provide for her, so that she could finish college, and that I was just a good person.

who respected and cherished her. My lawyer could've also called my son's mother (Shelby Cook) who was willing to testify to the fact that since my son's birth, I have been there, not just to provide, but to care and teach. Ms. Cook would've testified that I was a great father. It is true that my lawyer did call my mom as a witness. But my mom testified about my upbringing. My lawyer should've then called some witnesses who could describe the man that I had become despite my unstable upbringing.

During my sentencing, the prosecutor tried her hardest and did every in her power to portray me as a "lost cause." The witnesses mentioned above portray a ~~man~~ totally different person. The prosecutor made so many improper statements, it's not even funny. Still, my lawyer did not even object to one. Therefore, the prosecutor got away with every single improper statement she made. It was like the prosecutor had no adversary whatsoever. Due to that, the prosecutor was able to portray me as an "Menace" despite any evidence to prove it. I will now like to present some of the improper statements made by the prosecutor, without no objections from my lawyer.

- A) "Had this been a jury trial, 23 years would be the statutory minimum." Sent. Trans. pg. 11 (This statement is leading.)
- B) "I was the one who pointed the knife at Mr. Payne." pg. 12 (Speculations, there's no evidence to support this statement.)
- C) "These robberies wasn't economic gain." pg. 12 (Expression personal opinions)
- D) "Since the age of 14, I have been quite consistent in violating the law." pg. 13 (False statement, my lawyer should've asked prosecutor to remove the violations.)
- E) "At every turn, I said no thank you to the state services, I have

said "I'm not interested in doing right." pg 13

(Speculation, these words never came out my mouth.)

The law clearly states "A prosecutor may not express personal opinions about the defendant's credibility." (SEE *Boyd v. French*, 149 F.3d 319, 328-29 (4th Cir. 1998)) The prosecutor also made

inaccurate statements about what the sentencing guidelines take into account when they ^{are} scored. (Sent. Trans. pg 15)

Ultimately, for that inaccurate statement, I was sentenced outside my guidelines. (SEE Sentencing Guideline Score Sheet)

The prosecutor went on to tell the judge that she would've had probable cause to ~~convict~~ ^{charge me} with conspiracy. (Sent. Trans. pg 17)

As proven by record, I was never charged nor convicted of conspiracy. But yet again, the judge used that statement

as another reason to go outside my guidelines. (Sentencing Guideline Score Sheet pg. 2) My lawyer allowed the prosecutor

to make improper, misleading and false statements without raising not one objection. In which ultimately lead

to my twenty-three years sentence, which is, ten years outside my guidelines. After all that, my lawyer turns

around and opens up her argument with the following statement "The argument that I have, I don't know

that I can focus in that direction." The court then states "Counsel, you can ignore it." This clearly shows

that my lawyer was unprepared and that the damage was already done.

Issue 4

I was denied effective assistance during my direct appeal.

I would first like to provide this court with a brief description on the relationship between my lawyer and myself. Before any brief was filed, I asked the "Court Of Appeals" to withdraw and substitute my lawyer. I explained to the courts that I felt like my lawyer did not give me the opportunity to present my side of the story. Therefore, my lawyer wasn't functioning as the "Counsel" guaranteed to me by the sixth amendment, in which will deprive me of a fair trial. I also informed the court that I was intended on filing an "Ineffective Assistance Claim." I filed this motion on March 15, 2013. On March 19, 2013, my lawyer filed her own "Motion To Withdraw." This clearly shows that my lawyer and myself was not seeing eye-to-eye and that a conflict appears. Normally a court will allow a counsel to withdraw if there lies a conflict between them and their client, to prevent any future injustices. Sadly, the "court of appeals" forced me to proceed with a lawyer whose trust, loyalty, integrity has been broken. I knew from that point on, that I wasn't going to have effective representation during my appeal.

I now argue that my appeal lawyer failed to raise "Plain Error" claims during my direct appeal. Below is a list of "Plain Error" claims that could've been raised by lawyer:

- 1) Trial judge erred by allowing the victims to remain in the courtroom.

On August 22, 2012 (morning of trial) my lawyer asked that all witnesses be excluded from the courtroom. The trial judge then told everyone who was going to testify in the case, step outside the courtroom. But at the prosecutors'

request, the judge allowed the three victims to remain in the courtroom. According to the "Rule of the Supreme Court of Virginia Rule 2:0615 "Any victim who is to be called as a witness may remain in the courtroom and shall not be excluded unless the court in its discretion determines that their presence will deprive the defendant of a fair trial." The prosecutor never explained why she needed the victims to remain in the courtroom. I will now explain why leaving the victims in the courtroom, deprived me of a fair trial.

Prior to trial, my lawyer had no pre-trial statements made by Bradley Stabler. My lawyer had only reviewed the "911 recording" of Christopher McMichael. (Because this is the only tape that the prosecutor turned over.) Let's now ask ourselves several questions.

- 1.) Why was McMichael 911 tape turned over to my lawyer, but not Stabler?
- 2.) Why play McMichael 911 tape at trial, but not Stabler's?

(Let's keep in mind, McMichael is the first victim to take the stand.) Virginia Code Ann. § 19.2-265.1, was put in place to prevent witnesses from shaping their testimonies to correspond to that of other witnesses testimonies.

(I would like to turn this court attention to some suspicious acts committed by the prosecutor in regards to the Stabler robbery.)

A) Prosecutor never released Stabler 911 tape, nor did she play it in court. But she released McMichael's and she played it in court, so that Stabler can hear it.

B) Prosecutor wanted Stabler to remain in courtroom.

C) On direct, prosecutor asked the responding officer in McMichael case "did McMichael give you a description of the vehicle?" But on direct, prosecutor never asked the responding officer in Stabler case that question. I was convicted of Stabler's robbery just because

of his testimony at trial. There is no evidence whatsoever linking me or my co-defendants to the robbery of Stabler.)

Since we had no impeachment material, we had no way of knowing if Stabler would shape his testimony to correspond to that of McMichael's testimony. Now since it's hard to show what someone would have said rather than what they actually did say, in the absence of evidence to the contrary, I argue that because of this difficulty, prejudice should be presumed. After examining both Rule 2:615 and §19.2-265.1, it is a settled principle of statutory construction that every part of a statute is presumed to have some effect and no part will be considered meaningless. With that being said, just because McMichael, Stabler, & Payne were victims, that didn't give them absolute right to remain in the courtroom. Prosecutor never gave a valid reason for why she needed the victims in the courtroom, other than the fact that they were victims. We must remember, all three robberies occurred at different times & locations, therefore allowing the victims to remain in the courtroom was a distinct advantage to the Commonwealth, an advantage in which the rule was put in force to prevent. This was clearly a plain error and my lawyer should've raised this issue on direct appeal. (SEE *Pomchair v. Conway*, 601 F.3d 66, 72-77 (2d. Cir. ~~2010~~ 2010))

2.)

I now argue that my appeal lawyer should've argued that the sentencing court erred when they ruled that multiple "Use of Firearms" charges couldn't be ran concurrent. (SEE *U.S. v. Escalante-Reyes*, 689 F.3d 415, 423-24 (5th Cir. 2012))

If the law was clear and adverse to defendant at trial, but has since changed by the time of the appeal

plain error is appropriate because a defendant should not have to object to correct law on the chance that the law will be changed by the time of appeal. (SEE Johnson v. U.S. 520 U.S. 461, 468 (1997))

On August 22, 2012, I was convicted in the Circuit Court of Richmond, VA on (3) counts of robbery and (2) counts of use of firearm. On October 16, 2012, I was sentenced to 23 years. On November 1, 2012, the "Supreme Court of Virginia" held that "Neither § 18.2-53.1 nor the mandatory minimum sentencing statute VA. Code Ann. § 18.2-12.1, prohibits a trial court from running multiple sentences imposed under § 18.2-53.1 concurrently with each other. (SEE Brown v. Comm. 284 VA. 538 (2012))

My "Petition For Appeal" wasn't filed until April 19, 2013. Therefore my appeal lawyer had plenty time to research this new precedent that was set by the "VA Supreme Court" in the Brown case. After reviewing my Sentencing transcripts, this court will find that my Sentencing judge tried to give me a "lesser" sentence than what I ultimately received. (SEE Sent. Trans. pg 24.) The only reason I didn't receive a lighter sentence, is because the prosecutor repeatedly told the judge that he can't run the sentences concurrent or suspend them. (SEE Sent. Trans. pg 11 & 16)

In conclusion, since it is proven that I would've received a different outcome at my Sentencing, my lawyer should've raised this issue on appeal. (SEE U.S. v. Reinhardt 357, F.3d 521, 530-31 (5th Cir. 2004))

Appendix D

Reason For Granting The Writ

I come to argue that the Eastern District Court of Virginia and the Fourth Circuit Court of Appeals was wrong in denying to hear my "Federal Habeas Corpus". To support my argument, I would like to use the Martinez v. Ryan 566 U.S. 1 (2012) case.

I do not dispute the district's or Fourth circuit court findings that my ineffective assistance claims are procedurally defaulted. I argue that I can show cause and prejudice under Martinez, to excuse the procedural default.

(Procedural Default)

A claim is procedurally defaulted if it was or will be rejected by the state courts based on independent and adequate state procedural grounds or if its unexhausted and state procedural rules would now bar the

petitioner from bringing the claim in state court. This often occurs when prisoners fail to pursue their habeas in a timely manner. Meaning that being "Time Barred" also puts a petition in procedural default.

IN Conclusion, due to the fact that I filed my federal habeas petition outside of the allowed time frame govern by Virginia rules. My claim is in default. Which means that Federal review of my claim is barred unless I can demonstrate cause for the default and actual prejudice as a result of the alleged violation of Federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.

(Cause And Prejudice)

The absence or ineffective assistance of state post-conviction counsel generally cannot establish cause to excuse a procedural default because there is no constitutional right to counsel in state post-conviction

proceedings. However, in Martinez, this court established an equitable exception, holding that the absence or ineffective Assistance of counsel at an initial-review collateral proceeding, may establish cause to excuse a petitioner's procedural default of "substantial" claims of ineffective assistance of trial counsel. This court states "To excuse a procedural default under Martinez, a petitioner must show (1) that his ineffective assistance-of-trial counsel claim is substantial; (2) that he had no counsel during his state collateral review proceeding or that his counsel during his state proceeding was ineffective under the standards of Strickland v. Washington; (3) that the state collateral proceeding was the initial review proceeding in respect to the "ineffective-assistance-of-trial counsel claim; and (4) that the state law requires ineffective-assistance-of-trial counsel claims to be raised in initial review collateral proceedings. (See Martinez.)

Note: (1) In order to show that his claims are substantial, a petitioner must demonstrate that they have "some merits."

(2) A petitioner who was not represented by post-conviction counsel in his initial-review collateral proceeding is not required to make any additional showing of prejudice over and above the requirement of showing a substantial trial-level ineffective assistance of counsel claim. See Detrich v. Ryan 740 F.3d 1237, 1245 (9th Cir. 2013)

(Satisfying Rules 1-4)

I would now like to show that I in fact did satisfy "Rules 1-4" that was set forth in Martinez by this court.

Rule 1 After reviewing the state's court findings from my state habeas petition, you will find that one of my IAC claims satisfied one of the two prongs that is set forth in Strickland.

Rule 2. After reviewing my "State Habeas Corpus" you will find that I filed my petition "pro se."

Rule 3. In the state of Virginia, defenders can not raise Ineffective Assistance Claims during their direct appeal.

Rule 4. In the state of Virginia, the law requires
DO 4 at 5

offenders to "raise "IAC" claims only during
"Habeas Corpus."

In conclusion, as verified by my state
habeas petition, I was not represented by counsel during my
initial-review collateral proceeding. Therefore accordingly,
I only need to show that my "Ineffective Assistance
of Trial Counsel" claim is substantiated in order to
excuse the procedural default under the "Martinez
rule, which was set in this court.

Finally, the district and Circuit Court didn't
deny my claims because of the "substantially
aspect of my claims. Their reason for denying my
petition, was that "Martinez" has no precedent in
their court. (SEE Appendix A). I dispute that
reasoning, because "Martinez" is a U.S Supreme Court
case. Which shall govern over all district and Circuit
Courts. Therefore, I argue that the courts should've
allowed me to use the "Martinez" case. By failing to do so,
the courts rulings are clearly in conflict with this court.
Denying me the opportunity to file my "Federal Habeas"
would clearly be a "Miscarriage Of Justice." Therefore,
I ask this court to grant my writ. Thanks and Have
A Blessed Day.

Conclusion

I ask this court to consider the total effect of all my lawyer's errors. For, I have been denied effective assistance during my trial, sentencing and my appeal. I would also like to remind this court that the "Supreme Court" has specifically said the "prejudice prong" requires me to show only a "reasonable probability" of a different result, and I do not have to prove my lawyer's errors "more likely than not" altered the outcome. Finally, I argue that since my lawyer failed to conduct a pre-trial investigation, develop a defense, present mitigating evidence during sentencing and failed to raise reasonable claims during my direct appeal, my lawyer's performance was so deficient, that it failed to subject the prosecution's case to meaningful adversarial testing. (SEE Groseclose)

Devon Byrd
Devon Byrd
Pro SE

Footnote (From pg. 3)

- 1.) Correction: Rodney's case was not time barred. In Rodney's case, two of his ineffective assistance of counsel claims were procedurally defaulted, and still the "Court of Appeals" vacated and remanded Rodney case for the district court to conduct an analysis of the substantiality of his (IAC) claims pursuant to Martinez v. Ryan.

In Conclusion, "SCOTUS" in Martinez, did not specifically state which procedural default can be excused. Therefore, if a claim is in procedural default (Whether by unexhaustion of Time, Barred.) you can excuse that default by satisfying the requirements set forth in Martinez.

My Copy

Affidavit

Pursuant to title 28 U.S.C. section 1746,
I declare under penalty of perjury that the foregoing
is true and correct

On the Night of December 3, 2011, me
and some of my friends were on our way to an
local nightclub. (Straughter, Haskins, Brooks). After arriving
in "Shoekoe Bottom, we found a place to park. While
sitting in the car, Haskins & Straughter exited the car.
Upon returning to the car, it was said that we had to
leave. At this time, Haskins was driving, Mike in the
front seat and Straughter and myself was in the back.
They then informed me that the reason we had to
leave was because they had robbed somebody.
We made one last, quick stop and left the area.
(Shoekoe Bottom) This is when I took the gun from
Straughter. Brooks wanted to go home, so on the
way to drop Brooks off, we saw Michael Payne.
Influenced by the other robbery, on top of being
mad, I robbed Mr. Payne. Shortly soon after, we
stopped at a gas station. While at the gas
station, Haskins, Straughter and myself decided
that we were still going out to the club.

We then got ourselves prepared to go to the club. This is when I put the gray jacket on. I put it on because it matched everything that I had on. Shortly after leaving the gas station, the car was stopped by "Richmond City Police."

I was taken to a local police precinct where I was interrogated by Detective Hughes. I informed Hughes that I did not see the robbers of "McMichael or Stabler" and that I had nothing to do with the robberies. I was then arrested and charged with the robbery of "Michael Payne."

On January 9, 2012 Devika Davis was appointed by the court to represent me. From that day forward, I told Ms. Davis that I did not rob McMichael or Stabler, and that I had no knowledge until after the fact. I told Ms. Davis that I only committed the robbery of Mr. Payne. On April 11, 2012 (my 1st trial day) I asked for a "Motion to Continuance" because I was unprepared to go to trial. Prior to that day, me and my lawyer never discussed a proper defense. I was granted the motion, and my trial was set for August 22, 2012. While awaiting trial, Straughter informed me that he was willing to testify in open court on

my behalf. I informed Ms. Davis about this evidence and witness. On July 23, 2012, Ms. Davis sent her assistant (Mr. Beaves) to interview Straughter. During this interview, Straughter informed Mr. Beaves that he was wearing gray sweater and not me. Sadly, no notes were taken during the interview or Ms. Davis is just telling me that no notes were recorded. But Ms. Davis supposed to had made sure Mr. Beaves recorded everything that Straughter told him.

Me and my attorney (majority Mr. Beaves) spoke a total of ten times prior to August 22, 2012. Not one time did we discuss a defense strategy. Every single visit was about me accepting a plea. Even down to the last visit before trial, after Ms. Davis knew that I wasn't accepting the plea, we still didn't discuss a defense. Ms. Davis mentioned some about "Accomplice Liability and Common scheme Plot," but in order to prove either of them, I knew the "Commonwealth" would have to get one of my co-defendants to say that I had prior knowledge, and that I conspired to

commit the robberies. I knew that none of my co-defendants were willing to say that, so I thought Ms. Davis was gone use that as our defense. I was also expecting straighter to testify, because Ms. Davis never mentioned to me that she wasn't gone call him as a witness. This is why I stated that I was prepared to go to trial. Had I known that I had no defense or witnesses presented, I would've asked for another "Continuance" and I would've also asked to have Ms. Davis withdraw from my case. Ms. Davis never raised an "Objection", never presented any evidence, nor did she cross-examine two key witnesses. (Det. Hughes or Officer Headman)

In between my conviction and my sentencing, my lawyer (herself) never came to see me. On 9-23-12 and 10-15-12, Mr. Heaves visited me to discuss my sentencing guidelines. He never even discussed a proper sentencing defense. During my sentencing, Ms. Davis did not present the mitigating evidence that was clearly available to her. Instead, Ms. Davis allowed the Commonwealth to portray me as a menace with no chance of ever becoming a productive member of society.

Sadly, with no evidence to the contrary, the judge sentenced me as if there was no hope for me.

In conclusion, according to my lawyer's own "handwritten case file," she came to visit me approximately twelve times. In which majority of the visits was from her assistant. I feel like the court didn't appoint Mr. Heaves as my attorney, the court appointed Ms. Davis. (I don't even think Mr. Heaves had a law license at this time.) And yet my life was placed in his hands, because after Ms. Davis realized that I wasn't accepting a plea for some I didn't do, she wanted nothing to do with me or my case. I may have told Det. Hughes an inaccurate story, but that was because I wasn't going to incriminate myself. But I told my lawyer the truth from the beginning and she believed the Commonwealth over me. It wasn't hard for Ms. Davis to prepare a proper defense for my case, that would've put the Commonwealth's case to the test that was guaranteed to me by the U.S. Constitution. Had she obtained the police reports.

or 911 tapes, she would've discovered that the only direct evidence that the Commonwealth had, was evidence that only points to me having on gray jacket sometime after the last robbery. Because Mr. Payne testified that I wasn't wearing gray jacket.

But my lawyer didn't know this because she never obtained any pre-trial statements and never attempted to. (According to her own case file.) Ms.

Davis listened to everything that the Commonwealth Attorney told her, she did not attempt to do her own investigation. Next, she could've made a argument at trial about why it is so important to allow the victims to remain in the courtroom.

Ms. Davis had to know that this would deprive me of a fair trial, for she brought the motion to the court's attention. But due to her unpreparedness,

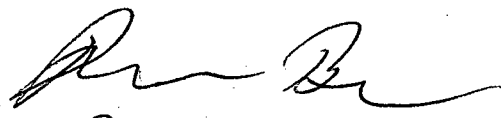
she wasn't expecting the prosecutor to disagree with her, therefore she had no argument. Third,

she should've tried to exclude me as one of the robbers in regards to Mr. Michael and Stabler.

To do this, all she had to ask each victim was, "Can they describe the suspect wearing the gray jacket, weight, height Etc. Etc."

Fourth, she

Could've used Mr. Payne testimony to corroborate the fact that I wasn't wearing gray jacket until after the crime-spree was over. For the only evidence that the Commonwealth had was the fact that I had on gray jacket at time of my arrest. Which also corroborate the fact that I only had on gray jacket after the crime-spree. Last but not least, Ms. Davis should've called Straughter, who would've testified that he was wearing gray jacket during the robbery. Instead, Ms. Davis presented no defense at all. Had I known that I had no defense what-so-ever, I would not have went to trial. There was no need to go to trial, if all the judge going to hear is the prosecutor's side of the story.


Debra Byrd #1446884