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NO. _____

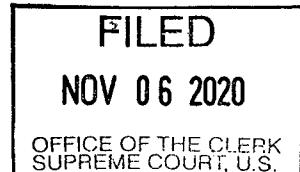
IN THE
SUPREME COURT OF THE UNITED STATES

SEAN P. REILLY,

Petitioner,

ORIGINAL

vs.



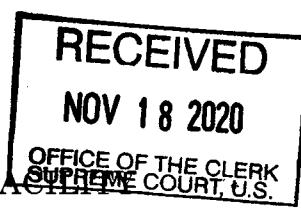
MARK INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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OVERVIEW

Sean Reilly filed a post-conviction motion in the state court raising several ineffective assistance of trial counsel claims collaterally challenging his conviction and sentence. The state court appointed post-conviction counsel and set the matter for an evidentiary hearing. Appointed post-conviction counsel abandoned meritorious ineffective assistance of trial counsel claims at the state court evidentiary hearing.

After exhausting his available state court remedies, Reilly filed a § 2254 federal habeas petition in the United States District Court. He raised the abandoned ineffective assistance of trial counsel claims in the federal petition. He invoked the United States Supreme Court precedent *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to excuse the procedural default caused by post-conviction counsel's ineffectiveness.

In denying Reilly's constitutional claims, the District Court adopted the Magistrate Judge's recommendation that Reilly failed to satisfy *Martinez*'s requirements because he could have easily discharged his post-conviction counsel if he did not agree with counsel's abandonment of his claims and pursued the claims by himself in *pro se* fashion; in other words, he did not have to acquiesce to counsel's decision. DE # 35 at 16. In drawing this conclusion, the Magistrate effectively limited the scope of *Martinez*, but cited no authority to support such limitation.

Reilly asks the Supreme Court to clarify the holding in *Martinez* to prevent lower courts in the federal judicial system from bypassing legitimate ineffective assistance of trial counsel claims.

QUESTION PRESENTED

1. **Does a federal habeas petitioner forfeit his or her opportunity to invoke *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and bring forth an otherwise unexhausted ineffective assistance of trial counsel claims in a § 2254 petition, where the Petitioner initially raised the claim in a state post-conviction motion, but appointed post-conviction counsel later abandoned the claim over the petitioner's express objection?**

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:

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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 _____; or

[] has been designated for publication but is not yet reported; or

[] is unpublished.

[] For cases from state court:

The opinion of the United States Court of Appeals 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 May 6, 2020. A copy of that decision appears at Appendix A.

[] 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: June 9, 2020 and a copy of the order denying rehearing appears at Appendix D.

[] An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

[] 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 _____.

[] 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 writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

Sixth Amendment right to effective assistance of counsel. 6th Amendment to the United States Constitution

28 U.S.C. § 2254 State custody; remedies in Federal courts

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

STATEMENT OF THE CASE

The issue in this case is whether a federal court can deny a § 2254 habeas petitioner's *Martinez*-based claim because the petitioner did not discharge state post-conviction counsel and fully exhaust the ineffective-assistance-of-trial counsel claim on his own in state court proceedings. This case requires the Supreme Court to elucidate the holding in *Martinez* and prevent federal courts from limiting the scope of clearly established law.

A.

Sean Reilly filed a § 2254 federal habeas petition in the United States District Court raising four *Martinez*-based ineffective-assistance-of-trial-counsel claims. His state court appointed post-conviction counsel abandoned these four constitutional claims against Reilly's wishes.

In the first ground of his § 2254 petition, Reilly argued that his trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, for failing to investigate exculpatory facts and pursue a viable defense of an un-willful violation at his community control revocation proceeding which would have proved he is actually innocent of the alleged violation. DE # 22 at 4-5. Because this claim is unexhausted in the state court, Reilly invoked the Supreme Court's holding in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), to excuse the procedural default. *Id.* at 4-5.

In denying this claim, the District Court adopted the Magistrate Judge's recommendation, which was two-fold. First, the Magistrate claimed that Reilly

failed to satisfy *Martinez*'s requirements because he could have easily discharged his post-conviction counsel if he did not agree with counsel's abandonment of his constitutional ineffective assistance of trial counsel claims and pursued the claims by himself in *pro se* fashion; in other words, he did not have to acquiesce to counsel's decision. DE # 35 at 16. In drawing this conclusion, the Magistrate effectively limited the scope of *Martinez*, but cited no authority to support such limitation. *Id.* Second, the Magistrate concluded that even if *Martinez* were activated, the claims nonetheless fail on the merits. DE # 35 at 16.

Reilly argued on appeal to the United States Circuit Court of Appeals for the Eleventh Circuit that no competent counsel would have abandoned the claim concerning trial counsel's failure to pursue an unwillful violation defense. And this is especially true where counsel had the hard work done for him: Reilly filed a *pro se* rule 3.850 motion raising the ineffective-assistance-of-trial-counsel claim at issue. Counsel then abandoned the claim over Reilly's express objection.¹ Certainly no competent counsel would have taken this action.

The Magistrate Judge and the District Court Judge concluded that, under these facts, Reilly forfeited his opportunity to invoke *Martinez* so as to excuse the procedural default of this claim because he acquiesced to post-conviction counsel's decision. Reilly argued that this was a plainly erroneous interpretation of *Martinez*.

As Reilly explained in his objections to the Magistrate's report and recommendation, his post-conviction counsel refused to pursue the claims, insisting

¹ Correspondence between Reilly and postconviction counsel was attached to Reilly's objection to the Magistrate's report and recommendation.

that it did not have merit and that he had no choice but to abandon it. And so Reilly was left with two options: acquiesce to counsel and allow counsel to abandon the claim, or represent himself at the evidentiary hearing. Reilly is not an attorney. He had no hope of prevailing on any of his claims absent the assistance of counsel. Reilly was therefore compelled to allow counsel to abandon the claims.

Reilly argued that contrary to the Magistrate Judge's findings, just because Reilly acquiesced to counsel does not mean he forfeited his opportunity to bring the abandoned claims to the federal district court under *Martinez*. It just means that counsel, under these circumstances, performed objectively unreasonable under prevailing professional norms, as contemplated by the Supreme Court in *Martinez*. The Magistrate Judge and the District Court erred in concluding otherwise.

Reilly's claim was meritorious and thus "substantial" under *Martinez*

In addition to concluding that Reilly was precluded from utilizing *Martinez* to overcome the procedural default due to his acquiescence to post-conviction counsel's abandonment of the claim, the Magistrate Judge and the District Court also concluded that the claim is not "substantial" within the meaning of *Martinez* because it does not have at least some merit. DE # 35 at 16.

The question whether an ineffective assistance of trial counsel claim is "substantial" under *Martinez* is not the same as a merits review.

Here, Reilly satisfied more than a mere preliminary *Strickland* review. This claim is premised upon trial counsel's failure to investigate exculpatory facts and present a viable defense of an unwilling violation of community control. DE # 22 at 4-5. In support of this claim, Reilly explained that although he was not actually

searching for a job when he left his residence on the days in question (which formed the basis of the alleged violation of condition 15), counsel still could have demonstrated that the violation was unwilling under existing Florida law. *Id.* This is because once Reilly's probation officer authorized him to leave his residence, it could not be said that he violated condition 15 requiring him to stay confined to his residence, regardless of whether he was actually searching for a job. *Id.*

Moreover, Reilly asserted that, had post-conviction counsel done a little research, counsel would have discovered that there are several Florida cases that support this proposition and prove actual innocence. Reilly cited them not only when he replied to the State's response to his federal habeas petition. DE#30. He cited them in his objections to the Magistrate's report and recommendation. DE# 43.

Nonetheless, the Magistrate Judge and the District Court completely disregarded these cases and focused instead on the things Reilly was actually doing when he was supposed to be looking for a job. Instead of searching for a job, the Magistrate explained, Reilly was out doing things like "playing basketball at a local park," "visiting a friend at the friend's house and a park," and "visiting a park and restaurant," and "attending a professional baseball game." DE # 35 at 16. Although the Magistrate Judge's position may seem plausible – after all, what *was* Reilly doing playing basketball and visiting friends when he was on house arrest – Florida case law unambiguously holds that a probationer cannot be violated for failing to remain confined to his or her residence where the probation officer permitted the probationer to be absent from the residence for a certain period of time. And this is

true despite what the probationer may or may not have been doing while they were absent. While this may seem a bit outlandish, it is completely consistent with Florida case law.

Reilly argued that Florida's Fourth District Court of Appeal in *Shelton v. State*, 851 So.2d 912 (Fla. 4th DCA 2003) held that “[i]t is well established that a defendant's probation/community control *cannot be revoked for conduct that is not prohibited or required by the order of probation/community control.*” *Id.* At the revocation hearing, Shelton's employer testified that Shelton was not at work on the relevant dates. *Id.* The Fourth District explained that “the condition that Shelton was found to have violated simply does not require him to be at his place of employment; rather, it requires him to be at home with some limited exceptions.” *Id.* The Fourth District reversed the order of revocation because the condition required that Shelton “remain confined to [his] except for one half hour before and after [his] approved employment, community service work, or any other activities approved by [his] officer.” *Id.* at 913.

Consequently, Reilly argued that just like *Shelton*, the condition that Reilly was found to have violated, “simply does not require him to be at his place of employment; rather, it requires him to be at home with some limited exceptions.” *Id.* One of those exceptions was that he could leave his residence when granted permission to do so. At the revocation hearing, Probation Officer Guelsy Herrera admitted that she gave Reilly permission to leave his residence to search for employment on certain days and for certain periods of time. (T. 238) He asserted

that during the periods of time that Reilly was not at his residence, he was authorized to be absent. Thus, had trial counsel presented an unwillful violation defense as in *Shelton*, Reilly could not have been found guilty of violating the condition that required him to stay confined to his residence with limited exceptions. If the State alleged the wrong violation based on the facts of the case, then that was the State's problem, not Reilly's.

There are several other cases in which trial counsel could have used to support Reilly's contention of an unwillful violation of his community control. *See, e.g., Eubanks v. State*, 903 So. 2d 1005 (Fla. 2d DCA 2005) (Defendant's failure to remain confined to her own residence on four occasions did not warrant revocation of community control where community control officer authorized defendant to be absent from her residence to perform community control); *Berthiaume v. State*, 755 So. 804 (Fla. 2d DCA 2000) (same); *Lawhorn v. State*, 145 So. 2d 987 (Fla. 1st DCA 2014) (same); *Hicks v. State*, 874 So.2d 699 (Fla. 1st DCA 2004) (same).

Therefore, the ineffective-assistance-of-trial-counsel claim had merit as if the unwillful violation defense would have been pursued by counsel he would have proved that Reilly could not have had his probation revoked when he was given permission from the probation officer to leave his home.

QUESTION TO BE ANSWERED

The Supreme Court should answer the following question: Does a federal habeas petitioner forfeit his or her opportunity to invoke *Martinez* and bring forth an otherwise unexhausted ineffective-assistance-of-trial-counsel claim in a § 2254 petition, where the petitioner initially raised the claim in a state post-conviction motion, but appointed post-conviction counsel later abandoned the claim over the petitioner's express objection. As it stands, there is a dearth of federal case law addressing this factual scenario.

REASONS FOR GRANTING THE PETITION

Petitioner asks the Supreme Court to grant this petition to clarify the holding in *Martinez*. This case would prevent the federal district courts from limiting the scope of *Martinez* in future § 2254 federal habeas proceedings.

In *Martinez v. Ryan*, the Supreme Court held that post-conviction counsel's failure to raise an ineffective-assistance-of-trial-counsel (IATC) claim at an initial review collateral proceeding could serve as the necessary "cause" to overcome the procedural default of that type of claim when the state prohibits it from being raised during the direct review process. *Id.*, 566 U.S. at 11-12. A federal habeas petitioner seeking to utilize *Martinez* must demonstrate that post-conviction counsel was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Id.*, 182 L. Ed. 2d at 286. Pursuant to *Strickland*, a petitioner must show both that his attorney's performance fell below an objective standard of reasonableness and that the performance prejudiced the defense. *Strickland*, 466 U.S. at 688.

The proper measure of attorney performance is "simply reasonableness under prevailing professional norms" considering all the circumstances. *Hinton v. Alabama*, 571 U.S. 263, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014) (citing *Strickland*, 466 U.S. 687 (internal quotations and citations omitted)). To be objectively unreasonable, the performance must be such that no competent counsel would have taken the action in question. See *Rose v. McNeil*, 634 F. 3d 1224, 1241 (11th Cir. 2011); see also *Hall v. Thomas*, 611 F. 3d 1259, 1290 (11th Cir. 2010).

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. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029 (2003) (describing standards for certificate of appealability to issue).

The Supreme Court did not intend for *Martinez* to restrict § 2254 federal habeas petitioners from raising procedurally defaulted ineffective-assistance-of-trial-counsel claims because they could not compel their post-conviction counsel to argue the claim in the state post-conviction proceeding. The district court's interpretation runs awry of the cause-and-prejudice standard. The cause for not fully exhausting this claim in the state court was that post-conviction counsel abandoned it and the petitioner was prejudiced by counsel's decision because the ineffective-assistance-of-trial-counsel claim had some merit.

Here, no competent counsel would have abandoned the claim concerning counsel's failure to pursue an unwillful violation defense. And this is especially true where counsel had the hard work done for him: Reilly filed a *pro se* rule 3.850 post-conviction motion raising the very ineffective-assistance-of-trial-counsel claim at issue. Appointed post-conviction counsel then abandoned the claim over Reilly's express objection (*letters between Reilly and counsel demonstrated Reilly's insistence on raising the claim*). Certainly no competent counsel would have taken this action.

Like many similar § 2254 federal habeas petitioners, one is stuck between a rock and a hard place in having to choose between allowing post-conviction counsel,

who has more experience than a *pro se* prisoner, to go forward with their strategy or fire post-conviction counsel and represent themselves at a state post-conviction evidentiary hearing to ensure that the claim does not get abandoned by a qualified attorney.

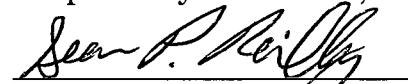
This Court should decide whether a § 2254 federal habeas petitioner actually forfeits their opportunity to bring an abandoned claim in United States District Court under *Martinez*. It just means that counsel, under these circumstances, performed objectively unreasonable under prevailing professional norms, as contemplated by the Supreme Court in *Martinez*.

There is a dearth of case law on the issue. Thus, it is important for this Court to clarify the federal court's misinterpretation of *Martinez v. Ryan* so that it is not misapplied in future cases by federal courts across the country.

CONCLUSION

Petitioner respectfully prays that this Court grant him a writ of certiorari to clarify this issue.

Respectfully Submitted,



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