

20-7685
No.

Supreme Court, U.S.
FILED

FEB 11 2021

OFFICE OF THE CLERK

In the Supreme Court of the United States

TERRANCE HEARD,
Petitioner,

v.

GRADY PERRY, Warden
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

QUESTION PRESENTED

- I. Whether the Tennessee District Courts are correctly considering whether a procedurally defaulted IATC claim is substantial, having merit, presented under the *Miller-El Cockrell* standard, which was defined in this Court's *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), decision, when the District Courts are denying consideration of these claims, without any factual development?

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceeding other than those listed in the style of the case. Petitioner is Terrance Heard. Respondent is Grady Perry, Warden.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terrance Heard respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, rendered and entered in Case Number 19-6323, in that court on November 17, 2020, *Terrance Heard v. Grady Perry, Warden*,¹ which affirmed the final order of the United States District Court for the Western District of Tennessee for the Eastern Division denying relief under 28 U.S.C. § 2254.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Sixth Circuit, *Terrance Heard v. Grady Perry*, Case No: 19-6323 (6th Cir. 2018), appears at Appendix_A, which affirmed the final Order from the United States District Court for the Western District of Tennessee for the Eastern Division, appearing at Appendix_B. The Opinion from the Tennessee Court of Criminal Appeals wherein it was determined the IATC claim were not presented, appears at Appendix_C. The Tennessee Supreme Court Order Denying Application for Permission to Appeal, appears at Appendix_D.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on November 17, 2020. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 2253(c)(2) in light of the district court's denying a certificate of

¹ See Attached Appendix_A.

appealability.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners intend to rely upon the following Constitutional provision:

II. U.S. CONST. AMEND. V

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law.

III. U.S. CONST. AMEND. VI

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to.....to have the Assistance of Counsel for his defense.

IV. FEDERAL STATUTORY PROVISIONS

28 U.S.C. § 2254 provides in relevant part:

(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.

28 U.S.C. § 1254 provides in relevant part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2253 provides in relevant part:

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State

court;.....

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner Terrance Heard, State prisoner, serving a Life sentence for first-degree murder, sought to vacate his conviction under 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus. Mr. Heard laid out several claims asserting he was provided the ineffective assistance of trial counsel (IATC). Mr. Heard also set forth that the claims regarding this IATC, were procedurally defaulted, of which he could show cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012).

On September 15, 1997, during the course of an enforcement of a gang rule violation, from a gang based out of Memphis, Tennessee, known as the Gangster Disciples, Marshall Shipp was killed. The gang rule violation consisted of a 6 minute beating while in the middle of a circle formed by other members of the gang. If you weren't a member of the gang then you would not be allowed to be participate. Understanding this very important fact is relative to the State withholding exculpatory evidence and presenting knowing false testimony at Petitioner Heard's trial.

Ricky Aldridge and Timothy Aldridge, both self-admitted members of this Gangster Disciple gang, participated in locating Shipp, going along with Shipp to the place wherein the violation would be administered and participated in the violation-beating that resulted in Shipp's death.

The plan was that a 6 minute beating would take place against Shipp and Ricky Aldridge. There is undisputed facts that establish this was the States position. This form of violation-beating was a lesser degree of punishment,

being there consisted various degrees of beatings, such as a mouth shot, a three-minute beating, a six-minute beating, or a "pumpkin head deluxe," depending upon the severity of the violation. All of these beating punishments involved the use of fists only, no weapons. The "pumpkin head deluxe" involved putting the victim in a full nelson and allowing other members to beat his head for six minutes until his head was the size of a pumpkin.

Somewhere amid the violation-beating of Shipp, it escalated to more, being that tire irons and bats were used to beat Shipp to death. Another gang member shot Shipp in the butt after the beating.

Ricky & Timothy Aldridge participated in the violation-beating of Shipp and yet when they were presented before the jury, it was as if they were victims. The prosecution went as far as to bolster their testimony, by stating that they were not receiving any deals or promises in exchange for their testimony. When in fact, the very acts both Ricky & Timothy Aldridge admitted to having participated were exactly the same acts Petitioner was convicted of participating.

Because none of these issues were raised by post-conviction counsel, the issues were procedurally defaulted.² Petitioner thereby raised them through the *Martinez* gateway, establishing that he was denied his constitutional right to the effective assistance of trial counsel. Post-conviction counsel fell below the demanded norm in failing to raise this substantial claim in the post-conviction proceedings.

Specifically, as it relates to the claims under twenty-eight through thirty-one, regarding the State withholding exculpatory evidence, the Sixth Circuit erroneously holds Petitioner Heard to a higher standard set forth by *Martinez*.

² Failed to prepare an adequate record for appellate review as required by Tenn. R. App. P. 24(b).

which, under the 6th Circuits standard under Martinez, requires Petitioner Heard to prove the outcome of the proceedings would have been different. When in fact, *Martinez*, simply requires a Petitioner to show that a reasonable jurist would debate.

Based upon the fact that the State presented evidence by Ricky & Timothy Aldridge, that: **(1)** they were members of the Gangster Disciples in Memphis, Tennessee; **(2)** they both participated in voting about what form of violation was to take place on Ricky and Shipp; **and (3)** they participated in serving the violations.

The very same evidence that established the above three (3) essential facts, is the exact same evidence the State used to prosecute and convict the Petitioner. It is the exact same evidence the Sixth Circuit states is mere speculation on the part of Petitioner that there was some kind of non-prosecution agreement with Ricky & Timothy Aldridge.

It is unquestionable that the State never once has proven that the violation being served on Ricky Aldridge and Marshal Shipp was anything other than a 6-minute violation-beating. It is unquestionable that if Ricky Aldridge and Timothy Aldridge voted on and participated in beating of Shipp, the only way the State would not have prosecuted them is if they were given a non-prosecution agreement. The undisputed fact that trial counsel had these very same essential facts before him and thought enough to ask whether there was an agreement during trial and file pretrial motions seeking non-prosecution agreements between the State and these witnesses, goes to show it was much more than mere speculation. A reasonable jurist would debate the fact if trial counsel went as far as having this much interest but never once was provided an evidentiary setting to develop the facts, or sought out such, this was in fact a

substantial claim that should have been raised in the post-conviction proceedings.

Furthermore, Petitioner Heard submitted responses to the Request For Admissions establishing Robert Walker received a deal, when the State assistant district attorney general admitted as much in response to the request for admissions. These request for admissions were part of the Motion seeking fact-development procedures to be held so that it would determine the facts regarding the *Martinez*.

The district court denied all the fact-development procedures sought by Petitioner. Turning around and stating that the Petitioner has provided no affidavits or evidence supporting his assertions. Fact is, had the IATC claim been properly considered under *Martinez's* "substantial" claim standard under *Miller-El Cockrell*, 537 U.S. 322 (2003), it would have been considered a substantial claim, being that reasonable jurist would debate the fact that if the State provided the evidence being sought, it would show there was favorable treatment being given to the State's witnesses in exchange for their testimony. Namely, the fact it was not prosecuting active participants in the offense of which they were prosecuting Petitioner Heard. A crucial fact the trier of fact, (jury) must have in order to protect Petitioner Heard's due process rights secured under the 14th Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

- I. The Court Should Grant The Writ To Clarify The Standard Under Which Procedurally Defaulted Claims Of IATC Are Considered "*Substantial*" Under *Martinez V. Ryan*.**

In March of 2012, in *Martinez v. Ryan*, the U.S. Supreme Court announced

a new type of cause under the cause-and-prejudice exception to procedural default in federal habeas cases. This new type of cause allowed federal courts to review a subset of claims that had been procedurally defaulted in State habeas proceedings due to the ineffectiveness of post-conviction counsel. The parameters of that subset were the source of a heated debate on the Supreme Court. The majority, limiting its analysis to the facts before it, claimed that the new cause excused only claims of IATC. The dissent, however, argued that the new cause would apply to other claims as well. That has since been decided by this Court in *Davilla v. Davis*, 582 U.S. ____ (2017). However, the crux of many of the claims of ineffective assistance of trial counsel that are failing to be considered are based upon the unclear meaning of what a substantial claim is.

The application of *Martinez* and the standard of considering whether or not a petitioner clears the procedural default bar are unclear across the circuits, and unclear within these individual circuits. When considering whether an IATC claim is a "substantial" claim to excuse procedural default, this Court should clarify exactly what "substantial means under *Miller-El Cockrell*, when being considered under *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Defining Substantial for Petitioners Claims of Ineffective Assistance of Trial Counsel

The substantial claim requirement is met if Heard's IATC claim is "substantial," meaning 'the claim has some merit,' analogous to the substantiality requirement for a certificate of appealability." (quoting *Martinez* 556 U.S. 1, 14)). Thus, the question, for *Martinez* purposes, is merely whether "reasonable jurists could debate" that Heard's IATC claim has merit, or whether the claim is "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*,

529 U.S. 473, 483 (2000)). In considering whether Heard's IATC claim is substantial, the district court is guided by the two-part *Strickland* analysis, but should remain mindful that the “substantiality” inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.

Heard's IATC claim is “adequate to deserve encouragement to proceed further. Trial counsel’s performance fell below an objective standard of reasonableness, satisfying the performance prong of *Strickland*, when there are two witnesses testifying as to their actual involvement counsels client is being accused and counsel never objects or seeks out the fact why they are **not** being charged. Trial counsel simply asked whether they were receiving any leniency and when they responded no, trial counsel shrugs and states there are no further questions. There is no discernible strategic reason why trial counsel would refrain from making an inquiry, after all, counsel did ask about receiving a deal. With respect to the prejudice prong of *Strickland* as it might have been envisioned in *Martinez*, the *Martinez* Court does not address it, other than to say at the conclusion of the opinion that the court of appeals “did not address the question of prejudice.” *Id.* at 18.

It would seem that, in light of the relatively light “substantiality” test regarding the merits of the IATC claim, a strict prejudice analysis for *Martinez* purposes would be misplaced. Indeed, the Ninth Circuit Court of Appeals addressed this issue and reasoned that if a petitioner “were required to show prejudice, in the ordinary *Strickland* sense,” at the *Martinez* stage, “this would render superfluous the . . . *Martinez* requirement of showing that the underlying *Strickland* claims were ‘substantial’— that is, that they merely had ‘some merit.’” See *Dietrich*

v. *Ryan*, 740 F.3d 1237, 1246 (Dec. 10, 2012)), (quoting *Martinez*, 566 U.S. at 14). In other words, a somewhat relaxed prejudice analysis, in the *Detrich* court's eyes, was "necessary to harmonize" the various *Martinez* requirements.

It could be that the need for a showing of prejudice at the *Martinez* stage might rise and fall depending upon the strength of the IATC claim. Here, where counsel's performance was shown that he questioned whether these witnesses for the State were being given leniency in exchange for their testimony, being that the witnesses admitted to have participated in the essential elements of the offense his client was being tried for, but by failing to go through the gate regarding the State offering leniency to them seems clearly substandard under the first prong of *Strickland*.

Petitioner Heard avers that an evidentiary hearing may be necessary to determine whether trial counsel was ineffective. *See Martinez*, 566 U.S. at 11-12 (noting that IATC claims can require "investigative work" and that "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"). A hearing is particularly useful in this case since Heard's IATC claim turns on the performance prong of *Strickland*. Since, in order to determine whether Heard's attorney's performance was deficient, it is necessary to ask the attorney to state the strategic or tactical reasons for his actions. Here, where Heard's IATC claim hinges on the prejudice prong of *Strickland*, and the factual record has never been fully developed on that issue, evidentiary hearing is necessary.

The district court denied the IATC claim based upon a position that

no affidavits or evidence were submitted in support of the claims that the Aldridge brothers had agreements with the State for leniency. When it is undisputed that the district court recognizes that the State objected to and the Court denied having any fact-development procedures.

However, the district court holds Petitioner Heard to a higher standard attempts to reach the merits of the *Strickland* analysis by stating "Robert Walker's testimony betrays Petitioner's allegations. (R. ECF No. 15-10 at PageID 1554-56.) Walker testified during trial that he expected the prosecutor to consider his trial testimony in resolving his pending aggravated robbery charge. Petitioner's trial counsel cross-examined Walker about his expectation of leniency. (*Id.* at PageID 1609-11.) Plus Ricky Aldridge testified that the State did not charge him for his role in this case. (*Id.* at PageID 1516.)"

The fact is, during the State court's determination on direct appeal, the Court determined that Walker held the position of chief of security for Memphis in the Gangster Disciples organization until he was arrested on two counts of aggravated robbery in the fall of that year. Walker later pled guilty to two counts of facilitation of robbery and agreed to cooperate with the State in this case. This would appear at the time of Mr. Heard's trial that no deal had been reached. However, based upon the guilty plea proceedings, the district attorney general made it clear that the negotiated plea deal between Walker and the State of Tennessee was based upon his favorable testimony against the individuals on the Shipp murder. In fact the State offered Robert Walker, who had confessed to at least two prior murders and was directly involved with the Shipp murder, a time served deal on an Aggravated Robbery, wherein he was facing a

30 year minimum sentence.

As for the showing of prejudice under the *Strickland* prong, requires a petitioner to demonstrate “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” To make this determination, federal habeas courts must weigh the evidence adduced in the habeas proceeding and that adduced at trial against the aggravating evidence.

The problem in the district courts in Mr. Heard's case, is the fact that there has been no evidence adduced in any proceeding wherein factual-development of his IATC claim, was conducted. These are precisely the circumstances that led this Court in *Martinez v. Ryan*, to recognize a narrow exception to the procedural default doctrine under which the ineffective assistance of counsel in an initial-collateral-review-proceeding may provide "cause" to excuse the default of a substantive claim of ineffective assistance of trial counsel. As in *Martinez* and *Trevino*, the Tennessee system makes the State post-conviction proceedings the first occasion for prisoners to develop the record necessary to establish ineffective assistance of trial counsel.

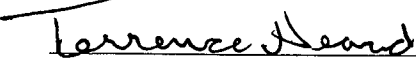
Holding Mr. Heard to a higher standard in presenting a "substantial claim of IATC under *Martinez*, is contrary to this Courts reasons why it opened the narrow exceptions of *Coleman*, procedural default gate in *Martinez* and should be clearly established.

CONCLUSION

Whereas the above premise being considered, this Court should grant the instant Writ of Certiorari to the Court of Appeals for the Sixth

Circuit and reverse the judgment below, remanding the case to permit
Heard fact-development on his IATC claim under the standards set forth
in *Martinez*.

Respectfully Submitted,


Terrance Heard

October 2020