

No. _____

In The
Supreme Court of the United States

TONY KING,

Petitioner,

v.

STANLEY PAYNE, Warden,
Eastern Reception, Diagnostic and Correctional Center,

Respondent.

**On Petition For A Writ Of Certiorari To the
Supreme Court of Missouri**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Mr. King filed a petition for habeas corpus relief from his state convictions for first degree murder, felony child abuse, and second-degree arson. Mr. King is serving a life sentence without parole for the murder conviction and two fifteen-year consecutive sentences for his other convictions. The district court denied seven of Mr. King's ineffective assistance of counsel claims as being procedurally barred, and did not issue a certificate of appealability. Rather than following the review procedure set out in *Martinez*, the district court did a full merits review of these claims under *Strickland* when denying them. Mr. King appealed. The Eighth Circuit denied Mr. King a certificate of appealability. Accordingly, the case presents the following question:

The question presented is:

Does a petitioner need to meet the *Strickland v. Washington*, 466 U.S. 668 (1984) standard when presenting a defaulted claim under the *Martinez-Trevino* exception or does he simply need to show that the ground for relief is factually supported and is not “without merit?”

**LIST OF PARTIES AND CORPORATE DISCLOSURE
STATEMENT**

All parties appear in the case caption on the cover page of this petition.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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In The
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Tony King respectfully prays that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court entered in this case.

OPINIONS BELOW

The order of the Eighth Circuit denying Mr. King a certificate of appealability is printed at Appendix (hereinafter “App.”) p. 1a. The memorandum and order of the district court is printed beginning at App. 2a

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on October 6, 2020, denying Mr. King a certificate of appealability. That court denied a timely petition for rehearing or, in the alternative, for rehearing en banc, on December 30, 2020. This Court has jurisdiction under 28 U.S.C. § 1257 to review this Petition. Under this Court’s March 19, 2020, Order, Mr. King’s petition for certiorari is due June 1, 2021.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

U.S. Const. Amend. XIV

The Fourteenth Amendment to the United States Constitution provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. King is a Missouri state prisoner due to the sentence and judgment of the Buchanan County, Missouri Circuit Court. A jury found Mr. King guilty of first-degree murder, first-degree child abuse and second-degree arson for the death of his son. The trial court sentenced Mr. King to consecutive sentences of life without the possibility of parole for his son's murder and fifteen years' imprisonment for the abuse and arson counts. Mr. King timely appealed his convictions and sentences without success. Subsequently, he sought post-conviction relief under Missouri law which was also denied.

After the exhaustion of his state remedies, Mr. King filed a timely habeas petition. After briefing, the U.S. District Court, Western District of Missouri, denied relief as to all grounds. Also, the district court denied a certificate of appealability (COA). Mr. King timely appealed. The Eighth Circuit denied Mr. King a COA and his petition for rehearing.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI AND FIND THAT A HABEAS PETITIONER DOES NOT HAVE TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL AS TO THE UNDERLYING DEFAULTED CLAIM UNDER *STRICKLAND* TO BENEFIT FROM THE *MARTINEZ-TREVINO* EXCEPTION TO PROCEDURALLY DEFAULTED CLAIMS.

Mr. King raised seven ineffective assistance of counsel claims in his amended habeas petition that were procedurally defaulted. Specifically, he alleged that trial counsel was ineffective for: (1) failing to properly develop and present a defense of third-party guilt; (2) failing to properly investigate and call an expert regarding the cause of the fire to rebut the State's expert; (3) failing to properly investigate his son's autopsy; (4) failing to object to the State's late endorsement of a witness; (5) failing to impeach a witness; (6) incorrectly advising him that if he was convicted and sentenced to a life sentence it would be with parole; and (7) failing to request a mistrial because of witness misconduct. In denying these claims, the district court did not perform an analysis under *Martinez* to determine whether the underlying claim was "substantial" but addressed the merits of each ineffective assistance of counsel claims under *Strickland*. App. 29a-40a.

In 2012, this Court reversed a long line of inferior court decisions that had erroneously extended the procedural bar ruling of *Coleman v. Thompson*, 501 U.S.

722 (1991) beyond its intended scope in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

Writing for the *Martinez* majority, Justice Kennedy stated:

Coleman, however, did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default. The alleged failure of counsel in *Coleman* was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner's claims had been addressed by the state habeas trial court.

Id.

As Justice Kennedy elaborated:

Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert [v. Michigan]*, 545 U. S. 605, 619 [(2005)]. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

Id. at 1317). Thus, *Martinez* held that ineffective assistance by post-conviction counsel – in a state where ineffective assistance of trial counsel cannot be raised on direct appeal – will provide the "cause" necessary to overcome a procedural default in a subsequent 28 U.S.C. § 2254 proceeding.

Mr. King's Missouri Rule 29.15 proceeding before the state motion court was the first available forum where he could advance his claims of ineffective assistance of trial counsel. If Mr. King can show that postconviction counsel's conduct in litigating his 29.15 action before the motion court was constitutionally deficient under *Strickland v. Washington*, 466 U.S. 668 (1984), he can eliminate any procedural impediment to a full and fair review of his underlying claims of ineffective assistance of trial counsel under *Martinez*. 132 S. Ct. at 1318-1319. Contrary to the district court's holding, Mr. King, however, did not need to meet the *Strickland v. Washington*, 466 U.S. 668 (1984), standard as to the underlying ineffective assistance of trial counsel claim at this juncture to come under the *Martinez-Trevino* exception. Rather, he simply needed to show that the procedurally barred grounds were factually supported and not "without merit." *White v. Warden*, 940F.3d 270, 276 (6th Cir. 2019), quoting *Martinez*, 566 U.S. at 16. Mr. King did this and was entitled to an evidentiary hearing. As the Ninth Circuit observed, "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state [postconviction relief ("PCR")] counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him." *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (plurality op.), 740 F.3d at 1247, citing *Strickland*, 466 U.S. at 694. The district

court ignored *Martinez* when it addressed the merits of Mr. King's defaulted ineffective assistance of counsels without holding a hearing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 2021

APPENDIX

Judgment of the Eighth Circuit Court of Appeals (October 6, 2020)	1a
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