

No. ____

**In the
Supreme Court of the United States**

DONALD G. KARR, JR.,

PETITIONER,

v.

MARK SEVIER,

RESPONDENT.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the *Davis-Hatton* Procedure is unconstitutional as-applied to Mr. Karr's case and whether the Indiana State Courts and United States District Court For The Southern District of Indiana erred in denying Mr. Karr Sixth and Fourteenth Amendment's guaranteed right to counsel and due process.

Whether the appellate attorney provided ineffective assistance of counsel by initiating a Davis Petition.

Whether the United States District Court For The Southern District of Indiana erred in not holding ineffective assistance of counsel when Petitioner's counsel objectively failed, with that failure's impact a disproportionately positive multiplier effect forgone, when the standard of review is not about whether there would be a different verdict with the evidence, but whether in its absence he received a fair trial.

Whether the United States District Court For The Southern District of Indiana erred in not holding ineffective of counsel from an accumulation or errors.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Donald G. Karr, Jr.

Keith Butts, Warden of the New Castle Correctional Facility, in New Castle, Indiana, where Petitioner Karr currently is in custody

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA

Case No. 1:19-cv-01973-JPH-TAB

DONALD G. KARR, JR., v. KEITH BUTTS

Writ of habeas corpus DENIED. Application for
Certificate of Appealability GRANTED. Judgment
Dated 7/28/2021.

UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Case No. 21-2463

DONALD G. KARR, JR. v. MARK SEVIER

Appeal on Petition for Writ of Habeas Corpus
DENIED. District Court Judgment AFFIRMED.
Judgment dated 3/30/22.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDINGS.....	ii
LIST OF PROCEEDINGS.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE	4
A. Concise Statement of Facts Pertinent to the Questions Presented.....	4
B.Procedural History	5
REASONS TO GRANT THIS PETITION	13
I. THE DISTRICT COURT ERRED WHEN IT DID NOT RESOLVE THAT THE INDIANA COURTS' APPLICATION OF THE <i>DAVIS- HATTON</i> PROCESS WAS UNCONSTITUTIONAL AS-APPLIED HERE	13
A. <i>THE DISTRICT COURT ERRED WHEN IT DID NOT RESOLVE A MARTINEZ- TREVINO EXCEPTION TO THE PROCEDURAL DEFAULT RULE</i>	14

B. <i>THE DISTRICT COURT SHOULD FIND THAT APPLICATION INDIANA’S DAVIS-HATTON PROCEDURE HERE IS INEFFECTIVE.</i>	16
C. <i>THE DISTRICT COURT ERRED WHEN IT DID NOT FOLLOW MARTINEZ-TREVINO SUPREME COURT DOCTRINE, THAT INDIANA’S DAVIS-HATTON PROCEDURE IS CAUSE THEREIN, FOR PETITIONER TO BRING NEW CLAIMS IN COURT.</i>	19
II. THE DISTRICT COURT ERRED WHEN IT DID NOT FIND INEFFECTIVE ASSISTANCE OF COUNSEL.	22
CONCLUSION	27
APPENDIX	
Appendix A	Opinion in the United States Court of Appeals for the Seventh Circuit (March 30, 2022)App. 1
Appendix B	Order Denying Petition for a Writ of Habeas Corpus and Directing Entry of Final Judgment in the United States District Court Southern District of Indiana Indianapolis Division (July 28, 2021).....App. 26

Appendix C	Final Judgment in the United States District Court Southern District of Indiana Indianapolis Division (July 28, 2021).....App. 55
Appendix D	Memorandum Decision in the Court of Appeals of Indiana (January 31, 2018).....App. 57
Appendix E	Order on State’s Motion for Summary Denial of the Petition for Post-Conviction Relief in the Superior Court No. 5 of Hamilton County (June 13, 2017).....App. 97

TABLE OF AUTHORITIES

Cases

<i>Brown v. Brown</i> , 847 F.3d 502 (7th Cir. 2017).....	14
<i>Clark v. State</i> , 648 N.E.2d 1187 (Ind. Ct. App. 1995).....	7, 21
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	15, 22
<i>Davis v. State</i> , 368 N.E.2d 1151 (1977)	<i>passim</i>
<i>Hatton v. State</i> , 626 N.E.2d 442 (Ind. 1993).....	<i>passim</i>
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	<i>passim</i>
<i>Peaver v. State</i> , 937 N.E. 2d 896 (Ind. Ct. App. 2010).....	18, 21
<i>Slusher v. State</i> , 823 N.E.2d 1219 (Ind. Ct. App. 2005).....	18
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	5, 19, 20, 21, 26
<i>Thomas v. State</i> , 797 N.E.2d 752 (Ind. 2003)...	7, 8, 21
<i>Thompson v. State</i> , 671 N.E. 2d 1165 (Ind. 1996)....	18
<i>Trevino v. Thaler</i> , 569 U.S. 413 (2013)	<i>passim</i>
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977).....	14
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	13
<i>Woods v. State</i> , 701 N.E.2d 1208 (Ind. 1998)	16, 17, 18, 19, 20

Statutes

28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	2
28 U.S.C. § 2253	2, 3

28 U.S.C. § 2254	1, 3, 4, 13, 14
28 U.S.C. § 1331	2

Constitutional Provisions

U.C. Const. Art. I, § 9, cl. 2	1
U.S. Const. amend. VI	2
U.S. Const. amend. XIV	2

Rules

Ind. Rules of Post-Conviction Remedies, § 8	18
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karr respectfully requests that a Writ of Certiorari be issued to review the United States District Court For The Southern District of Indiana's denial of Petitioner Karr's Petition for Writ of Habeas Corpus.

OPINIONS BELOW

The July 28, 2021, order denying Petitioner Karr's Petition for Habeas Corpus from the United States District Court For The Southern District of Indiana is reproduced in the Appendix ("Pet. App. 26-54").

The March 30, 2022, order from the United States Court Of Appeals For The Seventh Circuit is reproduced in the Appendix. ("Pet. App. 1-25"). This order is not published.

BASIS FOR JURISDICTION IN THIS COURT

This Petition is brought pursuant to 28 U.S.C. § 2254 and Article I, § 9, Clause 2 of the Constitution, and federal question jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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. VI.

The Fourteenth Amendment to the United States Constitution provides:

No person shall be deprived of life, liberty, or property without due process of law.

U.S. Const. amend. XIV.

Title 28 U.S.C. § 2253(c)(1)-(3) provides:

(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; or

(B) the final order in a proceeding under section 2255.

(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.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c)(1)-(3).

Title 28 U.S.C. § 2254(d)(1)-(2) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

The Incident In Question

On May 5, 2016, an alleged altercation took place between Mr. Karr and AP. Mr. Karr accused A.P. of having someone else in their home while he was at work, and the couple began to argue. Mr. Karr allegedly hit A.P. across her cheek with his open hand. Mr. Karr then allegedly pulled her by her hair hard enough for strands to fall out and demanded she performs oral sex on him. An unrelated inflammation of A.P.'s preexisting ovarian cysts caused the couple to then go to the hospital. They dropped A.P.'s children off at her parent's home on their way to the hospital.

While at the hospital, A.P. told first a nurse and then a police officer that Mr. Karr had hit her. She showed the officer a clump of hair she alleged Mr. Karr

pulled out of her head. The officer told A.P. he could not arrest Mr. Karr because A.P. had no physical signs of injury or bruising. He offered to take A.P. somewhere away from Mr. Karr, but she declined and went home with Mr. Karr after receiving treatment for her preexisting ovarian cyst condition.

When Mr. Karr and A.P. returned from the hospital that evening, there was another altercation between A.P. and Mr. Karr, where Mr. Karr allegedly hit A.P. again and demanded A.P. perform oral sex upon Mr. Karr. The following day, at a follow-up medical appointment related to her ovarian cysts, A.P. reported the events to a victim's advocate, law enforcement became involved, and Mr. Karr was subsequently arrested and charged. A jury trial was conducted in August of 2016. The trial court found Mr. Karr guilty of two counts of rape and one count of domestic battery.

B. Procedural History

Petitioner Karr was indicted for four charges related to his alleged sexual assault and battery of his girlfriend. Mr. Karr was represented by Trial Counsel Joshua Taylor at trial. Mr. Karr entered a plea of not guilty and did not testify at trial. On August 5, 2016, Mr. Karr was convicted of the four charges and sentenced on November 11, 2016, to over twelve years of prison. Karr then moved for a new trial with new post-conviction counsel, where he raised four grounds contending ineffective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). In the motion under *Strickland*, Karr's four grounds

contended: (1) failure of trial counsel to impeach the alleged victim, A.P., as to her consumption of illegal drugs; (2) failure of trial counsel to impeach A.P. on her request for drugs at the E.R. on the night of the alleged abuse; (3) failure of trial counsel to call a certain exculpatory witness, Gisele Karr; and (4) the failure of trial counsel to request a mistrial when the State referenced certain inadmissible evidence at trial.

In preparation for a hearing on the motion for new trial, Karr solicited the testimony of trial counsel, Joshua Taylor. Trial counsel testified as to the medical records he requested, the witnesses he called, and his decision to not explore alleged drug use by A.P. On September 19, 2016, the trial court conducted an evidentiary hearing on Karr's ineffective assistance of counsel claims. At this evidentiary hearing, Karr presented testimony from A.P.; a neighbor, a police officer involved in the investigation; and Taylor, trial counsel. However, the motion for new trial was denied on September 20, 2016, based on the evidence presented at the hearing.

On November 15, 2016, Karr timely filed a direct appeal to the denied motion for new trial. The appellate brief was due on or before January 26, 2017. But on January 6, 2017, while the direct appeal still pending, Karr petitioned the Indiana Court of Appeals to return the case to the Trial Court so that Karr could pursue post-conviction relief in the Indiana Trial Court. Such a petition is known as a "Davis petition" and is available under *Davis v. State*, 368 N.E.2d

1149, 1151 (1977); and see *Hatton v. State*, 626 N.E.2d 442, 443 (Ind. 1993).¹

Karr's Davis Petition went unopposed by the state, and the Indiana Court of Appeals granted Karr's petition to return to the trial court for post-conviction relief and dismissed the appeal.

On March 3, 2017, Karr filed a Verified Petition for Post-Conviction Relief, in which Karr raised seven grounds for relief, not the mere four grounds for relief raised in the previous motion for new trial. Furthermore, Karr raised a claim of actual innocence, stating: "Trial counsel committed ineffective assistance of counsel ... resulting in the conviction of an innocent man." Karr also raised other contentions, including that trial counsel failed to use exculpatory phone records; and, that trial counsel failed to use text messages between A.P. and Karr about A.P.'s narcotics use in the hours before the alleged criminal conduct. The State of Indiana moved for summary denial of Karr's Petition for Post-Conviction Relief, contending that res judicata barred Karr from raising any ineffective assistance of counsel claims in a postconviction proceeding, since they were already raised in Karr's motion for a new trial. In support of its position, the State cited *Clark v. State*, 648 N.E.2d 1187, 1190 (Ind. Ct. App. 1995), where the Indiana Supreme Court stated that res judicata is "fully applicable to post-conviction proceedings." And further, the State cited to *Thomas v. State*, 797 N.E.2d

¹ Importantly, counsel that represented Karr on appeal, informed the state court that she intended to file for a *Davis-Hatton* procedure.

752, 754 (Ind. 2003), where the Indiana Supreme Court similarly stated, “once raised on direct appeal, a defendant may not argue ineffective assistance of trial counsel in post-conviction proceedings.”

The Trial Court granted the State summary judgment dismissing the claims on res judicata grounds, reasoning that the seven post-conviction claims were collaterally estopped by the four claims in Karr’s original motion for a new trial.

In its Order denying the post-conviction petition, the trial court stated:

13. Although the Petitioner has abandoned two grounds of alleged ineffectiveness of counsel originally raised in the trial court, the allegations now raised in the Petitioner’s Petition for Post- Conviction Relief are otherwise the same. All of the grounds alleged in the pending Petition were directly argued, were available to be argued from the evidence and/or were available to be raised at the time of the hearing on Petitioner’s Motion for a New Trial.

14. In his Motion for a New Trial, the Petitioner sought to have his convictions for Domestic Battery and Rape vacated based upon the alleged ineffective assistance of counsel. This is the exact same relief requested in the Petitioner’s Petition for Post- Conviction Relief, and that relief is sought based upon the exact

same grounds that were raised or could have been raised and determined under Petitioner's Motion for a New Trial.

15. Finally, and most obviously, the parties to the controversy in the current matter are the same as those who were the parties to the original criminal case.

16. A court may grant a motion by either party for summary disposition of a petition for post-conviction relief when it appears that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

17. In this case, there is no genuine issue of material fact because the evidentiary issues now raised by the Petitioner have already been heard and decided against Petitioner in the original trial court.

Pet. App. 75-76.

In light of this dismissal, Karr moved the court to reconsider on June 21, 2017, which the court denied. Karr then appealed to the Indiana Court of Appeals on July 10, 2017, where Karr contended the Superior Court erroneously applied the doctrine of res judicata in barring his petition. However, the Indiana Court of Appeals denied the appeal, reasoning that:

A petitioner seeking post-conviction relief bears the burden of establishing grounds for relief by a preponderance of

the evidence. Post-Conviction Rule 1(5). A post-conviction court is permitted to summarily deny a petition for post-conviction relief if the pleadings conclusively show the petitioner is entitled to no relief. “An evidentiary hearing is not necessary when the pleadings show only issues of law; [t]he need for a hearing is not avoided, however, when a determination of the issues hinges, in whole or in part, upon facts not resolved.” *Kuhn v. State*, 901 N.E.2d 10, 13 (Ind. Ct. App. 2009) (quoting *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), trans. denied). On appeal, “A petitioner who is denied post-conviction relief appeals from a negative judgment, which may be reversed only if the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” *Collins v. State*, 14 N.E.3d 80, 83 (Ind. Ct. App. 2014).

The Court of Appeals concluded that since Karr’s claims as to ineffective assistance of counsel were raised and denied in the hearings on Karr’s motion for new trial, they were barred from being presented in a post-conviction proceeding. As the court noted, under Indiana law:

Claim preclusion applies when the following four factors are present: (1) the former judgment was rendered by a court

of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies.” *M.G. v. V.P.*, 74 N.E.3d 259, 264 (Ind. Ct. App. 2017) (internal quotations omitted).

With this reasoning, the Court of Appeals ultimately held:

We do not find that Karr’s claims are waived; we find that his claims of ineffective assistance of counsel have already been raised, heard, and decided. To the extent that Karr is arguing that only those claims of ineffective assistance of counsel that were raised on direct appeal may be barred by res judicata, we disagree with his suggestion that direct appeal is the exclusive basis for rendering the ineffectiveness assistance claims barred. We find that, in the unique posture and context of this case, it was not error for the postconviction court to find that Karr was not entitled to relitigate the claims, and we find no error with its decision to grant the State’s request for

*summary denial of Karr's petition for
post-conviction relief.*

Pet. App. 95-96.

In response to this denied appeal, Karr sought further review in the Indiana Supreme Court. In Karr's appeal to the Indiana Supreme Court, Karr argued that the courts below erred in not granting a further evidentiary hearing as to Karr's seven post-conviction ineffective assistance of counsel claims. Karr contended: "the necessity of an evidentiary hearing is avoided when pleadings show only issues of law, but the need for a hearing is not avoided when a determination of the ultimate issues hinges, in whole or in part, upon unresolved factual questions of a material nature." But despite these arguments, the Indiana Supreme Court denied Petitioner's appeal.

Following the Indiana Supreme Court's denial, Karr then petitioned the Supreme Court of the United States for a Writ of Certiorari on July 20, 2018. In Karr's Writ of Certiorari, Karr contended the decision of the Indiana Supreme Court conflicted with the Supreme Court precedent established under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). However, the Supreme Court denied the petition on October 1, 2018.

On June 5, 2019, Mr. Karr filed an amended petition for writ of habeas corpus relief to the United States District Court for the Southern District of Indiana claiming ineffective assistance of post-conviction counsel and appellate counsel under *Martinez* and *Trevino*. The District Court for

Southern Indiana denied the amended writ of habeas corpus but granted a Certificate of Appealability.

On appeal, the Seventh Circuit Court of Appeals, affirmed the District Court's holding.

Now, this Petition for Writ of Certiorari follows.

REASONS TO GRANT THIS PETITION

I. THE DISTRICT COURT ERRED WHEN IT DID NOT RESOLVE THAT THE INDIANA COURTS' APPLICATION OF THE *DAVIS-HATTON* PROCESS WAS UNCONSTITUTIONAL AS-APPLIED HERE.

The Antiterrorism and Effective Death Penalty Act of 1996 allows a federal court to grant habeas corpus relief in connection with a claim that was adjudicated on the merits in a state court if the state court decision (1) was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)–(2). The first requirement “refers to the holdings, as opposed to the dicta, of...[the Supreme Court's] decisions as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). As to the second requirement, deference is only given to the state court's factual findings if no unreasonable factual determination by the state court is found in light of the record. 28 U.S.C. § 2254(d)(2).

Karr also claims that *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017) support his argument that the Indiana procedure under *Davis/Hatton* does not provide for a meaningful review of ineffective counsel claims. In *Brown*, the Seventh Circuit Court of Appeals held that the *Martinez-Trevino* doctrine applied to post-conviction relief proceedings under Indiana law. Stated otherwise, the Seventh Circuit held that, for Indiana prisoners, “a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Id.* If Karr desires to proceed to federal habeas review under 28 U.S.C. § 2254, Karr must now contend that trial counsel and post-trial counsel-(including possibly his appellate counsel)-were all ineffective. Nevertheless, Karr claims the Indiana Supreme Court’s denial of his *Davis-Hatton* claims based on res judicata violated his federal constitutional due process rights.

A. *THE DISTRICT COURT ERRED WHEN IT DID NOT RESOLVE A MARTINEZ-TREVINO EXCEPTION TO THE PROCEDURAL DEFAULT RULE.*

As a general rule, federal district courts may not review habeas corpus claims that were not presented to a state court due to petitioner’s procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). As such, federal habeas petitioners that failed

to present their claims to the state courts will have their claims dismissed. *Id.* However, there is an exception to this general rule when petitioner can show “cause” for his failure to present claims to the state court. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Furthermore, the Supreme Court has held there is “cause” to ignore procedural default when there was ineffective assistance of counsel at initial review collateral proceedings. *Martinez*, 566 at 9 (“[i]nadequate assistance of counsel at initial review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.”) Under *Martinez*, if the first opportunity to raise ineffective assistance of counsel under state law arose in a collateral post-conviction proceeding, a reviewing federal court may then evaluate procedurally-defaulted habeas claims. *Id.* at 4, 9. As the Supreme Court reasoned, when state court procedural rules don’t allow petitioners to argue ineffective assistance of counsel until a collateral proceeding, where the evidentiary record is already solidified, that is cause to allow the federal court to ignore the procedural default. *Id.*

But the *Martinez* rule has been extended to other situations too. In *Trevino v. Thaler*, the Supreme Court held that even if the state procedures don’t absolutely require ineffective assistance of counsel claims to be brought in a separate collateral proceeding, there will be cause to allow procedural default if the state courts make it practically difficult to raise ineffective assistance of counsel claims on

direct appeal. *Trevino*, 569 U.S.at 429. In *Trevino*, the Court stated that *Martinez* applies to a jurisdiction that “in theory grants permission” to present ineffective assistance claims on direct review, but “as a matter of procedural design and systematic operation, denies a meaningful opportunity to do so.” *Trevino*, 569 U.S. at 429. Thus, if a state procedure makes presenting ineffective assistance claims too difficult, the claims are not procedurally barred for a federal court’s habeas review. *Id.*

B. THE DISTRICT COURT SHOULD FIND THAT APPLICATION INDIANA’S DAVIS-HATTON PROCEDURE HERE IS INEFFECTIVE.

Although Indiana permits defendants to raise ineffective assistance of counsel claims in either direct or collateral proceedings, the Indiana Supreme Court stated “a post-conviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim.” *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998). As this language suggests, the Indiana courts subject ineffective assistance of counsel claims that are brought on direct appeal to substantial procedural restraints. The *Woods* case holds that a defendant may not expand the record on a motion for new trial and rule on ineffective counsel issues. Counsel was ineffective by expanding the record. Since the trial court may not expand the record, Counsel was ineffective by depriving Mr. Karr with a meaningful claim on ineffective trial counsel.

Two burdensome restraints are especially relevant here. First, defendants seeking direct review over their ineffectiveness claims are limited to the evidence in the trial record alone. *Woods*, 701 N.E. 2d at 1216–17. Second, defendants may not strategically raise some ineffectiveness claims that only require the record on direct review; but also seek to raise other ineffectiveness claims requiring further factual development on collateral review where an evidentiary hearing would be granted. *Woods*, 701 N.E.2d at 1220 (“The specific contentions supporting the [ineffectiveness] claim, however, may not be divided between the two proceedings.”) As the Indiana Supreme Court clearly stated in *Woods*, if the defendant raises ineffectiveness claims in a direct appeal, “the issue will be foreclosed from collateral review.”) *Id.*

If the defendant chooses to bring ineffective assistance claims in a post-conviction proceeding, the defendant will have two options: first, the defendant can initiate a collateral review proceeding after the direct appeal is concluded; or, alternatively, defendants can request that the Indiana Court of Appeals dismiss or suspend their pending direct appeal, and the defendant can immediately return to the trial court to begin collateral review before the disposition on the direct appeal is even completed. *Woods*, 701 N.E.2d at 1219. The second pathway, where the Defendant returns to the trial court to begin postconviction proceedings, is known as the “*Davis-Hatton*” procedure after the Indiana court cases that

established it. *Slusher v. State*, 823 N.E.2d 1219, 122 (Ind. Ct. App. 2005). In deciding whether to grant a defendant's petition for a *Davis-Hatton* remand, "the appellate court preliminarily screens the motions and remands to the trial court those cases in which an arguably meritorious motion is sought to be made." *Davis*, 368 N.E. 2d at 1151; and see *Thompson v. State*, 671 N.E. 2d 1165, 1168 n.2 (Ind. 1996) ("Finding that the appellant had failed to make any showing that his claim of ineffective assistance of counsel has a substantial likelihood of success at trial, we denied his petition, and this appeal ensued.")

If the appellate court grants the *Davis* petition, then once in the trial court, the defendant files their first post-conviction petition for relief—and, the petitioner must raise all available grounds in this original petition. *Woods*, 701 N.E.2d at 1219; Ind. Rules of Post-Conviction Remedies, § 8. If the first post-conviction proceeding is unsuccessful, the petitioner may appeal the court's findings, but there is an increased burden of proof upon appellate review. *Peaver v. State*, 937 N.E. 2d 896, 900 (Ind. Ct. App. 2010) (internal quotations omitted). A petitioner appealing a decision on their petition "faces the rigorous burden of showing that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the court." *Id.*

C. *THE DISTRICT COURT ERRED WHEN IT DID NOT FOLLOW MARTINEZ-TREVINO SUPREME COURT DOCTRINE, THAT INDIANA'S DAVIS-HATTON PROCEDURE IS CAUSE THEREIN, FOR PETITIONER TO BRING NEW CLAIMS IN COURT.*

The Indiana law restricting the right to bring ineffectiveness of counsel claims in a Davis petitioner's post-conviction infringes upon Constitutional rights guaranteed by *Martinez* and *Trevino*, and thus, is cause under those doctrines for petitioner to proceed with his ineffectiveness claims in this court, since he cannot do so in the Indiana courts. The Court stated in *Trevino* that *Martinez* applies to a jurisdiction that "in theory grants permission" to present ineffective assistance claims on direct review, but "as a matter of procedural design and systematic operation, denies a meaningful opportunity to do so." *Trevino*, 569 U.S. at 429.

Here, in theory, Karr could have presented ineffective assistance of counsel claims on direct appeal, but a direct review would have probably been futile under Indiana's cumbersome law. Under Indiana law, Karr could only have cited evidence in the trial record as to ineffective assistance of counsel. *Woods*, 701 N.E.2d at 1219. Of course, in order to prove trial counsel was ineffective under *Strickland v. Washington*, Karr would have had to prove both that (1) counsel's performance was objectively unreasonable and (2) that the result of the proceeding would have differed if counsel provided better

representation. 466 U.S. 668 (1984). This is a fact-intensive inquiry, that requires evidence beyond what the court reporters and clerks included into the record at trial. Thus, the Indiana law limiting direct appeals to the trial record does very little for defendants' right to have defense counsel's representation evaluated for constitutional adequacy.

Furthermore, even if some of Karr's claims may have been resolvable under direct review, Indiana law bars defendants from bifurcating some claims to a new post-conviction proceeding and others to direct review. Rather, under Indiana law, "the specific contentions supporting the [ineffectiveness] claim, however, may not be divided between the two proceedings." *Woods*, 701 N.E.2d at 1220. This forces defendants, like Karr, for all practical purposes, to return to the trial court for a collateral post-conviction proceeding. Thus, like in *Trevino*, while petitioner could have "in theory" submitted his claims to direct review, Karr would not have had a meaningful chance to have them fairly reviewed. *Trevino*, 569 U.S. at 429.

This drove Karr's counsel to recommend filing the *Davis* petition, and to have his proceeding remanded to the trial court, with the hope there would be a new evidentiary hearing there to further develop the factual record upon post-petition review. But appellate counsel's decision to file the *Davis* petition put Karr in an even worse position than he was before. If Karr had simply continued the appeal from his denied motion for a new trial with the Indiana Court

of Appeals, then the standard of review on appeal over the new trial's *Strickland* claims would have been substantially less onerous than the standard of review in the post-conviction proceeding. At the post-conviction proceeding, petitioner "faces the rigorous burden of showing that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the court." *Peaver*, 937 N.E. 2d at 900 (internal quotations omitted).

With this burdensome standard at play, no reasonable appellate attorney would have advised their client to initiate the *Davis* petition. The only strategic benefit may have been the possibility of opening a new evidentiary hearing at the post-conviction proceeding, where new evidence of trial counsel's ineffective assistance might have arisen. But this didn't happen, since the State of Indiana defeated Petitioner's Post-Petition Claim on summary denial without an evidentiary hearing as to trial counsel's ineffective assistance on res judicata grounds.

As appellate counsel should have known, res judicata is "fully applicable to post-conviction proceedings" under Indiana law. *Clark*, 648 N.E. 2d at 1190. "Once raised on direct appeal, a defendant may not argue ineffective assistance of trial counsel in post-conviction proceedings." *Thomas*, 797 N.E.2d at 754. Finally, appellate counsel herself admitted in a letter to Karr that appellate counsel provided ineffective assistance.

Karr's *Davis* petition spelt the end for Karr's ineffective assistance of counsel claims, and appellate counsel's decision to execute the *Davis* procedure was therefore ineffective assistance of counsel under *Martinez*. Furthermore, the Indiana precedent that allows the *Davis* procedure at all left Petitioner without a meaningful chance to have his claims fairly reviewed. *Trevino*, 569 U.S. at 429. Thus, under the *Martinez* and *Trevino* doctrines, since Petitioner was barred from presenting colorable ineffective assistance claims in the Indiana courts, Petitioner has good cause to proceed with his new ineffective assistance of counsel claims in this court. *Coleman*, 501 U.S. at 750.

II. THE DISTRICT COURT ERRED WHEN IT DID NOT FIND INEFFECTIVE ASSISTANCE OF COUNSEL.

Before seeking federal relief, a federal habeas petitioner must present all federal habeas claims to the state court either on direct review or state collateral review. The claims alleged in this subsection were properly presented to the Indiana Courts. The following seven grounds were raised in the Indiana Initial Post-Conviction State Proceeding, and are realleged here:

- (i) Trial counsel rendered constitutionally ineffective assistance of counsel under the Sixth and Fourteenth Amendments of the United States

Constitution and Article I, §13 of the Indiana Constitution when:

a. “Trial counsel failed to use available discovery provided by the State, which was exculpatory. Phone records produced by the State from the phone of the defendant showed that there were no videos or photos taken of the alleged victim in this case during the alleged acts that formed the basis of counts 2 and 3, rape, although the alleged victim had testified that she was photographed or filmed during the act.”

b. “Trial counsel failed to use available discovery provided by the State, which was exculpatory. Phone records produced by the State from the phone of the defendant showed that there were no pornographic cites [sic.] accessed on his phone before, during, or after the alleged acts that formed the basis of counts 2 and 3 rape, although the alleged victim had testified that defendant had watched pornography in frustration over her unwillingness to engage in sexual activity.”

c. “Trial counsel failed to obtain medical records of the alleged victim to discover whether she had been administered anesthesia at the hospital ER in the

hours prior to alleged events, which would have affected her ability to discern between reality and imagination in the next few hours when she alleged she was raped, the allegations that constitute counts 2 and 3.”

d. “Trial counsel failed to obtain a drug store/prescription records to determine whether a prescription the alleged victim had for narcotics was filled the same day she alleged the battery occurred and later went to the ER, where she may have been administered and been under the influence of anesthesia along with narcotics already consumed, when she went home with the defendant, later accusing him of rape.”

e. “Trial counsel failed to use at trial text messages he had retrieved in discovery, showing conversations between the alleged victim and the defendant, wherein the alleged victim admitted that her prescription for narcotics was filled on the day allegations were made against the defendant, thus, establishing that she was possibly under the influence of narcotics.”

f. “Trial counsel failed to use at trial text messages he had retrieved in discovery, showing conversations between the

alleged victim and the defendant, wherein the alleged victim admitted that she was administered anesthesia at the ER in the hours prior to the allegations of rape, thus, establishing that she was under the influence of narcotics.”

g. “Trial counsel’s accumulation of error and omissions denied Petitioner effective assistance of counsel, and denied him a meaningful defense of innocence. Petitioner was denied a fair trial, and PCR is warranted in this case.”

Regarding grounds for ineffective assistance of counsel above, trial counsel failed wholly to capitalize on basic cues, on many opportunities to show that A.P. may have been under the influence of not one but two central nervous system depressant narcotics the night of the incident, promethazine and hydrocodone. Top line common side effects of promethazine are acute confusion, followed by excitement, nightmares, and blurred vision. A.P. was acutely on promethazine at the time she was allegedly raped, because they had just returned from her emergency room visit for an unrelated ovarian cyst treatment. A.P. was also on hydrocodone that day, which would act like a sedative multiplier of the promethazine.

“Narcotics” is a commonly used word in modernity, and its usage should have a high correlation with narcotics act as a multiplier when ingested simultaneously. The fact that the District Judge never once mentioned the word “narcotic” in his

denial order of Mr. Karr's amended habeas corpus shows that the District Judge is giving short shrift to a fundamental claim. A.P. adequately performing on the day of her testimony day may have been very low and/or just different from her first interview from the incident.

The fact that there was no meaningful discussion by the District Judge in his denial order, regarding alleged victim recollection issues due to the alleged victim being under the influence of multiple narcotics the night she alleged rape, is a consideration that must be heard by a jury. Heretofore, Mr. Karr's counsel had not been effective enough to get it done.

Knowledge is cumulative, and when errors accumulate unchecked, juries may be left to consider a set of facts alternate to the most accurate one. The accumulation failures by Petitioner counsel, both trial and appellate counsel, constitute ineffective assistance of counsel under the standard in *Strickland v. Washington*, since counsel's ineffective defense was objectively unreasonable and prejudiced the defendant's ability to adequately receive a fair trial. *Strickland*, 466 U.S. at 668. Further evidence as to trial counsel's ineffective assistance will be revealed at an evidentiary hearing on the matter. We pray for this writ of certiorari to permit.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted. The *Davis-Hatton* procedure is unconstitutional as-applied to Mr. Karr's case and the Petitioner's appellate attorney was ineffective assistance of counsel by initiating a *Davis* Petition. For either standalone reason, Mr. Karr deserves a new trial.

Respectfully submitted,

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