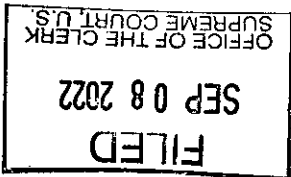


22-5665
ORIGINAL

No.



SUPREME COURT OF THE UNITED STATES

IN THE

Arturo Cano — PETITIONER
(Your Name)

vs.

Secretary, Florida Dept. of Corrections.
— RESPONDENT(S)
ON PETITION FOR A WRIT OF CERTIORARI TO

Eleventh Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Arturo Cano # 167106
(Your Name)

9544 CR 476 B
(Address)

Bushnell, FL 33513
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether being pro se versus being represented by counsel at the state initial-collateral proceedings is a determinative factor for obtaining an evidentiary hearing before a federal habeas court when a prisoner seeks to excuse a procedural default and demonstrate that the defaulted IATC claim is substantial under Martinez?

2. Whether Petitioner's rights to the assistance of counsel, to the protection against self-incrimination, and that to be tried only for the offense charged were violated by the prosecutors' improper and excessive questioning about petitioner's unrelated charges that were pending at the time of the trial below and counsel for those pending charges was not present?

RELATED CASES

☒ 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:

LIST OF PARTIES

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JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was October 15, 2021.

☐ 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: 05/18/2022, and a copy of the order denying rehearing appears at Appendix C.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including 09/15/2022 (date) on 08/22/2022 (date) in Application No. 22 A 160.

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT - No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT - 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 defence.

FOURTEENTH AMENDMENT - SECTION 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Arturo Cano ("Cano"), was arrested in June 2001, after going to his former residence. The State charged him with "burglary and aggravated battery (the 'burglary case' or the 'pending charges'). Cano retained a private attorney to represent him on the burglary case and the attorney informed him that burglary carried a sentence of 25 years to life in prison.

A month later, in July 2001, Cano was again arrested. The State charged him with several sex offenses on a minor (the "sex case") which were alleged to have occurred eight months before the burglary case. The state trial court appointed the public defender for representing Cano in the sex case. The alleged victim in the sex case was also one of the alleged victims in the burglary case.

The State focused on the prosecution of the sex case and, therefore, the burglary case remained pending. In fact, after Cano was convicted in the sex case, the State dismissed the burglary case.

At the sex case trial, appointed defense counsel asked Cano if he had a pending burglary case and if he had an attorney other than the public defender to defend that case. Cano answered both questions in the affirmative. Counsel then asked Cano if he knew the potential prison sentence he faced for his pending charges. Cano responded that his private counsel had informed him that burglary carried a prison sentence of 25 to life.

In direct examination the alleged victim testified: And at that time that he was having the pocket knife out, I took it away from him. And then my brother tried to take him out of the house, and he just started, you know, yelling at my

brother and Guadalupe, saying that he was going to kill one of them and he was going to beat them up. (TT 297)

During cross-examination, the prosecutor inquired about Cano's pending charges, in this manner:

Q. [Prosecutor]: And you talked about this burglary, you actually broke into your former home, right?

A. [Cano]: No, sir, I didn't break in.

[Defense]: Objection, Judge, relevancy, 403, to the present allegations.

[Prosecutor]: Clearly they brought it up on several occasions on his direct examination.

[the court]: Well, in reference to the breaking in, I'll sustain that objection.

Q. In fact you hit Lupe... pulled out a pocket knife.

A. No, sir.

Q. You heard Sandra testify about that....

A. I probably heard, but that doesn't mean it's true.

Q. And you were drinking that day....

A. No, sir.

Q. And you never pulled out a pocket knife and threatened to kill Roberto?

A. No, sir.

Q. ... you weren't yelling at him?

A. No, sir.

Q. You never pulled out a pocket knife and threatened to kill Lupe?

A I never threatened to kill nobody in my life.

(TT 736 - 738)

In closing argument, the State argued:
And everything I'm saying about this case is
either involving the evidence or inference
from the evidence. ... This is the incident
involving Lupe, Sandra's boyfriend. Why is he so
angry, why does he attack him, threaten to kill
Roberto, threaten to kill Lupe.
He talks about they want to send me to life in
prison, 25 to life. Okay, is he talking about the
burglary? ... I tell you, I'm going to go to
prison. That's what he's talking about, about
for having sex with her. ... ***

The burglary incident. I know Mr. Quisenberry
talked about it, I'll just touch upon it real
quick. ... He hits the guy, rips his shirt, he's
intoxicated.

(TT 813, 817, 818, 865)

After his conviction and sentence were affirmed on
direct appeal, Cano, pro se, filed a supplemental rule
3.850 postconviction motion raising an IAC claim
alleging that trial counsel's failure to object to the
prosecutor's excessive, improper, and prejudicial remarks
about Cano's pending charges was ineffective assistance
of counsel in that there were no strategic reasons that
could justify counsel's failure to object. The state
court dismissed the claim as being untimely.

Subsequently, Cano, pro se, raised the exact claim

in Ground Two of his federal habeas petition and invoked the Court's decision in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012) to obtain federal review of his procedurally defaulted claim.

In response, the respondent argued that Cano's failure to raise the claim in the state courts, and the resulting default of the claim, was not caused by Cano's lack of an attorney. Specifically, the respondent argued that "Cano clearly knew the procedure for raising an ineffective assistance claim as he properly raised several other claims of ineffective assistance in his rule 3.850 motion." Cano replied saying that were the respondent's argument considered to be correct, then Martinez would be a dead letter because nothing in Martinez suggests that a finding of "cause" excuses procedural default only if Cano had raised no claims of ineffective assistance of trial counsel whatsoever.

The district court denied Cano's § 2254 petition by finding, with regard to Ground Two, that "Cano asserts that trial counsel was ineffective for not objecting to the admission of burglary and aggravated battery charges which were pending against him in another state criminal case." Appendix-B, p. 10 (emphasis added). The district court denied also Cano's request for an evidentiary hearing to assess the merits of his claim, i.e., for showing that his IATC claim was substantial.

In his rule 59(e) motion to alter or amend judgment, Cano appraised the district court, though to no avail, that the court had misapprehended his IAC claim because he did not challenge the admission of that evidence since,

after all, his trial counsel had used it to inform the jury that Cano was talking about the potential sentence he faced if found guilty of the pending charges and he was not talking about going to prison for sexual abuse. Cano thus informed the district court that the gist of his claim was that his trial counsel had rendered ineffective assistance for not objecting to the prosecutors excessive, improper, and prejudicial remarks about Cano's unrelated and pending charges.

In denying Cano's rule 59(e) motion, the district court stated that the claim was meritless and - although the state sought to use the pending charges for different purposes - the district court opined that the pending charges were properly admitted to impeach Cano's credibility. Appendix D, p. 2

Cano appealed to the Eleventh Circuit Court of Appeals and sought a certificate of appealability on the point that "[j]urists of reason could find debatable the district court's conclusion that [Cano] cannot show that Ground Two has some merits under *Martinez*."

In denying Cano's motion for COA, the court of appeals misapprehended Cano's claim and found that Ground Two of Cano's § 2254 petition alleged that "counsel failed to object the admission of charges that were pending against him in another state criminal case." Appendix-A at 1. (emphasis added). Thus, the court of appeals concluded that "reasonable jurists would not debate the district court's denial of Cano's § 2254 petition "because "Ground [1] Two... [is] procedurally defaulted, and he cannot overcome that default because his underlying claim [does] not have merit." Appendix-A, at 1, 2.

REASONS FOR GRANTING THE PETITION

1. Martinez and Trevino are dead letter if a pro se petitioner is not afforded an evidentiary hearing so that he can show that his procedurally defaulted IATC claim is substantial.

Under the doctrine of procedural default, federal courts generally decline to hear any federal claim that was not presented to the state courts consistent with the state's own procedural rules. Edwards v. Carpenter, 529 U.S. 446, 453 (2000).

In Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309 (2012), the Supreme Court created a "narrow exception" that allows a state prisoner to obtain federal review of unexhausted claims of IATC in a petition for a writ of habeas corpus. Martinez, 132 S.Ct. at 1315.

The Court held that where a claim of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding under state law, "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." Martinez, 566 U.S. at 17. (emphasis added).

Thus, Martinez authorizes a finding of "cause" to overcome a procedural default where a habeas petitioner meets four requirements: (1) the claim of IATC is a substantial claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the initial review collateral proceeding; (3) the state collateral proceeding was the "initial" opportunity to review the "IATC claim"; and (4) the state's law requires the

ineffective assistance of trial counsel claims to be raised in the initial collateral proceeding. Martinez, 132 S.Ct. at 1318-19, 1320-21; Trevino v. Thaler, 133 S.Ct. 1911, 1918 (2013).

The Supreme Court recognized in Martinez that determining whether there has been ineffective assistance of counsel often requires factual development in a collateral proceeding. The Court emphasized that ineffective assistance of counsel claims can require "investigative work" and development of the "evidentiary basis" that "often turns on evidence outside the trial record." Martinez, 132 S.Ct. at 1317.

For example, to determine whether an attorney's performance was deficient, it is often necessary to ask the attorney to state the strategic or tactical reasons for his actions. To determine prejudice, it is often necessary to authorize discovery and conduct an evidentiary hearing to assess the effect of the attorney's deficient performance.

The Supreme Court held in Cullen v. Pinholster, 131 S.Ct. 1388 (2011), that a federal habeas court is ordinarily confined to the evidentiary record made in state court. However, Pinholster does not prevent a district court from holding an evidentiary hearing in a Martinez case. Pinholster applies when a "claim" has "been adjudicated on the merits in state court proceedings." Pinholster, 131 S.Ct. at 1398. But, in a Martinez case, the underlying IATC claim has not been adjudicated on the merits in a state court proceeding.

In Cano's case, "cause" exists to excuse his failure to exhaust his claim in the state courts. Florida prisoners

ordinarily must present claims of ineffective assistance of trial counsel in their first motion for postconviction relief. *Bruno v. State*, 807 So.2d 55, 63 (Fla. 2001). Here, Cano litigated his postconviction motion pro se. Cano's pro se status establishes "cause" to excuse his procedural default. See *Martinez*, 132 S.Ct. at 1318. The respondent's assertion that "Cano's failure to timely raise this claim in the state courts, and the resulting default of the claim, was not caused by Cano's lack of an attorney" because "Cano clearly knew the procedure for raising an ineffective assistance claim as he properly raised several other claims of ineffective assistance in a timely rule 3.850 motion" runs afoul with the holdings in *Martinez* and *Trevino*.

Cano's IATC claim is also substantial. See id. It is well recognized that all attorneys are presumed to know the law. Here, trial counsel should have known that under Florida law the prosecutor's questioning was an impermissible method of impeachment for "If it is only permitted to interrogate witnesses as to previous convictions, not mere arrests or accusations, for crime." *Fulton v. State*, 335 So.2d 280, 283 (Fla. 1976).

In Cano's case, the district court misperceived Cano's claim by taking it as a claim of ineffective assistance for failing to object to the admission of the pending charges when actually Cano's claim is predicated on counsel's failure to object to the prosecutor's improper comments and questioning about the nature of the pending charges.

In the instant case, counsel should have objected to the questioning about improper accusations of threats to kill, breaking in, hitting somebody, and drunkenness since

Cano had never been convicted for any of those accusations and there was no substantial connection between the pending charges and the charges for which Cano was on trial. The prejudice is evident. As other court has noted, "Any evidence related to these other serious charges pending against petitioner would have been highly prejudicial to petitioner's defense on the current charges." *Harvey v. Jones*, 2008 Dist. LEXIS 60303.

As applied to Cano's case, the new *Martinez* rule presents an unsurmountable hurdle. There is no doubt that Cano satisfies the second requirement of *Martinez* because he was not represented by counsel during the state postconviction review proceedings. Nevertheless, rather than helping it, the fact that Cano was a pro se party hurt his cause. For example, had Cano presented an ineffective assistance-of-postconviction-counsel claim it would have been more likely than not that the district court would have conducted an evidentiary hearing to determine if postconviction counsel's performance was deficient by asking counsel to state the strategic or tactical reasons for his actions or omissions, and would have authorized discovery and conduct an evidentiary hearing to assess the effect of counsel's deficient performance.

In Cano's case, by him being a pro se party, the district court concluded that the aforesaid determination and assessment were not necessary. Thus, the standard for granting an evidentiary hearing in a *Martinez* case varies depending on whether there was counsel in the initial collateral review or if it was no counsel at all.

Martinez and Trevino are dead letter if Cano's only opportunity to develop the factual record of his trial counsel's ineffectiveness was in the state postconviction court where he is procedurally barred. In deciding whether to excuse Cano's procedural default, the district court should have allowed the development of evidence relevant to answering the linked Martinez questions of whether there was "cause" and whether the underlying IATC claim was "substantial."

In this case, neither the district court nor the court of appeals could possibly evaluate Cano's factual allegations against his trial counsel and the ensuing prejudice from a cold transcript without the risk of evaluating Cano's claim through the lens of a subjective judgment. Nevertheless, the district court's subjective findings became unassailable on appellate review.

The record in this case demonstrates that the state plainly focused on the pending charges for proving its case by "impermissibly raising an inference that Cano was specially dangerous or had committed other crimes." *Reeves v. State*, 711 So.2d 561, 562 (Fla. 2d DCA 1997). In this case, Cano's Ground Two presents a "substantial" claim of ineffective assistance of trial counsel because "[u]nder the second prong of Strickland analysis... [there is] a reasonable probability that counsel's deficient performance deprived [Cano] of a fair trial, undermining the outcome of the proceedings." *Francis v. State*, 143 So.3d 340, 347 (Fla. 2014).

2. A defendant in a criminal case is entitled to be tried upon competent evidence and only for the offense charged.

In this case, Cano pleaded not guilty of the sexual abuse accusations and exercised his Sixth Amendment right to a public trial but the prosecutor interrogated him regarding the burglary and aggravated battery charges as in effect Cano was on trial for those charges. See, supra, at 5-6.

The Supreme Court has held that for "however depraved in character, and however full of crime [his] past [life] may have been, the [defendant is] entitled to be tried upon competent evidence, and only for the offense charged." *Boyd v. United States*, 142 U.S. 450, 458 (1892).

In the case at hand, the district court found that "the burglary and aggravated battery were inextricably intertwined with the sexual offenses." Appendix-B at 11. The district court's finding is a manifest error of law. In the context of evidence, the phrase "inextricably intertwined" has become a term of art in that it must always be determined by a judge.

The Florida Supreme Court, has determined that under the "inextricably intertwined" theory, evidence of collateral acts is admissible only when "it is a relevant and inseparable part of the act which is in issue," and "it is necessary to admit the evidence to adequately describe the deed." *Griffin v. State*, 639 So.2d 966, 968 (Fla. 1994).

In Cano's case, the prosecutor's excessive, improper, and prejudicial questioning on the assumption of Cano's guilt on the pending charges was not necessary to "adequately describe the deed" for which Cano was tried. See e.g., *Sexton v. State*, 697 So.2d 833, 837 (Fla. 1997).

(reversing the judgment and sentences after finding that "Sexton was not on trial for the maltreatment of his children. Yet the jury could only have been inflamed by this damaging testimony and might have been moved to punish Sexton for those collateral acts by finding him guilty of the murder in this case.")

In this case, counsel's failure to object to the prosecutor's excessive, improper, and prejudicial questioning about Cano's pending case cannot be considered reasonable for "[w]hatever effect, prejudicial to [Cano], the improper and prejudicial questioning about his pending charges produced upon the minds of jurors, remained with them." Boyd v. United States, 142 U.S. at 457

Trial counsel should have objected to the prosecutor's questioning about Cano's pending charges on the ground that the prosecutor's questioning was in violation of Cano's Sixth Amendment rights because counsel for the pending charges was not present. See *Maine v. Moulton*, 434 U.S. 159, 176 (1965) ("The fact the government may have a legitimate and constitutional reason for confronting a person facing criminal charges does not permit it to circumvent the protection of the Sixth Amendment as it pertains to the pending charges.")

Trial counsel could have also objected to the prosecutor's questioning about Cano's pending charges on the ground that the prosecutor's questioning was in violation of Cano's Fifth Amendment protection against self incrimination. Cano could not defend himself from the prosecutor's attacks because any thing he would have said would have been used against him at the pending trial.

Cano's procedurally defaulted claim of ineffective assistance of trial counsel presents a "substantial claim" under Martinez. Cano's pro se status in in accord with the requirements of Martinez and the district court should have conducted an evidentiary hearing to assess the substantiality of the defaulted claim. By the same token, the court of appeals should have granted a certificate of appealability. Martinez's assertion that "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" is dead letter if pro se petitioners are not afforded an evidentiary hearing to show that their claims of IATC are substantial.

Date: September 12, 2022

A. C. C.

Respectfully submitted,

The petition for a writ of certiorari should be granted.

CONCLUSION

