Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

No. 16-1014

DENTRELL BROWN,

Petitioner-Appellant,

v.

RICHARD BROWN,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:13-cv-1981-JMS-DKL — **Jane Magnus-Stinson**, *Chief Judge*.

ARGUED SEPTEMBER 28, 2016 — DECIDED FEBRUARY 1, 2017

Before KANNE, SYKES, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Petitioner Dentrell Brown and his co-defendant Joshua Love were convicted of murder in a joint trial in an Indiana court. After exhausting state court remedies, Brown filed a federal habeas corpus petition under 28 U.S.C. § 2254. He claims he was denied effective assistance

of counsel when his lawyer failed to insist that the judge give the limiting instruction required when evidence of a co-defendant's out-of-court confession is introduced in a joint trial. See *Bruton v. United States*, 391 U.S. 123 (1968) (protecting codefendant from testimonial confessions of other co-defendants). The district court denied the habeas petition, finding that Brown had procedurally defaulted this claim for ineffective assistance of trial counsel by failing to assert it in state court so that federal review is barred. Brown has appealed.

On the issue of procedural default, we hold that the form of "cause" found in *Martinez v. Ryan*, 566 U.S. —, 132 S. Ct. 1309 (2012), and expanded in *Trevino v. Thaler*, 569 U.S. —, 133 S. Ct. 1911 (2013), is available to federal habeas corpus petitioners in Indiana who have substantial claims for ineffective assistance of trial counsel that have been procedurally defaulted in state post-conviction proceedings by lack of any counsel or lack of effective counsel. Brown is entitled to an opportunity to overcome procedural default of his claim for ineffective assistance of *trial* counsel for failure to request a limiting instruction if he can both demonstrate ineffective assistance of *post-conviction* counsel and assert a substantial claim of ineffective assistance of trial counsel. We conclude that he is entitled to an evidentiary hearing.

I. *Factual and Procedural Background*

On appeal we review *de novo* district court rulings on petitions for habeas relief and review any findings of fact for clear error. See *Lisle v. Pierce*, 832 F.3d 778, 781 (7th Cir. 2016); *Coleman v. Hardy*, 690 F.3d 811,

814 (7th Cir. 2012). Those claims not adjudicated on the merits in the state court, like the one presented here, are also reviewed *de novo*. *Cone v. Bell*, 556 U.S. 449, 472 (2009); *Warren v. Baenen*, 712 F.3d 1090, 1096, 1098 (7th Cir. 2013).

A. *The Murder Trial of Joshua Love and Dentrell Brown*

In the early morning hours of March 8, 2008, in Elkhart, Indiana, Gerald Wenger was murdered after trying to buy drugs. He was discovered lying dead in the street around 2:00 a.m., with a single nine-millimeter bullet wound to his head. Two bullet casings were found near Wenger's body, one from a nine-millimeter handgun and a second from a .45 caliber handgun. No physical evidence was recovered beyond the shell casings.

Following the murder, investigators relied on information from interviews with community members. After interviews provided the names of Joshua Love and Dentrell Brown, investigators began to rely on information from incarcerated individuals. On June 18, 2008, the State charged Brown with murder.

Brown was then just thirteen years old, and Love was nineteen years old. Brown was waived into adult felony court, and the two were tried together. At trial, the State's key evidence tying Brown to the crime scene was the testimony of Mario Morris. Morris testified that, while Morris, Brown, and Love were all in the Elkhart County Jail, Brown and Love each confessed separately to involvement in the murder. Testifying first to his conversation with Love, Morris

said that Love confessed to trying to sell fake drugs to Wenger the night of the murder, and then, after the sale went bad, shooting Wenger in the head with a nine-millimeter handgun.

Morris then testified that Brown had told him a similar story, but with some important differences. For example, Morris testified that Brown said he had struck Wenger with the butt of a .45 caliber handgun, discharging one unintentional shot. A critical feature of Morris's testimony for *Bruton* purposes was that his account of Love's confession included no mention of Brown or anyone else having been present at the shooting, and his account of Brown's confession included no mention of Love or anyone else having been present when Brown hit Wenger in the head.

After Morris testified, Brown and Love both moved for a mistrial based on *Bruton v. United States*, 391 U.S. 123 (1968). The trial judge denied both motions, emphasizing that at no time did Morris say Brown's name when testifying against Love, nor did he say Love's name when testifying against Brown. Both Love and Brown were convicted of murder, with Brown's conviction based on a theory of accomplice liability. Brown was sentenced to 60 years in prison.

B. *Direct & Collateral Review in the State Courts*

On direct appeal, Brown's counsel raised three claims, including that the trial court abused its discretion when it denied his *Bruton* motion for a mistrial. *D.B. v. State (D.B. I)*, 916 N.E.2d 750, 2009 WL 3806084, at *1, 2–3 (Ind. App. 2009) (mem.). Brown's appellate counsel argued that Morris's testimony about Love's statement violated Brown's

confrontation rights because Brown could neither compel Love to testify nor cross-examine him. *Id.* at *2. The appellate court was not persuaded. It found no *Bruton* violation because Morris's account of Love's confession to him never mentioned a third party present at the scene of the murder. *Id.* at *3.

Brown filed a petition for post-conviction relief in state court with the assistance of counsel. His post-conviction lawyer raised a single issue in the operative petition: ineffective assistance of trial counsel for having failed to move to sever Brown's trial from Love's. The argument relied on *Bruton* even though the appellate court on direct review had "specifically held" that there was no *Bruton* violation in Brown's trial. The trial court denied relief, and the Indiana Court of Appeals affirmed, finding that the ineffective assistance of counsel claim was an attempt to revisit the *Bruton* issue decided against Brown on direct appeal and thus barred by *res judicata*. *D.B. v. State (D.B. II)*, 976 N.E.2d 146, 2012 WL 4713965 at *2–3 (Ind. App. 2012) (mem.).

C. *Brown's Federal Habeas Petition*

Brown's habeas petition to the federal district court raised three issues, two of which have been dropped on appeal. The only claim before us is Brown's claim that his "trial lawyer was ineffective for failing to request an instruction limiting the use of Love's statement, offered through Morris, to Love." Because it was not presented to the state courts, the claim for ineffective assistance of trial counsel would ordinarily be barred from federal review because of procedural default. In the district court, however, Brown argued that he should be given the opportunity

to overcome that default under *Martinez*, 132 S. Ct. 1309, and *Trevino*, 133 S. Ct. 1911.

The district court held that *Martinez* and *Trevino* do not apply to § 2254 cases in Indiana, and thus Brown was not entitled to attempt to overcome procedural default on his claim for ineffective assistance of trial counsel. *Brown v. Brown*, No. 1:13-cv-1981-JMS-DKL, 2015 WL 1011371, at *2–3 (S.D. Ind. 2015). His request for an evidentiary hearing was denied and his petition dismissed. We granted Brown an expanded certificate of appealability that included this claim because Brown had "made a substantial showing of the denial of his right to effective assistance of trial counsel."

II. *Analysis*

Brown's claim for ineffective assistance of trial counsel requires a two-step analysis. We hold first that the *Martinez-Trevino* doctrine can apply to claims for ineffective assistance of counsel arising from the Indiana state courts. We next hold that Brown has offered some evidence of deficient performance by his post-conviction relief counsel and has asserted a substantial claim of ineffective assistance of trial counsel. We reverse and remand the case to the district court for an evidentiary hearing on both claims for ineffective assistance, first on the procedural default issue and then, if the default is excused, on the merits of the trial-based claim.

Before explaining our view on *Martinez-Trevino*, we pause to address the state's assertion that petitioner's argument on appeal has been forfeited.

The state argues that in the federal district court, petitioner's claims were based on the Confrontation Clause pursuant to *Bruton* rather than the Indiana Rules of Evidence. Under this theory, Brown's claim of ineffective assistance of trial counsel for failure to request a limiting instruction based on the Indiana Rules of Evidence would be forfeited now on appeal. We disagree. Brown's habeas petition claimed clearly that his "trial lawyer was ineffective for failing to request an instruction limiting the use of Love's statement, offered through Morris, to Love." The habeas petition discussed the failure to request the limiting instruction as something that should have occurred following the denial of the motion for a mistrial, and the federal district court evaluated Brown's claim separately from the Confrontation Clause issue. Thus, petitioner's specific claim—although not presented in the state courts—was not forfeited by any supposed failure to raise it in the federal district court.

A. *The Martinez-Trevino Doctrine Applies in Indiana*

On appeal, petitioner argues that the rule established in *Martinez* and *Trevino* applies to § 2254 cases in Indiana so that he may try to overcome the procedural default of his claim for ineffective assistance of trial counsel. See *Martinez*, 132 S. Ct. 1309; *Trevino*, 133 S. Ct. 1911. We agree. We first explain the scope of the *Martinez-Trevino* doctrine. Against that backdrop, we then review the Indiana procedures for raising ineffective assistance of trial counsel, and we compare those procedures to those in other jurisdictions where the *Martinez-Trevino*

doctrine applies. We find that Indiana procedures governing ineffective assistance of trial counsel claims fall into the category the Supreme Court addressed in *Trevino*.

1. *The Martinez-Trevino Doctrine*

A federal habeas petitioner's claim is subject to the defense of procedural default if he does not fairly present his claim through a complete round of state-court review. *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014). A prisoner can overcome procedural default by showing cause for the default and resulting prejudice, or by showing he is actually innocent of the offense. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Until recently, a federal petitioner could not overcome the federal bar on procedurally defaulted claims by proving ineffective assistance of post-conviction counsel because there is no constitutional right to post-conviction counsel. See *id.* at 752–53.

In 2012, however, the Supreme Court recognized a new form of cause for overcoming procedural default in *Martinez*: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, 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." 132 S. Ct. at 1315, 1320. The Court explained that this route was needed to protect a prisoner with "a potentially legitimate claim of ineffective assistance of trial counsel" when state law required defendant to bring claim for ineffective assistance of trial counsel on collateral review. *Id.* If

post-conviction counsel errs by failing to raise a claim for ineffective assistance of trial counsel in the initial round of collateral review, it is unlikely that any state court at any level will hear the claim. *Id*. at 1316.

The next year, the Court expanded the *Martinez* form of "cause" in *Trevino*, holding that "a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference." *Trevino*, 133 S. Ct. at 1921. Examining Texas law, *Trevino* observed that even though Texas did not *require* a defendant to raise an ineffective assistance of trial counsel claim in state collateral review proceedings, the "structure and design of the Texas system in actual operation" worked effectively as a ban on claims on direct review. *Id*. at 1915. Like Texas, Indiana does not always require prisoners to bring claims for ineffective assistance of trial counsel on collateral review, so petitioner Brown must depend on the *Trevino* extension of *Martinez* to overcome procedural default.

In dissent in *Trevino*, Chief Justice Roberts predicted accurately a long process of state-by-state litigation on applying *Trevino*. *Id*. at 1923 (Roberts, C.J., dissenting). At least eight circuits, including this one, have decided whether *Trevino* applies to specific jurisdictions. This court applied the *MartinezTrevino* doctrine to federal prisoners who bring motions for

post-conviction relief under § 2255.[1] *Ramirez v. United States*, 799 F.3d 845, 853 (7th Cir. 2015) ("[T]he federal courts have no established procedure … to develop ineffective assistance claims for direct appeal," so "the situation of a federal petitioner is the same as the one the Court described in *Trevino*."); see also *Coleman v. Goodwin*, 833 F.3d 537, 543 (5th Cir. 2016) (*Martinez-Trevino* applies in Louisiana); *Runningeagle v. Ryan*, 825 F.3d 970, 981–82 (9th Cir. 2016) (*Martinez-Trevino* applies in Arizona); *Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015) (*Martinez-Trevino* applies in Kentucky); *Fowler v. Joyner*, 753 F.3d 446, 463 (4th Cir. 2014) (North Carolina procedures do "not fall neatly within *Martinez* or *Trevino*" and doctrine applies only in certain circumstances); *Sutton v. Carpenter*, 745 F.3d 787, 795–96 (6th Cir. 2014) (*Martinez-Trevino* applies in Tennessee); *Sasser v. Hobbs*, 735 F.3d 833, 852–53 (8th Cir. 2013) (*Martinez-Trevino* applies to capital defendants in Arkansas). Cf. *Lee v. Corsini*, 777 F.3d 46, 61 (1st Cir. 2015) (*Martinez-Trevino* does not

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[1] On two occasions, we have also observed that the *Martinez-Trevino* exception does not apply to the procedures that govern the typical ineffective assistance of trial counsel claim in Wisconsin courts. See *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015) ("Wisconsin law treats postconviction relief in an unusual way, insofar as it allows defendants to raise a claim of ineffectiveness of counsel simultaneously with a direct appeal."); *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014) ("Wisconsin law expressly allows—indeed, in most cases requires—defendants to raise claims of ineffective assistance of trial counsel as part of a consolidated and counseled *direct* appeal, and provides an opportunity to develop an expanded record."). Our analysis here does not alter that analysis of Wisconsin law.

apply in Massachusetts); *Fairchild v. Trammell*, 784 F.3d 702, 721 (10th Cir. 2015) (*Martinez-Trevino* does not apply in Oklahoma).

2. *Claims for Ineffective Assistance of Trial Counsel in Indiana*

With *Trevino* as our guide, two characteristics of Indiana practice—the "procedural design" and "systemic operation"—convince us that the *Martinez-Trevino* doctrine applies in Indiana. *Trevino*, 133 S. Ct. at 1921. First, while Indiana law does not always require claims for ineffective assistance of trial counsel to be brought on collateral review, the Indiana Supreme Court has adopted rules and doctrines that strongly discourage any other path. Second, in actual practice, the Indiana Supreme Court's discouragement has worked to force almost all such claims to wait for collateral review.

a. *Procedural Design*

The Indiana Supreme Court acted to clear up the law governing claims for ineffective assistance of trial counsel in *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998). After considering alternative approaches to procedural default, the court concluded "that the most satisfactory resolution of a variety of competing considerations is that ineffective assistance may be raised on direct appeal, but if it is not, it is available in postconviction proceedings irrespective of the nature of the issues claimed." *Id.* at 1216. A claim for ineffective assistance of counsel is barred on collateral review if it was already raised on direct appeal. *Id.* at 1220. Critical for our purposes, presenting a claim for ineffective assistance is an all-or-nothing proposition

in Indiana. A defendant may not present one specific ground on direct appeal and wait to present another on collateral review. *Id*.

The court in *Woods* explained that a claim for ineffective assistance of trial counsel will ordinarily require evidence beyond the record of the conviction and so should ordinarily be brought in a collateral post-conviction case where the defendant can offer new evidence. *Id*. at 1216. The complicating factor here—which shifts Indiana from *Martinez* to *Trevino*—is that *Woods* also recognized there may be an "exceptional case in which the defendant prefers to adjudicate a claim of ineffective assistance before direct appeal remedies have been exhausted." *Id*. at 1219–20. Under these rare circumstances, *Woods* explained, a procedure known in Indiana as the *DavisHatton* procedure allows a convicted appellant to suspend or terminate his direct appeal to pursue a petition for post-conviction relief. *Id*. at 1219, citing *Davis v. State*, 368 N.E.2d 1149 (Ind. 1977); *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993); see also Ind. R. App. P. 37; *Peaver v. State*, 937 N.E.2d 896, 899 (Ind. App. 2010). The *Davis-Hatton* procedure might be appropriate if the trial record itself supports an indisputable claim of ineffective assistance of trial counsel that will result in the immediate release of a person who is in prison improperly.

If a trial court denies a *Davis-Hatton* petition, an appeal from that post-conviction denial and the original direct appeal will be consolidated but evaluated under separate standards of review. *Peaver*, 937 N.E.2d at 899–900; *Slusher v. State*, 823

N.E.2d 1219, 1222 (Ind. App. 2005); *Dodd v. Knight*, 533 F.

Supp. 2d 844, 852 (N.D. Ind. 2008). A defendant who uses the *Davis-Hatton* procedure will be barred from asserting any new claim for ineffective assistance on direct appeal, or in any of the consolidated proceedings or additional post-conviction proceedings that may follow. *Peaver*, 937 N.E.2d at 899. Most helpful for the issue we face here, the Indiana Supreme Court explained that the *Davis-Hatton* procedure is "not to be used as a routine matter in adjudicating the issue of trial counsel's effectiveness." *Woods*, 701 N.E.2d at 1220.

Like Texas in *Trevino* and Tennessee in *Sutton*, Indiana "*permits* defendants to raise the claims on direct appeal." Compare *Sutton*, 745 F.3d at 791, quoting *Trevino*, 133 S. Ct. at 1918, with *Woods*, 701 N.E.2d at 1216, 1220. Because most claims for ineffective assistance of trial counsel cannot be shown within the four corners of the original trial court record, and because of the presumption of competence that applies in Indiana courts, claims for ineffective assistance of trial counsel brought on direct appeal "almost always fail." *Woods*, 701 N.E.2d at 1216, quoting *United States v. Taglia*, 922 F.2d 413, 417–18 (7th Cir. 1991). *Trevino* made much the same point about the need to present evidence outside the original trial record. 133 S. Ct. at 1918.

Additional aspects of Indiana procedure align with other aspects of *Trevino*. As in our federal cases, a defendant who asserts a claim for ineffective assistance of trial counsel on direct appeal may not relitigate the claim on collateral review. Compare

Ramirez, 799 F.3d at 853, with *Woods*, 701 N.E.2d at 1220. Like the federal rules we reviewed in *Ramirez*, Indiana's rule is even more restrictive than the Texas procedures in *Trevino*. See *Ramirez*, 799 F.3d at 853. Also, Indiana does not allow counsel on direct appeal from a conviction to use a motion to correct errors to supplement the record to assert a claim for ineffective assistance. Compare *Woods*, 701 N.E.2d at 1216, with *Trevino*, 133 S. Ct. at 1918 (determining that a motion for new trial is an inadequate vehicle for ineffective assistance of trial counsel claims).

Moreover, because a *Davis-Hatton* petition in Indiana is a collateral attack on a conviction, it does not provide, in the *Trevino* Court's words, "meaningful review" of an ineffective assistance counsel claim on direct review: it simply is not direct review. See *Trevino*, 133 S. Ct. at 1919. Perhaps most important, the *Davis-Hatton* procedure is neither "systematic" nor "typical." It is, in the words of *Trevino*, "special, limited, … [and] rarely used." Compare *Woods*, 701 N.E.2d at 1220, with *Trevino*, 133 S. Ct. at 1919–21. Amicus Indiana Public Defender Council tells us that between 2008 and 2012, its attorneys filed approximately 2000 appeals and only four *Davis-Hatton* petitions.

b. *Systemic Operation*

Indiana rules work together to make it unlikely that an Indiana defendant will be able to raise adequately on direct appeal a claim for ineffective assistance of trial counsel. The Indiana Supreme Court said as much in *Woods*: "As a practical matter," the confluence of these rules "will likely deter all but the most confident appellants from asserting any

claim of ineffectiveness on direct appeal." 701 N.E.2d at 1220. As in *Trevino* itself, "special, rarely used procedural possibilities" like the *Davis-Hatton* procedure cannot overcome the Indiana courts' directives that the preferred forum for ineffective assistance of trial counsel claims is post-conviction review. See *Trevino*, 133 S. Ct. at 1920.

The Indiana courts, like the Texas courts in *Trevino*, routinely direct defendants to bring claims for ineffective assistance of trial counsel on collateral review and warn against bringing them on direct review. Compare *Woods*, 701 N.E.2d at 1219–20 ("[A] postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim."), with *Trevino*, 133 S. Ct. at 1919–20. The Indiana Supreme Court not only has reinforced the preference for collateral review but has gone so far as to decline addressing a defendant's claim for ineffectiveness of trial counsel actually presented on direct appeal, believing it "preferable for the defendant to adjudicate his claim … in a post-conviction relief proceeding." *McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999); see also *Landis v. State*, 749 N.E.2d 1130, 1132 (Ind. 2001).

The Indiana Court of Appeals has followed suit, routinely issuing non-precedential decisions that echo the lesson of *Woods*, especially when denying relief on direct appeal. E.g., *Crockett v. State*, 13 N.E.3d 556, 2014 WL 2202763, at *4 (Ind. App. 2014) ("[I]t is well-settled that a post-conviction proceeding is generally the preferred forum," even if "a criminal defendant … is at liberty to elect whether to present this claim on direct appeal or in post-conviction proceedings"); see

also *Johnson v. State*, 46 N.E.3d 499, 2016 WL 327985, at *2 (Ind. App. 2016); *Merriman v. State*, 40 N.E.3d 1280, 2015 WL 5703912, at *5 n.3 (Ind. App. 2015); *Beals v. State*, 37 N.E.3d 977, 2015 WL 4105047, at *10 (Ind. App. 2015); *Anderson v. State*, 16 N.E.3d 488, 2014 WL 3511699, at *5 (Ind. App. 2014); *Wine v. State*, 9 N.E.3d 771, 2014 WL 1266285, at *3 (Ind. App. 2014); *Reed v. State*, 985 N.E.2d 1151, 2013 WL 1701879, at *3 (Ind. App. 2013).

Like the Texas bar in *Trevino*, the Indiana criminal defense bar "has taken this strong judicial advice seriously." See *Trevino*, 133 S. Ct. at 1920. In its annual training, amicus Indiana Public Defender Council "consistently advises against appellate counsel presenting ineffective assistance claims on direct appeal." When a public defender handling a direct appeal asked the Council if she should raise a claim for ineffective assistance of trial counsel in the direct appeal, the responses were best summarized by one that began, "NOOOOOO!!!" Amicus Br. of Ind. Pub. Def. at 21a.

For these reasons, in the language of *Trevino*, "as a matter of its structure, design, and operation," the Indiana procedural system "does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921. The *Martinez-Trevino* form of cause to excuse procedural

default is available to Indiana defendants who seek federal habeas relief.[2]

B. *Cause Under Martinez*

In a state like Indiana where the *Martinez-Trevino* doctrine can apply, procedural default in the state courts will not bar federal habeas review when a petitioner can demonstrate cause for the default. See *Trevino*, 133 S. Ct. at 1918; *Martinez*, 132 S. Ct. at 1318; *Coleman*, 501 U.S. at 747–48. To demonstrate cause under *Martinez-Trevino*, the petitioner must show deficient performance by counsel on collateral review as required under the first prong of the *Strickland* analysis. *Martinez*, 132 S. Ct. at 1318; see *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Actual resulting prejudice can be established with a substantial claim of ineffective assistance of trial counsel that would otherwise have been deemed defaulted. See *Detrich v. Ryan*, 740 F.3d 1237, 1245–46 (9th Cir. 2013) (observing that this reading is required to square the requirement with the structure of *Martinez*). Accordingly, to avoid procedural default, petitioner Brown must demonstrate that his collateral review counsel was deficient and must make a substantial claim of ineffective assistance of trial counsel. See *Trevino*, 133 S. Ct. at 1918, citing *Martinez*, 132 S. Ct. at 1318–19, 1320–21. Petitioner Brown has made a strong enough showing of each element to call for an evidentiary hearing in the district court.

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[2] On this issue, we respectfully disagree with both the district court here and the Northern District of Indiana in *Brown v. Superintendent*, 996 F. Supp. 2d 704, 716–17 (N.D. Ind. 2014).

1. *Ineffective Assistance of Post-Conviction Relief Counsel*

Brown claims that his lawyer in his post-conviction case was deficient because she did not raise a claim that his trial counsel was ineffective for failing to request a limiting instruction. To demonstrate that counsel's performance was deficient, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Judicial review of counsel's performance is "highly deferential," with "every effort … made to eliminate the distorting effects of hindsight." *Id*. at 689.

The State has not directly addressed whether Brown's collateral review lawyer was ineffective. On this record, and without having heard yet from the post-conviction attorney, we find that petitioner Brown has offered evidence that his post-conviction counsel's representation fell below an objective standard of reasonableness so that he is entitled to an evidentiary hearing on the issue.

The amended complaint on collateral review made a single allegation of error: trial counsel had been ineffective "for failing to move for a severance of his trial from Petitioner's codefendant" as a remedy for a *Bruton* violation. The problem with this claim, as the post-conviction courts held, was that on his direct appeal Brown had already argued the joint trial produced a *Bruton* violation. The state courts rejected that claim, squarely and definitively. Even if we account for the benefits of hindsight, a new claim built on the assumption of a *Bruton* violation would seem to have had little or no chance of success.

We recognize that the vast majority of claims for post-conviction relief are without merit, so an attorney's failure to prevail, or even pursuit of an unpromising claim, does not show ineffective assistance. Also, the Supreme Court's fundamental point in *Strickland* about avoiding the distorting effects of hindsight applies as much in the post-conviction process as in any other. See *Strickland*, 466 U.S. at 689. A post-conviction attorney can and should use professional judgment in selecting which claims and issues to raise, just as we expect from attorneys in direct appeals. See *Morris v. Bartow*, 832 F.3d 705, 709– 11 (7th Cir. 2016) (finding counsel's performance competent despite mixed record indicating possible coerced plea); *Vinyard v. United States*, 804 F.3d 1218, 1225–27 (7th Cir. 2015) (*Strickland* not applied unreasonably; counsel advised client not to challenge guilty plea); *Makiel v. Butler*, 782 F.3d 882, 898–902 (7th Cir. 2015) (*Strickland* not applied unreasonably; counsel selected issues for appeal and did not include an additional obvious claim).

For purposes of applying *Martinez* and *Trevino*, the approach we take to claims of ineffective assistance of counsel on direct appeal provides the best available guide. Pursuit of unsuccessful arguments and claims does not show ineffective assistance of counsel. But we may compare the claims actually presented to those that might have been presented. Where counsel chose to pursue just one issue that was a virtually certain loser, as in *Shaw v. Wilson*, a petitioner may show deficient performance by showing that a much stronger claim or argument was available. 721 F.3d 908, 915 (7th Cir. 2013); see

also *Vinyard*, 804 F.3d at 1228; *Makiel*, 782 F.3d at 898–99.

Even without relying on the benefits of hindsight, petitioner Brown makes a strong argument here that the one claim counsel pursued in the post-conviction petition was doomed from the beginning. The claim that counsel was ineffective by failing to move to sever Brown's trial from Love's appears to have been built on the assumption that the joint trial resulted in a *Bruton* violation. The state courts had already rejected that premise on direct appeal.

Petitioner argues that a viable ineffective assistance of trial counsel claim could have been premised on failure to seek a limiting instruction as to the hearsay Morris offered when testifying to his conversation with Love. See Ind. R. Evid. 801(c) (defining hearsay), 802 (making hearsay inadmissible), and 105 (providing a limiting instruction when evidence is presented that is "admissible against a party or for a purpose— but not against another party or for another purpose"). In contrast, the claim post-conviction review counsel presented instead was barred by *res judicata*. We do not mean to imply that we have reached a conclusion on the ultimate question of counsel's performance. As noted, no court has heard testimony from Brown's post-conviction counsel about the selection of issues and other factors that may affect the performance issue under *Strickland*. By showing that another, much stronger claim was available, however, petitioner has shown he is entitled to an evidentiary hearing on that issue.

2. *Substantial Underlying Claim for Ineffective Assistance of Trial Counsel*

Martinez also requires a petitioner to show "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1318–19. *Martinez* offered little guidance as to what is a "substantial" claim for these purposes. It provided only a "cf." citation to *Miller-El v. Cockrell*, 537 U.S. 322 (2003), describing the standards for certificates of appealability. 132 S. Ct. at 1319. *Miller-El* held that a certificate of appealability should be granted when a substantial showing can be made "by demonstrating that jurists of reason could disagree with the district court's resolution … or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. "This threshold inquiry does not require full consideration." *Id*. at 336.

The *Martinez* dissent predicted the problem we face here: "to establish cause a prisoner must demonstrate that the ineffective-assistance-of-trial-counsel claim is 'substantial,' which apparently means the claim has at least some merit. … The Court does not explain where this substantiality standard comes from." *Martinez*, 132 S. Ct. at 1322 n.2 (Scalia, J., dissenting). Appellate opinions applying *Martinez* and *Trevino* thus far offer limited further guidance. See *Ramirez*, 799 F.3d at 854–56 (concluding that there was "some merit" to Ramirez's argument without delving further into the standard). See also *Runningeagle*, 825 F.3d at 983 (deciding case on other

grounds); *Sexton v. Cozner*, 679 F.3d 1150, 1161 (9th Cir. 2012) (same); *Flores v. Stephens*, 794 F.3d 494, 505 (5th Cir. 2015) (concluding "that reasonable jurists would not debate the district court's decision … because the claims are not 'substantial' within the meaning of *Martinez*"); *Cox v. Horn*, 757 F.3d 113, 119 (3d Cir. 2014) (applying standard for certificate of appealability); *Detrich*, 740 F.3d at 1245 (citing *Miller-El* standard); *Cook v. Ryan*, 688 F.3d 598, 610 n.13 (9th Cir. 2012) (observing that *Martinez* used *Miller-El* as "generally analogous support").

In this case, petitioner argues that by granting a certificate of appealability, we have already determined that his defaulted ineffective assistance of trial counsel claim is substantial under *Martinez*. The State simply repeats that a "substantial claim is one that has 'some merit,'" then argues that petitioner cannot satisfy cause and prejudice under *Strickland*. We conduct a separate and deeper review of the record, beyond our grant of a certificate of appealability, and find a substantial ineffective assistance of trial counsel claim under *Martinez*.

We are guided by *Strickland*'s two-prong approach to claims of ineffective assistance of counsel. Brown must address whether his trial counsel's performance was deficient, falling below an objective standard of reasonableness. He must also address whether the ineffective assistance caused actual prejudice. *Strickland*, 466 U.S. at 687–88, 691–92. Substantiality is a threshold inquiry; full consideration of the merits is not required. *Miller-El*, 537 U.S. at 336.

a. *Substantial Showing of Trial Counsel's Deficient Performance*

At trial, the State relied heavily on the testimony of Mario Morris to place both Love and Brown at the scene of the murder. Morris testified to separate conversations he had in the Elkhart County Jail, one with Love and others with Brown. Without his testimony, only circumstantial evidence and one other reluctant witness implicated Brown.

Morris first testified to a conversation he had in Elkhart County Jail with Love. Like many of the witnesses called by the State, Morris suffered from credibility issues. He claimed that over a card game in jail, Love admitted he was involved in the murder of Wenger. According to Morris, Love told him that he had left a woman's apartment at the Middlebury Apartments to sell a "gang pack" (something that appears to be crack cocaine but is not) to a "white guy, Mr. Wenger." Love then told Morris he got in the back seat of a truck with Wenger in the driver's seat, and drove around a few blocks. Once Wenger figured out the drugs were fake, an argument ensued. Both men got out of the truck. Love then shot Wenger with a nine-millimeter handgun. Afterwards, he got back into the truck and pulled off to park behind some houses. Love came back later to wipe down any fingerprints he might have left on the truck.

Immediately after describing Love's tale for the jury, Morris testified that he had a separate conversation with Brown, also in the jail, who Morris said told a story very similar to Love's. Morris testified that Brown told him that he left a woman's apartment at the Middlebury Apartments on the

night of the murder. He was going to try to sell some fake drugs. Morris was asked by the prosecutor, "And did *they* actually try to sell him those gang packs?" (emphasis added). Morris responded, "Yes, sir."

Then, Morris testified, Brown told him that he had gotten out of the truck and hit Wenger on the head with his .45 caliber handgun. The blow caused the gun to fire. Brown then got in the truck and drove to an alley behind some houses. During deliberations, the jury requested to review Morris's testimony. It was read back to them in the courtroom.

Morris's testimony as to his conversation with Love, although admissible against Love, was inadmissible hearsay as offered against Brown. As petitioner's brief emphasizes, "like perhaps all jurisdictions, Indiana courts assume that jurors follow their instructions." If Brown's trial attorney had requested the limiting instruction to which Brown was probably entitled, it would have left the prosecution to rely on the arguably weak remainder of its case against Brown.

We are not convinced, on the limited record before us, that the decision not to seek a limiting instruction was objectively reasonable. Without the testimony of Morris's conversation with Love, which mirrored so closely the testimony of Morris's conversation with Brown, none of the evidence presented by the prosecution puts Brown at the murder scene with Love.

b. *Substantial Showing of Prejudice*

The additional evidence against Brown was not so strong that his claim of actual prejudice is not

substantial for purposes of *Martinez* and *Trevino*. The State relies primarily on the testimony of Kendrick Lipkins, who at trial was treated as a witness hostile to the prosecution. He responded only reluctantly with a single word, "Correct," to a leading question regarding an overheard confession by Brown. Lipkins also testified that he had a separate conversation in a car with Love, in Brown's presence, about the disposal of a .45 caliber handgun. But Lipkins, like most of the State's witnesses, had serious credibility issues. He admitted to being interested in a reward offered for information on the case, and he was willing to cooperate with police in order to keep his brother, T.J. Lipkins, out of jail.

The remaining evidence against Brown was circumstantial and not conclusive. A witness testified that a few weeks before the shooting she saw Brown with what she thought was a gun. Another witness testified that she saw both Love and Brown around 10:30 p.m. the night of the shooting. That was over three hours before Wenger was found, and she had a difficult time identifying Brown. A man testified that he saw two boys walking by Wenger's truck the morning after the shooting, but he could neither identify Brown nor say what the two boys were doing. Two witnesses testified that Brown was trying to sell a nine-millimeter handgun in the weeks following the shooting. One of those witnesses testified that when Brown was asked whether he murdered someone with the gun, he laughed. Although at least sixteen fingerprints were pulled from the truck, they were all Wenger's. No guns were recovered, but one .45 casing and one nine-millimeter casing were found at the crime scene. Bullet fragments found in Wenger's body

were from a single nine-millimeter bullet. The evidence was legally sufficient to permit a jury to convict Brown, but Brown has made a substantial claim of deficient trial counsel and resulting prejudice. His claim for ineffective assistance of trial counsel is not "wholly without factual support," or lacking in all legal merit. *Martinez*, 132 S. Ct. at 1319.

If Brown's theory is proven at an evidentiary hearing, he will have made a successful ineffective assistance of trial counsel claim. On the record before us, reasonable jurists "could disagree … or … conclude the issues presented" in petitioner's brief and borne out in the trial transcript "are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Brown has presented a substantial claim of ineffective assistance of trial counsel, sufficient to avoid the procedural default because he has demonstrated that the claim has some merit. See *Martinez*, 132 S. Ct. at 1318–19.

* * *

In sum, the *Martinez-Trevino* doctrine applies to Indiana procedures governing ineffective assistance of trial counsel claims. Petitioner Brown has presented evidence of ineffective post-conviction counsel and made a substantial claim of ineffective assistance of trial counsel. Accordingly, we REVERSE the district court's dismissal of Brown's petition and REMAND to the district court for an evidentiary hearing on the issue of ineffective assistance of post-conviction counsel. If the district court finds deficient performance by post-conviction counsel, Brown's default will be excused, and he will be entitled to an evidentiary hearing on the merits in the district court

for the underlying claim of ineffective assistance of trial counsel for failure to request a limiting instruction.

SYKES, *Circuit Judge*, dissenting. "Federalism and comity principles pervade federal habeas jurisprudence." *Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015). "One of these principles is that 'in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights.'" *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)). The doctrine of procedural default enforces this principle: A federal court will not hear a state prisoner's habeas claim unless the prisoner has first presented it to the state courts for one full round of review. *Id.* (citing *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014)).

Requiring state prisoners to exhaust state remedies serves important federalism interests. The "state courts are the principal forum for asserting constitutional challenges to state convictions," *Harrington v. Richter*, 562 U.S. 86, 103 (2011), and federal habeas review "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998) (internal quotation marks omitted). Federal habeas review of state convictions disturbs the State's "significant interest in repose for concluded litigation … and intrudes on state sovereignty to a degree

matched by few exercises of federal judicial authority." *Richter*, 562 U.S. at 103 (quotation marks omitted). Accordingly, "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

The deferential standard of review adopted in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), protects these state interests. So does the exhaustion requirement. For this reason, a federal court may review a defaulted claim only in very limited circumstances. The court may excuse a procedural default only if the prisoner (1) demonstrates cause for the default and consequent prejudice or (2) makes a convincing showing of actual innocence, thus establishing that the failure to review the defaulted claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749– 50; *Jones v. Calloway*, 842 F.3d 454, 461 (7th Cir. 2016).

"Cause" is an objective factor *external* to the defense that impedes the presentation of the claim to the state courts. *Coleman*, 501 U.S. at 753; *Weddington v. Zatecky*, 721 F.3d 456, 465 (7th Cir. 2013). Attorney error ordinarily doesn't satisfy the externality requirement because the defendant's attorney is his agent and the attorney's actions are imputed to his principal. *Coleman*, 501 U.S. at 753. But attorney error *can* excuse a procedural default if the error "is an independent constitutional violation," i.e., a denial of the Sixth Amendment right to the effective assistance of counsel. *Id.* at 755. In that

situation, the risk of error falls on the State as a corollary to its constitutional duty to provide effective counsel. *Id.* at 754. It follows, then, that because there is no Sixth Amendment right to counsel on collateral review, attorney negligence at that stage is *not* cause to excuse a procedural default. *Id.* at 755.

As my colleagues explain, in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the Supreme Court recognized a narrow exception to the *Coleman* rule. Luis Martinez, an Arizona prisoner, alleged in his federal habeas petition that his trial counsel was constitutionally ineffective in violation of the rule articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). He had counsel for his initial collateral-review proceeding, but his attorney did not present this claim to the state courts. *Martinez*, 132 S. Ct. at 1314. Under Arizona law a claim of ineffective assistance of trial counsel cannot be raised on direct appeal; it *must* be presented in an initial collateralreview proceeding. *Id.* The Court held that this procedural requirement of Arizona law warranted an equitable exception to the *Coleman* rule that an error by postconviction counsel is not cause to excuse a procedural default. *Id.* at 1315.

The Court held that if state law *requires* a prisoner to bring a *Strickland* claim on collateral review, a default at that stage of the criminal process does not preclude federal habeas review if "there was no counsel or counsel in that proceeding was ineffective." *Id.* at 1320. To be eligible for federal review, however, the defaulted *Strickland* claim must be "a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at

1318. The Court remanded Martinez's case, directing the lower courts to determine whether his state postconviction counsel was constitutionally ineffective, and if so, whether the underlying claim for ineffective assistance of trial counsel was "substantial." *Id.* at 1321.

The Court expanded the *Martinez* exception in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), making it available to prisoners in states that, though not *expressly* restricting *Strickland* claims to collateral review, nonetheless have procedural rules that foreclose the opportunity to develop the factual record necessary to effectively litigate the claim on direct review. Carlos Trevino was a Texas prisoner sentenced to death for murder. He alleged in his federal habeas petition that his trial counsel was ineffective for failing to adequately investigate and present mitigating circumstances in the penalty phase of his trial. *Id.* at 1915. The state trial judge had appointed new counsel for Trevino's direct appeal, but the attorney did not raise this claim. The judge appointed still another attorney for collateral review; that attorney too failed to raise the claim.

Martinez could not help Trevino. Unlike Arizona, Texas does not expressly *require* prisoners to reserve *Strickland* claims for collateral review. *Id.* at 1918. But the state's procedural rules make it "all but impossible" to raise such a claim on direct appeal. *Id.* at 1920. That's because a claim of ineffective assistance of trial counsel almost always requires development of a factual record, but the time constraints imposed by Texas law (most notably, the time for preparation of the transcript) eliminate the

opportunity to make the necessary record in conjunction with a direct appeal. *Id.* at 1918. That is, under the procedural rules in place in Texas, it's "'virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim' on direct appeal." *Id.* (quoting *Robinson v. State*, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)). For this reason the Texas Court of Criminal Appeals—the state's highest criminal tribunal— "has explicitly stated that '[a]s a general rule' the defendant 'should *not* raise an issue of ineffective assistance of counsel on direct appeal,' but rather in collateral review proceedings." *Id.* at 1920 (quoting *Mata v. State*, 226 S.W.3d 425, 430, n.14 (Tex. Crim. App. 2007)).

These two features of Texas law—a procedural system that makes it virtually impossible to effectively litigate a *Strickland* claim on direct review and an affirmative judicial directive *not* to do so—put Trevino in much the same position as Martinez. The Court concluded that the "procedural design and systemic operation" of the criminal appeal process in Texas was the functional equivalent of Arizona's rule barring *Strickland* claims on direct review. *Id.* at 1921 ("[A] distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference."). So the Court extended the *Martinez* exception to prisoners in Texas and other states where the "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a

meaningful opportunity to raise a claim of ineffective assistance of counsel on direct appeal." *Id.*

My colleagues conclude that Indiana is enough like Texas to warrant extending *Martinez-Trevino* to defaulted *Strickland* claims in habeas petitions brought by Indiana prisoners. I disagree. Indiana does not by procedural rule make it virtually impossible to litigate a *Strickland* claim on direct appeal. To the contrary, Indiana *explicitly provides* a process for doing so: the so-called *Davis*/*Hatton* procedure, which "allows a defendant to suspend the direct appeal to pursue an immediate petition for postconviction relief" in order to develop the factual record necessary to support a *Strickland* claim at the direct-appeal stage. *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998). The Indiana Supreme Court specifically reaffirmed the vitality of the *Davis*/*Hatton* procedure in *Woods*. *Id.* at 1219–20.

Nor has Indiana's highest tribunal gone as far as the Texas Court of Criminal Appeals, which specifically directed defendants *not* to raise these claims on direct review. In *Woods*—the seminal case on this subject—the Indiana Supreme Court explained that although collateral review is "normally the preferred forum" for a claim of ineffectiveness assistance of trial counsel, direct review remains an appropriate and workable option in light of the *Davis*/*Hatton* procedure. *Id.* at 1219.

Here, in full, is the key passage in the state high court's opinion:

> For the reasons outlined, a postconviction hearing is normally the

preferred forum to adjudicate an ineffectiveness claim. We nonetheless agree that potential for administrative inconvenience does not always outweigh the costs of putting off until tomorrow what can be done today: "If there is no reason for delay in presenting a claim, the delay should not be countenanced, for there is a considerable social interest in the finality of criminal proceedings." [*U.S. v.*] *Taglia*, 922 F.2d [413,] 418 [7th Cir. 1991]. If we are dealing with an improperly incarcerated defendant, the cause of justice is plainly better served by making that determination as soon as possible. The same is true even if a retrial is required. Resolving record-based ineffectiveness claims on direct review also has some doctrinal appeal because it is more consistent with the residual purpose of postconviction proceedings. *Langley* [*v. State*], 267 N.E.2d [538,] 541 [Ind. 1971] ("[T]he permissible scope of review on direct appeal is well defined and broader than that permitted by collateral attack through post conviction relief."). These considerations can be largely met under a procedure that allows a defendant to suspend the direct appeal to pursue an immediate petition for postconviction relief. *Davis v. State*, 368 N.E.2d 1149 (1977); *see also Hatton v. State*, 626 N.E.2d 442 (Ind. 1993) (reiterating vitality of *Davis* procedure). This should cover the exceptional case in which the defendant prefers to adjudicate a claim of

> ineffective assistance before direct appeal remedies have been exhausted. Because of the *Davis* procedure, the direct appeal is not necessarily an obstacle to speedy adjudication of the adequacy of the representation, as recent cases in which the procedure was invoked for that purpose demonstrate. *See Coleman v. State*, 694 N.E.2d 269 (Ind. 1998); *Brown v. State*, 691 N.E.2d 438 (Ind. 1998). Although not to be used as a routine matter in adjudicating the issue of trial counsel's effectiveness, a *Davis* request may be appropriate "where the claim asserted arguably requires a certain level of fact finding not suitable for an appellate court." *Lee v. State*, 694 N.E.2d 719, 721 n.6 (Ind. 1998), *petition for cert. filed,* 67 U.S.L.W. 3362 (U.S. Sept. 24, 1998) (No. 98–6205).

Id. at 1219–20 (footnote omitted).

The state supreme court went on to fashion a rule against claim splitting, holding that all allegations of trial counsel's ineffectiveness must be consolidated in a single proceeding. More specifically, the court said that "[t]he specific contentions supporting the claim … may not be divided between the two proceedings." *Id.* at 1220. It's a strong rule of preclusion; if the defendant raises the issue on direct review, he may not do so again in collateral proceedings. *Id.* The court acknowledged the likelihood that this "all or nothing" requirement would channel many *Strickland* claims to collateral review: "As a practical matter, this rule will likely deter all but the most confident appellants

from asserting any claim of ineffectiveness on direct appeal. It will certainly deter some." *Id.* Still, the court held—unequivocally—that "concerns for prompt resolution of claims lead us to permit ineffective assistance to be raised [on direct appeal] within or without the procedure available pursuant to *Davis*." *Id.*

So Indiana offers defendants a true choice—direct appeal *or* collateral review—and *either* forum is a procedurally viable option for adjudicating a *Strickland* claim. Indeed, *Woods* was explicit on this point. "The defendant must decide the forum for adjudication of the issue—direct appeal or collateral review." *Id.* In sharp contrast to Texas, *both* options are fully open in Indiana, and the state provides a meaningful opportunity to litigate the issue at *either* stage. This takes Indiana outside the rule and rationale of *Trevino*.

My colleagues focus on the state high court's strong preference for reserving *Strickland* claims for collateral review, a preference apparently reinforced by the lower courts and generally followed by the criminal defense bar. Majority Op. at pp. 13–15. That's not enough to bring Indiana within the ambit of *Trevino*. The Supreme Court justified extending *Martinez* to Texas prisoners primarily because that state's procedural rules make it *virtually impossible* to effectively raise a *Strickland* claim on direct appeal. *Trevino*, 133 S. Ct. at 1918–19. These procedural barriers, in turn, have led Texas courts to admonish defendants *not* to bring these claims on direct review. It's true that the Court spent several paragraphs discussing this "strong judicial advice."

Id. at 1920. But the advice of the Texas judiciary played only a supporting role in the Court's decision; it certainly wasn't sufficient on its own to support the expansion of *Martinez*.

Moreover, unlike the Texas Court of Criminal Appeals, the Indiana Supreme Court has *not* directed defendants to refrain from bringing claims of trial counsel's ineffectiveness on direct review; it has said, rather, that collateral review is "normally the preferred forum" for these claims. *Woods*, 701 N.E.2d at 1219. Indeed, as the passage quoted above makes clear, one of the main points of the court's decision in *Woods* was to preserve the direct-review option and highlight the availability of the *Davis*/*Hatton* procedure for defendants who are concerned about delay but need to make a factual record before bringing a *Strickland* claim on direct review.

In short, my colleagues' decision is not so much an application of *Trevino* as an unwarranted *expansion* of it. This has real consequences for criminal litigation in Indiana, for federal habeas review of Indiana convictions, and ultimately for the relationship between the federal and state courts. It is by now canonical that federal habeas review of state convictions is extremely deferential. Under AEDPA the state court's factual findings are presumed to be correct, § 2254(e)(1), and a federal court may not grant habeas relief unless the state court's adjudication of a federal claim was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court, § 2254(d). As the petitioner's counsel acknowledged in oral argument, *Martinez-Trevino* creates a moral

hazard in the state postconviction process, even where by its terms the doctrine clearly applies. If a prisoner complies with the exhaustion requirement and presents his *Strickland* claim to the state courts, AEDPA's highly deferential standard of review applies. If instead he defaults the claim and the *Martinez-Trevino* exception applies, the *Strickland* claim gets plenary review in federal court. Given these perverse incentives, we should be wary of expanding the doctrine beyond the limits of its rationale.

As a result of today's decision, the Indiana district courts will be deluged with defaulted *Strickland* claims. It is an unfortunate reality in postconviction litigation that ordinary claims of trial error can be easily repackaged as claims of ineffective assistance of trial counsel. Now that Indiana prisoners may use *Martinez-Trevino*, Indiana district judges will routinely have to contend with the two gateway questions that unlock the door to plenary review of defaulted *Strickland* claims. A federal judge will have to decide—de novo—whether the prisoner's postconviction counsel was ineffective, and if so, whether the underlying *Strickland* claim is substantial. An affirmative answer means full federal review of the defaulted claim unburdened by AEDPA's deferential standard of review.

This is a serious intrusion on federalism interests. I return to where I started: The "state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 103. That will no longer be true in Indiana for at least some *Strickland* claims. After today's decision, the

federal courts, not the state courts, will be the primary forum for more constitutional challenges to state convictions. That result would be unavoidable if *Martinez* and *Trevino* inescapably applied. But they do not inescapably apply. I respectfully dissent.

Appendix B

In the
United States Court of Appeals
For the Seventh Circuit

No. 16-1014

DENTRELL BROWN,

Petitioner-Appellant,

v.

RICHARD BROWN,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:13-cv-1981-JMS-DKL — **Jane Magnus-Stinson**, *Chief Judge*.

July 19, 2017

PER CURIAM.

On consideration of respondent- appellee Richard Brown's petition for rehearing and rehearing en banc, filed on March 9, 2017, a majority of judges in active service voted to deny the petition for rehearing en banc. Judges Flaum, Easterbrook, and Sykes voted to grant the petition for rehearing en banc. Judges Kanne and Hamilton voted to deny panel rehearing; Judge Sykes voted to grant panel rehearing.

Accordingly, the petition for rehearing and rehearing en banc filed by respondent-appellee Richard Brown is DENIED.

SYKES, *Circuit Judge*, with whom FLAUM and EASTERBROOK, *Circuit Judges*, join, dissenting from the denial of rehearing en banc.

Indiana asks us to rehear this habeas case en banc. For the reasons elaborated in my panel dissent and briefly summarized here, I would grant that request.

A federal court may not review a state prisoner's habeas claim unless the prisoner has exhausted state remedies by presenting the claim to the state courts for one full round of review. 28 U.S.C. § 2254(b)(1)(A); *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). Failure to exhaust is a procedural default and precludes federal review unless the prisoner establishes cause to excuse the default and consequent prejudice. *Coleman*, 501 U.S. at 749–50. Attorney error is not "cause" unless the error amounted to a denial of the prisoner's constitutional right to the effective assistance of counsel. *Id.* Because the Constitution does not guarantee counsel in postconviction proceedings, attorney error at that stage of the state criminal process is *not* cause to excuse procedural default. *Id.* at 755.

A narrow exception exists for defaulted claims of trial counsel's ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984)—but *only* if state law expressly *requires* prisoners to bring these claims on collateral review, *Martinez v. Ryan*, 566 U.S. 1, 16–

17 (2012), or a state's procedural system effectively deprives prisoners of a meaningful opportunity to litigate the claim on direct appeal, *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). The panel majority held that *Martinez-Trevino* applies to defaulted *Strickland* claims by Indiana prisoners. *Brown v. Brown*, 847 F.3d 502, 510–13 (7th Cir. 2017). As I explained in my panel dissent, that decision is an unwarranted expansion of the narrow *Martinez-Trevino* exception. *Id.* at 519–21 (Sykes, J., dissenting).

Indiana does not expressly require prisoners to bring *Strickland* claims in collateral-review proceedings, and the state's procedural rules do not deny a meaningful opportunity to litigate the claim on direct review. To the contrary, the Indiana Supreme Court explicitly *permits* prisoners to bring these claims on direct appeal and provides a special procedure for developing the factual record necessary to effectively litigate the claim at that stage of the criminal process. *Id.* (discussing *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998)). True, the state high court has said that postconviction review is normally the "preferred forum" for these claims, *Woods*, 701 N.E.2d at 1219, but a preference is not a requirement, *see Lee v. Corsini*, 777 F.3d 46, 60 (1st Cir. 2015) (*Martinez* and *Trevino* do not apply in Massachusetts even though the preferred method for raising a claim of ineffective assistance of counsel in that state is through a motion for a new trial.) (internal quotation marks omitted). Nothing in Indiana law either forecloses *Strickland* claims on direct review or makes it "all but impossible" to effectively present the claim in connection with a direct appeal. *Trevino*, 133 S. Ct. at 1920. "This takes Indiana outside the rule

and rationale of *Trevino*." *Brown*, 847 F.3d at 521 (Sykes, J., dissenting).

The panel's contrary conclusion should be reconsidered by the full court—not only because it is mistaken but also because it has broad systemic importance. Expanding *Martinez-Trevino* disturbs the settled federalism and comity principles that animate federal habeas jurisprudence. *Id.* at 521–22. More concretely, it carries significant institutional costs. District judges in Indiana will now be flooded with defaulted *Strickland* claims, each requiring adjudication of the gateway *Martinez-Trevino* questions that open a path to plenary federal review of defaulted *Strickland* claims: Was postconviction counsel ineffective, and if so (or if the prisoner lacked postconviction counsel) is the underlying *Strickland* claim "substantial," i.e., does it have "some merit"? *Id.* at 518–19. Affirmative answers to these questions yields "full federal review of the defaulted claim unburdened by AEDPA's deferential standard of review." *Id.* at 522. As I explained in my panel dissent, this will shift much *Strickland* litigation to the Indiana federal district courts, altering the federal-state balance and seriously intruding on Indiana's sovereign authority to review convictions obtained in its own courts for compliance with federal constitutional requirements. *Id.* at 521–22.

The Supreme Court's newly released decision in *Davila v. Davis* supports en banc rehearing. There the Court refused to extend the *Martinez-Trevino* exception to a new context: defaulted claims of ineffective assistance of *appellate* counsel. *Davila v. Davis*, 137 S. Ct. 2058 (2017). *Davila* doesn't directly

resolve whether *Martinez-Trevino* should be available to Indiana prisoners, but the Court's opinion is nonetheless instructive. First, the Court repeatedly emphasized that *Martinez-Trevino* is a "narrow," "limited," and "highly circumscribed" equitable exception to *Coleman*'s general rule. *Id.* at 2062, 2065, 2066–67, 2068, 2069, 2070. This suggests a strong reluctance to expand the exception beyond the limits of its rationale. Second, the Court restated the core reasoning underlying the exception: When a state makes a deliberate choice "to move trial-ineffectiveness claims outside the direct-appeal process, where counsel is constitutionally guaranteed," that procedural choice, though otherwise permissible, "significantly diminishe[s]" a prisoner's ability to file such claims and is "not without consequences for the State's ability to assert a procedural default." *Id.* at 2068 (quoting *Martinez*, 566 U.S. at 13). Indiana has *not* moved *Strickland* claims outside the direct-appeal process, so the reason for the exception does not exist here.

Finally, the Court expressed deep concern about the systemic costs of expanding *Martinez-Trevino*. *Id.* at 2068–70. The Court worried that extending the exception to a new category of claims would "undermine the doctrine of procedural default and the values it serves." *Id.* at 2070. "That doctrine, like the federal habeas statute generally, is designed to ameliorate the injuries to state sovereignty that federal habeas review necessarily inflicts by giving state courts the first opportunity to address challenges to convictions in state court, thereby 'promoting comity, finality, and federalism.'" *Id.* (quoting *Cullen v. Pinholster*, 563 U.S. 170, 185

(2011)). Expanding *Martinez-Trevino*, the Court said, "would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." *Id.* (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).

The same principles are implicated here. The panel's expansion of *Martinez-Trevino* cannot be justified under the terms of those decisions and is hard to reconcile with the Court's reasoning in *Davila*. For these reasons and those explained more thoroughly in my panel dissent, we should rehear this case en banc.

Appendix C

Filed 12/03/15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DENTRELL BROWN
Petitioner,
v.
RICHARD BROWN,
Respondent.

Case No. 1:13-cv-1981-JMS-DKL

Entry Discussing Petition for Writ of Habeas Corpus, and Granting Certificate of Appealability Regarding One Claim

Presently pending before the Court is petitioner Dentrell Brown's petition for a writ of habeas corpus. Mr. Brown raises three grounds for relief in his petition. The Court addressed Grounds Two and Three in a previous Entry, concluding that they were procedurally defaulted, and therefore dismissed them with prejudice. The Court ordered the parties to submit additional briefing regarding Ground One. That briefing is now complete.[1] For the reasons

[1] The Court ordered the respondent to supplement the record in this case. The deadline to do so has passed. Given the Court's resolution of Mr. Brown's Confrontation Clause claim based on *Crawford*, the supplemental record was not ultimately necessary. Nevertheless, the respondent must ensure strict compliance with this Court's orders and deadlines in the future.

explained below, Mr. Brown is not entitled to relief on Ground One, and, despite Mr. Brown's request, the Court finds no basis to reconsider its decision with respect to Ground Two. Therefore, Mr. Brown's habeas petition is **denied**. The Court issues a certificate of appealability on Ground One as specified at the end of this Entry.

I.
Background

In February 2009, Mr. Brown was convicted in an Indiana state court of murder, and he was sentenced to 60 years' imprisonment. His conviction was upheld by the Indiana Court of Appeals. *See D.B. v. State*, 916 N.E.2d 750, 2009 WL 3806084 (Ind. Ct. App. 2009) ("*Brown I*"). The Indiana Supreme Court denied transfer. *See D.B. v. State*, 929 N.E.2d 781 (Ind. 2010). Mr. Brown then sought post-conviction relief in state court, the denial of which was affirmed by the Indiana Court of Appeals. *See D.B. v. State*, 976 N.E.2d 146, 2012 WL 4713965 (Ind. Ct. App. 2012) ("*Brown II*").

District court review of a habeas petition presumes all factual findings of the state court to be correct, absent clear and convincing evidence to the contrary. *See Daniels v. Knight*, 476 F.3d 426, 434 (7th Cir. 2007). The Indiana Court of Appeals summarized the relevant factual background in *Brown I* as follows:

> On March 8, 2008, Elkhart police responded to a report of gunshots and discovered Gerald Wenger lying dead in the street with a single bullet wound to his

head. Police discovered two bullet casings next to Wenger, one from a 9mm handgun and one from a .45 caliber handgun. Forensic analysis revealed Wenger's wound resulted from a 9mm bullet.

Prior to the murder, Wenger had been using cocaine with some friends. Around 1:00 in the morning on March 8, 2008, Wenger left his apartment in a red and black Ford pickup truck to buy more drugs. At approximately 3:30 a.m. on March 8, 2008, Dan Holt, who lived in the same neighborhood where the murder occurred, got up to get ready for work. Holt noticed a red and black Ford pickup truck parked in an alley near his home. Ron Troyer, who also lived in the neighborhood, saw the same truck as he arrived home from work around 9:00 p.m. on March 8, 2009. As Troyer approached, he noticed two individuals near the truck. The individuals ran away when they saw Troyer, and Troyer called the police, who identified the red and black pickup truck as belonging to Wenger. However, forensic analysis of the truck did not reveal any fingerprints other than those belonging to Wenger.

On June 18, 2008, the State charged D.B. with murder, a felony. Although D.B. is a minor, the juvenile court waived his charges to an adult felony court. The trial court held a jury trial from February 2nd to 5th, 2009,

at which it tried both D.B. and codefendant Joshua Love.…

The State also presented the testimony of Mario Morris. Morris testified regarding individual conversations he had with D.B. and Love, in which each man separately confessed his respective involvement in Wenger's murder. Morris first testified about conversations he had with Love while both were in jail. Love told Morris he met Wenger on the night of the murder because Wenger wanted to buy some drugs. Love got into the back seat of Wenger's truck and attempted to sell Wenger a "gang pack," which is a substance that looks like crack cocaine, but is not really crack cocaine. When Wenger discovered the ruse, he stopped the truck and an argument ensued. Both men exited the truck and Love shot Wenger in the head with a 9mm handgun. Love then got back into Wenger's truck and travelled to a nearby alley. Love got out of the truck and went to hide his gun. He returned later to wipe down the truck so police could not find any fingerprints. During his testimony regarding his conversations with Love, Morris never mentioned the presence of a third party during the commission of the crime and never mentioned D.B. by name or by implication.

Morris next testified about conversations he had with D.B. while both were in jail.

D.B. told Morris that he met up with Wenger on the night of the murder because Wenger wanted to buy drugs. D.B. got into the front seat of Wenger's truck and decided to try to sell Wenger a gang pack. When Wenger discovered the drugs were fake, an argument ensued and Wenger demanded his money back. Both Wenger and D.B. got out of the truck and continued arguing. D.B. then pulled out a .45 caliber handgun and struck Wenger on the side of his head. As D.B. struck Wenger with the gun, it fired, grazing Wenger. D.B. then told Morris he got back into Wenger's truck and drove to a nearby alley, where he left the truck. During his testimony regarding his conversations with D.B., Morris never mentioned the presence of a third party during the commission of the crime and never mentioned Love by name or by implication.

Although he had not objected to any of Morris's testimony, at the conclusion of Morris's testimony, D.B. moved for a mistrial. The trial court heard extensive arguments from all parties and ultimately denied the motion, noting that Morris's testimony regarding his conversations with each defendant did not inculpate the other defendant. At the conclusion of the trial, the jury found D.B. guilty of murder, a felony. On March 5, 2009, the trial court held a sentencing hearing, after which it sentenced D.B. to an aggregate term of sixty years with fifty-five years executed at the Department

> of Correction, and five years suspended to probation.

Brown I, 2009 WL 3806084, at *1-2.

After his convictions were affirmed on direct appeal and he was denied post-conviction relief, Mr. Brown filed the instant petition for a writ of habeas corpus in this Court.

II.
Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws … of the United States." 28 U.S.C. § 2254(a). "Under the current regime governing federal habeas corpus for state prison inmates, the inmate must show, so far as bears on this case, that the state court which convicted him unreasonably applied a federal doctrine declared by the United States Supreme Court." *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001) (citing 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362 (2000); *Morgan v. Krenke*, 232 F.3d 562 (7th Cir. 2000)). Thus, "under AEDPA, federal courts do not independently analyze the petitioner's claims; federal courts are limited to reviewing the relevant state court ruling on the claims." *Rever v. Acevedo*, 590 F.3d 533, 536 (7th Cir. 2010). "A state-court decision involves an unreasonable application of [the Supreme] Court's clearly established precedents if the state court applies [the Supreme] Court's precedents to the facts in an objectively unreasonable manner." *Brown v. Payton*, 544 U.S. 131, 141 (2005) (internal citations omitted). "The habeas applicant has the

burden of proof to show that the application of federal law was unreasonable." *Harding v. Sternes*, 380 F.3d 1034, 1043 (7th Cir. 2004) (citing *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)).

In addition to the foregoing substantive standard, "federal courts will not review a habeas petition unless the prisoner has fairly presented his claims 'throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings.'" *Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015) (quoting *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014), and citing 28 U.S.C. § 2254(b)(1)); *see also Anderson v. Benik,* 471 F.3d 811, 814-15 (7th Cir. 2006) ("To avoid procedural default, a habeas petitioner must fully and fairly present his federal claims to the state courts.") (internal quotation marks and citation omitted).

Insofar as pertinent here, procedural default "occurs when a claim could have been but was not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court." *Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992). A federal claim is not fairly presented unless the petitioner "put[s] forward operative facts and controlling legal principles." *Simpson v. Battaglia*, 458 F.3d 585, 594 (7th Cir. 2006) (citation and quotation marks omitted). "A federal court may excuse a procedural default if the habeas petitioner establishes that (1) there was good cause for the default and consequent prejudice, or (2) a fundamental miscarriage of justice would result if the defaulted claim is not heard." *Johnson*, 786 F.3d at 505.

III.
Discussion

The Court addresses first Mr. Brown's claim that his rights under the Confrontation Clause were violated, before turning to Mr. Brown's request for the Court reconsider its decision that his ineffective assistance of counsel claim is procedurally defaulted.

A. Sixth Amendment Confrontation Clause Claim

The parties dispute both whether this claim is procedurally defaulted and its merits. The Court will address each contention in turn.

1. Procedural Default

Before the Indiana Court of Appeals in *Brown I*, Mr. Brown argued that his Confrontation Clause rights as set forth in *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny were violated when the trial court permitted Mr. Morris to testify regarding Mr. Love's confession that, together with Mr. Morris's testimony regarding Mr. Brown's confession and other evidence, incriminated Mr. Brown. [*See* Filing No. 14-5 at 10-15.] The Indiana Court of Appeals rejected this claim on the merits. *See Brown I*, 2009 WL 3806084, at *2-3. Mr. Brown sought transfer to the Indiana Supreme Court, and in his transfer petition he raised the same Confrontation Clause claim raised before the Indiana Court of Appeals. [*See* Filing No. 14-8 at 7-11.]

In the instant habeas petition, Mr. Brown again raises a Confrontation Clause claim based on *Bruton* and its progeny. [*See* Filing No. 1 at 10-17.] Part of his argument is that the Indiana Court of Appeals

misapplied that case law because it failed to recognize that a limiting instruction stating that Mr. Love's confession could not be considered against Mr. Brown—which was not given by the trial court—was necessary to avoid a Confrontation Clause violation. [*See* Filing No. 1 at 12-13.]

The respondent argues that Mr. Brown's Confrontation Clause claim has morphed from how it was presented in state court because Mr. Brown's habeas petition focuses on the lack of limiting instruction as the source of the constitutional error, rather than the admission of Mr. Love's confession altogether. [Filing No. 22 at 4-7.] Because the basis of the claim has changed, says the respondent, Mr. Brown did not fairly presented this claim in state court and thus it is procedurally defaulted. [Filing No. 22 at 4-7.] Mr. Brown replies that he raised a Confrontation Clause claim based on *Bruton* and its progeny along with the operative facts supporting his claim at every stage of this litigation, and that is all that is required to fairly present the claim to the state courts. [Filing No. 29 at 29 at 2-4.]

As set forth above, "federal courts will not review a habeas petition unless the prisoner has fairly presented his claims throughout at least one complete round of state-court review." *Johnson*, 786 F.3d at 504 (citations and quotation marks omitted). "Fair presentment, however, does not require a hypertechnical congruence between the claims made in the federal and state courts; it merely requires that the factual and legal substance remain the same." *Anderson v. Benik*, 471 F.3d 811, 814-15 (7th Cir. 2006); *see also Picard v. Connor*, 404 U.S. 270, 277-78

(1971) ("[W]e do not imply that respondent could have raised the equal protection claim only by citing 'book and verse on the federal constitution.' We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts.") (citations omitted). "If the facts presented do not evoke a familiar constitutional constraint, there is no reason to believe the state courts had a fair opportunity to consider the federal claim." *Anderson*, 471 F.3d at 815. Therefore, the Court considers "four factors when determining whether a petitioner has fairly presented his federal claim to the state courts: 1) whether the petitioner relied on federal cases that engage in a constitutional analysis; 2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; 3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and 4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation." *Id.* (citations and quotation marks omitted).

Here, all four relevant factors demonstrate that Mr. Brown fairly presented his claim to the state courts. As to the first three factors, Mr. Brown relied on both federal and state cases engaging in a constitutional analysis of the Confrontation Clause as applied to similar facts in both his direct appeal brief and his petition to transfer to the Indiana Supreme Court. [*See, e.g.*, Filing No. 14-5 at 12 (citing *Bruton*; *Cruz v. New York*, 481 U.S. 186 (1987); *Fayson v. State*, 726 N.E.2d 292, 294 (Ind. 2000)); Filing No. 14-8 at 7-9 (citing the same cases).] Regarding the fourth and final factor, Mr. Brown detailed facts regarding

Mr. Morris's testimony and how, through Mr. Morris, the confession of Mr. Love was admitted against him, which precluded Mr. Brown from crossexamining Mr. Love. [*See* Filing No. 14-5 at 10-11; Filing No. 14-8 at 7.] These facts are similar to those in mainstream constitutional litigation regarding *Bruton* violations and the Confrontation Clause. Finally, the lack of a limiting instruction was specifically noted in a footnote in Mr. Brown's brief, [*see* Filing No. 14-5 at 15 n.1], which undermines the respondent's argument that Mr. Brown's claim has impermissibly morphed into a new claim regarding the limiting instruction on habeas review. Accordingly, this claim was fairly presented in state court and is not procedurally defaulted.

2. Merits

The parties' arguments primarily focus on two issues: whether the Indiana Court of Appeals reasonably resolved Mr. Brown's *Bruton* claim and, although not discussed by the Indiana Court of Appeals, whether the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), altered the *Bruton* rule such that Mr. Brown's Confrontation Clause claim is meritless. The Court will first address the Indiana Court of Appeals' resolution of Mr. Brown's claim, before turning to whether *Crawford* altered *Bruton*'s rule.

a. The Indiana Court of Appeals Unreasonably Applied Clearly Established Federal Law as Determined by the United States Supreme Court

The Indiana Court of Appeals reasoned as follows in rejecting Mr. Brown's Confrontation Clause claim:

> D.B. argues that Morris's testimony regarding statements made by the codefendant, Love, violated his constitutional right to cross-examination because he could not compel Love to testify. In *Bruton v. United States*, 391 U.S. 123, 126 (1968), the Supreme Court addressed the issue of the admissibility of a codefendant's pre-trial statement during a joint trial. The Court concluded a substantial risk exists that the jury might consider one codefendant's incriminating pre-trial statement against the other codefendant as well. *Id.* Because the former cannot be forced against his will to take the stand, the latter is denied his Sixth Amendment right to confront and cross-examine witnesses against him. *Id.* at 137. However, a codefendant's statements violate Bruton only if they "facially incriminate" another defendant. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Fayson v. State*, 726 N.E.2d 292, 294 (Ind.2000); *Brock v. State*, 540 N.E .2d 1236, 1240 (Ind.1989).

> Morris gave separate testimony regarding statements made to him by Love and D.B. respectively. At no point during his testimony regarding Love's statements did Morris mention D.B. by name or implication. In fact, Morris made no mention of a third-party being present at the crime at all. D.B. argues, however, it would be impossible for a reasonable juror hearing testimony about both statements to not connect them into a single crime. This does not create a *Bruton* violation, however. Each codefendant confessed to his respective involvement in the crime and provided essentially identical details. Thus, each was implicated by his own statements to Morris alone, not by the statements of the other codefendant. Love's statements did not facially incriminate D.B., and therefore, no *Bruton* violation occurred. As a result, the trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial on the basis of the alleged *Bruton* violation.

Brown I, 2009 WL 3806084, at *2-3.

Mr. Brown argues that the Indiana Court of Appeals unreasonably applied Supreme Court precedent in denying his Confrontation Clause claim in that it ignored the fact that a limiting instruction was required to make Mr. Love's confession offered through Mr. Morris constitutionally permissible. [Filing No. 1 at 12-13.] The respondent contends that the trial court was not required to give a limiting instruction *sua sponte*, and because Mr. Brown did

not request a limiting instruction, he cannot now argue that the lack of limiting instruction violated his rights under the Confrontation Clause. [Filing No. 22 at 11-12.] Mr. Brown replies that *Richardson* does not require the defendant to request a limiting instruction; instead, it makes clear that the instruction must be given to avoid a violation of the Confrontation Clause. [Filing No. 29 at 5-6.]

"In *Bruton v. United States*, the Supreme Court held that a defendant's Sixth Amendment right to confront witnesses against him is violated when the confession of a nontestifying codefendant, in which the defendant is expressly implicated as a participant in the crime, is admitted in the joint trial of the two defendants, even if the jury is instructed to consider the confession only against the confessing codefendant." *United States v. Souffront*, 338 F.3d 809, 828 (7th Cir. 2003); *see Bruton*, 391 U.S. at 136 ("Despite the concededly clear instructions to the jury to disregard … inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."). Subsequently, the Supreme Court reasoned in *Richardson v. Marsh*, 481 U.S. 200 (1987), that the rationale driving *Bruton*—namely, when faced with a "facially incriminating confession" by a nontestifying codefendant, a limiting instruction was "inadequate"—does not apply "when confessions that do not name the defendant are at issue." *Id.* at 202. Therefore, the Supreme Court held "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession

with a proper limiting instruction when … the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211 (emphasis added); *see Gray v. Maryland*, 523 U.S. 185, 185-86 (1998) (noting that "*Bruton*'s scope was limited by *Richardson* …, in which the Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only that defendant's name, but any reference to his or her existence").

The Court agrees with Mr. Brown that the Indiana Court of Appeals unreasonably applied Supreme Court precedents, particularly *Richardson*, in rejecting his Confrontation Clause claim. *Bruton* and the subsequent cases relying on *Bruton* focus on the necessity of a limiting instruction in preventing a violation of the Confrontation Clause. In *Bruton*, the Supreme Court held that the Confrontation Clause is violated when "the confession of a nontestifying codefendant, in which the defendant is expressly implicated as a participant in the crime, is admitted in the joint trial of the two defendants, *even if* the jury is instructed to consider the confession only against the confessing codefendant." *Souffront*, 338 F.3d at 828 (emphasis added); *see Bruton*, 391 U.S. at 136. *Bruton* represented a "narrow exception" to the "assumption of the law that jurors follow their instructions," but an exception that the Supreme Court declined to expand in *Richardson*. *See Richardson*, 481 U.S. at 207. Instead, the Supreme Court reasoned that the calculus regarding the adequacy of a limiting instruction changes "when

confession that do not name the defendants are at issue." *Id.* at 211. Therefore, as explained above, the Supreme Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession *with a proper limiting instruction* when … the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* (emphasis added). This holding makes clear that two things must occur for a confession to be admissible in similar circumstances: (1) the confession must be redacted to eliminate any reference to the defendant's existence; and (2)a "proper limiting instruction" must be given. *Id.*

The Indiana Court of Appeals cited *Richardson* as standing for the proposition that "a codefendant's statements violate *Bruton* only if they 'facially incriminate' another defendant." *Brown I*, 2009 WL 3806084, at *2 (citing *Richardson*, 481 U.S. at 211). It then went on to analyze only whether Mr. Love's statements facially incriminated Mr. Brown, concluding that they did not. *See id.* at *3. But such an analysis ignores the other key component of *Richardson*—namely, whether a limiting instruction was given. Cases following *Bruton* and *Richardson* have reinforced the necessity of a limiting instruction to ensure that a defendant's confrontation rights are not violated. *See Gray*, 523 U.S. at 185-86 ("*Bruton*'s scope was limited by *Richardson* …, in which the Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession *with a proper limiting instruction* when the confession is redacted to eliminate not only that defendant's name, but any

reference to his or her existence") (emphasis added); *United States v. Sutton*, 337 F.3d 792, 799 (7th Cir. 2003) ("Proper redaction of the confession to eliminate all references to the co-defendants, *combined with a limiting instruction to the jury that it may not consider the confession against anyone other than the confessing defendant* [was] adequate [to avoid a Confrontation Clause violation].") (emphasis added); *Souffront*, 338 F.3d at 830 ("*If a proper limiting instruction is given to the jury*, a redacted statement which incriminates a defendant only in conjunction with other evidence in the case does not violate *Bruton*.") (emphasis added); *United States v. Ward*, 377 F.3d 671, 676-77 (7th Cir. 2004) ("When redaction *is coupled with a limiting instruction to the jury that it may not consider the evidence against anyone other than the confessing defendant*, a defendant's Confrontation Clause rights are sufficiently protected.") (emphasis added).

Despite the Indiana Court of Appeals' failure to properly acknowledge and apply the rule from *Richardson* regarding the necessity of a limiting instruction, the respondent maintains that any error regarding the limiting instruction is not a basis for reversal given that Mr. Brown never requested a limiting instruction at trial. There is some support for the respondent's position. *See Montes v. Jenkins*, 626 F.2d 584, 587 (7th Cir. 1980) (holding that the petitioner is not entitled to habeas relief on his *Bruton* claim because he "waived his right to a limiting instruction when he failed to request one"). The Court questions *Montes*'s applicability given that it was decided before *Richardson* and the other cases cited above that make the necessity of a limiting

instruction clear to avoid a Confrontation Clause violation. Further, unlike in *Montes*, the State here did not admit during trial that a limiting instruction would be proper, *see id.* at 588, and thus at most, Mr. Brown forfeited the usage of a limiting instruction, instead of waiving it.[2]

In the end, the Court need not ultimately resolve whether *Montes* governs here, since, as explained

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[2] The Court also notes that the Seventh Circuit in *Montes* was relying on the plurality decision in *Parker v. Randolph*, 391 U.S. 123 (1968). *See Montes*, 626 F.2d at 587-88. As the Supreme Court explained in *Cruz*, *Parker* "resembled *Bruton* in all major respects save one: Each of the jointly tried defendants had himself confessed, his own confession was introduced against him, and his confession recited essentially the same facts as those of his nontestifying codefendants." 481 U.S. at 190-91. The plurality in *Parker* held that these so-called "interlocking confessions" did not violate the Confrontation Clause. *Id.* The Supreme Court, however, departed from the *Parker* plurality rule in *Cruz*, holding that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193 (citation omitted). Mr. Brown contends that the Indiana Court of Appeals also unreasonably applied clearly established federal law by ignoring the rule in *Cruz* regarding interlocking confessions, which, Mr. Brown says, his and Mr. Love's confessions were. [Filing No. 1 at 12.] The respondent does not meaningfully address the applicability of *Cruz* and the Indiana Court of Appeals' failure to address it. However, given the Court's ultimate decision that *Crawford* forecloses Mr. Brown from obtaining habeas relief, the Court will not address this potential alternative basis for assessing the reasonableness of the Indiana Court of Appeals decision.

below, *Crawford* altered the Confrontation Clause landscape such that Mr. Brown does not have a viable *Bruton* claim. Nevertheless, the Court wishes to highlight that the Indiana Court of Appeals' sole focus on whether Mr. Love's confession facially incriminated Mr. Brown was an unreasonable application of clearly established federal law, as it failed to address the necessity of a limiting instruction even when Mr. Brown explicitly noted the lack of limiting instruction in his brief.

b. Mr. Brown's Confrontation Clause Rights Were Not Violated

Although the Indiana Court of Appeals' analysis was flawed, it does not necessarily follow that Mr. Brown is entitled to habeas relief. A writ of habeas corpus may only issue if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *see Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) (explaining that AEDPA requires a petitioner to show that he is being held in violation of federal law pursuant to 28 U.S.C. § 2254(a) and that his detention resulted from an unreasonable state court decision pursuant to § 2254(d)).

The respondent contends that—irrespective of the Indiana Court of Appeals' analysis, which did not address *Crawford*—Mr. Brown's Confrontation Clause rights were not violated because *Crawford* held that the Confrontation Clause, and therefore *Bruton*'s holding that was rooted in the Confrontation Clause, only applies when the evidence at issue is testimonial hearsay. [Filing No. 22 at 12-15.] Mr. Brown acknowledges that several circuits have held

that *Bruton*, post-*Crawford*, does not apply to nontestimonial confessions of nontestifying codefendants, but argues that the Seventh Circuit in *Jones v. Basinger*, 635 F.3d 1030, 1041 (7th Cir. 2011), implicitly suggested that *Crawford* did not so limit *Bruton*. [Filing No. 29 at 7-8.]

As noted, the Indiana Court of Appeals did not address *Crawford* or its impact on *Bruton*, likely because those issues were not raised by the parties during the direct appeal. Nevertheless, for the reasons explained, the respondent is correct that *Crawford* precludes Mr. Brown from establishing that the introduction of Mr. Love's confession via Mr. Morris's testimony violated his rights under the Confrontation Clause.

The Supreme Court's holding in *Bruton* was rooted in the right of a defendant to crossexamine witnesses against them as established by the Confrontation Clause. *See Bruton*, 391 U.S. at 125 ("We hold that … admission of [the nontestifying codefendants's] confession in [a] joint trial violate[s] petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."). Several decades later, the Supreme Court in *Crawford* held that the Confrontation Clause bars "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for crossexamination." *Crawford*, 541 U.S. at 53. The Supreme Court subsequently explained that "[a] critical portion of [*Crawford*'s] holding … is the phrase 'testimonial statements,'" since "[o]nly statements of this sort cause the declarant to be a

'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006). In short, this means that only testimonial statements are "subject to the Confrontation Clause." *Id.*; *see United States v. Watson*, 525 F.3d 583, 588-89 (7th Cir. 2008) ("The Confrontation Clause does not … apply to statements that are not testimonial in nature."). *Crawford*'s limitation of the Confrontation Clause's applicability to testimonial hearsay has led at least eight circuits to hold that *Bruton*'s rule only applies to testimonial hearsay as well. *See United States v. Dargan*, 738 F.3d 643, 650-51 (4th Cir. 2013) ("*Bruton* is simply irrelevant in the context of nontestimonial statements. *Bruton* espoused a prophylactic rule designed to prevent a specific type of Confrontation Clause violation. Statements that do not implicate the Confrontation Clause, *a fortiori*, do not implicate *Bruton*."); *United States v. Berrios*, 676 F.3d 118, 128 (3d Cir. 2012) ("[B]ecause *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements."); *see also United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010); *United States v. Pike*, 292 Fed. Appx. 108, 112 (2d Cir. 2008); *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir. 2009); *United States v. Dale*, 614 F.3d 942, 958-59 (8th Cir. 2010); *Smith v. Chavez*, 2014 WL 1229918, at *1 (9th Cir. 2014); *United States v. Clark*, 717 F.3d 790, 816 (10th Cir. 2013).

Mr. Brown does not dispute that Mr. Love's statements offered through Mr. Morris were non-testimonial, nor could he. A statement is testimonial when "made under circumstances which would lead an objective witness reasonably to believe that the

statements would be available for use at a later trial." *Crawford*, 541 U.S. at 52. Thus an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Applying this rule, the Supreme Court has described statements made "from one prisoner to another" as "clearly nontestimonial." *Davis*, 547 U.S. at 825. And circuits that have been confronted with a *Bruton* claim involving the confession of a nontestifying codefendant to a fellow inmate have held that, pursuant to *Crawford* and *Davis*, the nontestimonial nature of the communication precludes such a claim. *See, e.g.*, *Dargan*, 738 F.3d at 651 (holding that "*Bruton* is simply irrelevant in the context of nontestimonial statements," such a those made "to a cellmate in an informal setting"); *Berrios*, 676 F.3d at 128 (holding that *Bruton* does not apply to nontestimonial statements such as the "surreptitious record" or a "prison yard conversation").

Mr. Brown acknowledges the authority from other circuits holding that *Bruton* applies only to testimonial hearsay, but argues that the Seventh Circuit's decision *Jones* suggests otherwise. Mr. Brown's reading of *Jones* is not without some force. *See United States v. Vasquez*, 766 F.3d 373, 379 n.16 (5th Cir. 2014) (noting that the Seventh Circuit in *Jones* "arguably applied *Bruton* to non-testimonial statements, although without explicitly acknowledging the resulting split of authority"). The Court, however, disagrees with his characterization of *Jones*. The Seventh Circuit in *Jones* held that petitioner Jones's Confrontation Clause rights were violated pursuant to both *Crawford* and *Bruton* when

a police officer was allowed to testify that Lewis informed the police officer that Parks told Lewis that Parks and Jones committed the crimes in question. *See Jones*, 635 F.3d at 1037, 1040-52. The Seventh Circuit addressed at the outset whether Lewis's, and only Lewis's, statement to the police officer was testimonial, concluding that it clearly was given that it was made to the police "for the purpose of helping bring to justice the people responsible for the [crimes]." *Id.* at 1041. After discussing *Crawford* and *Bruton*, the Seventh Circuit concluded that "*Bruton* makes clear that Jones' right to confront Lewis and Parks about that confession was violated by Lewis' and Parks' failure to testify at trial and to subject their testimony to the 'crucible of cross-examination.'" *Id.* at 1051 (quoting *Crawford*, 541 U.S. at 61).

The fact that the Seventh Circuit refers to Jones's right to confront Lewis *and Parks*, says Mr. Brown, demonstrates that Parks's statement to Lewis's—which was clearly nontestimonial— is implicitly a holding that *Bruton* does not apply only to testimonial statements. But the Seventh Circuit was not, at any point in *Jones*, directly addressing whether *Bruton* applies only to testimonial hearsay post-*Crawford*. Indeed, only at the outset of the opinion did the Seventh Circuit address whether the relevant statements were testimonial, and in doing so, only addressed whether Lewis's statements to the police officer were testimonial, not Parks's statement to Lewis. Moreover, when much later in the opinion the Seventh Circuit states that *Bruton* reveals that Jones's right to confront Lewis *and Parks* was violated, the Seventh Circuit is not discussing the testimonial nature of any of the statements—that

issue had already been decided. Taking the testimonial question out of the analysis, the Seventh Circuit's statement that *Bruton* holds that Jones had a right to confront both Lewis and Parks is a correct statement of *Bruton*. But it is *Crawford* that later limits *Bruton*'s rule to testimonial statements—an aspect of the analysis that the Court had already settled by determining that Lewis's statement to the police were testimonial. Given this, the Court does not read the portion of *Jones* on which Mr. Brown relies to hold that *Crawford* does not limit *Bruton*'s rule to testimonial statements. The totality of the opinion reveals that the Seventh Circuit had already resolved the undisputed question of whether Lewis's statements to the police officers were testimonial, and thus was not addressing whether Parks's statements to Lewis were testimonial, let alone the unresolved question in the circuit of whether *Crawford* limited *Bruton*.

In the absence of binding precedent to the contrary, the Court agrees with the circuits who have held that *Crawford* and *Davis* limit *Bruton*'s application to testimonial statements. The Seventh Circuit itself has recognized that the "Confrontation Clause does not … apply to statements that are not testimonial in nature." *Watson*, 525 F.3d at 588-89. And, as explained above, *Bruton*'s rule is undoubtedly rooted in the Confrontation Clause. *See Bruton*, 391 U.S. at 125 ("We hold that … admission of [the nontestifying codefendants's] confession in [a] joint trial violate[s] petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."). Therefore, "because *Bruton* is no more than a by-product of the Confrontation Clause,

the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements." *Berrios*, 676 F.3d at 128. As discussed above, because Mr. Love's confession to Mr. Morris was nontestimonial, Mr. Brown's rights under the Confrontation Clause were not violated by its admission. Accordingly, he is not entitled to habeas relief on this claim.

B. Ineffective Assistance of Trial Counsel

Mr. Brown asks the Court to reconsider its decision in its March 5, 2015, Entry that his ineffective assistance of trial counsel claim was procedurally defaulted. [*See* Filing No. 29 at 1214.] In his habeas petition, Mr. Brown argued that his trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Mr. Love's statement as evidence against Mr. Brown. He acknowledged that he did not raise this claim in his direct appeal or during his post-conviction proceeding, but, relying on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), he contends that he can overcome this potential procedural default because his state post-conviction counsel provided ineffective assistance by not raising this claim. The Court concluded in its previous entry that *Martinez* and *Trevino* were inapplicable in Indiana, reasoning as follows:

> As a general matter, "ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default." *Wooten v. Norris*, 578 F.3d 767, 778 (7th Cir. 2009). The Supreme Court

recently articulated an exception to this rule: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, 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*, 132 S. Ct. at 1320. Stated otherwise, "procedural default caused by ineffective postconviction counsel may be excused if state law, either expressly or in practice, confines claims of trial counsel's ineffectiveness exclusively to collateral review." *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014).

Given the foregoing, whether Mr. Brown can overcome his procedurally defaulted claim based on the alleged ineffective assistance of state post-conviction counsel turns on whether Indiana limits ineffective assistance of counsel claims to postconviction proceedings. In short, Indiana does not confine ineffective assistance of counsel claims to post-conviction proceedings; such claims can be raised either on direct appeal or in a post-conviction proceeding. *See Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008) ("A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in

> postconviction proceedings."); *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998) (noting that while "a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim," such claims may be brought on direct appeal and that, in some instances, it may be preferable to do so). Two other federal courts in this state have reached the same conclusion. *See Brown v. Superintendent*, 996 F.Supp.2d 704, 716-17 (N.D. Ind. 2014); *Johnson v. Superintendent*, 2013 WL 3989417, *1 (N.D. Ind. 2013).

[Filing No. 21 at 4-5.]

Mr. Brown argues that the Court should reconsider this decision because *Trevino* expanded the *Martinez* rule to apply to states that not only formally restrict ineffective assistance of counsel claims to collateral view, but also to states that have a "procedural framework, by reason of its design and operation, [which] makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921. Mr. Brown argues that the Indiana Supreme Court's statement in *Woods*—that the limitation that defendants can only raise an ineffective assistance of counsel claim *either* on direct appeal or during post-conviction proceedings, but not both, "will likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal," 701 N.E.2d at 1220—supports his position. [Filing No. 29 at 13.]

The Court disagrees that *Woods* provides a basis for the Court to reconsider its previous decision. The Indiana Supreme Court in *Woods* by no means suggested that defendants do not have a meaningful opportunity to raise an ineffective assistance of counsel claim on direct appeal, even if it acknowledged that in most cases collateral review is the preferred route; instead, the Indiana Supreme Court reiterated that defendants had multiple available routes to raise such claims. First, the Indiana Supreme Court noted that "record-based ineffectiveness claims" could be raised on direct appeal and doing so may in some instances be preferable. *See Woods*, 701 N.E.2d at 1219 ("Resolving record-based ineffectiveness claims on direct review also has some doctrinal appeal because it is more consistent with the residual purpose of postconviction proceedings."). Second, recognizing that ineffective assistance of counsel claims often require the development of the record, the Indiana Supreme Court highlighted that Indiana has a long-standing procedure established in *Davis v. State*, 267 Ind. 152 (Ind. 1977), "that allows a defendant to suspend the direct appeal to pursue an immediate petition for postconviction relief." *Woods*, 701 N.E.2d at 1219; *see also id.* (citing *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993), which "reiterate[es] the vitality of the *Davis* procedure"). Third, the Indiana Supreme Court held that an ineffective assistance of counsel claim may be raised during a post-conviction hearing, which is in most cases "the preferred forum." *Id.*

Although a defendant may raise an ineffective assistance of counsel claim via one, and only one, of these routes, the fact that there are meaningful

options to raise such a claim other than via collateral review—including "on direct appeal by a *Davis* petition," *id.* at 1220—demonstrates that Indiana does not "either expressly or in practice, confine[] claims of trial counsel's ineffectiveness exclusively to collateral review," *Nash*, 740 F.3d at 1079. Accordingly, *Martinez*'s rule, as extended in *Trevino*, does not apply in Indiana, and the Court will not alter its ruling that Mr. Brown's ineffective assistance of counsel claim is procedurally defaulted.

IV.
Certificate of Appealability

Rule 11(a) of the *Rules Governing § 2254 Cases* requires the district courts to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and "[i]f the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Pursuant to § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Such a showing includes demonstrating "that reasonable jurists could debate whether … the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and quotation marks omitted).

The Court concludes that the resolution of Mr. Brown's Sixth Amendment Confrontation Clause claim discussed in this Entry could be debated by reasonable jurists and is adequate to deserve encouragement to proceed further, particularly given

the lack of Seventh Circuit authority regarding *Bruton*'s application after *Crawford*. A certificate of appealability is therefore **granted**, and this Entry shall constitute a certificate of appealability as to that claim. The same is not true for Mr. Brown's other claims that the Court ruled were procedurally defaulted in its Entry dated March 5, 2015, and therefore the Court **denies** a certificate of appealability as to those claims.

IT IS SO ORDERED.

Date: December 3, 2015

s/ Jane Magnus-Stinson
Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Appendix D

Filed 03/05/15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DENTRELL BROWN
Petitioner,
v.
RICHARD BROWN,
Respondent.

Case No. 1:13-cv-1981-JMS-DKL

Entry Dismissing Procedurally Defaulted Claims and Directing Further Proceedings

Presently pending before the Court is petitioner Dentrell Brown's petition for a writ of habeas corpus. Mr. Brown raises three grounds for relief in his petition. In brief, his first ground asserts that the Indiana Court of Appeals erred in deciding a *Bruton* claim raised on direct appeal. His second ground is ineffective assistance of trial counsel concerning the *Bruton* issue. Finally, he asserts a *Giglio* violation concerning his testifying co-defendant. The Court addresses only the latter two in this Order. The parties are ordered to submit additional briefing regarding Ground One as set forth at the end of this Order.

As to his second ground, Mr. Brown requests relief in the form of an evidentiary hearing. Regarding his third ground, Mr. Brown asks the Court to stay this

case so that he can request permission from the Indiana Court of Appeals to initiate a successive state post-conviction proceeding. For the reasons explained, both of these requested are **denied**. Mr. Brown has procedurally defaulted both of these claims, and they are therefore **dismissed with prejudice**.

I.
Background

In February 2009, Mr. Brown was convicted in an Indiana state court of murder, and he was sentenced to 60 years' imprisonment. On direct appeal to the Indiana Court of Appeals, Mr. Brown, among other things, argued that his rights set out in *Bruton v. United States*, 391 U.S. 123 (1968), were violated when the trial court denied his motion for a mistrial. Mr. Brown raised his *Bruton* claim in his petition to transfer to the Indiana Supreme Court, but his petition to transfer was denied on January 7, 2010.

Mr. Brown filed a petition for post-conviction relief in state court on March 29, 2010. The post-conviction court denied Mr. Brown's petition. Mr. Brown appealed, arguing that his trial counsel was ineffective in failing to prevent a *Bruton* violation by not moving to sever Mr. Brown's trial from his codefendant's trial. The Indiana Court of Appeals held that Mr. Brown's ineffective assistance of counsel claim was merely an attempt to re-litigate the *Bruton* claim that was rejected on direct appeal, and therefore the claim was barred by res judicata. Mr. Brown filed a petition to transfer to the Indiana Supreme Court, which was denied on December 14,

2012. Mr. Brown then filed the instant petition for a writ of habeas corpus in this Court.

II.
Discussion

Mr. Brown asserts three grounds for relief in his habeas petition: (1) his rights under the Confrontation Clause were violated, and the Indiana Court of Appeals on direct appeal unreasonably applied *Bruton* in reaching the contrary result; (2) his trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Mr. Brown's codefendant's statement as evidence against Mr. Brown; and (3) Mr. Brown's rights under *Giglio v. United States*, 405 U.S. 150 (1972), were violated because Mario Morris, a prisoner who testified against Mr. Brown, stated that he did not receive a benefit for testifying against Mr. Brown when he in fact did. In his petition, he requests an evidentiary hearing regarding his second issue and, as to his third issue, requests that the Court stay this case so that he can pursue leave to file a successive post-conviction proceeding in state court. The Court addresses each of these two requests in turn.

A. The Second Ground and Mr. Brown's Request for an Evidentiary Hearing

Mr. Brown maintains that his trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Mr. Brown's codefendant's statement as evidence against Mr. Brown. He acknowledges that this claim was not raised in his state post-

conviction proceeding and is therefore procedurally defaulted. However, relying on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), he contends that he can overcome this potential procedural default because his state postconviction counsel provided ineffective assistance by not raising this claim. He further requests that the Court grant him an evidentiary hearing so that he can develop whether his state postconviction counsel was ineffective.

The State responds that no evidentiary hearing is necessary because Mr. Brown cannot overcome the procedural default. Specifically, the State argues that Seventh Circuit law is clear that ineffective assistance of state post-conviction counsel can only excuse a procedural default if state law generally requires ineffective assistance claims to be raised in state post-conviction proceedings, which is not the case in Indiana.

Procedural default occurs "when a habeas petitioner has failed to fairly present to the state courts the claim on which he seeks relief in federal court and the opportunity to raise that claim in state court has passed." *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004). A habeas petitioner may overcome procedural default by demonstrating cause for the default and actual prejudice or by showing that the habeas court's failure to consider the claim would result in a fundamental miscarriage of justice. *See House v. Bell,* 547 U.S. 518, 536 (2006); *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). As a general matter, "ineffective assistance of counsel during state postconviction proceedings cannot serve as cause to

excuse factual or procedural default." *Wooten v. Norris*, 578 F.3d 767, 778 (7th Cir. 2009). The Supreme Court recently articulated an exception to this rule: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, 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*, 132 S. Ct. at 1320. Stated otherwise, "procedural default caused by ineffective postconviction counsel may be excused if state law, either expressly or in practice, confines claims of trial counsel's ineffectiveness exclusively to collateral review." *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014).

Given the foregoing, whether Mr. Brown can overcome his procedurally defaulted claim based on the alleged ineffective assistance of state post-conviction counsel turns on whether Indiana limits ineffective assistance of counsel claims to post-conviction proceedings. In short, Indiana does not confine ineffective assistance of counsel claims to post-conviction proceedings; such claims can be raised either on direct appeal or in a post-conviction proceeding. *See Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008) ("A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction proceedings."); *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998) (noting that while "a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim," such

claims may be brought on direct appeal and that, in some instances, it may be preferable to do so). Two other federal courts in this state have reached the same conclusion. *See Brown v. Superintendent*, 996 F.Supp.2d 704, 716-17 (N.D. Ind. 2014); *Johnson v. Superintendent*, 2013 WL 3989417, *1 (N.D. Ind. 2013).

In sum, Mr. Brown has procedurally defaulted on his underlying claim that trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Mr. Brown's codefendant's statement as evidence against Mr. Brown. This claim could have been presented in his direct appeal, but was not. Moreover, for the reasons stated, Mr. Brown cannot excuse his procedural default of this claim by arguing that his post-conviction counsel provided ineffective assistance. His request for an evidentiary hearing is therefore denied and his second habeas claim is dismissed.

B. The Third Ground and Mr. Brown's Request to Stay this Case

Mr. Brown argues that his rights under *Giglio* were violated because Mr. Morris, a prisoner who testified against Mr. Brown, stated that he did not receive a benefit for testifying against Mr. Brown when he in fact did. Mr. Brown acknowledges that he failed to raise this claim in state court, but, relying on *Rhines v. Weber*, 544 U.S. 269 (2005), and *Dolis v. Chambers*, 454 F.3d 721 (7th Cir. 2006), he maintains that the Court should stay this federal habeas proceeding so that he can seek leave to file a

successive post-conviction petition in state court and exhaust this claim. According to Mr. Brown, such a course is appropriate when, as here, a petitioner presents a mixed petition—that is, one containing both exhausted and unexhausted claims.

The State responds that the Court need not consider whether the stay procedure set forth in *Rhines* should be used, as that procedure is available only when the petitioner presents a mixed petition. Here, says the State, Mr. Brown's *Giglio* claim is procedurally defaulted rather than unexhausted. Therefore, the State maintains that the Court should conclude that Mr. Brown's *Giglio* claim is procedurally defaulted and deny his request to assess whether a stay is warranted under *Rhines*.

The parties do not dispute that the stay procedure set forth in *Rhines* applies only when a petitioner presents a mixed petition—that is, a petition "containing both exhausted and unexhausted claims." *Rhines*, 544 U.S. at 273 (citing *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982)). They are right to do so, given that the Supreme Court in *Rhines* made clear that the question before it pertained only to whether a district court may stay a case involving a mixed petition. *See Dolis*, 454 F.3d at 724 ("In *Rhines*[], the Court considered 'whether a federal district court has discretion to stay [a] mixed petition to allow the petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition.'") (quoting *Rhines*, 544 U.S. at 271-72). The parties dispute, however, whether Mr. Brown's *Giglio* claim is unexhausted, which would make his petition

mixed, or procedurally defaulted, which would make his petition include only exhausted claims.

Exhaustion and procedural default are related but distinct doctrines. A claim is unexhausted "[w]here state remedies remain available to a habeas petitioner who has not fairly presented his constitutional claim to the state courts," while, as stated above, a procedural default occurs when "the petitioner has already pursued his state-court remedies and there is no longer any state corrective process available to him." *Perruquet*, 390 F.3d at 514; *see also Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992) ("Exhaustion refers only to issues that have not been presented to the state court but still may be presented. Procedural default, on the other hand, occurs when a claim could have been but was not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court."). Therefore, "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman*, 501 U.S. at 732 (quoting 28 U.S.C. § 2254(b)).

The Court agrees with the State that Mr. Brown's *Giglio* claim is procedurally defaulted rather than unexhausted. Mr. Brown has presented claims to the Indiana courts during both a direct appeal and a post-conviction proceeding, but he admittedly did not present his *Giglio* claim in either one.[1] Given that Mr.

---

[1] Mr. Brown contends that he failed to raise a *Giglio* claim in state court because the claim was undiscoverable, given that Mr.

Brown "has already pursued his state-court remedies and there is no longer any state corrective process available to him," his *Giglio* claim is procedurally defaulted. *Perruquet*, 390 F.3d at 514; *see Engle v. Issac*, 456 U.S. 107, 125 n.28 (1982) (holding that because the respondents had completed all avenues of state relief available and "could have [brought their claim] on direct appeal,… they have exhausted their state remedies with respect to this claim").

Since Mr. Brown's *Giglio* claim is procedurally defaulted rather than unexhausted, he has not presented the Court with a mixed petition. Accordingly, the stay procedure outlined in *Rhines* is inapplicable, and Mr. Brown's request for a stay is denied. Mr. Brown's *Giglio* claim is dismissed.

III.
Conclusion

For the reasons stated, Mr. Brown's requests for an evidentiary hearing and to stay this case are **denied**. Grounds Two and Three are procedurally defaulted and thus **dismissed with prejudice**. No partial final judgment shall issue at this time.

Morris' criminal case was not resolved until a week before Mr. Brown filed his reply brief in his state post-conviction proceeding. But as the State points out, Mr. Brown was aware of the potential *Giglio* issue at the time of trial; at the very least, Mr. Brown could have attempted to pursue the claim during his state post-conviction proceeding, as Mr. Morris had plead guilty and was sentenced before post-conviction briefing was complete before the Indiana Court of Appeals. Mr. Brown chose not to do so, and thus procedurally defaulted this claim.

The Court must still decide whether Mr. Brown is entitled to habeas relief on Ground One of his petition, but the parties have not fully briefed the merits of that issue. The State must supplement its return to show cause only as to the merits of Ground One of Mr. Brown's petition by **April 13, 2015**. Mr. Brown may file a reply brief regarding only Ground One by **May 13, 2015**. The Court does not anticipate granting extensions to these deadlines.

IT IS SO ORDERED.

Date: 03/05/2015

s/ Jane E. Magnus-Stinson
Hon. Jane Magnus-Stinson, Judge
United States District Court

Appendix E

IN THE
COURT OF APPEALS OF INDIANA

D.B.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A05-1201-PC-18
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-1003-PC-10

October 4, 2012

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

D.B. was convicted of murder, a felony, and sentenced to sixty years in prison with five years

suspended to probation. The post-conviction court denied his claim that he received ineffective assistance of trial counsel. He raises one issue for our review, which we restate as whether the post-conviction court erred in denying his petition for post-conviction relief. Concluding the post-conviction court did nor err, we affirm.

Facts and Procedural History

On March 8, 2008, Elkhart police responded to a report of gunshots and found Gerald Wenger dead with a single bullet wound. The State charged D.B. with murder, a felony, and the juvenile court waived his charges to an adult felony court. A joint jury trial was held for D.B. and codefendant Joshua Love. Among the evidence offered was the testimony of jail house informer Mario Morris.

Morris testified that he spoke with D.B. and Love individually and on separate occasions in prison. Morris recounted the details of the conversations for the jury, explaining that each man separately confessed to his respective involvement in Wenger's murder, and that neither codefendant mentioned nor implicated the other in any way. Although no objection was made during Morris's testimony, D.B. moved for a mistrial when Morris finished testifying, arguing that admitting Morris's testimony was a violation of D.B.'s constitutional rights under Bruton v. U.S. because he could not compel Love to testify.[1]

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[1] Bruton, 391 U.S. 123 (1968). Violation criteria will be explained in the discussion.

Since Morris's account of Love's confession made no mention of D.B., and vice versa, the trial court concluded that the defendants' conversations did not inculpate one another and thus denied the motion. D.B. was found guilty of murder, a felony, and was sentenced to an aggregate term of sixty years in prison with five years suspended to probation.

D.B. appealed his conviction on several issues, including a claim that the trial court had abused its discretion in denying his motion for a mistrial on account of a Bruton violation. This court found that no Bruton violation occurred and affirmed the trial court. D.B. v. State, 916 N.E.2d 750, *3 (Ind. Ct. App. 2010)(Table), trans. denied.

D.B. thereafter filed a petition for post-conviction relief, claiming his trial counsel was ineffective because he failed to file a motion to sever D.B.'s trial from that of his codefendant. The post-conviction court concluded D.B. failed to establish his counsel acted unreasonably, and it denied the petition. D.B. now appeals.

Discussion and Decision

I. Standard of Review

D.B. argues that the post-conviction court erred in denying his petition for postconviction relief. On post-conviction relief, the petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

> A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the

> evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Roberts v. State, 953 N.E.2d 559, 562 (Ind. Ct. App. 2011) (citations omitted), trans. denied.

II. D.B's Ineffective Assistance of Trial Counsel Claim

D.B. argues that he did not receive effective assistance of trial counsel based on his counsel's failure to move to sever D.B.'s trial from that of his codefendant.

> In order to prevail on a claim of ineffective assistance of counsel, defendant must show that (i) defense counsel's representation fell below an objective standard of reasonableness and (ii) there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation.

Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

D.B. argues that admission of Morris's testimony of the two conversations was a Bruton

violation and that counsel, if acting reasonably, would have moved to sever the trial from that of his codefendant. In Bruton, the Supreme Court found that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial[.]" Richardson v. Marsh, 481 U.S. 200, 207 (1987) (citing Bruton, 391 U.S. at 135-136). In our previous opinion on D.B.'s direct appeal, we recognized that, had a Bruton violation occurred, trial counsel would have waived the right to appeal that issue by failing to move to sever the trial from that of D.B.'s codefendant. Whether counsel's failure would have been unreasonable, however, is irrelevant as this court went on to decide that no Bruton violation occurred.

D.B. tries to revisit the issue of whether there was a Bruton violation. "[R]es judicata bars relitigation of a claim after a final judgment has been rendered when the subsequent action involves the same claim between the same parties[.]" Hermitage Ins. Co. v. Salts, 698 N.E.2d 856, 859 (Ind. Ct. App. 1998). "The doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute." BenYisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000) (emphasis and citations omitted)(cert. denied, 534 U.S. 1164 (2002)).

D.B. tries to circumvent res judicata by arguing that the issue of ineffective assistance of counsel is separate from the issue of whether a Bruton violation occurred. However, "[a] petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue

and define an alleged error." Shepherd v. State, 924 N.E.2d 1274, 1281 (Ind. Ct. App. 2010) (quoting Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006)), trans. denied. This is precisely what D.B. is attempting to do, as the only error D.B. alleges counsel made was failing to avert a Bruton violation.

D.B. also attempts to avoid res judicata by arguing that the Bruton issue was not previously decided on the merits because this court did not address the holdings of Cruz v. New York, 481 U.S. 186 (1987), and Lee v. Illinois, 476 U.S. 530 (1986). In Cruz, the Supreme Court held:

> where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him.

481 U.S. at 193 (reference omitted); see also Lee v. Illinois, 476 U.S. at 541 (stating "the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."). D.B. argues that Morris was an unreliable informant and that his testimony lacked sufficient indicia of reliability under the Lee standard. The Cruz and Lee analyses, however, only apply to a "nontestifying codefendant's confession incriminating the defendant." Cruz 481 U.S. at 193 (emphasis added). Neither Cruz nor Lee modify the Bruton violation requirement that the codefendant's pretrial statement be "facially incriminating" to the

defendant. Richardson, 481 U.S. at 207. As this court stated previously, "[e]ach codefendant confessed to his respective involvement in the crime and provided essentially identical details. Thus, each was implicated by his own statements to Morris alone, not by the statements of the other codefendant." D.B v. State, 916 N.E.2d at *3.

D.B. fails to prove his counsel's representation fell below an objective standard of reasonableness. As counsel's representation has not been shown to have been unreasonable, we need not address whether there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's alleged inadequate representation.

Conclusion

In support of his claim that he received ineffective assistance of trial counsel, D.B. fails to raise any issue apart from that of an alleged Bruton violation, an issue already decided and barred from reconsideration by res judicata. The post-conviction court did not err when it denied D.B.'s petition for post-conviction relief. Therefore, we affirm the denial of his petition.

Affirmed.

BAKER, J., and BRADFORD, J., concur.

Appendix F

IN THE
COURT OF APPEALS OF INDIANA

D.B.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0904-CR-185
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff,	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0806-MR-2

November 13, 2009

**MEMORANDUM DECISION –
NOT FOR PUBLICATION**

ROBB, Judge

Case Summary and Issues

D.B. appeals his conviction, following a jury trial, of murder, a felony, and his resulting sixty-year sentence. For our review, D.B. raises three issues, which we restate as: 1) whether the trial court abused

its discretion when it denied D.B.'s motion for a mistrial; 2) whether the trial court abused its discretion when it admitted evidence that D.B. possessed a gun prior to the murder; and 3) whether D.B.'s sentence is inappropriate in light of the nature of his offense and his character. Concluding the trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial or when it admitted evidence he possessed a gun, and D.B.'s sentence is not inappropriate, we affirm.

Facts and Procedural History

On March 8, 2008, Elkhart police responded to a report of gunshots and discovered Gerald Wenger lying dead in the street with a single bullet wound to his head. Police discovered two bullet casings next to Wenger, one from a 9mm handgun and one from a .45 caliber handgun. Forensic analysis revealed Wenger's wound resulted from a 9mm bullet.

Prior to the murder, Wenger had been using cocaine with some friends. Around 1:00 in the morning on March 8, 2008, Wenger left his apartment in a red and black Ford pickup truck to buy more drugs. At approximately 3:30 a.m. on March 8, 2008, Dan Holt, who lived in the same neighborhood where the murder occurred, got up to get ready for work. Holt noticed a red and black Ford pickup truck parked in an alley near his home. Ron Troyer, who also lived in the neighborhood, saw the same truck as he arrived home from work around 9:00 p.m. on March 8, 2009. As Troyer approached, he noticed two individuals near the truck. The individuals ran away when they saw Troyer, and Troyer called the police, who

identified the red and black pickup truck as belonging to Wenger. However, forensic analysis of the truck did not reveal any fingerprints other than those belonging to Wenger.

On June 18, 2008, the State charged D.B. with murder, a felony. Although D.B. is a minor, the juvenile court waived his charges to an adult felony court. The trial court held a jury trial from February 2nd to 5th, 2009, at which it tried both D.B. and codefendant Joshua Love. At the trial, the jury heard the testimony of Leiora Davis who lives in an apartment building near the murder scene. Davis testified that sometime between the 22nd and 25th of February, 2008, D.B. visited her apartment. As D.B. bent over, a gun fell from his waist onto the floor. D.B. objected to Davis's testimony; however, the trial court admitted the testimony over D.B.'s objection, instructing the jury to consider the evidence "for the limited purpose of showing preparation and plan" and not for any other reason. Transcript at 358.

The State also presented the testimony of Mario Morris. Morris testified regarding individual conversations he had with D.B. and Love, in which each man separately confessed his respective involvement in Wenger's murder. Morris first testified about conversations he had with Love while both were in jail. Love told Morris he met Wenger on the night of the murder because Wenger wanted to buy some drugs. Love got into the back seat of Wenger's truck and attempted to sell Wenger a "gang pack," which is a substance that looks like crack cocaine, but is not really crack cocaine. When Wenger discovered the ruse, he stopped the truck and an

argument ensued. Both men exited the truck and Love shot Wenger in the head with a 9mm handgun. Love then got back into Wenger's truck and travelled to a nearby alley. Love got out of the truck and went to hide his gun. He returned later to wipe down the truck so police could not find any fingerprints. During his testimony regarding his conversations with Love, Morris never mentioned the presence of a third party during the commission of the crime and never mentioned D.B. by name or by implication.

Morris next testified about conversations he had with D.B. while both were in jail. D.B. told Morris that he met up with Wenger on the night of the murder because Wenger wanted to buy drugs. D.B. got into the front seat of Wenger's truck and decided to try to sell Wenger a gang pack. When Wenger discovered the drugs were fake, an argument ensued and Wenger demanded his money back. Both Wenger and D.B. got out of the truck and continued arguing. D.B. then pulled out a .45 caliber handgun and struck Wenger on the side of his head. As D.B. struck Wenger with the gun, it fired, grazing Wenger. D.B. then told Morris he got back into Wenger's truck and drove to a nearby alley, where he left the truck. During his testimony regarding his conversations with D.B., Morris never mentioned the presence of a third party during the commission of the crime and never mentioned Love by name or by implication.

Although he had not objected to any of Morris's testimony, at the conclusion of Morris's testimony, D.B. moved for a mistrial. The trial court heard extensive arguments from all parties and ultimately denied the motion, noting that Morris's testimony

regarding his conversations with each defendant did not inculpate the other defendant. At the conclusion of the trial, the jury found D.B. guilty of murder, a felony. On March 5, 2009, the trial court held a sentencing hearing, after which it sentenced D.B. to an aggregate term of sixty years with fifty-five years executed at the Department of Correction, and five years suspended to probation. D.B. now appeals.

Discussion and Decision

I. Motion for Mistrial

A. Standard of Review

D.B. first argues the trial court abused its discretion when it denied his motion for a mistrial following Morris's testimony. The denial of a motion for mistrial lies within the sound discretion of the trial court and we review the decision only for an abuse of that discretion. Lucio v. State, 907 N.E.2d 1008, 1010 (Ind. 2009). The trial court is in the best position to assess the circumstances of an error and its probable impact on the jury. Id. "The overriding concern is whether the defendant „was so prejudiced that he was placed in a position of grave peril.'" Id. (quoting Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000)).

B. Bruton Violation[1]

D.B. argues that Morris's testimony regarding statements made by the codefendant, Love, violated

[1] We point out initially the possibility that D.B. waived his Bruton claim by not moving to sever his trial from Love's. Indiana Code section 35-34-1-11(b) allows a defendant to move

his constitutional right to cross-examination because he could not compel Love to testify. In Bruton v. United States, 391 U.S. 123, 126 (1968), the Supreme Court addressed the issue of the admissibility of a codefendant's pre-trial statement during a joint trial. The Court concluded a substantial risk exists that the

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for a separate trial because another codefendant has made an out-of-court statement which makes reference to the moving defendant. In such a situation, the trial court must require the prosecutor to elect one of three remedies: 1) a joint trial at which the statement is not admitted into evidence; 2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been redacted; or 3) a separate trial for the moving defendant. Id. The trial court discussed the possibility of a Bruton problem prior to the beginning of the trial. The State indicated it could handle the Bruton issue during Morris's testimony. D.B. did not move the trial court to sever his trial from Love's. "[I]t is a well settled principle of law that a defendant may waive his right to confront and cross-examine witnesses." Norton v. State, 772 N.E.2d 1028, 1031-32 (Ind. Ct. App. 2002). "It has also been established in Indiana that a defendant may waive his claim of a Bruton violation through error." Id. at 1032 (citing Latta v. State, 743 N.E.2d 1121, 1126 (Ind. 2001) (defendant waived post-conviction relief claim of Bruton violation by not arguing the issue on direct appeal)). In Norton, this court found a defendant waived his Bruton claim when he moved the trial court to admit a codefendant's entire statement pursuant to the doctrine of completeness despite his knowledge the previously redacted portions of the statement would implicate him in the crime. Id. at 1036. The Indiana Code provides a pre-trial remedy for a defendant who is aware of a possible Bruton issue, and it is possible the defendant's failure to seek out such a remedy, especially when combined with the defendant's failure to object to the questionable testimony during the trial, may result in a waiver of the Bruton issue on direct appeal. However, because we find no Bruton violation in this case, we need not address the waiver issue.

jury might consider one codefendant's incriminating pre-trial statement against the other codefendant as well. Id. Because the former cannot be forced against his will to take the stand, the latter is denied his Sixth Amendment right to confront and cross-examine witnesses against him. Id. at 137. However, a codefendant's statements violate Bruton only if they "facially incriminate" another defendant. See Richardson v. Marsh, 481 U.S. 200, 211 (1987); Fayson v. State, 726 N.E.2d 292, 294 (Ind. 2000); Brock v. State, 540 N.E.2d 1236, 1240 (Ind. 1989).

Morris gave separate testimony regarding statements made to him by Love and D.B. respectively. At no point during his testimony regarding Love's statements did Morris mention D.B. by name or implication. In fact, Morris made no mention of a third party being present at the crime at all. D.B. argues, however, it would be impossible for a reasonable juror hearing testimony about both statements to not connect them into a single crime. This does not create a Bruton violation, however. Each codefendant confessed to his respective involvement in the crime and provided essentially identical details. Thus, each was implicated by his own statements to Morris alone, not by the statements of the other codefendant. Love's statements did not facially incriminate D.B., and therefore, no Bruton violation occurred. As a result, the trial court did not abuse its discretion when it denied D.B."s motion for a mistrial on the basis of the alleged Bruton violation.

II. Admission of Evidence

A. Standard of Review

D.B. next argues the trial court abused its discretion when it admitted evidence he possessed a gun approximately two weeks prior to the murder. The admissibility of evidence is within the sound discretion of the trial court, and we will not reverse its decision absent a showing of abuse of discretion. Gibson v. State, 777 N.E.2d 87, 89 (Ind. Ct. App. 2002). An abuse of discretion occurs if the trial court"s decision is clearly against the logic and effect of the facts and circumstances before it or if the court has misinterpreted the law. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2009), trans. denied.

B. Prior Possession of a Handgun

Indiana Evidence Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ….

Evidence Rule 404(b) prevents the State from punishing a defendant for his character by relying upon evidence of uncharged misconduct. Rogers, 897 N.E.2d at 960. D.B. argues that evidence he possessed a handgun falls within the purview of Evidence Rule 404(b) because he was a minor. See

Ind. Code § 35-47-2-3(g)(3) (prohibiting the issuance of a license to carry a handgun to any person under eighteen years of age).

Accepting as true D.B.'s assertion the evidence falls within Evidence Rule 404(b), evidence that D.B. possessed a weapon of the type used in the charged crime is nonetheless relevant to a matter at issue other than D.B.'s propensity to commit murder. See Dickens v. State, 754 N.E.2d 1, 4 (Ind. 2001) (evidence defendant carried a gun two days prior to the shooting was relevant to show opportunity to commit the crime); Rogers, 897 N.E.2d at 960-61 (evidence defendant possessed a steak knife similar to the murder weapon was admissible); Pickens v. State, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002) (evidence defendant possessed an assault rifle two years prior to the murder was admissible). Similarly here, evidence D.B. possessed a handgun a couple of weeks prior to the murder is relevant to his opportunity to commit the crime. Therefore, the trial court did not abuse its discretion when it admitted the evidence.

III. Inappropriateness of Sentence

A. Standard of Review

Finally, D.B. argues his sentence is inappropriate in light of the nature of his offense and his character. D.B."s sixty-year sentence is five years above the advisory sentence for murder, a felony. See Ind. Code § 35-50-2-3(a). Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence if, after due consideration of the trial court"s decision, we find that the sentence "is inappropriate in light of the nature of the offense and the character of the offender." Id.

When making this decision, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). However, the defendant bears the burden to "persuade the appellate court that his … sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

B. Nature of the Offense

This murder resulted from D.B."s attempt to sell counterfeit drugs to Wenger. Wenger discovered the ruse, became angry, and demanded his money back. An argument ensued between Wenger, D.B., and Love. There is no evidence Wenger became violent, possessed a weapon, or threatened harm to D.B. and Love. The only threat apparently made by Wenger was to report D.B. and Love to the police. Nonetheless, D.B. struck Wenger in the head with a handgun that fired upon impact grazing Wenger, and Love shot Wenger in the head from behind. D.B. and Love then took Wenger"s truck and left him to die in the street. These facts depict the particularly heinous murder of an unarmed man after he discovered the defendants" scheme to sell him counterfeit drugs. Because of this, we cannot say D.B."s sentence is inappropriate in light of the nature of his offense.

C. Character of the Offender

D.B. was thirteen years old at the time of the murder. His criminal history consists of a single juvenile adjudication for what would have been burglary, a Class B felony, if committed by an adult. The burglary occurred close in time to the murder. D.B.'s youth and the fact this is apparently his first foray into serious crime weigh in favor of his character.

However, D.B. admitted he had used marijuana on a daily basis since he was eleven and drank alcohol almost every weekend. There is evidence that D.B. possessed a handgun two weeks prior to the murder and he struck Wenger with a handgun just prior to the murder. D.B. was also engaged in the sale of illegal drugs and attempted to sell Wenger counterfeit drugs on the night of the murder. After the murder, D.B. drove Wenger's truck away from the scene and hid it in a nearby alley. D.B. also attempted to dispose of the murder weapon by selling it. D.B. bragged about the details of the murder to friends in jail and laughed when asked about it. These facts weigh heavily against B."s character. As a result, we cannot say D.B.'s sentence is inappropriate in light of his character.

D.B. bears the burden of demonstrating the inappropriateness of his sentence, and he has failed to do so. Although he was only thirteen at the time of the murder, his life was heading full speed down a dangerous path. The trial court ordered D.B. to serve the advisory sentence executed at the Department of Correction and added an additional five years of supervised probation. The trial court advised D.B. to

use this time to pursue an education and addictions counseling so he would be prepared to reenter society as a productive citizen. His sentence is not inappropriate in light of the nature of his offense and his character.

Conclusion

The trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial or when it admitted evidence that D.B. possessed a handgun prior to the murder. In addition, D.B.'s sentence is not inappropriate in light of the nature of his offense and his character. Therefore, we affirm his conviction and sentence.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.