IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-1014

DENTRELL BROWN,
Petitioner-Appellant,

v.

RICHARD BROWN,
Superintendent, Wabash Valley Correctional Facility,
Respondent-Appellee.

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

RESPONDENT-APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

CURTIS T. HILL, JR.
Attorney General of Indiana

STEPHEN R. CREASON
Chief Counsel for Appeals

Office of the Attorney General
Ind. Gov't Center South, Fifth Fl.
302 W. Washington St.
Indianapolis, IN 46204

Counsel for Respondent-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

The State of Indiana seeks panel and en banc rehearing of this Court's decision that incorrectly decided that Indiana's appellate procedures are insufficient to require this Court to honor state court procedural defaults given *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, __ U.S. __, 133 S. Ct. 1911 (2013). Those two cases allow a habeas petitioners to avoid the preclusive effects of their procedural defaults of ineffective assistance of trial counsel claims by simply asserting a substantial (i.e., debatable) claim that state post-conviction counsel rendered deficient performance by not raising a defaulted trial counsel argument in state court (a "cause" for the default) and that such a failure was prejudicial. However, these cases only provide such an exception if Indiana actually or effectively prevents defendants from raising trial counsel ineffectiveness claims on direct appeal. The panel wrongfully concluded that Indiana does this, and has effectively eliminated any comity and respect that federal courts owe to Indiana's state court procedural law.

This Court's respect is due to Indiana's rules because Indiana not only allows such a claim to be brought on direct appeal, but defendants actually do—and prevail. Moreover, Indiana encourages the early resolutions of particularly strong or obvious trial counsel ineffectiveness claims by providing a hybrid direct and collateral review process to review trial counsel claims as quickly as possible. In other words, Indiana does not frustrate early resolution of trial counsel ineffectiveness claims, it flexibly accommodates a variety of avenues for vindicating

those claims and leaves to defendants and their counsel to decide which path is the better strategic choice.

As Judge Sykes observed in dissent, the panel's expansion of the Supreme Court's self-described "narrow" exception to the procedural default rules is unsupported by those decisions and has made district courts in Indiana the primary forum for collateral attacks on Indiana convictions and require widespread evidentiary hearings. *Brown v. Brown*, 847 F.3d 502, 519–22 (7th Cir. 2017) (Sykes, J., dissenting). This is not an overstatement, as those district courts are already holding other cases for the final resolution of this case before applying *Martinez* and *Trevino* to excuse failures of criminal defendants at no fault of Indiana. "This is a serious intrusion on federalism interests." *Id.* at 522 (Sykes, J., dissenting). Rehearing en banc is appropriate to properly reset the proper balance in Indiana habeas litigation.

ARGUMENT

Martinez and *Trevino* do not apply to excuse procedural defaults in habeas challenges to Indiana convictions

In her dissenting opinion, Judge Sykes correctly analyzes how the *Martinez* and *Trevino* cases do not permit federal courts to excuse state court procedural defaults via ineffective assistance of post-conviction counsel claims. *Id.* at 518–22 (Sykes, J., dissenting). *Trevino* holds that "where, as here, state 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 trial counsel on direct appeal, our holding in *Martinez*

applies." 133 S. Ct. at 1921. The panel majority asserts that Indiana's procedural system "by its structure, design, and operation" deprives defendants of any meaningful opportunity to raise a *Strickland* claim on direct appeal, *see Brown*, 847 F.3d 510–13, but actual practice—which the majority explains incorrectly—belies that belief.

The Indiana Supreme Court allows defendants the choice of raising ineffective assistance of trial counsel claims on direct appeal or in state post-conviction review proceedings, but not both. *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998). It could have channeled all ineffectiveness claims to collateral review like how Arizona courts do—and most other states' courts do. *See*, *e.g.*, *Martinez*, 132 S. Ct. at 1314. But Indiana's high court did not, because of its "concerns for prompt resolution of claims lead us to permit ineffective assistance to be raised [on direct appeal]." *Id.* The problem that inherently exists with raising ineffectiveness claims is that the claimant must usually develop a record to defeat the presumptions of competence that federal law requires be given to trial counsel when any court reviews an ineffective assistance claim. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984).

So, the Indiana Supreme Court has created a third way to raise ineffective assistance claims, a hybrid procedure that suspends the direct appeal while the defendant expeditiously raises an ineffectiveness claim in a post-conviction relief proceeding, and then reinstates the appeal for all claims to be raised in one unified appeal. *Woods*, 701 N.E.2d at 1219–20. This is known as the *Davis-Hatton*

procedure. *Id.* And while all trial counsel ineffectiveness claims must be raised at the same time, *id.* at 1220, "Indiana offers defendants a true choice—direct appeal *or* collateral review—and *either* forum is a procedurally viable option for adjudicating a *Strickland* claim." *Brown*, 847 F.3d at 521 (Sykes, J., dissenting) (emphasis in original). Indiana even offers an early and expedited post-conviction procedure for those who want to use it. "This takes Indiana outside the rule and rationale of *Trevino*." *Id.*

Indeed, it does. The Texas procedure at issue in *Trevino* made it virtually impossible to raise a *Strickland* claim on direct appeal. *Trevino*, 133 S. Ct. at 1918–19. While Texas courts certainly discouraged litigants from doing so, they also only nominally allowed such claims. *Trevino* turned on the latter point, *Brown*, 846 F.3d at 521 (Sykes, J., dissenting) (citing *Trevino*, 133 S. Ct. at 1918–19), as the former is merely a recognition of the truism that given the *Strickland* standards, defendants are without question better off in the vast majority of cases using post-conviction procedures to fully investigate and develop a factual record to meet the constitutional burden. The only discouragement that Indiana courts give against raising trial counsel ineffectiveness claims before post-conviction review is that which is readily apparent, if not explicitly made, in the U.S. Supreme Court's own ineffectiveness precedent. Certainly, *Trevino* does not mean that when a state court acknowledges federal law, it necessarily prevents any meaningful opportunity to raise those claims.

The majority faults the Indiana Supreme Court of "go[ing] 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.'" *Brown*, 847 F.3d at 512 (citing *McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999), and *Landis v. State*, 749 N.E.2d 1130, 1132 (Ind. 2001)). That misunderstands those cases. *McIntire* involved an ineffectiveness of counsel claim made in a brief filed on direct appeal *before* the Indiana Supreme Court decided *Woods* and during the time when all ineffective assistance of trial counsel claims had to be raised at that time. Because the law changed during the pendency of the appeal, and that change might have adversely effected McIntire's rights, the Indiana Supreme Court declined to consider the *Strickland* claim in that unique circumstance. *McIntire*, 717 N.E.2d at 101–02. Under the majority's reasoning, the Indiana Supreme Court's careful protection of a defendant's right to raise a *Strickland* claim is evidence of a conspiracy to frustrate that right.

Landis explains this further. In that case, the Court of Appeals of Indiana did what the majority accuses Indiana courts of doing: frustrating a defendant's ability to raise his *Strickland* claims on post-conviction review instead of direct review by imposing a procedural default in the name of *McIntire*. But the Indiana Supreme Court rebuffed that move, chastised the appellate court for interfering with the defendant's choice, and addressing the *Strickland* claim on the merits. 749 N.E.2d at 1132–33. *Landis* is perhaps the best evidence of the Indiana Supreme Court's

promotion of a free choice for defendants to raise their *Strickland* claims as they wish, not evidence of undermining that choice by providing a fake remedy.

The majority also cites a handful of Court of Appeals of Indiana decisions that address claims of ineffective assistance made on direct appeal as evidence of a systemic hostility to direct appeal *Strickland* claims. *Brown*, 847 F.3d at 512 (collecting seven non-precedential decisions that deny *Strickland* claims on the merits over nearly twenty years). Those cases denied relief on the merits under the Sixth Amendment standard applicable to such claims. Other cases, such as *Brown v. State*, 59 N.E.3d 364, 2016 WL 3556267 (Ind. Ct. App. June 29, 2016), grant relief under *Strickland* on direct appeal.[1] In these cases, Indiana courts applied controlling federal law and respected the defendant's choice as to what proceeding was used to raise the claim. Nothing in *Trevino* requires state courts to misapply federal law to maintain federal courts' respect for procedural defaults.

The majority also misunderstands the amicus briefs and the extra-record materials included in them as proof that Indiana courts systemically frustrate direct appeal *Strickland* claims. The majority states, "Amicus Indiana Public Defender Council tells us that between 2008 and 2012, its attorneys filed approximately 2000 appeals and only four *Davis-Hatton* petitions." *Brown*, 847 F.3d at 512. This is incorrect and misleading. The Indiana Public Defender Council is merely a state body that provides training, research, lobbying, and similar services

[1] This case was decided while briefing in this case was ongoing, and counsel for Respondent-Appellee cited the case in oral argument before this Court.

to criminal defense counsel across Indiana. It is not a public defender agency. *See* Indiana Public Defender Council, http://www.in.gov/ipdc (accessed March 8, 2017). In its amicus brief, it included presentation slides from the appellate chief of the public defender agency in Indianapolis, and it was there where the four in 2000 number originated. There's no reason to doubt that information, but the Court did not realize that in there have been between 1800 and nearly 2300 criminal appeals filed each year between 2011-2015. Annual Report, Court of Appeals of Indiana, http://www.in.gov/judiciary/appeals/files/court-of-appeals-annual-report-2015-online.pdf (accessed March 8, 2017). The Indianapolis public defenders account for only about third of those cases. Actual statistics for the number of Davis-Hatton petitions that have been filed are not kept, and Respondent-Appellee has not been able to obtain accurate numbers for the Court. It is grossly incorrect to believe, however, that only four *Davis-Hatton* petitions were filed by public defenders between 2008 and 2012.

* * *

Indiana courts have tried to fashion open and flexible procedures to allow defendants at least three procedures to raise their *Strickland* claims. One of those is direct appeal and Indiana courts respect defendants' free choices to raise their counsel claims then. This is, by definition, a meaningful opportunity. That a defendant has a better chance at winning if he waits until state post-conviction review given the controlling *Strickland* standard does not mean that Indiana's procedures and its defendants' choices are not meaningful under *Trevino*. If the

reported cases are a guide, Indiana guarantees its defendants more procedural flexibility than any other state. Given the serious federalism concerns implicated by *Martinez* and *Trevino*, this Court should be reluctant to punish Indiana for guaranteeing that flexibility for the benefit of its criminal defendants.

CONCLUSION

This Court should grant rehearing en banc and affirm the district court's judgment.

Respectfully submitted,

CURTIS T. HILL, JR.
Attorney General of Indiana

s/Stephen R. Creason
Stephen R. Creason
Chief Counsel for Appeals

Office of the Attorney General
Ind. Gov't Center South, Fifth Fl.
302 W. Washington St.
Indianapolis, IN 46204

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Michael Ausbrook: mausbrook@gmail.com

Victoria Bailey: victoria.bailey@indy.gov

Brent L. Westerfeld: bwesterfeld@wkelaw.com

s/Stephen R. Creason
Stephen R. Creason