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 Case No. 1:13–cv–1981–JMS–DKL The Honorable Jane Magnus-Stinson, Judge.

PETITIONER-APPELLANT'S CORRECTED ANSWER TO RESPONDENT-APPELLEE'S PETITION FOR REHEARING *EN BANC*

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Disclosure Statement

No. 16–1014

Short Caption: **Dentrell Brown v. Richard Brown.**

The undersigned, counsel of record for the Petitioner-Appellant, Dentrell Brown, furnishes the following in compliance with 7th Circuit Rule 26.1:

(1) The full name of every party or amicus the attorney represents in the case:

Dentrell Brown

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Not Applicable

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Dated: April 11, 2017

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Argument

The panel majority got it completely correct: the rule of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), as expanded by *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), should apply to Indiana cases brought under 28 U.S.C. § 2254. *Brown v. Brown*, 847 F.3d 502, 506 (7th Cir. February 1, 2017), *reh'g pending*. Indiana's "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." *Trevino*, 133 S. Ct. at 1921.

Every court has a necessarily intimate acquaintance with its own procedures. That makes it especially difficult to make entirely intelligible to one court the procedures of another. If the Court takes one thing away from this answer on rehearing, it should be this:

> Indiana's *Davis* / *Hatton* procedure is utterly irrelevant to whether the rule of *Martinez* should apply to Indiana § 2254 cases. That is because the procedure is a timing mechanism only; it is a means to invoke initial collateral review earlier by suspending or dismissing a direct appeal without prejudice. It is *not* a way to raise trial ineffective assistance—or any other post-conviction claim—in a direct appeal.

The panel majority certainly—and correctly—recognized this. *See Brown*, 847 F.3d at 511-12 ("[B]ecause 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."). The Appellee concedes as much on rehearing: "[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* . . . ." Rehearing Petition, Doc. 58 at 3 (emphasis added).

The Court does not have to believe the panel majority, Dentrell, or even the Appellee about this. The Indiana Supreme Court could not have been clearer about this: "[The] use or non-use of [a *Davis* petition] does not have substantive significance, but serves only to raise at an earlier time an issue that otherwise would be available for later presentation in post-conviction proceedings." *Thomas v. State*, 797 N.E.2d 752, 755 (Ind. 2003).[1] Indiana federal district courts have recognized this repeatedly as well.[2]

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[1] The only possible quibble to be had with the panel majority's decision is that a *Davis* petition is actually directed at the Indiana appellate court where the direct appeal is filed. It is a request to suspend the appeal—or more typically dismiss it without prejudice—so that a convicted person may file a post-conviction petition without having to wait for the direct-appeal process to play out. *See White v. State*, 25 N.E.3d 107, 121 (Ind. Ct. App. 2014) (The *Davis* / *Hatton* procedure "is the termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a petition for post-conviction relief to be pursued in the trial court."), *reh'g denied*, *trans. denied*, *cert. denied sub. nom. White v. Indiana*, 136 S. Ct. 595 (2015).

[2] Indiana federal district courts have recognized this repeatedly as well. *E.g.*, *Foote v. Zatecky*, 2014 U.S. Dist. LEXIS 21048 at *1-2 n.2 (S.D. Ind. Feb. 20, 2014) ("The *Davis-Hatton* procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, *to allow a post-conviction relief petition to be pursued in the trial court.*" (Emphasis added)

(continued...)

The *Davis / Hatton* procedure is in no way a third, "hybrid" procedure distinct from direct appeal and initial collateral review. If it were—if it provided a way of raising a trial ineffective assistance on direct review—one would expect that there would be Indiana cases in which the lawyer in an appeal resulting from use of the *Davis / Hatton* procedure would have been held ineffective for omitting or fumbling a trial ineffective assistance claim. There are no such cases.

Texas made the same argument in *Trevino*: Texas' procedure for abating a direct appeal should exempt Texas' legal system from the rule of *Martinez*. The Supreme Court dispatched that argument in part as follows:

> Respondent further argues that there is no equitable problem to be solved in Texas because if counsel fails to bring a substantial claim of ineffective assistance of trial counsel on direct appeal, the ineffectiveness of appellate counsel may constitute cause to excuse the procedural default. *See Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986). But respondent points to no case in which such a failure by appellate counsel has been deemed constitutionally ineffective.

Trevino, 133 S. Ct. at 1920. So it is also in the case of Indiana: the Appellee points to no case in which the *Davis / Hatton* procedure has been invoked and then, later, the lawyer who litigated the post-conviction petition

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[2] (...continued)
(citations omitted).); *Hertel v. Superintendent*, 2010 U.S. Dist. LEXIS 89714 at *3 (N.D. Ind. Aug. 27, 2010) ("Hertel sought to use the *Davis-Hatton* procedure *to develop claims of ineffective assistance of trial counsel in post-conviction proceedings.*" (Emphasis added) (citations omitted).); *Williams v. Superintendent*, 2010 U.S. Dist. LEXIS 2370, at *28 n.3 (N.D. Ind. Jan. 12, 2010).

resulting from use of the *Davis / Hatton* procedure was even alleged constitutionally ineffective, much less actually held to have been so.

With respect to the *Davis / Hatton* procedure being nothing but a timing mechanism, the Court should also note that in *Runningeagle v. Ryan*, 825 F.3d 970 (9th Cir. 2016), the Ninth Circuit dispatched the identical argument the Respondent makes in this case with respect to the *Davis / Hatton* procedure. In Arizona, one can file a so-called Rule 32 motion to initiate collateral review and "seek an order from the appellate court suspending the appeal." *Id.* at 980 (internal quotation marks and citation omitted). Here is the Ninth Circuit's treatment of Arizona's argument that *Martinez* should not apply because of Arizona's so-called *Valdez* procedure:

> The district court found that *Trevino* did not apply because the *Valdez* procedure of staying the direct appeal and consolidating it with the Rule 32 proceeding in effect provided "direct appellate review of ineffectiveness claims." However, this consolidation was merely ministerial. *Under* Valdez*, direct appeals and Rule 32 petitions remained on separate tracks, though they ultimately converged at the same station. Crucially, that convergence would occur after PCR counsel had raised the issues for review and developed the evidentiary record before the PCR court. The Arizona appellate court would concurrently review the direct appeal and the denial of the PCR petition, as it did in this case, but this is not the same as reviewing the petition in the first instance.*
>
> . . . .
>
> The Arizona system therefore posed the grave risk with which *Martinez* is concerned: that PCR counsel would fail to raise or develop substantial trial-level IAC claims, and, because PCR

> counsel's performance is not constitutionally reviewable, any deficiency in this regard would result in "no court . . . review[ing] the prisoner's claims." *Martinez*, 132 S. Ct. at 1316. The equitable rules of *Martinez* and *Trevino* prevent this inequitable result.
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> Thus, during the period Runningeagle was litigating his direct appeal and Rule 32 petition, Arizona law in effect required the assertion of IAC claims in the initial-review collateral proceeding. The district court erred in holding otherwise.

Runningeagle, 825 F.3d at 981-82 (emphasis added). There does not appear to be a lick of difference between Arizona's *Valdez* procedure and Indiana's *Davis* / *Hatton* procedure, and the panel majority's decision in Dentrell's case is just as correct as the Ninth Circuit's was in *Runningeagle*.

Even if the *Davis / Hatton* procedure provided "a third way," distinct from direct and initial collateral review–and it truly does not—it is certainly not employed in the typical case. The panel majority correctly recognized this as well:

> 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.

Brown, 847 F.3d at 512.[3] It should not be surprising that the *Davis / Hatton* procedure is rarely invoked. The Indiana Supreme Court has said: "[A Davis petition] should cover *the exceptional case* in which the defendant prefers to adjudicate a claim of ineffective assistance before direct appeal remedies have been exhausted." *Woods v. State,* 701 N.E.2d 1210, 1219-20 (Ind. 1998) (emphasis added).

The Appellee insists that the *Davis / Hatton* procedure must be used more often than recited in the opinion of the panel majority: "It is grossly incorrect to believe, however, that only four *Davis-Hatton* petitions were filed by public defenders." Rehearing Petition, Doc. 58 at 7. Based on the 2015 Annual Report of the Indiana Court of Appeals ("2015 Appellate Report"), http://www.in.gov/judiciary/appeals/files/court-of-appeals -annual-report- 2015-online.pdf (last visited April 11, 2017), the Appellee says that the Appellate Division of the Marion County Public Defender Agency ("Marion County") only accounted for about a third of the 1800 to 2300 criminal direct appeals filed with the Indiana Court of Appeals between 2011 and 2015. Rehearing Petition, Doc. 58 at 7. Hence, the

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[3] Dentrell disagrees that this is the most important aspect of the *Davis* / *Hatton* procedure. The most important aspect is that the *Davis* / *Hatton* procedure simply does not result in direct review of trial ineffective-assistance claims. That is, the existence of the procedure, in the first instance, makes no difference for the purposes of *Martinez* and *Trevino*. The infrequency with which the procedure is employed is an additional "even if" argument that really need not be reached. What the infrequency with which the procedure is employed *does* demonstrate is that the procedure adds nothing. If the *Davis* / *Hatton* procedure made it possible to litigate missed trial ineffective-assistance claims—the concern of *Martinez* and *Trevino*—the Court would have to suppose that the Indiana defense bar collectively, in a vast number of cases, is intentionally foregoing a chance to get the clients an extra level of review. Dentrell suggests that such a supposition that the Indiana defense bar is that incompetent should be resisted.

Appellee says, there's a "gross" undercount of *Davis* / *Hatton* cases filed by Indiana public defenders, even though "[a]ctual statistics for the number of *Davis* / *Hatton* petitions are not kept." Rehearing Petition, Doc. 58 at 7.

There are a number of serious problems with this analysis. First, no one has ever claimed that Marion County filed all of the *Davis* / *Hatton* petitions between 2008 and 2012. Certainly other public defenders beyond Indianapolis probably filed some; and it is not unreasonable to suppose that some privately retained lawyers filed some. As the largest institutional litigator of direct criminal appeals in Indiana, Marion County's rate of filing *Davis* / *Hatton* petitions was meant to be representative of the filing rate statewide. If, in something like 2000 direct appeals over 5 years, Marion County filed a *Davis* / *Hatton* petition in 4 cases, then Marion County filed such a petition in approximately 0.2% of the cases it handled over the period. The Appellee does not dispute this number and provides no reason to believe that *Davis / Hatton* petitions are filed at any significantly greater rate statewide.

Second, the Appellee is truly hiding the ball here. The Indiana Attorney General, who represents the Appellee superintendent, should know *exactly* how many *Davis* / *Hatton* petitions are filed statewide in any given year. This is because the Indiana Attorney General represents the State of Indiana in *every* direct criminal appeal. *See* Ind. Code § 4-6-2-1 (Burns Supp. 2016); *State v. Harper*, 8 N.E.3d 694, 698 n.4 (Ind. 2014).

The Appellee's assertion that there are no statistics available for how many *Davis* / *Hatton* petitions are actually filed is literally correct. But the

2015 Appellate Report to which the Appellee has called the Court's attention provides an upper bound of about 0.6%. The report recites that, in 2015, Indiana Court of Appeals disposed of 1,038 direct criminal appeals. 2015 Appellate Report at 2. Of those 1,038 cases, the Court of Appeals disposed of 1,032 by majority opinion and 6 by order. *Id*. To get an upper bound on the number of *Davis* / *Hatton* petitions filed in 2015, one only has to assume that all 6 of the cases disposed of by order, of the 1000-plus disposed of by any means, were cases in which a *Davis* / *Hatton* petition was filed.

Whether the filing rate for *Davis* / *Hatton* petitions statewide is close to the 0.2% of Marion County, or whether it is actually closer to the upper limit of about 0.6% for 2015 that the 2015 Appellate Report establishes, the *Davis* / *Hatton* procedure is rarely used.

But there is a statistic that absolutely swamps the Appellee's claim of significant numerical error. As Chief Judge Wood noted last week at oral argument in *Spiller v. United States*, Case No. 15-2889, "The Supreme Court has recognized that the criminal law is all about plea agreements." (April 5, 2017 oral argument at 17:10).[4]. In 2015, of the 120,119 Indiana criminal cases disposed of by trial or guilty plea, almost 98% were disposed of by guilty plea; only just over 2% were tried either to a jury or to the

[4] The recording of the oral argument is available online at: http://media.ca7.uscourts.gov/sound/external/rt.15-2889.15-2889_04_05_2017.mp3 (last visited April 11, 2017).

bench.[5] The decisive significance of this is that Indiana absolutely bars direct appeals of convictions following a guilty plea:

> It is well settled that a person who pleads guilty cannot challenge the propriety of the resulting conviction on direct appeal; he or she is limited on direct appeal to contesting the merits of a trial court's sentencing decision, and then only where the sentence is not fixed in the plea agreement. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004).

Alvey v. State, 911 N.E.2d 1248, 1249 (Ind. 2009). So, for the 98% of the criminal defendants who pled guilty in 2015, the usefulness *vel non* of the *Davis* / *Hatton* procedure for the other 2% is irrelevant, as is the frequency with which *Davis* / *Hatton* petitions are actually filed. (Indeed, in 98% of the cases, Indiana *is* Arizona, *requiring* that trial ineffective-assistance claims—such as the failure to transmit a favorable plea offer—be raised on initial collateral review.) And if the upper limit in 2015 for the number of *Davis / Hatton* petitions was 0.6% in the 2% or so of cases in which it was available, then the real rate at which *Davis* / *Hatton* petitions were filed in 2015, considering the total universe of 2015 criminal convictions, was .012%—about 1 in 10,000 thousand cases.

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[5] Dentrell has derived the statistics from the Trial Court Statistics in Volume 1 of the 2015 Indiana Judicial Service Report produced by the Indiana Supreme Court's Office of Judicial Administration. It is located on the Internet at: http://www.in.gov/judiciary/admin/files/rpts-ijs-2015-judicial-v1-review.pdf (last visited April 11, 2017). The number 120,119 includes only cases that were disposed of by guilty plea or trial, bench or jury. It also only includes charges of misdemeanors up to murder.

According to the report, in 2015, 117,546 criminal cases resulted in guilty pleas; there were 2,573 trials—1,694 bench trials and 879 jury trials. Report, Volume 1, at 82. The 117,546 guilty-plea cases constituted 97.86% of the 120,119 total number of cases; The 2,573 trials constituted 2.14% of the cases.

Indiana's *Davis* / *Hatton* procedure does not—and cannot—result in direct review of a trial ineffective-assistance claim. And, as the Indiana Supreme Court has directed, it is used in exceptional cases—only in *truly* exceptional cases, actually, the available statistics show.

The only other argument made by the Appellee in support of rehearing is that Indiana is not hostile to trial ineffective-assistance claims raised in a direct appeal and that people can, in fact, succeed raising them in a direct appeal. Rehearing Petition, Doc. 58 at 6. First, as noted above, in 2015, the 98% who pled guilty in 117,000-plus criminal cases could only appeal their sentences; they could not attack their conviction on direct appeal at all.

Second, of the 1,000-plus direct criminal appeals that the Indiana Court of Appeals decided by majority opinion, 2015 Appellate Report at 2, Dentrell has identified 10 cases that actually decided trial ineffective-assistance claims—about 1% of the cases decided in 2015 by majority opinion.[6] Not a single one of those claims prevailed. As the Indiana

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[6] Direct criminal appeals are supposed to have a "CR" designation in the case number. See Ind. Administrative Rule 8.1(B)(3)(ii). The Court of Appeals' direct-appeal cases can be captured in Lexis Advance by searching in the Indiana state cases for "number(CR)" and then restricting the search Court of Appeals cases.

Of the 1000-plus direct appeal cases thus produced, 35 cases have the term "ineffective." Of those cases, 3 are post-conviction appeals, even though they have the designation "CR"—no system is perfect.

Of the remaining 32 cases containing the word "ineffective," 11 of the direct-appeal cases actually disposed of a trial ineffective-assistance claim: *Torres-Reynoso v. State*, 42 N.E.3d 586 (Ind. Ct. App. 2015); *Hart v. State*, 42 N.E.3d 173 (Ind. Ct. App. 2015); *Lewicki v. State*, 41 N.E.3d 719 (Ind. Ct. App. 2015); *Merriman v. State*, 40 N.E.3d 1280 (Ind. Ct. App. 2015); *Bohannon v. State*, 33 N.E.3d 1207 (Ind. Ct. App. 2015); *Shannon v. State*, 31 N.E.3d 1046 (Ind. Ct. App. 2015); *Scroggin v. State*, 31 N.E.3d 549 (Ind. Ct. App. 2015); *Peak v. State*, 26

(continued...)

Supreme Court said in *Woods*, quoting this Court in *United States v. Taglia,* 922 F.2d 413, 418 (7th Cir. 1991), trial ineffective assistance claims raised in a direct appeal "almost always fail." *Woods*, 701 N.E.2d at 1216.

The Appellee raises up on a banner, as it were, a single case from 2016 in which a trial ineffective-assistance claim succeeded in a direct appeal: *Brown v. State*, 59 N.E.3d 364 (Ind. Ct. App. 2016). See Rehearing Petition, Doc. 58 at 6. But of course, *Woods* and *Taglia* only say that direct-appeal claims of trial ineffective assistance *almost* always fail. A single case from a single year in which, again, the Indiana Court of Appeals decided more than 1,000 direct criminal appeals, does not undermine the accuracy of the assessment made by *Woods* and *Taglia*. That some very few have survived a fall from a 20-story building in pretty good shape does not counsel against taking the stairs, if they are available, when there's a fire.[7]

Finally, this case is not about punishing Indiana for anything it has done wrong or about failing to respect the choices, made mostly by the Indiana Supreme Court, about how trial ineffective-assistance claims are to be handled in the typical case. *Martinez*, itself, says, "This is not to imply the State acted with any impropriety by reserving the claim of ineffective

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[6] (...continued)
N.E.3d 1010 (Ind. Ct. App. 2015); *Hess v. State*, 29 N.E.3d 180 (Ind. Ct. App. 2015); *Brown v. State*, 24 N.E.3d 529 (Ind. Ct. App. 2015).

[7] See, *e.g.*, Briton Walks Away from 22-Story Fall, Deseret News, April 3, 1993, http://www.deseretnews.com/article/283627/BRITON-WALKS-AWAY-FROM-22-STORY-FALL.html (last visited April 11, 2017).

assistance for a collateral proceeding." 132 S. Ct. at 1318. And *Trevino* said: "[W]e do not (any more than we did in *Martinez*) seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for the States to decide. And, as we have said, there are often good reasons for hearing the claim initially during collateral proceedings." 113 S. Ct. at 1921. It is the panel majority's decision that completely respects the completely reasonable choices Indiana has made about how trial ineffective-assistance claims ought to be handled in the typical case. It is, in fact, the Appellee's repeated mischaracterizations of Indiana legal system and actual practice that deeply disrespects those choices.

There is simply no plausible argument that, in the typical case and as a practical matter, Indiana provides a meaningful opportunity to raise a claim of trial ineffective assistance in a direct criminal appeal. The majority panel decision got this right, and the Court should deny rehearing.

Conclusion

For the foregoing reasons, and for the reasons set out in his briefs before the panel, the Petitioner-Appellant respectfully requests that this Court deny rehearing.

Respectfully submitted,

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Certificate of Service

I hereby certify that on April 11, 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.

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