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 Verified Request to Expand Certificate of Appealability

The Petitioner-Appellant, Dentrell Brown, by counsel, now comes before the Court under Federal Rule of Appellate Procedure 22(b) and *Dalton v. Battaglia*, 402 F.3d 729, 738 (7th Cir. 2005), with his Verified Request to Expand Certificate of Appealability. For the reasons that follow, the Court should expand the certificate of appealability to include the question of whether Dentrell may, under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), as extended by *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), attempt to overcome the procedural default of the substantial trial ineffective-assistance claim dismissed by the district court.

1. Introduction

This case presents the important question of first impression in this Court of whether *Martinez*, as extended by *Trevino,* applies to § 2254 cases in Indiana. At least it will, if the Court expands the certificate of appealability to include the question. In addition to the question being important and one of first impression, it is a recurring question that Indiana district courts have now answered incorrectly four times.

2. The Rule of *Martinez* as Expanded by *Trevino*

As recited in *Trevino*, *Martinez* held that a federal habeas court may find cause to excuse a procedural default of a trial ineffective-assistance claim, if four conditions are met:

> (1) the claim of :ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law **requires** that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino, 133 S. Ct. at 1918 (quoting *Martinez*, 132 S. Ct. at 1318-19). (Emphasis in the original). A "subsantial" claim of trial ineffective assistance is one that has "some merit." *Martinez* 132 S. Ct. at 1318–19 (equating "some merit" with the standard for a certificate of appealability by citation to *Miller-El v. Cockrell*, 537 U.S. 322 (2003)); *Ramirez v. United States*, 799 F.3d 845, 854 (7th Cir. 2015).

Trevino expanded the coverage of *Martinez* from state law systems that *require* trial ineffective-assistance claims be raised on collateral review to state law systems that, "by reason of [their] design and operation, make[] 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.

3. The standard for a certificate of appealability is low.

To obtain a certificate of appealability, Dentrell must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Dentrell can satisfy this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (internal quotation marks omitted). Dentrell need not "prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Although the standard for issuance of a certificate of appealability is not so low that one should issue in every case, *see id.* at 337, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. And it is particularly important that the Court not deny a certificate of appealability by actually deciding the merits of the *Martinez* question at this stage: "When a court of appeals sidesteps th[e COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at 336–337.

Because the question of *Martinez*'s applicability to Indiana is an antecedent procedural question regarding default, to obtain a certificate of appealability, Dentrell must make the showing required by § 2253(c) both with respect to that question and to the merits of the defaulted trial ineffective assistance claim, itself. *See Crockett v. Butler*, 807 F.3d 160, 165–66 (7th Cir. 2015) (noting that the Court had granted a certificate of appealability both with respect to the merits of the claims and to the questions of default). For the reasons that follow, both the *Martinez* procedural question and Dentrell's defaulted trial ineffective-assistance claim on its the merits meet the low standard required by § 2253(c) for a certificate of appealability to issue.

4. It really should not be debatable: *Martinez* applies to Indiana.

Because of *Trevino*, itself, which applied *Martinez* to Texas, and because of this Court's decision in *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), which applied *Martinez* to § 2255 cases, it should be obvious that *Martinez* does apply to § 2254 cases in Indiana.

a. Because *Martinez* applies to Texas, it applies to Indiana.

Indiana is even more unforgiving than Texas, the state at issue in *Trevino*, when ineffective assistance has been raised on direct appeal. In Texas, one may raise a trial ineffective-assistance claim on direct appeal and again revisit it on collateral review. *See Trevino*, 132 S. Ct. at 1919 ('[Texas courts] have held that defendant's decision to raise [trial ineffective assistance] on direct review does not bar the defendant from also raising the claim in collateral proceedings." (Citation omitted).). *See also Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004)

(ineffective-assistance claims may be raised a second time on collateral review if more evidence has been developed to support them).

That is distinctly not the case in Indiana. In Indiana, if trial ineffective assistance has been raised on direct appeal, the entire issue will be *res judicata* on collateral review. *E.g.*, *Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008).

If *Martinez* applies to Texas—and *Trevino* says it does—*a fortiori* it applies to Indiana.

b. Because *Martinez* applies to § 2255 cases in this circuit, it applies to § 2254 cases in Indiana.

In *Ramirez*, this Court applied *Martinez* to motions under 28 U.S.C. § 2255 that invoke collateral review of federal convictions: "The same principles apply in both the section 2254 and the section 2255 contexts, as this case illustrates. Ramirez was effectively unable to raise his ineffective-assistance claim until collateral review because he was in the typical situation of needing to develop the record more fully before he could proceed." *Ramirez*, 799 F.3d at 854. Indiana's procedural approach to trial ineffective-assistance claims is materially identical to the federal approach in this circuit. In both Indiana and in this circuit, it is possible to raise trial ineffective assistance on direct appeal, but it is just a terrible idea to do so in the typical case. Compare *Woods*, 701 N.E.2d at 1216 ("'It is no surprise that such claims almost always fail.'" (Quoting *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991)) with *United States v. Flores*, 739 F.3d 337, 341 (7th Cir. 2014) (trial ineffective-assistance claims raised on direct appeal are "doomed"). *See also Woods*, 701 N.E.2d at 1220 ("all but the most confident appellants" will wait to raise trial ineffective-assistance claims on collateral review). By its reliance on this Court's decision in *Taglia*, it should be apparent that the Indiana Supreme Court actually

intended in *Woods* to reform Indiana practice with respect to trial ineffective-assistance claims to match the practice in this circuit. See *Flores*, 739 F.3d at 341 ("For we held in *United States v. Taglia*, 922 F.2d 413 (7th Cir.1991), and *Peoples v. United States*, 403 F.3d 844 (7th Cir.2005), that, when an ineffective-assistance claim is rejected on direct appeal, it cannot be raised again on collateral review.").

If *Martinez* applies in § 2255 cases in this circuit, it applies to § 2254 cases in Indiana.

5. Four Indiana district courts, including the court below, have held incorrectly that *Martinez* does not apply to Indiana.

There is only one reason *Martinez's* applicability to Indiana can be at all debatable: four Indiana district courts, including the court below, have held that *Martinez* does not apply to Indiana. Entry, D.E. 31 at 18–20; *Johnson v. Superintendent*, 2013 U.S. Dist. LEXIS 108423, *3–4 (N.D. Ind. Aug. 1, 2013); *Brown v. Superintendent*, 996 F. Supp.2d 704, 716–17 (N.D. Ind. 2014); and *McAuley v. Superintendent*, 2015 U.S. Dist. LEXIS 21732, *7–8 (N.D. Ind. Feb. 24, 2015). All correct decisions are alike; all incorrect decisions are incorrect in their own way. The various mistakes made by the Indiana district courts with respect to *Martinez*'s applicability to Indiana are discussed below.

a. The Mere-Possibility Mistake

To a greater or lesser degree, all four decisions concluded that *Martinez* does not apply to Indiana, merely because it is possible to raise trial ineffective assistance on direct appeal in Indiana. Entry, D.E. 31 at 19 ("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." (Citation

omitted)); *Johnson*, 2013 U.S. Dist. LEXIS 108423 at *3–5; *Brown*, 996 F. Supp.2d at 716; *McAuley*, 2015 U.S. Dist. LEXIS 21732 at *7–8. Of course, the whole point of *Trevino* was to extend the applicability of *Martinez* to states where it is possible to raise ineffective-assistance claims on direct appeal, but direct appeals provide no meaningful opportunity for review of the claims in the typical case. *Trevino*, 133 S. Ct. at 1921.

The district court in this case went a step further than mere possibility, citing *Woods* for the proposition that raising a record-based ineffective-assistance claim on direct appeal "may in some instances be preferable." D.E. 31 at 20 (citing *Woods*, 701 N.E.2d at 1219). But that ignored two critical facts recognized by *Woods*, itself: 1) ineffective-assistance claims raised on direct appeal almost always fail, *id*. at 1216; and 2) it is dangerous to raise even a strong record-based ineffective assistance claim on direct appeal, because doing so will foreclose later consideration on collateral review of any non-record-based ineffective-assistance claims. *Id*. at 1220 ("The defendant must decide the forum for adjudication of the issue—direct appeal or collateral review. The specific contentions supporting the claim, however, may not be divided between the two proceedings."). It also ignored the fact, also recognized by *Woods*, that plausible record-based ineffective assistance claims are not presented in the typical case. *See id*. at 1216 ("We agree with the Tenth Circuit that in the context of assessing ineffectiveness claims, **typically a factual record must be developed** in and addressed by the [trial] court in the first instance for effective review." (Internal quotation marks omitted) (citation omitted).); *see also Ramirez*, 799 F.3d at 854 ("Ramirez was effectively unable to raise his ineffective assistance claim until collateral review **because he was in the typical situation of**

needing to develop the record more fully before he could proceed." (Emphasis added).).

b. Two courts made a serious mistake about Indiana law.

Both *Brown* and *McAauley* said that there are situations in which Indiana requires trial ineffective-assistance claims be raised on direct appeal: "Indiana law allows (and in some instances, requires) ineffective-assistance claims to be raised on direct appeal. *See Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998)," *Brown*, 996 F. Supp.2d at 716–17; "Indiana law not only allows ineffective assistance of trial counsel claims to be raised on direct appeal, it sometimes requires it. *See Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *Benefiel v. State*, 716 N.E.2d 906, 911 (Ind. 1999), and *Brown v. Superintendent*, 996 F. Supp. 2d 704 (N.D. Ind. 2014)." *McAuley*, 2015 U.S. Dist. LEXIS 21732 at *7–8. There are, in fact, no Indiana cases holding that any situation requires ineffective-assistance claims to be raised on direct appeal. The citation to *Woods* by both *Brown* and *McAuley* should be startling, because *Woods* says quite the opposite on the very page *Brown* and *McAuley* cite: "For the reasons given, the doors of postconviction must be open to adjudicate ineffective assistance if it is not raised on direct appeal. The defendant must decide the forum for adjudication of the issue— direct appeal or collateral review." *Woods*, 701 N.E.2d at 1220.

c. So-called "Davis petitions" are not used in "the typical case" and are, in any event, merely a procedural device to accelerate collateral review, not a device to raise post-conviction claims, including trial ineffective-assistance claims, "on direct appeal."

The district court below identified three ways trial ineffective-assistance claims may be raised in Indiana. Entry, D.E. 31 at 19–20. Two ways are on direct appeal and on collateral review in post-conviction proceedings. *Id*. It has already been

shown above why Indiana direct appeals do not present a meaningful opportunity for review of ineffective-assistance claims in the typical case.

Uniquely among the four courts to hold that *Martinez* does not apply to Indiana, the district court below seized on the availability of so-called "*Davis* petitions" as a third distinct way to raise ineffective assistance:

> [R]ecognizing 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[, 368 N.E.2d 1149] (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')."

Entry, D.E. 31 at 20. The court concluded that a *Davis* petition provides a "meaningful option" "other than via collateral review" to raise an ineffective-assistance claim:

> 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," [*Woods*, 701 N.E.2d] 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.

Entry, D.E. 31 at 20. As will appear below, this is incorrect: a *Davis* petition, when granted, always results in collateral review; it is not a means for obtaining review in some way "other than via collateral review." But first, there follows a fuller and correct description of what a *Davis* petition is:

> White invoked the *Davis-Hatton* procedure, which 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.** Where, as here, the postconviction relief petition is denied, the appeal can be reinstated. **Thus, in addition to the issues raised on direct appeal, the issues litigated in the**

> **post-conviction-relief proceeding can be raised. In other words, the direct appeal and the appeal of the denial of postconviction relief are consolidated.**

White v. State, 25 N.E.3d 107, 121 (Ind. Ct. App. 2014), *reh'g denied*, *trans. denied*, *cert. denied sub. nom. White v. Indiana*, 193 L. Ed. 2d 477 (2015) (citations omitted) (emphases added).

For the following three reasons, any procedural possibilities offered by a *Davis* petition cannot change the conclusion that *Martinez* applies to Indiana.

i. Davis petitions are used in the "exceptional case," not in "the typical case."

Woods, itself, says that "[A *Davis* petition] should should cover **the exceptional case** in which the defendant prefers to adjudicate a claim of ineffective assistance before direct appeal remedies have been exhausted." 701 N.E.2d at 1219–20 (emphasis added). If the Court expands the certificate of appealability to include the *Martinez* question, Dentrell expects the *amicus* brief of the Appellate Division of the Marion County Public Defender Agency to say that it files a *Davis* petition in something like 1 percent of the 300 or so direct appeals it litigates annually. The Court should also note that the Public Defender of Indiana, the chief post-conviction litigator in Indiana, has a policy of not accepting cases resulting from the grant of a *Davis* petition. See Frequently Asked Questions web page of the Indiana Public Defender, http://www.in.gov/judiciary/defender/2330.htm#6 (Answer D. to Question 6, "On what cases or issues does the Public Defender not provide representation?") (last visited February 9, 2016).

Whether *Martinez* applies to Indiana depends on whether there is a meaningul opportunity to raise trial ineffective-assistance claim on direct appeal "in the typical case." *Trevino*, 133 S. Ct. at 1921. Even if a *Davis* petition were a means to raise

ineffective assistance on direct appeal—and it isn't—*Davis* petitions are not typically used.

ii. When granted, a *Davis* petition still results trial ineffective-assistance claims first being raised on initial collateral review and not on direct appeal.

Even if *Davis* petitions were common—and they aren't—it would not matter. *Woods*, itself says, *Davis* petitions are merely a timing device used to accelerate post-conviction proceedings—collateral review—"before direct appeal remedies have been exhausted." *Woods*, 701 N.E.2d at 1220. "Appellate counsel's 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) (concluding that appellate counsel cannot be ineffective for failing to pursue a *Davis* petition). *See also Peaver v. State*, 937 N.E.2d 896, 898, 901 (Ind. Ct. App. 2010), *trans. denied* (discussing in separate sections the direct appeal and post-conviction issues in a consolidated appeal after the use of a *Davis* petition.) And actually, if anything, a *Davis* petition presents the opportunity to preserve the direct appeal issues for the appeal from the denial of post-conviction relief, not the opportunity to raise post-conviction issues on direct appeal. *See id*. at 896 (the *Peaver* appellate case number, 02A03-1004-PC-255 designates a post-conviction appeal, not a direct appeal, which would have a "CR" case number instead of "PC").

iii. *Trevino*, itself, rejects a comparable "abatement" procedure in Texas as a reason not to apply *Martinez* to Texas.

According to *Trevino*, Texas has a procedure comparable to Indiana's *Davis* petition, yet that did not stand in the way of *Trevino* applying *Martinez* to Texas:

> Sometimes, for example, an appellate court can abate an appeal and remand the case for further record development in the trial court. But the procedural possibilities to which Texas now points seem special, limited in their application, and, as far as we can tell, rarely used. . . . We do not believe that this, or other, special, rarely used procedural possibilities can overcome the Texas courts' own well-supported determination that collateral review normally constitutes the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel claim.

Trevino, 133 S. Ct. at 1920 (citations omitted). Compare also *Woods*, 701 N.E.2d at ([A] postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim.").

If *Martinez* applies to Texas despite Texas' "abatement" procedure, it applies to Indiana despite the existence of *Davis* petitions, which are rarely used and, in any event, still result in collateral review of trial ineffective-assistance claims.

6. Dentrell's defaulted ineffective-assistance claim is "substantial" and more compelling, in fact, than the *Bruton* claim for which the district court issued a certificate of appealability.

Dentrell's underlying and defaulted trial ineffective-assistance claim is actually more "substantial" than the *Bruton* claim for which the district court granted a certificate of appealability. *See Martinez*, 132 S. Ct. at 1320 (exception to overcome procedural default applies to "substantial" claims of trial ineffective assistance); *accord*, *Trevino*, 133 S. Ct. at 1921. Dentrell's *Bruton* claim has little chance of success; his trial ineffective-assistance claim should succeed on the merits, if Dentrell can overcome its procedural default by showing under the standards of

Strickland v. Washington, 466 U.S. 668 (1984), that his post-conviction lawyer was "ineffective" for failing to raise it in the state post-conviction litigation. *See Martinez*, 132 S. Ct. at 1318 (procedural default of a substantial trial ineffective-assistance claim may be overcome by showing appointed counsel in initial collateral review was "ineffective" under the standards of *Strickland*).

a. Dentrell's *Bruton* claim depends upon an ambiguity in *Jones v. Basinger*, 635 F.3d 1030 (2011), that the district court probably resolved correctly against Dentrell.

Charged with murder as an adult at 13, Dentrell was convicted at 14 and sentenced to 60 years in prison with 5 years suspended. He was also fined $10,000.

Dentrell was tried together with Joshua Love. At Dentrell's trial, Mario Morris testified. Morris had been in the Elkhart County Jail at the same time as both Dentrell and Love. At trial, Morris testified to what both Love and Dentrell had told him. Dentrell was convicted largely on the strength of what Love had told Morris, not because of what he, Dentrell, had told Morris.

After Morris testified to what both Love and Dentrell had told him, Dentrell's lawyer moved for a mistrial. The motion was based on *Bruton v. United States*, 391 U.S. 123 (1968). But Morris's account of what Love and Dentrell had told him had been carefully prepared so that what Love had told Morris never mentioned Dentrell, and what Dentrell had told Morris never mentioned Love. The trial court denied the motion for a mistrial on the authority of *Richardson v. Marsh*, 481 U.S. 200 (1987), which had created an exception to *Bruton* for incriminating statements of a non-testifying co-defendant that do not mention even the existence of the other defendant. *Id*. at 211.

Once the trial court denied Dentrell's motion for a mistrial based on *Bruton*, nobody moved for a limiting instruction that would have restricted the jury's use of

Love's statement to Morris to the prosecution's case against Love. This was a problem as a matter of federal constitutional law, because the Supreme Court had been explicit in *Richardson* that the *Bruton* exception *Richardson* announced was narrow and conditional: "We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S. at 211. That is, absent a limiting instruction, the *Richardson* exception to *Bruton* did not apply to Love's statement to Morris, even though Morris had scrupulously omitted any reference to Dentrell in his account of what Love had told him.

In his direct appeal, Dentrell raised his *Bruton* claim. He even pointed out that there had been no limiting instruction. The Indiana Court of Appeals nevertheless affirmed his conviction by applying *Richardson*. *D.B. v. State*, Indiana Court of Appeals No. 20A05-0904-CR-185 (Ind. Ct. App. November 13, 2009) (*mem.*) ("*D.B. I*"), *trans. denied.*

In his habeas petition, Dentrell renewed the *Bruton* claim from his direct appeal. Because there had been no limiting instruction as required by *Richardson*, the district court found that the *D.B. I* court had unreasonably applied *Richardson*. Entry, D.E. 31 at 10 ("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."). It denied relief on Dentrell's *Bruton* claim nonetheless because, it said, the jailhouse conversation between Love and Morris was not testimonial and therefore not subject to the restrictions of the Sixth Amendment's Confontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny. Entry, D.E. 31 at 18 ("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.").

In his supplemental reply, Dentrell certainly recognized the considerable federal authority that holds that jailhouse and prison-yard conversations are not testimonial within the meaning of *Crawford*. See Supplemental Reply, D.E. 27–1 at 8 (citing *Vasquez v. United States*, 766 F.3d 373, 378-79 (5th Cir. 2014) (collecting federal circuit cases holding that informal inmate conversations are not testimonial within the meaning of *Crawford*)). Nevertheless, Dentrell relied on an arguable ambiguity in this Court's decision in *Jones v. Basinger*, 635 F.3d 1030 (2011). See Supplemental Reply, D.E. 27–1 at 7–8. The district court probably parsed out that arguable ambiguity correctly in rejecting Dentrell's *Bruton* claim on its merits, see Entry, D.E. 31 at 16–17, but it issued a certificate of appealability on the *Bruton* question. Entry, D.E. 31 at 21.

Counsel for Dentrell is well aware of what this Court said in *Cage v. McCaughtry*, 305 F.3d 625 (7th Cir. 2002): "When we make a mistake and issue a certificate of appealability that specifies an improper ground, counsel for both sides, rather than indulging a fiction of judicial infallibility, should inform us before briefing begins and ask us to amend the certificate . . . ." *Id.* at 627; *accord Lavin v. Rednour*, 641 F.3d 830, 833 (7th Cir. 2011). The district court should almost certainly have granted a certificate of appealability with respect to *Martinez*'s applicability to Indiana. Whether it should have issued a certificate of appealability with respect to Dentrell's *Bruton* claim is doubtful at best. And after the Supreme Court's decision last term in *Ohio v. Clark*, 135 S.Ct. 2173 (2015), it is an uncomfortably close call whether the issuance by the district court of a certificate of appealability with respect to Dentrell's *Bruton* claim was "an obvious blunder." *See*

Lavin, 641 F.3d at 833 (lawyers should only ask that certified claims be vacated when issuance of the certificate was "an obvious blunder").

b. A limiting instruction that Dentrell's trial lawyer failed to request as a matter of state law would have achieved the same result as the failed mistrial motion under *Bruton*.

The failure to request a limiting instruction was not just a *Richardson* problem; it was also a problem as a matter of state law. Even if Love's statement to Morris was not subject to the Confrontation Clause, although admissible against Love, it was inadmissible hearsay as offered against Dentrell. Ind. Evidence Rule 801(c) (defining hearsay); Ind. Evidence Rule 802 (making hearsay inadmissible).

Because Love's statement to Morris was admissible against Love but not against Dentrell, Dentrell would have been entitled to an instruction limiting the use of Love's statement to Morris. At the time of Dentrell's trial in 2009, Indiana Evidence Rule 105 provided: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly." *See also Grund v. State*, 671 N.E.2d 411 (Ind. 1996) (under Indiana Evidence Rule 105, "defendant would have been entitled to a limiting instruction had defense counsel requested it"). And, like perhaps all jurisdictions, Indiana courts assume that jurors follow their instructions, *See*, *e.g.*, *Ware v. State*, 816 N.E.2d 1167, 1176 (Ind. Ct. App. 2004) ("When a limiting instruction is given that certain evidence may be considered for only a particular purpose, the law will presume that the jury will follow the trial court's admonitions." (Citation omitted).). So a limiting instruction would have achieved the same result as the failed *Bruton* mistrial motion—it would have taken from the jury's consideration against Dentrell the entirety of Love's statement to Morris.

Without Love's statement to Morris, the prosecution's case was circumstantial and thin. It should frankly be unimaginable why, having lost on the *Bruton* mistrial motion, any lawyer would not request an instruction limiting the jury's use of Love's hearsay offered through Morris.

Represented by the Public Defender of Indiana, Dentrell raised a single post-conviction claim of trial ineffective assistance. The claim was that his lawyer should have moved for severance of Dentrell's trial from Love's in light of the *Bruton* problem. The Indiana Court of Appeals affirmed the denial of post-conviction relief, saying that Dentrell was merely attempting to revisit the *Bruton* claim of his direct appeal and that that claim was *res judicata*. *See generally*, *D.B. v. State*, Indiana Court of Appeals No. 20A05-1201-PC-18 (Ind. Ct. App. October 4, 2012) (*mem.*) ("*D.B. II*"), *trans. denied*. But even setting aside the question of *res judicata*, no Indiana case had ever required a lawyer to move for severance to avoid a *Bruton* problem—which problem the *D.B. I* court had already decided did not exist.

Dentrell's post-conviction lawyer did not raise the obvious claim of trial ineffective assistance: Dentrell's trial lawyer had failed to request an instruction limiting the use of Love's statement to Morris to the prosecution's case against Love. Again, such a limiting instruction would have achieved precisely the same result as the *Bruton* objection or, for that matter, severance of Dentrell's trial from Love's. But because this claim of trial ineffective assistance was not raised in the state post-conviction proceedings and was undeniably procedurally defaulted for the purposes of federal habeas litigation.

7. This is the ideal case for the Court to take up *Martinez*'s applicability to Indiana.

Not only is the important question of *Martinez*'s applicability to Indiana one of first impression in this Court that has been recurring in the lower courts, this is the ideal case for the Court to take up the question for three additional reasons. First, the question is directly presented without any procedural complication—by having been raised belatedly, for example, by way of a Rule 60(b) motion. *See Ramirez*, 799 F.3d at 850 (first navigating the Rule 60(b) question before reaching the applicability of *Martinez*); *Nash v. Hepp*,740 F.3d 1075, 1078–79 (7th Cir. 2014) (discussing the applicability of *Martinez* to Wisconsin as raised in a Rule 60(b) motion). Dentrell specifically claimed and argued in his habeas petition that he should be given the opportunity overcome the procedural default of his trial ineffective-assistance claim by application of the rule of *Martinez*. D.E. 1 at 18–23.

Second, Dentrell's case is one for which the *Martinez* rule was specifically intended: Dentrell's substantial trial ineffective-assistance claim will go unreviewed, if he cannot use the rule of *Martinez* to overcome the claim's procedural default. *See Martinez*, 132 S. Ct. at 1316 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim.").

Finally, because the question of *Martinez*'s applicability to Indiana is so important, if the Court does expand the certificate of appealability, Dentrell expects the Indiana Public Defender Council and the Appellate Division of the Marion County Public Defender Agency to request permission to file *amicus* briefs on

Dentrell's behalf. The Indiana Public Defender Council's "About Us" web page says of the Council:

> The Indiana Public Defender Council is a state, judicial branch agency, established in 1977 as a support center for attorneys who represent indigent criminal defendants in Indiana (I.C. 33-40-4). The mission of the Council is to improve legal representation provided at public expense in state courts in Indiana. The Council is governed by an 11-member Board of Directors and currently has approximately 1100 members.

http://www.in.gov/ipdc/public/aboutus.html (last visited February 2, 2016). The Appellate Division of the Marion County Public Agency litigates approximately 300 direct criminal appeals in a year. To the extent that actual Indiana practice cannot be extracted from the Indiana appellate cases, the views of both organizations should be helpful to the Court in understanding how, in practice and in the typical case, Indiana provides no meaningful opportunity to raise a trial ineffective-assistance claim on direct appeal.

Conclusion

For the foregoing reasons, the Petitioner-Appellant respectfully requests that the Court expand the certificate of appealability granted by the district court to include the question of whether *Martinez v. Ryan*, as extended by *Trevino v. Thaler*,

applies to Indiana, and whether he should therefore have the opportunity in the district court to overcome the procedural default of his substantial trial ineffective-assistance claim.

Respectfully submitted,

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

Telephone: 812.322.3218
E-mail: mausbrook@gmail.com

Counsel for Dentrell Brown,
Petitioner-Appellant

I affirm under penalty for perjury that the foregoing representations are true.

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53

Certificate of Service

I hereby certify that on February 9, 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.

/s Michael K. Ausbrook
Indiana Attorney No. 17223-53