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 REPLY BRIEF

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Argument

I. Dentrell has forfeited nothing: his defaulted trial ineffective-assistance claim has always been that his trial lawyer failed to request a limiting instruction that would have restricted the use against Dentrell of Love's statement to Morris.

Point heading 4.2 in section 4 of Dentrell's habeas petition—the claims section—clearly stated Dentrell's admittedly-defaulted trial ineffective-assistance claim: "Dentrell's trial lawyer was ineffective for failing to request a limiting instruction that would have prevented Dentrell's jury from using Joshua Love's statement, offered through Mario Morris, against Dentrell." D.E. 1 at 18. The first sentence thereafter said almost the same thing: "Even though Dentrell's lawyer moved for a mistrial after Morris testified, once that objection was overruled, he did not request a limiting instruction that would have prevented the jury from considering Love's statement to Morris as evidence against Dentrell." D.E. 1 at 18.

The Respondent has misinterpreted Dentrell's underlying ineffective-assistance claim to be based on the failure to request the limiting instruction required by *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). See Br. of Appellee at 12 ("For the first time, Petitioner now alleges that his trial counsel was ineffective for failing to request a limiting instruction under the Indiana Rules of Evidence, and not on Confrontation Clause grounds pursuant to *Bruton* and *Richardson* (the argument he actually made in the district court)."). This misinterpretation makes no sense for two reasons. First, the post-*Marsh* authority is fairly uniform that *Marsh* requires a trial court to give the limiting instruction without request. In Indiana, that authority is *Taggart v. State*, 595 N.E.2d 256, 258 (Ind. 1992). The federal authority

is the same. *See Eley v. Erickson*, 712 F.3d 837, 859 n.19 (3d Cir. 2013); *United States v. Gayekpar*, 678 F.3d 629, 637 (8th Cir. 2012),; *Spears v. Mullin*, 343 F.3d 1215, 1231 (10th Cir. 2003); *United States v. Sauza-Martinez*, 217 F.3d 754, 758 (9th Cir. 2000). In his Supplemental Reply below, Dentrell laid this out in detail in answer to the Respondent's claim that Dentrell had defaulted his claim under *Bruton* and *Cruz* by failing to request the limiting instruction required by *Marsh*. Supplemental Reply, D.E. 29 at 5-7. And as Dentrell pointed out in that refutation: "It would be odd to require that a defendant take the steps necessary to make otherwise inadmissible evidence offered by the government admissible." Supplemental Reply, D.E. 29 at 5.

Under the circumstances, it should be hard to imagine why Dentrell would claim his trial lawyer was ineffective for requesting a limiting instruction that the trial court was required to give on its own. To any extent that Dentrell's lawyer might have thought *Marsh* applicable to Love's account as offered through Morris, he was actually very effective in not requesting the *Marsh* limiting instruction. Had *Marsh* been applicable, he would certainly have sown reversible error on appeal: with no limiting instruction as required by *Marsh*, no court would have said that the violation of *Bruton* and *Cruz*—the admission of Love's statement through Morris—was harmless beyond a reasonable doubt. Indeed, the district court concluded that the Indiana Court of Appeals' decision in *Brown I* was beyond even the expansive pale of the AEDPA because that decision applied *Marsh*, despite the lack of the limiting instruction *Marsh* requires. Entry, App. 22a ("[T]he 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.").

Second, the district court almost certainly did not understand Dentrell's defaulted trial ineffective-assistance claim as the Respondent does. Immediately after concluding that the Confrontation Clause—and therefore *Marsh*, *Bruton*, and *Cruz*—did not apply to Love's non-testimonial statement to Morris, Entry, App. 26a-27a, the district court began discussing Dentrell's defaulted trial ineffective-assistance claim: "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." Entry, App. 27a. The district court never reached the merits of the defaulted claim, because it embarked on its rejection of Dentrell's argument that *Martinez*, as expanded by *Trevino*, applies to § 2254 cases in Indiana. Entry, App. 27a ff. But the Confrontation Clause and *Marsh* did not apply to the case, the district court had just said. If the court had understood the limiting instruction not requested as depending on *Marsh*, which it had just said had no application to Dentrell's case, there would have been no reason to reach the *Martinez* question.

Finally, the Respondent's misunderstanding of the basis of Dentrell's trial ineffective assistance claim is, itself, newly-minted in this Court—which is to say the Respondent has forfeited its forfeiture argument. As the Respondent correctly recognized below: "Initially, Love's counsel sought a mistrial solely on state hearsay grounds (Tr. 561-68)." Supplemental Return, D.E. 22 at 11. The Respondent argued successfully below that the Confrontation Clause—and therefore *Marsh*—did not

apply to Love's non-testimonial statement to Morris. Supplement Return, D.E. 22 at 12-15. At no time below did the Respondent argue that Dentrell's defaulted ineffective-assistance claim was meritless simply because the Confrontation Clause and *Marsh* did not apply to the case. The Respondent does make the argument for the first time in this Court. Br. of Appellee at 17-18. The Respondent's forfeiture argument aimed at Dentrell in this Court really is the pot calling the kettle black.

Any ambiguity below resulted from everyone's focus on the applicability *vel non* of *Martinez* to Indiana. But that focus would have been absolutely unnecessary—indeed, it would have been irrelevant—had Dentrell's ineffective-assistance claim had any necessary connection to the Confrontation Clause. It has always been Dentrell's point that, once the *Bruton*-based mistrial motion had been denied, a limiting instruction would have achieved the next best thing: exclusion of Love's statement to Morris from the State's case against Dentrell. And juries follow their instructions, courts say; a limiting instruction would have achieved, in fact, the very same thing as the failed mistrial motion based on *Bruton*.

II. Dentrell's defaulted trial ineffective-assistance claim *is* "substantial" within the meaning of *Martinez*—even if the Respondent has not forfeited any argument on this issue by failing to challenge the certificate of appealability issued by the Court.

As Dentrell argued in his opening brief, the Court's order expanding the certificate of appealability said: "[W]e find that Brown has made a substantial showing of the denial of his right to effective assistance of trial counsel. See § 2253(c)(2)." Doc. 6, App. 32a. That means the Court has already found that Dentrell's defaulted trial ineffective-assistance claim is "substantial" within the meaning of

Martinez. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1318-19 (2012) (equating whether an underlying trial ineffective- assistance claim is "substantial," i.e., "has some merit" with the standard for issuance of a certificate of appealability). *See also Runningeagle v. Ryan*,2016 U.S. App. LEXIS 10535, *33 n.14 (9th Cir. June 10, 2016) (noting that *Martinez* suggests "that the substantiality standard is comparable to the standard for a certificate of appealability to issue under 28 U.S.C. § 2253(c)(2)"). And unless the Court is going to say that the certificate of appealability should not have been expanded to include the *Martinez* question, that should be the end of the Respondent's argument that Dentrell's defaulted ineffective-assistance claims is not substantial.

Nevertheless, Dentrell next addresses the Respondent's arguments regarding *Strickland* performance and prejudice.

A. Without an evidentiary hearing, there is very little that can be said now with respect to *Strickland* performance.

The Respondent approaches the performance of Dentrell's trial lawyer directly by arguing that, on the record as it exists, Dentrell cannot overcome the presumption that a lawyer performed satisfactorily. Br. of Appellee at 16-18. In particular, the Respondent argues: "[T]he absence of evidence with respect to trial counsel's strategic reason to forgo the instruction cannot demonstrate deficient performance under *Strickland*." Br. of Appellee at 18.

This direct approach to *Strickland* performance is a mistake that illuminates the entire point of *Martinez*. In the state courts, Dentrell's post-conviction lawyer did not raise an ineffective-assistance claim related to a limiting instruction; she litigated the claim that Dentrell's trial lawyer had been ineffective for failing to move

to sever Dentrell's trial from Love's. That is why the ineffective-assistance claim related to the limiting instruction was defaulted and why Dentrell is seeking to overcome the default via *Martinez*. And because she did not raise an ineffective-assistance claim related to the limiting instruction, Dentrell's post-conviction lawyer had no reason to inquire of Dentrell's trial lawyer the reason, if any, for failing to request an instruction limiting the use of Love's statement, as recounted by Morris, against Dentrell.

The whole point of invoking *Martinez* is to get an evidentiary hearing to establish four things, really: 1) whether Dentrell's post-conviction lawyer performed deficiently within the meaning of *Strickland* by not litigating the ineffective-assistance claim related to the limiting instruction; 2) that there is a reasonable probability that the state post-conviction case would have ended differently had she litigated the claim; 3) whether Dentrell's trial lawyer performed deficiently within the meaning of *Strickland* by not requesting a limiting instruction; and 4) whether there is a reasonable probability that Dentrell's trial would have ended differently had his trial lawyer requested a limiting instruction. Nothing can or need be said about 1 and 2 before 3 and 4 are handled. If either there was no deficient performance or *Strickland* prejudice at the trial level, then Dentrell's post-conviction lawyer cannot have been "ineffective" under the standards of *Strickland* in the post-conviction litigation—there would be no reasonable probability that Dentrell would have prevailed in the state post-conviction proceedings with the ineffective-assistance claim related to the limiting instruction.

But at his point, with respect to the performance of Dentrell's trial lawyer—3 above—little can be said, because there is no record of why Dentrell's lawyer failed to

request a limiting instruction after he lost on the Bruton mistrial motion. The Respondent's direct approach now to the performance question asks, in essence, that the Court decide the performance question as it would have been presented, with no record, on direct appeal. With no record, of course Dentrell cannot overcome the *Strickland* presumption that his lawyer performed adequately. That is why Dentrell would lose on the performancequestion now, were the Court to entertain it on its merits. It is also why he would have lost in the Indiana state courts had he raised in his direct appeal in *Brown I*. And the Respondent's invitation to decide the performance question on its merits—an invitation the Court should decline—is, itself, an object lesson in why *Martinez* should apply to § 2254 cases in Indiana.

There are a few things that *can* be said now about *Strickland* performance and the failure to request an instruction limiting the use of Love's statement to Morris. Love's statement to Morris was inadmissible hearsay with respect to Dentrell, and Dentrell would have been entitled to a limiting instruction had he asked for it. The Respondent has never contested this by, for example, claiming that Love's hearsay statement to Morris would have been admissible against Dentrell under any of the numerous Indiana hearsay exceptions. In fact, there was no attempt by the State at Dentrell's trial to fit Love's statement to Morris into any hearsay exception.

So a request for a limiting instruction, had it been made, would have been granted. It follows that Dentrell's defaulted ineffective assistance claim is not facially meritless. This Court, itself, concluded as much when it expanded the certificate of appealability.

It is also hard to say from the record, as it exists, why Dentrell's lawyer would not have requested a limiting instruction. He was desperate to cordon off Love's

statement to Morris from the jury's consideration. In arguing for a mistrial because of the (erroneously) perceived *Bruton* violation, he said:

> It would be an unbelievable stretch of the imagination, probably all the way around the globe, to suggest that the state's case doesn't hinge upon the two of these people being together allegedly, the two of them being at the Middlebury Apartments, the two of them making up a gang pack, the two of them getting in a truck. And it defies common sense to think that this man can get up and say two different stories that he was told by the defendant and not assume he is implicating both of them.

Tr. 565-66.

Of course, if Dentrell's trial lawyer had a strategic reason not to request a limiting instruction, that decision might be nigh unto unchallengeable. *E.g.*, *Gordon v. Hepp*, 2016 U.S. App. LEXIS 14111, *21-22 (7th Cir. August 3, 2016) (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). But if Dentrell's lawyer did not have a strategic reason for the decision, then the decision is not due any *Strickland* deference. *E.g.*, *id.* at *22. What the fact of the matter is will have to wait for the evidentiary hearing Dentrell is requesting.

B. Not only could reasonable jurists debate whether Dentrell was prejudiced within the meaning of Strickland by the failure to request a limiting instruction, Dentrell was seriously prejudiced in fact by the failure to request a limiting instruction.

Strickland prejudice at the trial level is a different matter. The record is what it is, and it is possible to simply ask directly now: Had a limiting instruction been given, is there a reasonable probability that Dentrell's trial would have ended differently? But for the purposes of *Martinez*, the Court only need decide now whether, under the standard for issuance of a certificate of appealability, reasonable jurists could debate

whether Dentrell was prejudiced, in the *Strickland* sense, by his trial lawyer's failure to request a limiting instruction. As already noted above, in its order expanding the certificate of appealability, the Court has already found that reasonable jurists could debate, at least, whether the failure to request a limiting instruction prejudiced Dentrell. The Respondent makes only a merits argument regarding *Strickland* prejudice. See Br. of Appellee, Doc. 34 at 19-20. Nowhere does the Respondent advert to the low standard required for a certificate of appealability to issue—the same standard under *Martinez* by which an underlying trial ineffective-assistance claim is to be judged "substantial." And nowhere does the Respondent challenge the Court's order expanding the certificate of appealability that said Dentrell had made a substantial showing that he had been deprived of the effective assistance of counsel.

Dentrell specifically argued in his opening brief that the Court's order expanding the certificate of appealability constituted a decision that Dentrell's defaulted ineffective-assistance claim was substantial. Corrected Br. of Appellant, Doc. 18 at 16, 25. The Respondent has not answered that argument. The Court should conclude that the Respondent has forfeited any argument that the defaulted ineffective assistance claim is not substantial—that includes any argument that any prejudice from the failure to request the limiting instruction was not substantial.

But directly on the merits of *Strickland* prejudice, the Respondent concedes that Dentrell admitted to Morris only that he, Dentrell, had struck Wenger with a gun and had grazed Wenger when the gun accidentally discharged. Br. of Appellee, Doc. 34 at 17. The harmfulness of Love's story admitted through Morris is demonstrable. It was only Love's story, as related by Morris, that placed Dentrell at the scene of the murder *when the murder happened*. In closing argument, the State

argued, "Dentrell Brown had intimate knowledge of that crime." Tr. 757. But it was only the way Love's story, as told to Morris, interlocked with Dentrell's story, as told to and by Morris, that provided any basis to suggest that Dentrell had any intimate knowledge of the circumstances surrounding Wenger's murder. Indeed, the State was explicit about this in its closing argument:

> In this case the information is that Joshua Love and Dentrell Brown each on different occasions explained their involvement in the murder of Gerald Wenger. How did they know intimate detail? Because they were there. It is absolutely impossible for them to know the things that they knew and provide the information that they provided unless they were there and saw it.

Tr. 761. Dentrell actually only admitted to Morris, if Morris is to be believed, that he hit Wenger with a .45 caliber gun; that in the course of the argument with Wenger, the gun went off; and that the shot grazed Wenger's head. Tr. 556, 557, 558. But the State argued: "Now, Dentrell Brown was actually present at Monroe and Middlebury *when this murder occurred*, and you know that from the testimony of Mario Morris." Tr. 722 (emphasis added). It was Love who admitted to Morris that he, Love, had shot Wenger in the head with a 9 mm pistol. Tr. 548. Without Love's story, as told to and by Morris, and as it coincided with Dentrell's story, as told to and by Morris, there was simply no evidence showing Dentrell was present when the murder occurred.

The Respondent also relies on Dentrell's so-called confession to Kendrick Lipkins: "Kendrick Lipkins testified that Brown admitted to committing murder, and that after Wenger was murdered Brown was trying to sell a 9mm handgun (Tr. 501, 504, 505)." Br. of Appellee, Doc. 34 at 19. Lipkins' testimony *was* equivocal at best. He denied remembering anything Dentrell may have said at least twice. Tr. 500.

Lipkins also said he was interested in a reward that had been offered and advertised around Elkhart. Tr. 507.

As for Dentrell trying to sell a 9mm handgun some time after the murder, that was not—and is not—relevant to prove that Dentrell was present when Love, by his own admission offered through Love, shot Wenger in the head with a 9mm handgun, Tr. 548. No evidence tied to Love—or to Wenger's murder—whatever gun Dentrell may have been trying to sell.

But more importantly, there was simply no evidence that Dentrell was trying to sell or otherwise dispose of a 9mm handgun. At page 500 of the transcript, the State repeatedly asks Lipkins about a .45 caliber handgun and whether there had been a discussion *with Joshua Love*, not Dentrell, about disposing of it. Then, inexplicably, the State asks Lipkins: "Did you buy that 9mm from Dentrell Brown?" Tr. 500. Lipkins says, "No." Tr. 500.

So in the first instance, the Lipkins' discussion about disposing of the .45 was with *Love*, not Dentrell. In the second, it was about disposing of a .45 caliber handgun, not a 9mm, which is what Love admitted to Morris that he used to shoot Wenger in the head. Lipkins simply never said that Dentrell was trying to dispose of *any* gun.

The jury asked for transcripts of Morris' and Lipkins' testimony; those transcripts were prepared and read to the jury. Tr. 793. Lipkins' testimony was brief, equivocal, and proves little. It certainly does not prove what the Respondent claims for it.

Morris' testimony was the State's case against Dentrell. More specifically, Love's statement to Morris, admitted without a limiting instruction, was the State's

case against Dentrell. The jury could only have concluded that Dentrell was guilty because of the way his statement to Morris interlocked with Love's statement to Morris and placed Dentrell at the time and place Love killed Wenger. But for the admission of Love's statement to Morris without an instruction forbidding the use of that statement against Dentrell, there is a reasonable probability that Dentrell would have been acquitted.

III. *Davis* petitions provide no "third way" to raise trial ineffective assistance claims "on direct review"; they are merely a gateway, if granted, to earlier initial collateral review and are intended, in any event, not for the typical case, but for the exceptional one.

Trevino could not have been clearer: *Martinez* applies where: 1) "the state collateral review proceeding was the "initial" review proceeding in respect to the ineffective-assistance-of-trial-counsel claim" and 2) a state law system that, "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 v. Thaler*, 133 S. Ct. 1911, 1921 (2013).

Respondent's only argument to take Indiana procedure out of the reach of *Martinez* and *Trevino* is the *Davis* petition as The Third Way. Doctrinally, that argument is insupportable from start to finish. The Respondent does not deny that what results from a *Davis* petition being granted—and an Indiana appellate court is under no obligation to grant a *Davis* petition—is initial collateral review. Nor could it, because there is no substantive difference between initial collateral review resulting from a granted *Davis* petition and initial collateral review undertaken

under Indiana's post-conviction rules after the direct appeal process has concluded. *See Thomas v. State*, 797 N.E.2d 752, 755 (Ind. 2003) ("[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.").

The Respondent similarly does not deny that raising a trial ineffective-assistance claim on direct review *without* pursuing a *Davis* petition is, in the typical case, a very bad idea. Nor could it: ""It is no surprise that such claims almost always fail.'" *Woods v. State*, 701 N.E.2d 1208, 1216 (Ind. 1998) (quoting *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991)).

So a *Davis* petition provides no "third way," in addition to direct and initial collateral review, to litigate an ineffective assistance claim. Dentrell correctly characterized a granted *Davis* petition as preserving for any necessary post-conviction appeal the direct appeal issues foregone by pursuit of a *Davis* petition: if post-conviction relief is denied after a *Davis* petition has been granted, "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). But "consolidated" does not mean that the post-conviction claims pursued pre-direct appeal via a *Davis* petition are then considered on appeal as "direct review." The Indiana appellate courts are actually quite fastidious about this. They separate the direct-appeal and post-conviction issues into distinct sections that set out the distinct—and distinctly different—standards of review for each group. *See*, *e.g.*, *Peaver v. State*, 937 N.E.2d

896, 898, 901 (Ind. Ct. App. 2010), *trans. denied*; *Ward v. State*, 2015 Ind. App. Unpub. LEXIS 244 (Ind. Ct. App. March 11, 2015) (*mem.*).

Runningeagle v. Ryan, 2016 U.S. App. LEXIS 10535 (9th Cir. June 10, 2016) is a case from Arizona, the native home of *Martinez*. In *Runningeagle*, the Ninth Circuit sent to its well-deserved final rest the identical argument the Respondent makes in this case with respect to *Davis* petitions. 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 *26 (internal quotation marks and citation omitted). Here is the Ninth Circuit's treatment of Arizona's argument that

> 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. *Martinez* makes clear that an appeal from an initial-review collateral proceeding is distinct from the initial-review collateral proceeding itself; the equitable excuse applies only to the latter. 132 S. Ct. at 1320.
>
> Consolidation did not alter the result that, by "structure and design," the Arizona system in actual operation made it "'virtually impossible' for an ineffective assistance claim to be presented on direct review." *Trevino*, 133 S. Ct. at 1915 (citation omitted). 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.
>
> 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.

Id. at *28-29. There is no material difference between the *Valdez* procedure in Arizona and

Also doctrinally, the Respondent wrongly suggests that *Davis* petitions are a generally available means to raise ineffective-assistance claims on direct review in the typical case. *Woods* forecloses that suggestion. Even if a *Davis* petition were a means to raise ineffective-assistance claims "on direct review"—the argument above shows they are not—*Woods* specifically said that *Davis* petitions "should cover *the exceptional case* in which the defendant prefers to adjudicate a claim of ineffective assistance before direct appeal remedies have been exhausted" and that they are "not to be used as a routine matter in adjudicating the issue of trial counsel's effectiveness." 701 N.E.2d at 1219-20.

So this Court has it from the Indiana Supreme Court that *Davis* petitions are not meant to cover "the typical case." As a matter of "design," then, in the language of *Trevino*, a *Davis* petition still results in initial collateral review and, in any event, is not to be used in "the typical case." That really should be the end of it:

With respect to the actual operation of Indiana's system for reviewing trial ineffective-assistance claims, the Court has heard from the Appellate Division of the Marion County Public Defender Agency ("The Agency"), the largest institutional litigator of criminal direct appeals on the defense side. Its lawyers do not file *Davis*

petitions "except under the most extraordinary circumstances . . . even if an issue of ineffective assistance of trial counsel appears on the face on the record." *Amicus* Br. of Agency, Doc. 27 at 5.

The Respondent's assertion that the Agency's lawyers do not pursue *Davis* petitions because they are inept is as inapt as it is rude. With post-conviction petitions in Indiana, it is in-for-a-penny, in-for-a-pound. As set out about, there is no substantive difference between post-conviction litigation that results from a granted *Davis* petition and the usual post-direct-appeal variety. So even if an Agency lawyer could, in the typical case, identify a trial-ineffective assistance claim with probable merit, that lawyer, if she undertook a *Davis* petition to litigate that claim earlier, would be on the hook to investigate and litigate all other post-conviction claims. See *Amicus* Br. of Agency, Doc. 27 at 5 ("[I]f appellate counsel files a *Davis*/*Hatton* petition to seek permission to suspend the appeal in order for the defendant to proceed with post-conviction relief proceedings, the appellate attorney is responsible for raising all possible claims, not just ineffective assistance of counsel."). See also *id.* at App. 7a (Training Material) (if trial ineffective assistance is pursued via a *Davis* petition, "[t]his is now your client's only chance to raise ALL possible post-conviction relief issues. You now need to investigate ALL possible post-conviction relief claims, not just ineffective assistance of counsel." (Emphasis in the original).).

Appellate work is not trial work; post-conviction work is. The Agency tells the Court: "Appellate counsel is often not well-equipped to investigate and present all the possible claims for relief in a post-conviction relief petition." *Amicus* Br. of Agency, Doc. 27 at 5. This is an unremarkable confirmation of what the Indiana Supreme Court, itself, said in *Woods*: "[E]xpecting appellate lawyers to look outside

the record for error is unreasonable in light of the realities of appellate practice. . . . Appellate lawyers may have neither the skills nor the resources nor the time to investigate extra-record claims, much less to present them coherently and persuasively to the trial court." 701 N.E.2d at 1216. The *Woods* court was there speaking of trying to shoe-horn ineffective assistance claims into pre-appeal motions to correct error. But the observations apply equally to pre-appeal petitions to pursue post-conviction relief.

Lawyers are specialists—unless they are judges. In its operation, Indiana's *system* has the Indiana Public Defender litigate post-conviction claims for the poor, not the appellate public defenders around the state.

Finally with respect to *Davis* petitions, inherent in accelerating post-conviction review via a *Davis* petition is an additional extreme hazard to a client. If a lawyer litigates both the post-conviction and direct appeals, there will be no collateral review available later to raise an appellate ineffective-assistance claim with respect to the direct-appeal issues the lawyer of two hats may have fumbled.

By its design and operation, Indiana's legal system makes it virtually impossible, in the typical case, to adequately raise trial ineffective-assistance claims at any stage other than initial collateral review. And the foregoing should make it pellucid that *nothing* about the availability of *Davis* petitions changes that. *Martinez*, as extended by *Trevino*, should apply to § 2254 cases in Indiana.

Conclusion

For the foregoing reasons, and for the reasons set out in his corrected opening brief, the Petitioner respectfully requests that this Court reverse the judgment of the district court and remand the case for an evidentiary hearing at which Dentrell may attempt to overcome the procedural default of his trial ineffective assistance claim by the application of *Martinez*.

Respectfully submitted,

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Rule 32(a)(7)(C)(I) Word-Count Certification

I affirm under penalty for perjury that the foregoing reply brief contains 4,982 words, which are fewer than the 7,000 words permitted by Federal Rule of Appellate Procedure 32(a)(7)(B)(ii), and that I counted the number of words using the word-count function of WordPerfect X7.

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Certificate of Service

I hereby certify that on August 4, 2016,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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