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
Cause No. 1:13-cv-1981-JMS-DKL
Hon. Jane Magnus-Stinson, Judge

BRIEF OF RESPONDENT-APPELLEE SUPERINTENDENT RICHARD BROWN

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JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

I. Whether Petitioner's current ineffective assistance of trial counsel claim is forfeited due to his failure to present the claim to the district court.

II. Whether Petitioner's procedurally defaulted ineffective assistance of counsel claim, raised for the first time on appeal, is substantial as to satisfy the threshold question in *Martinez*.

III. Whether Indiana, which permits defendants, and at times prefers, ineffective assistance of counsel claims to be raised on direct appeal is subject to *Martinez* and *Trevino*.

STATEMENT OF THE CASE

Nature of the Case

Petitioner seeks a writ of habeas corpus directed at his confinement for his 2009, Elkhart County, Indiana, conviction for murder and resulting sentence of sixty years in prison with five years suspended to probation. At this stage of the proceedings, Petitioner only raises a claim not raised in either state court or the district court—that he received ineffective assistance of trial counsel by counsel not requesting a limiting jury instruction under the Indiana Rules of Evidence—and seeks to avoid his procedural default by obtaining an evidentiary hearing on whether his state post-conviction counsel were themselves ineffective for not having raised the claim in state court. *Brief of Petitioner-Appellant* at 12-13, 23-24.

Statement of the Proceedings

On June 18, 2008, the State charged Petitioner with murder (Dkt. 14-7). Petitioner was tried before a jury from February 2-5, 2009, at which both Petitioner and codefendant Joshua Love were tried together (Dkt. 14-7). Petitioner was found guilty as charged and on March 5, 2009, sentenced to a term of sixty years with fifty-five years executed at the Department of Correction, and five years suspended to probation (Dkt. 14-7).

On direct appeal Petitioner presented three issues: 1) whether the trial court abused its discretion when it denied his motion for a mistrial based on *Bruton v. United States*, 391 U.S. 123 (1968); 2) whether the trial court abused its discretion when it admitted evidence that Petitioner possessed a gun prior to the murder; and 3) whether Petitioner's sentence was inappropriate in light of the nature of his offense and his character (Dkt. 14-5, 7). The Indiana Court of Appeals affirmed Petitioner's conviction and sentence on November 13, 2009 (Dkt. 14-3, 7). In his petition to transfer to the Indiana Supreme Court, Petitioner reasserted only his *Bruton* and sentencing claims (Dkt. 14-8). The Indiana Supreme Court denied transfer on January 7, 2010 (Dkt. 14-3).

On March 29, 2010, Petitioner filed a petition for post-conviction relief, which was subsequently amended by counsel (Dkt. 14-2). The petition alleged that his counsel was ineffective in failing to prevent a *Bruton* violation by moving to sever Petitioner's trial (Dkt. 14-12) The post-conviction court held an evidentiary hearing on August 18, 2011, and the parties submitted proposed findings of fact and

conclusions of law (Dkt. 14-2). On December 20, 2011, the post-conviction court found that Petitioner had failed to prove that counsel acted unreasonably, and that Petitioner's claim of prejudice was foreclosed by the Indiana Court of Appeals' opinion on direct appeal (PCR App. 58-60).

On October 4, 2012, the Indiana Court of Appeals held that Petitioner's ineffective assistance of trial counsel claim was an attempt to circumvent his previously litigated *Bruton* claim on direct appeal and found the claim barred by *res judicata* (Dkt. 14-12). Petitioner sought transfer to the Indiana Supreme Court in which he reiterated his ineffective assistance claim and contended that the Indiana Court of Appeals erroneously found that his claim was barred by *res judicata* (Dkt. 14-13). The Indiana Supreme Court denied transfer on December 14, 2012 (Dkt. 14-4).

Disposition Below

On December 16, 2013, Petitioner filed a petition for writ of habeas corpus that raised the following claims: 1) "his rights under the Confrontation Clause were violated, and the Indiana Court of Appeals on direct appeal unreasonably applied *Bruton v. United States*, 391 U.S. 123 (1968) (facially incriminating confession at joint trial violated the Confrontation Clause despite limiting instruction) in reaching the contrary result"; 2) "trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using [Petitioner's] codefendant's statement as evidence against [Petitioner]" pursuant to *Bruton* and *Richardson v. Marsh*, 481 U.S. 200 (1987) (redacted confession falls

outside of *Bruton*'s scope with appropriate limiting instruction); and 3) "his rights under *Giglio v. United States*, 405 U.S. 150 (1972) were violated because Mr. Morris, a prisoner who testified against [Petitioner], stated that he did not receive a benefit for testifying against Mr. Brown when he in fact did" (A. 3a, 6a).[1]

Initially, Petitioner requested that the district permit him to have an evidentiary hearing to determine whether his post-conviction counsel was ineffective for failing to allege that trial counsel was ineffective for failing to seek a limiting instruction with respect to Petitioner's co-defendant's confession pursuant to *Bruton* and *Richardson* (Dkt. 2). To utilize such a procedure, and to excuse his procedural default on this claim, Petitioner relied on *Martinez v. Ryan*, 566 U.S. __, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 569 U.S. __, 133 S. Ct. 1911 (2013). Petitioner also requested that the district court grant a stay and hold his petition in abeyance while he sought permission to file a successive post-conviction petition in state court to raise claims pursuant to *Giglio v. United States*, 405 U.S. 150 (1972) (a due process violation occurs when the prosecution fails to inform a jury that a witness had been promised not to be prosecuted in exchange for his testimony), and *Napue v. Illinois*, 360 U.S. 264 (1959) (the failure of the prosecutor to correct the testimony of a witness who stated that he did not receive a benefit from testifying was a due process of law in violation of the Fourteenth Amendment).

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[1] "Tr." indicates citations to the trial transcript, "Tr. App." indicates citations to the direct appeal appendix, "PCR Tr." indicates citations to the post-conviction transcript, "PCR App." indicates citations to the post-conviction appeal appendix, "Dkt." refers to the district court docket number, and "A." refers to Petitioner's Appendix in this appeal.

The district court ruled that *Martinez* and *Trevino* did not apply to Indiana because ineffective assistance of counsel claims are permitted, and at times, encouraged to be raised on direct review (Dkt. 21). The district court found that Petitioner was not entitled to a stay of his petition to seek successive review in state court because the petition was not a "mixed" petition and therefore the stay and abey procedure outlined in *Rhines v. Weber*, 544 U.S. 269 (2005), was inapplicable. Accordingly, the district court dismissed Petitioner's defaulted ineffective assistance of trial counsel and *Napue* claims with prejudice and ordered the parties to address Petitioner's *Bruton* claim on the merits (Dkt. 21).

In denying habeas relief on the merits of the *Bruton* claim, the district court concluded that "*Crawford* [*v. Washington*, 541 U.S. 36, 124 S.Ct 1354 (2004) precludes [Petitioner] from establishing that the introduction of [his co-defendant's non-testimonial] confession via [a third-party witness's] testimony violated his rights under the Confrontation Clause" (Dkt. 31 at 14). The district court further noted:

> Therefore, because *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* [*v. Washington*, 547 U.S. 813, 136 S.Ct. 2266 (2006) and *Crawford* likewise limit *Bruton* to testimonial statements." As discussed above, because [co-defendant's] confession to [a third party witness] was nontestimonial, [Petitioner's] rights under the Confrontation Clause were not violated by its admission. Accordingly, he is not entitled to habeas relief on this claim.

(Dkt. 33 at 18).

The district court granted a certificate of appealability with respect to the *Bruton* issue (A. 30a), and this Court expanded the certificate to include the ineffective assistance claim (A. 32a-33a). In his brief, Petitioner abandoned the

Bruton claim and argues only whether ineffective assistance of post-conviction counsel can excuse his procedural default with respect to his claim that his trial counsel was ineffectrive for failing to request a limiting instruction pursuant to *Bruton* and *Richardson* – or as he now argues for the first time, pursuant to the Indiana Rules of Evidence. *Brief of Petitioner-Appellant* at 12-13.

Facts underlying the offense

On direct appeal, the Indiana Court of Appeals set forth the following facts and procedural history regarding Petitioner's conviction:

> On March 8, 2008, Elkhart police responded to a report of gunshots and discovered Gerald Wenger lying dead in the street with a single bullet wound to his head. Police discovered two bullet casings next to Wenger, one from a 9mm handgun and one from a .45 caliber handgun. Forensic analysis revealed Wenger's wound resulted from a 9mm bullet.
>
> Prior to the murder, Wenger had been using cocaine with some friends. Around 1:00 in the morning on March 8, 2008, Wenger left his apartment in a red and black Ford pickup truck to buy more drugs. At approximately 3:30 a.m. on March 8, 2008, Dan Holt, who lived in the same neighborhood where the murder occurred, got up to get ready for work. Holt noticed a red and black Ford pickup truck parked in an alley near his home. Ron Troyer, who also lived in the neighborhood, saw the same truck as he arrived home from work around 9:00 p.m. on March 8, 2009. As Troyer approached, he noticed two individuals near the truck. The individuals ran away when they saw Troyer, and Troyer called the police, who identified the red and black pickup truck as belonging to Wenger. However, forensic analysis of the truck did not reveal any fingerprints other than those belonging to Wenger.
>
> On June 18, 2008, the State charged D.B. with murder, a felony. Although D.B. is a minor, the juvenile court waived his charges to an adult felony court. The trial court held a jury trial from February 2nd to 5th, 2009, at which it tried both D.B. and codefendant Joshua Love. At the trial, the jury heard the testimony of Leiora Davis who lives in an apartment building near the murder scene. Davis testified that sometime between the 22nd and 25th of February, 2008, D.B. visited

her apartment. As D.B. bent over, a gun fell from his waist onto the floor. D.B. objected to Davis's testimony; however, the trial court admitted the testimony over D.B.'s objection, instructing the jury to consider the evidence "for the limited purpose of showing preparation and plan" and not for any other reason. Transcript at 358.

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

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

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

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

(Dkt. 14-7 at 1-2 (*D.B. v. State*, No. 20A05-0904-CR-185 (Ind. Ct. App. 2009)).

SUMMARY OF THE ARGUMENT

I. 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 v. United States*, 391 U.S. 123 (1968) and *Richardson v. Marsh*, 481 U.S. 200 (1987) – the argument he raised in the district court. Because Petitioner's underlying ineffective assistance of trial counsel claim has been raised for the first time on appeal the claim is forfeited.

II. The *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) procedural default exception applies to excuse only procedural defaults of "substantial" ineffective assistance of trial counsel claims. Because Petitioner's ineffective assistance of trial counsel claim, raised for the first time on appeal is insubstantial, the Court should affirm the judgment of the district court and reject petitioner's invitation to evaluate Indiana's ineffective assistance of trial counsel procedural framework pursuant to *Martinez*/*Trevino*.

II. Even so, the *Martinez*/*Trevino* procedural default exception applies to excuse only procedural defaults of ineffective assistance of trial counsel claims in states where defendants are either barred from raising ineffective assistance claims

on direct appeal, or where state law makes it "virtually impossible" for them to do so. *Martinez* is generally inapplicable in Indiana, where state law not only permits ineffective assistance of trial counsel claims be raised on direct appeal but prefers claims apparent for the record to be raised immediately. Moreover, Indiana has recognized that ineffective assistance of counsel claims often require development of the record, and has long provided litigants with a mechanism to suspend their direct appeal to raise ineffective assistance of trial counsel claims in trial court to create a record and then proceed with a consolidated direct appeal. Indiana, unlike Texas, at issue in *Trevino*, and the federal system, provides a meaningful unrestrained opportunity to present ineffective assistance of trial counsel claims on direct appeal. Indiana neither expressly, nor in practice, limits claims of trial counsel ineffectiveness solely to collateral review. *Martinez's* rule, as modified by *Trevino*, does not apply in Indiana.

ARGUMENT

Standard of Review

In an appeal from a ruling on a petition for habeas relief, this Court reviews the district court's rulings on issues of law *de novo* and its factual determinations for clear error. *Denny v. Gudmanson*, 252 F.3d 896, 900 (7th Cir. 2001). In order to be entitled to federal habeas relief, a petitioner must establish that he is being held in violation of the United States Constitution or the laws or treaties of the United States. 28 U.S.C. § 2241; *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *Haas v. Abrahamson*, 910 F.2d 384, 389 (7th Cir. 1990). The burden of establishing a right

to federal collateral relief resides with the petitioner. *Harrington v. Richter*, 562 U.S. 86,131 S.Ct. 770, 784 (2011); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938); *Smith v. Grams*, 565 F.3d 1037, 1043 (7th Cir. 2009).

"Under the AEDPA [Anti-Terrorism and Effective Death Penalty Act of 1996], a federal court may grant habeas relief only if the state court's adjudication of the petitioner's constitutional claims was based on unreasonable fact-finding or was contrary to, or involved an unreasonable application of, clearly established federal law." *Starkweather v. Smith*, 574 F.3d 399, 402 (7th Cir. 2009) (citing 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 376-77 (2000); *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). A court reviewing claims under this standard is confined to the decisional law of the United States Supreme Court. 28 U.S. C. § 2254(d); *See Marshall v. Rodgers*, 133 S. Ct. 1446 (2013); *Williams*, 529 U.S. at 406; *Yancey v. Gilmore*, 113 F.3d 104, 106 (7th Cir. 1997).

A state court decision is "contrary to" established Supreme Court precedent when: (1) the state court applies a rule that contradicts the governing law set forth in Supreme Court cases; or (2) the state court confronts a set of facts that is materially indistinguishable from those of a decision of the Supreme Court and nevertheless arrives at a decision different from that reached by the Supreme Court precedent. *Id.* at 405-06. An "unreasonable" application of established Supreme Court precedent means more than merely an "incorrect" application of that precedent. *Williams*, 529 U.S. at 410-11. Thus, "a federal habeas court may not issue the writ simply because the court concludes that the relevant state-court decision

applied clearly established federal law erroneously or incorrectly." *Id*. Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. *Richter*, 131 S.Ct. at 784.

Moreover, "[o]n habeas review, we presume that the factual findings of the state appellate court are correct in the absence of clear and convincing evidence to the contrary." *Baddelle v. Correll,* 452 F.3d 648, 659 (7th Cir. 2006) (citing 28 U.S.C. § 2254(e)(1) and *Ruvalcaba v. Chandler,* 416 F.3d 555, 559 (7th Cir. 2005)). Here, Petitioner "has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Lamon v. Boatwright,* 467 F.3d 1097, 1102 (7th Cir. 2006) (quoting § 2254(e)(1) and citing *Rice v. Collins,* 126 S. Ct. 969, 974 (2006)). This is a "rigorous burden of proof." *Sanchez v. Gilmore*, 189 F.3d 619, 623 (7th Cir. 1999).

"[A] state court's application of federal constitutional law will be upheld if it is 'at least minimally consistent with the facts and circumstances of the case.'" *Simpson v. Battaglia*, 458 F.3d 585, 592 (7th Cir. 2006) (quoting *Rice v. McCann*, 339 F.3d 546, 549 (7th Cir. 2003)). Section 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther." *Richter*, 131 S.Ct. at 787. "If this standard is difficult to meet, that is because it was meant to be." *Id*.

I.
Petitioner's current ineffective assistance of trial counsel claim was not presented to district court.

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).

In the district court, Petitioner claimed:

> The trial ineffective assistance claim that has been defaulted and Dentrell seeks to raise is substantial. As already discussed, *Marsh* really says that even a redacted statement by a non-testifying co-defendant will violate the Confrontation Clause, if there is no limiting instruction. Once Dentrell's motion for a mistrial was denied, it is hard to imagine why Dentrell's lawyer did not request a limiting instruction. In the case of redacted statements by non-testifying co-defendants, *Marsh* says that a limiting instruction permissibly repairs the Confrontation Clause damage. Without a limiting instruction, there is a Confrontation Clause violation. To take *Marsh* seriously means that the failure to request a limiting instruction directly caused the violation of Dentrell's confrontation right.

(Dkt. 1 at 22). Having conceded on appeal that there was no Confrontation Clause issue, *see Brief of Petitioner-Appellant* at 12-13, Petitioner has no other option but to frame his ineffective assistance of counsel claim in a different manner. So now for the first time in any court, Petitioner argues that "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)." *Brief of Petitioner-Appellant* at 23. Petitioner then devotes almost an entire page of his brief in attempt to explain how Indiana Rule of Evidence 801(c) and 105

(limiting evidence that is not admissible against other parties or for other purposes) required trial counsel to seek a limiting instruction. *Brief of Petitioner-Appellant* at 23-24. Because Petitioner has raised this claim for the first time on appeal, the claim is not properly before the Court. *See Pole v. Randolph*, 570 F.3d 922, 937 (7th Cir. 2009) ("A party may not raise an issue for the first time on appeal."). Consequently, the Court should decline to entertain Petitioner's claim.

II.
Petitioner's ineffective assistance of trial counsel claim is insubstantial and so the *Martinez* rule is unavailable to him.

Petitioner also did not raise this ineffective assistance of trial court claim in the state courts, which constitutes a procedural default. Assuming for the sake of argument that *Martinez* and *Trevino* allows Indiana habeas petitioners to use ineffective assistance of state post-conviction counsel as cause and prejudice to excuse their procedural defaults—*but see* Argument III, below—this Petitioner cannot make out a "substantial" ineffective assistance of counsel claim. Unless a habeas petitioner can set out a "substantial claim" of ineffective assistance of trial counsel, then *Martinez* cannot be used to excuse a default. *Trevino*, 133 S. Ct. at 1918. Petitioner cannot make a "substantial" claim here, so the Court need not decide whether the *Matrinez* rule is available to habeas petitioners in Indiana. *See Henness v. Bagley*, 766 F.3d 550 (6th Cir. 2014); *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741 (6th Cir. 2013); *Landrum v. Anderson*, 813 F.3d 330, 336 (6th Cir. 2016) ("we need not decide the [*Trevino*] issue here because, just as in *Henness* and *McGuire,* Landrum has failed to demonstrate a 'substantial claim' of

ineffective assistance of counsel" holding that the overwhelming evidence established that Landrum could not demonstrate prejudice.); *Mills v. Warner*, 628 Fed. Appx. 531 (9th Cir. 2016) (reviewing a claim from Washington and holding that because Petitioner failed to raise a substantial claim of ineffective assistance of trial counsel the *Martinez* and *Trevino* inquiry was over); *See also Trevino*, 133 S. Ct. at 1918 (holding the first factor to show cause under *Martinez* is whether the underlying ineffective assistance of trial counsel claim is "substantial").

Martinez expounded on *Coleman v. Thompson*, 501 U.S. 722, 752-55 (1991), which held, *inter alia*, that "ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default." 578 F.3d at 778. *Martinez* announced a "narrow exception" to the *Coleman* rule:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a *substantial* claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

132 S.Ct. at 1320 (emphasis added). *Trevino* expounded on *Martinez* and the Seventh Circuit now reads the rule as follows: "[P]rocedural default caused by ineffective post-conviction counsel may be excused if state law, either expressly or in practice, confines claims of trial counsel's ineffectiveness exclusively to collateral review." *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014) (*citing Trevino v. Thaler*, 133 S.Ct. at 1921). A substantial claim is one that has "some merit." *Martinez*, 132 S. Ct. at 1318–19.

A. Standard of review for claims of ineffective assistance of counsel

Ineffective assistance of counsel claims require the petitioner to establish that his counsel's performance fell below an objective standard of reasonableness, and this deficiency actually caused prejudice. *Martin v. Evans*, 384 F.3d 848, 851 (7th Cir. 2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). To support a claim of ineffective assistance of counsel, Petitioner must demonstrate: (1) that counsel's performance was deficient, and (2) that absent said deficient performance, there exists a reasonable probability of a different outcome. To satisfy the first prong, Petitioner must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Williams*, 592 U.S. at 390. In considering counsel's performance, a reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. To satisfy the second prong, Petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694); *see also Bell v. Cone*, 535 U.S. 685, 702 (2002) (to support a claim of ineffective assistance of counsel on habeas review, a petitioner must show that the state court's application of *Strickland's* attorney-performance standard was objectively unreasonable); *See also Valenzuela v. United States*, 261 F.3d 694, 698–99 (7th Cir. 2001) (the court must consider the reasonableness of counsel's conduct "in the context of the case as a whole").

Richter also clarifies *Strickland's* prejudice requirement, noting that, "[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Id*. at 792. ". . . . [T]he difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id*. (quoting *Strickland*, 466 U.S., at 693). The likelihood of a different result must be *substantial*, not just conceivable. *Id* (emphasis added).

B. Trial counsel's decision not to seek a limiting instruction was not deficient nor prejudicial.

Trial counsel's decision not to seek a limiting instruction was objectively reasonable. Trial counsel was permitted to use reasonable strategy to determine whether a limiting instruction was advantageous to Petitioner. *See United States v. Lindsay*, 157 F.3d 532, 536 (7th Cir. 1998) (trial counsel routinely makes reasonable strategic choices not to request limiting instructions so as "to avoid underscoring the troublesome material for the jury"). At the post-conviction hearing, trial counsel was asked whether he sought a limiting instruction to which he replied that he did not "believe" [he] did that, no" (PC Tr. 8). Trial counsel was never asked or permitted to explain his decision not to seek a limiting instruction. This absence of evidence cannot overcome Petitioner's burden. As the Supreme Court recently reiterated, "[i]t should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable

professional assistance." *Burt v. Titlow*, 571 U.S. __, 134 S.Ct. 10, 13 (2013) (quoting *Strickland*, 466 U.S. at 689).

This is especially true whereas here, Morris' testimony as to Petitioner only accused him of striking Wenger with the firearm and grazing him with an accidental discharge—a contradiction, along with Morris' potential 90 years sentence looming that counsel for both defendant's utilized to call Morris' credibility into question (Tr. 733-34, 742-43). Given Petitioner's concession and abandonment of his Confrontation Clause *Bruton* and *Richardson* claim, trial counsel was left to decide whether under the Indiana Rules of Evidence a limiting instruction would have done more harm than good—an objectively reasonable decision.

As to a limiting instruction pursuant to *Bruton* and its progeny, the threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause "has no application." *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010) (quoting *Whorton v. Bockting*, 549 U.S. 406, 420 (2007)); *see also Thomas v. United States*, 978 A.2d. 1211, 1224-25 (D.C. 2009) (if a defendant's extrajudicial statement inculpating a co-defendant is not testimonial, then *Bruton* cannot apply because the co-defendant's Sixth Amendment rights are not triggered); *United States v. Vargas*, 570 F.3d. 1004, 1009 (8th Cir. 2009) (*Bruton* does not apply to nontestimonial codefendant statements); *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir.2009) (same); *United States v. Pike*, 292 F. App'x 108, 112 (2d Cir. 2008) ("[B]ecause the statement was not testimonial, its admission does not violate either *Crawford* or *Bruton*."); *United States v. Smalls*, 605

F.3d 765, 768 n. 2 (10th Cir. 2010) ("[T]he *Bruton* rule, like the Confrontation Clause on which it is premised, does not apply to nontestimonial hearsay statements."). Consequently, because *Bruton* did not apply to Petitioner's case, Petitioner's original procedurally defaulted argument, made to the district court, that trial counsel was ineffective for failing to seek a limiting instruction based upon the Confrontation Clause is without merit and therefore this Court should affirm the judgment of the district court. The Seventh Circuit has long held that "'[c]ounsel is not ineffective for failing to raise meritless claims." *Warren v. Baenen*, 712 F.3d 1090, 1104 (7th Cir. 2013).

As to a limiting instruction pursuant to the Indiana Rules of Evidence, a claim not raised in the district court, as noted, due to the non-interlocking statements testified to by Morris, coupled with Morris' credibility issues, trial counsel had to decide whether to "underscore" Morris' testimony and tip his hat to the jury that he was concerned about the testimony, or proceed and attack Morris' already damaged credibility. Either decision was objectively reasonable, *Lindsay*, 157 F.3d at 536, and counsel chose the latter most likely because it had the better possibility of obtaining an acquittal, while the tangible benefits of the former choice were more speculative. Even so, the absence of evidence with respect to trial counsel's strategic reason to forgo the instruction cannot demonstrate deficient performance under *Strickland*. Trial counsel's decision not to seek a limiting instruction was objectively reasonable.

Nevertheless, Petitioner cannot establish prejudice. As the State set forth below, Davis testified that Petitioner had a gun several weeks before the murder, and Stannifer testified that Petitioner and Love retrieved a gun from the hallway outside her apartment hours before the murder (Tr. 21, 300, 343-44, 358, 310, 397-98). Kendrick Lipkins, a friend of both Petitioner's and Love's testified, contrary to Petitioner's assertion, unequivocally testified that Petitioner admitted to committing murder, and that after Wenger was murdered Petitioner was trying to sell a 9mm handgun (Tr. 501, 504, 505). Marcelino Barrios testified that after Wenger's murder Petitioner was trying to sell a 9mm pistol, and Ballard recalled that Petitioner laughed when someone asked him if he had committed a murder with the gun he was trying to sell Lipkins (Tr. 474, 524-26, 526-28). The testimony was corroborated by the 9mm casing found at the murder scene and by forensic examinations which showed that Wenger was murdered by a 9mm firearm (Tr. 141, 667-68, 699, 701-02). Petitioner's confession to Morris places him at the murder scene, and that confession is corroborated by Troyer's and Holt's witnessing Wenger's truck some distance away from the murder scene, and the head injury to Wenger (Tr. 183, 215-16, 546-47, 547-49, 550, 566).

Even if, *arguendo*, trial counsel was deficient for not requesting a limiting instruction, the substantial aforementioned evidence, especially Lipkins's testimony that Petitioner confessed to the murder, coupled with the corroborating evidence of that confession, demonstrates that there is no probability that the outcome of his trial was prejudiced by the alleged deficiency, let alone a reasonable probability.

Accordingly, Petitioner has not presented a substantial claim of ineffective assistance of counsel to breach the *Martinez* threshold. Petitioner is not entitled to either the benefit of the *Martinez* rule or relief from his conviction.

III.
Indiana permits ineffective assistance of counsel claims to be raised on direct appeal, so *Martinez* and *Trevino* are unavailable to Indiana habeas petitioners.

Unlike nearly every other state, Indiana provides a special proceeding for those criminal defendants who want to raise claims of ineffective assistance of trial counsel before a direct appeal and gives them a vehicle to develop a factual record to substantiate those arguments. *Martinez* held that a petitioner may show cause for failing to present an ineffective assistance of trial counsel claim in an "initial-review collateral proceeding" if petitioner was *pro se* at that stage, or if counsel should have raised the claim at that level of state court review, and *where state law mandates that ineffective assistance claims be raised in post-conviction proceedings*. 132 S. Ct. at 1315, 1318. So not only can this Petitioner not benefit from the *Martinez* rule because his claim is not "substantial," but more fundamentally, *Martinez* does not apply to habeas cases arising from Indiana state courts because Indiana not only permits defendants to raise ineffective assistance of counsel claims on direct review, but openly accommodates that strategic choice by providing a unique procedure to maximize the ability for defendants to successfully prove their *Strickland* claims.

Nearly forty years ago, Indiana courts recognized that criminal defendants needed a procedure to more quickly obtain state post-conviction review of their convictions when the direct appeal attorney recognized issues in the appellate

record that were viable and potentially meritorious claims needing additional factual development. To solve this issue, and to avoid a direct appeal and post-conviction review occurring simultaneously, the Indiana Supreme Court created what has come to be known as the *Davis*/*Hatton* procedure. This procedure allows a defendant to stay his direct appeal while he litigates a petition for post-conviction relief in the trial court, and then if unsuccessful combine into a single appeal issues from both proceedings. *Davis v. State*, 368 N.E.2d 1149, 1152 (Ind. 1977). *See also Hatton v. State*, 626 N.E.2d 442 (Ind. 1993) (observing how that defendant took advantage of the *Davis* procedure).

This procedure is particularly well-suited for situations where a defendant realizes a potential claim of ineffective assistance of counsel while preparing a direct appeal and wishes to immediately litigate that claim instead of waiting many months (or years) while the direct appeal is litigated and then post-conviction proceedings are started. *See Woods v. State*, 701 N.E.2d 1208, 1219-20 (Ind. 1998) (discussing the various strategic considerations for criminal defendants who are deciding when to raise ineffective assistance of counsel claims, and observing that the *Davis*/*Hatton* procedure is designed for those defendants who want to raise ineffective assistance claims as early as possible, but still require discovery and/or an evidentiary hearing to develop the evidence necessary to prove their claim under the daunting *Strickland* standard). So far from prohibiting or even making it "virtually impossible" to raise ineffectiveness claims until after direct appeal has concluded, *see Trevino*, 133 S. Ct. at 1915, 1918, Indiana has specially created a

procedure by which defendants can easily develop records necessary for the early determination of ineffective assistance of counsel claims much like what could be done with claims requiring additional record development in a civil case under Indiana Trial Rules 59 or 60 or Federal Rules of Civil Procedure 59 or 60.

Martinez applied its rule to ineffective assistance claims arising in states that "bar defendant[s] from raising the claims on direct appeal," *Id.* at 1320, and instead permit defendants to raise them only in state collateral proceedings, *Id.* at 1313. Indiana does not bar direct appeal ineffective assistance claims. *Woods*, *supra*. However, *Trevino* extended this exception only to states where it is "virtually impossible" for criminal defendants to raise an ineffective assistance of trial counsel claim on direct appeal. *Trevino*, 133 S. Ct. at 1915, 1918. Because Indiana courts provide three procedural mechanisms to litigate ineffective assistance claims, two of them before the traditional post-conviction review discussed in *Trevino* and *Martinez*, Indiana defendants are well-protected against the concerns that motivate the *Martinez* rule. The *Trevino* Court held that Texas's procedural framework precludes a litigant from having a meaningful opportunity to raise an ineffective-assistance claim on direct appeal. *Id.* at 1918. While Texas permits defendants to raise claims of ineffective assistance of trial counsel on direct appeal, Texas's procedural rules make it "virtually impossible." Specifically, Texas rules require a defendant to file motions for new trial within 30 days of sentencing, and trial courts to dispose of the motions within 75 days of sentencing but allow up to 120 days post-sentencing for preparation of the transcript. Texas courts recognize, the rules

preclude the fact-gathering necessary to adequately present the claim. *Trevino*, 133 S. Ct. at 1918–19. Based upon the procedural framework and time impediments created by Texas's procedural rules, even the Texas Supreme Court has instructed that defendants "should not" bring ineffective assistance of counsel claims on direct appeal. *Id.* at 1920 (quoting *Mata v. State*, 226 S.W.3d 425, 430, n.14 (Tex. Crim. App. 2007). Petitioner's and the *amici's* attempt to equate Indiana's procedural framework to that of Texas and/or the federal system is misplaced.[2]

Indiana is not one of these states. In fact, Indiana not only permits, but at times, prefers that a defendant raise ineffective assistance of trial counsel claims on direct appeal where it is apparent from the record that counsel was ineffective. And in those cases where the record needs to be expanded before a defendant could even have a chance to prove a *Strickland* claim, , Indiana permits a defendant to suspend his direct appeal and develop a record through a hearing with counsel and then permit his ineffective assistance of counsel claims along with his direct appeal

[2] In the federal system, a defendant might elect to present an ineffectiveness claim on direct appeal, however, the court of appeals is not required to address it, and presumably would remit the defendant to collateral review under Section 2255 except in an unusual situation in which the record permits resolution of the claim on direct review. This Court has refused to consider such claims on direct appeal. *See United States v. Jones*, 696 F.3d 695, 702 (7th Cir. 2012) ("As is our practice, we decline to consider the ineffective assistance of counsel claims on direct appeal since determination of such claims requires evidence that is outside the trial record."); The federal system, to Respondent's knowledge, does not have an equivalent to Indiana's *Davis*/*Hatton* procedure. Consequently, unlike Indiana, the federal system does not provide litigants a meaningful opportunity to raise ineffective assistance of trial counsel claims on direct appeal. Any attempt by Petitioner to equate the federal system with Indiana is unfounded.

claims to be reviewed on direct review. *See Hatton*, 626 N.E.2d at 442; *Davis*, 368 N.E.2d at 1151. *See also* Ind. Appellate Rule 37(A).

Petitioner and the *amici* dedicate their briefs to the *Woods* case, but that case demonstrates the sensitivity Indiana courts have long given the procedural quandary that *Strickland*'s daunting burdens and presumptions leave criminal defendants. Petitioner misinterprets *Woods* to stand for the proposition that ineffective assistance of counsel claims should be raised on post-conviction review. In *Woods*, the Indiana Supreme Court made clear that a defendant may elect to raise an ineffective assistance of counsel claim either on direct appeal or on post-conviction review, but not both. 701 N.E.2d at 1220. While *Woods* acknowledged that a stronger evidentiary basis for success on an ineffective assistant of counsel claim could be developed on post-conviction review, and is preferred when extra record development is necessary, the Indiana Supreme Court also noted: "We nonetheless agree that potential for administrative inconvenience does not always outweigh the costs of putting off until tomorrow what can be done today: 'If there is no reason for delay in presenting a claim, the delay should not be countenanced, for

there is a considerable social interest in the finality of criminal proceedings.'"[3] *Id.* at 1219 (quoting *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991)).

Moreover, Indiana, as noted in *Woods*, has the *Davis*/*Hatton* procedure. Petitioner's assertion that such a procedure is merely a means to accelerate post-conviction review is misplaced and simply a squabble over semantics. *Trevino* holds that only when a state's procedural framework makes it "virtually impossible" then it falls within the purview of *Martinez.* Indiana not only provides a meaningful opportunity to litigate ineffective assistance of counsel on direct appeal, it at times encourages it and also provides a mechanism to expand the record with no time constraints such as Texas.

The district judge, a highly experienced former Indiana trial judge, best summarized *Woods* and Indiana's ineffective assistance of counsel procedural framework:

> The [c]ourt disagrees that *Woods* provides a basis for the Court to reconsider its previous decision. The Indiana Supreme Court in *Woods* by no means suggested that defendants do not have a meaningful opportunity to raise an ineffective assistance of counsel claim on direct appeal, even if it acknowledged that in most cases collateral review is the preferred route; instead, the Indiana Supreme Court reiterated that defendants had multiple available routes to raise such claims. First, the Indiana Supreme Court noted that "record-based ineffectiveness claims" could be raised on direct appeal and doing so

[3] That the amici criminal defense agencies are reluctant to encourage the use of *Davis*/*Hatton* due to concerns that appellate attorneys will be too inept to properly handle such a proceeding is not grounds for finding that Indiana makes it "virtually impossible" to raise ineffective assistance claims in a direct appeal proceeding. That is a problem among the criminal defense bar, or in the case of the Marion County Public Defender Agency, likely reflects county agency policy not to undertake the costs of those proceedings and shift the costs to the Indiana Public Defender, a state-funded office of professional post-conviction attorneys.

> may in some instances be preferable. *See Woods*, 701 N.E.2d at 1219 ("Resolving record-based ineffectiveness claims on direct review also has some doctrinal appeal because it is more consistent with the residual purpose of post-conviction proceedings."). Second, recognizing that ineffective assistance of counsel claims often require the development of the record, the Indiana Supreme Court highlighted that Indiana has a long-standing procedure established in *Davis v. State*, 267 Ind. 152 (Ind. 1977), "that allows a defendant to suspend the direct appeal to pursue an immediate petition for post-conviction relief." *Woods*, 701 N.E.2d at 1219; *see also id.* (citing *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993), which "reiterate[s] the vitality of the *Davis* procedure"). Third, the Indiana Supreme Court held that an ineffective assistance of counsel claim may be raised during a post-conviction hearing, which is in most cases "the preferred forum." *Id.*
>
> Although a defendant may raise an ineffective assistance of counsel claim via one, and only one, of these routes, the fact that there are meaningful options to raise such a claim other than via collateral review—including "on direct appeal by a *Davis* petition," *id.* at 1220—demonstrates that Indiana does not "either expressly or in practice, confine[] claims of trial counsel's ineffectiveness exclusively to collateral review," *Nash*, 740 F.3d at 1079. Accordingly, *Martinez's* rule, as extended in *Trevino*, does not apply in Indiana.

(A. 29a-30a). Accordingly, *Martinez*'s narrow exception, modified by *Trevino*, does not apply to Indiana.

The district courts of this Circuit have uniformly held that *Martinez's* "narrow exception" and *Trevino* are inapplicable to Indiana prisoners. *See Johnson v. Superintendent, Indiana State Prison*, 2013 WL 3989417, *1-2 (N.D. Ind. 2013); *Brown v. Superintendent*, 2014 WL 495400, *9 (N.D. Ind. 2014); *McAuley v. Superintendent*, 2015 WL 773046, at *3 (N.D. Ind. 2015); *Brown v. Brown*, 2015 WL 1011371, *2-3 (S.D. Ind. 2015). The Supreme Court has insisted that *Martinez* is a "narrow exception" to the preexisting procedural default rules. *Trevino*, 133 S. Ct. at 1917 (*citing Martinez*, 122 S. Ct. at 1315). If Indiana's procedural framework is

insufficient under *Trevino*, it is difficult to discern a system other than mandating that ineffective assistance of counsel claims be raised on direct appeal that would satisfy *Martinez*/*Trevino* requirement. But that is not what *Trevino* holds; *Trevino* merely holds that only when a state's procedural framework makes it "virtually impossible" to raise an ineffective assistance of trial counsel claim on direct appeal does a petitioner receive the benefit of *Martinez*. To be sure, Indiana not only permits defendants, but at times prefers, ineffective assistance of trial counsel claims to be raised on direct appeal in addition to providing litigants a mechanism to expand the record on direct appeal. Petitioner's ineffective assistance of trial counsel claim, raised for the first time on appeal, is procedurally defaulted.

CONCLUSION

This court should affirm the district court's denial of habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 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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