

CAPITAL CASE

No. 12-7720

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD WAYNE STROUTH,

Petitioner

vs.

ROLAND W. COLSON, Warden

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER
RE: HODGES v. COLSON, No. 09-5021, SLIP OP. (6TH CIR. MARCH 26, 2013)

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In his petition for certiorari, Donald Strouth has argued that this Court's decision in Martinez v. Ryan, 566 U.S. ___, 132 S.Ct. 1309 (2012), should be applied to his case. The Sixth Circuit, which affirmed the denial of relief on Strouth's ineffective assistance claim, has now ruled that Martinez does not apply to petitioners like Strouth who are convicted in Tennessee. Hodges v. Colson, No. 09-5021, Slip Op. (6th Cir. March 26, 2013). This ruling is based on the very same reasoning that the Fifth Circuit applied in Trevino v. Thaler, 449 Fed. Appx. 415 (5th Cir. 2011), a decision that is presently under review before this Court. Trevino v. Thaler, 568 U.S. ___, No. 11-10189 (argued Feb. 25, 2013). Because the Sixth Circuit's interpretation of Martinez is in question, it is appropriate to hold Petitioner's case pending a decision in Trevino, which would inform the court of appeals' application of Martinez to Strouth's case.

Strouth has argued that Martinez permits federal courts to consider his evidence of mental illness and brain damage, which was previously unavailable because the state court denied funding for a psychological expert, in support of his Sixth Amendment claim of ineffective assistance of trial counsel because either:

- (1) his evidence creates a new claim based on footnote 10 in the majority's decision in Cullen v. Pinholster, 563 U.S. ___, 131 S.Ct. 1388 (2011), and Martinez permits the ineffective assistance of Strouth's post-conviction counsel to demonstrate cause for the default of that claim; or,
- (2) the equitable rule of Martinez, which recognizes that a state's failure to appoint counsel or appointment of ineffective counsel could prohibit

substantial ineffective assistance claims from being heard because effective counsel and investigation are essential to litigate such claims, should apply to permit a federal court to consider Petitioner's evidence whose development the State inhibited by denying him expert funding.

In his Brief in Opposition, Respondent asserted that Tennessee "allow[s] (but do[es] not encourage) ineffective assistance of trial counsel claims to be raised on direct appeal." Resp. 10.

The Respondent's assertion acknowledges that Tennessee's statutes, rules of procedure and of court, and decisions from its Court of Criminal Appeals all cooperate to push ineffective assistance claims out of the direct appeal process and into post-conviction collateral review. The statutes and rules make appointed trial counsel the presumptive counsel for purposes of filing a new trial motion and litigating the direct appeal. Only those issues raised in a new trial motion can be argued on direct appeal. Hence, the rules create a conflict of interest by making trial counsel the same attorney who would raise and litigate an ineffectiveness claim. Furthermore, new trial motions must be filed within 30 days of verdict, without exception, which does not afford the time necessary to develop claims like Petitioner's that are based on extensive investigation outside of the trial record. The rules also do not assure defendants a hearing on their new trial motion wherein evidence in support of an ineffectiveness claim could be introduced. All of these rules were in place in 1978 at the time of Petitioner's direct appeal, which was

litigated by the trial counsel whose grossly deficient representation is the subject of this petition.

This Court considered these very kinds of restrictions on the direct appeal process in *Martinez*: “Ineffective-assistance claims often depend on evidence outside the record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis of a claim. Abbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective assistance claim.” 132 S.Ct. at 1318. In *Trevino v. Thaler*, 11-10189 (argued Feb. 25, 2013), the Court is now considering the import of those factors for the application of *Martinez* in states that do not explicitly prohibit litigating ineffectiveness on direct appeal.

In spite of the pending opinion in *Trevino*, the Sixth Circuit has now ruled in *Hodges v. Colson*, No. 09-5021, that “Tennessee’s system does not implicate the same concerns that triggered the rule in *Martinez* because in Tennessee a collateral proceeding is not ‘the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial.’” *Hodges*, Slip Op. 29, quoting *Martinez*, 132 S.Ct. at 1320. This ruling preempts this Court’s forthcoming decision in *Trevino* and does not take account of the statutes, rules of court, and court decisions in Tennessee that compel ineffectiveness claims to be raised in collateral review proceedings.

In light of the Sixth Circuit’s premature decision, it is appropriate to hold Petitioner’s case pending the ruling in *Trevino*, which will elucidate the proper application of *Martinez* and its equitable theory to Strouth’s previously unavailable

evidence of mental illness and brain damage that supports his claim of ineffective assistance of trial counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari was served this 26th day of March, 2013, upon counsel for Respondent, Mr. James E. Gaylord, 425 Fifth Avenue North, Nashville, Tennessee 37243.
