

NO. 12-8906

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IN THE SUPREME COURT  
OF THE UNITED STATES

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MICHAEL JOSEPH SIMS,

Petitioner,

v.

ROBERT P. HOUSTON, Director, Nebraska Department of Correctional Services

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE NEBRASKA SUPREME COURT

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does this Court's opinion in *Martinez v. Ryan* have any application in a jurisdiction which, under the facts of petitioner's case, mandates that claims of ineffective assistance of counsel be raised in the course of direct appellate review?
2. If so, does this Court's opinion in *Martinez v. Ryan* represent an "extraordinary circumstance" which might entitle a movant to relief under Rule 60(b)(6)?

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## NATURE OF THE CASE

This petition comes before this Court with the Circuit Court and the district court having both denied a certificate of appealability upon the Question Presented.

### *The crime*

On March 24, 1997, Michael J. Sims purchased a 12 gauge shotgun, a 7.62 caliber semiautomatic assault rifle, and ammunition for both weapons. *State v. Sims*, 258 Neb. 357, 359 (1999) (*Sims I*).

On the following day, Sims and a Harry Winefeldt drove into a residential neighborhood in Omaha, Nebraska and fired these weapons at Nathan Coleman and William Booth. *Id.* Nathan Coleman was killed. William Booth was wounded. *Id.*

On May 7, 1997, Sims was charged in the Douglas County District Court with first degree murder, attempted first degree murder, and two counts of use of a deadly weapon to commit a felony. *Id.* On September 1, 1998, Sims was convicted by a jury on all four counts. *Sims*, 258 Neb. at 360.

### *The Nebraska rule*

Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.

*State v. Watt*, 285 Neb. 647, 668 (April 12, 2013), citing, *State v. Young*, 279 Neb. 602 (2010).

### *Direct appellate review*

On direct appeal Sims was represented by appointed counsel distinct from his state court trial counsel. Sims asserted three claims of ineffective assistance of trial counsel (IAC) on direct appeal. *Sims I*, 258 Neb. at 377.

The Nebraska Supreme Court considered, but did not resolve, Sims' IAC claims on direct appeal. "[W]e conclude that the record on appeal affords an insufficient basis upon which to resolve Sims' claims of ineffective assistance of trial counsel . . . ." *Sims I*, 258 Neb. at 377.

### *State postconviction review #1*

On appeal from the denial of state postconviction relief, Sims raised two trial counsel IAC claims.<sup>1</sup> *State v. Sims*, 272 Neb. 811, 818 (2006) (*Sims II*).

One of those IAC claims (failure to assert a speedy trial violation) was raised in *Sims I* and its resolution was deferred by the Nebraska Supreme Court pending a state postconviction evidentiary hearing. In *Sims II*, with the benefit of that postconviction evidentiary hearing, the state trial court's denial of state postconviction relief upon the speedy trial IAC claim was affirmed. *Sims II*, 272 Neb. at 823.

Sims' second postconviction IAC claim (failure to assert a *Doyle* violation) was deemed defaulted by Sims due to Sims failure to raise that claim in the course of direct appellate review.

A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney

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<sup>1</sup> At no time has Sims raised IAC claims with respect to his direct appeal counsel. "Sims does not argue that his appellate counsel was ineffective for failing to raise on direct appeal trial counsel's failure to make a *Doyle* objection. Sims apparently did not argue this issue to the postconviction court, and the postconviction court did not address the effectiveness of appellate counsel." *Sims II*, 272 Neb. at 818.

on direct appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record.

*Sims II*, 272 Neb. at 825-826.

#### *State postconviction review #2*

Two months after Sims filed his federal habeas petition (see below), Sims filed a second state postconviction motion. The state trial court's denial of relief was affirmed by the Nebraska Supreme Court stating:

Sims' claims of ineffective assistance of counsel were known or knowable to Sims at the time of his direct appeal and his first motion for postconviction relief. Sims attempts to excuse his failure to raise his ineffective assistance of counsel claims in his prior postconviction motion by arguing that his postconviction counsel was ineffective for failing to raise these claims. However, we have held that there is no constitutional guarantee to effective assistance of counsel in a postconviction action, and therefore, Sims' claim of ineffective assistance of postconviction counsel is unavailing.

*State v. Sims*, 277 Neb. 192, 198-199 (2009).

#### *Federal Habeas Corpus*

On April 2, 2007, Sims filed a petition seeking a Writ of Habeas Corpus. *Sims v. Houston*, 562 F. Supp. 2d 1066 (D.Neb. 2008). The Respondent filed a Motion for Summary Judgment alleging all of Sims' claims were procedurally defaulted except Sims' speedy trial IAC claim. The district court stated:

Respondent argues that all the other claims are procedurally defaulted (1) because Sims either (a) failed to present them to the Nebraska Supreme Court at

any time or (b) failed to fully present them to the Nebraska Supreme in a timely fashion; and (2) because Sims cannot now present those claims to the Nebraska Supreme Court because Nebraska law bars repetitive litigation. Sims does not forcefully dispute the Respondent's assertion except to argue that his defaults should be excused. I agree with Respondent that all of Sims' other claims are procedurally defaulted under Nebraska law and he cannot return to the Nebraska courts under Nebraska law. I also find and conclude that Sims has failed to excuse his defaults.

*Sims v. Houston*, 562 F. Supp. 2d at 1077.

The district court ultimately denied Sims habeas corpus relief and a certificate of appealability. *Sims v. Houston*, 562 F. Supp. 2d 1066. See, Case No. 4:07cv3088, CM / ECF filing #46. Sims next sought, and was denied, a certificate of appealability from the Circuit Court. *Sims v. Houston*, Case No. 08-2857, CM / ECF filing #11, *cert.den.* 556 U.S. 1171 (2009).

#### *First Rule 60(b) Motion*

Sims' first Rule 60 motion was denied. *Sims v. Houston*, 2009 U.S. Dist. LEXIS 68864 (D. Neb. Aug. 6, 2009). The district and circuit court denied Sims a certificate of appealability. *Sims v. Houston*, 2009 U.S. Dist. LEXIS 105766 (D. Neb. Nov. 10, 2009); *Sims v. Houston*, Case No. 09-3628, CM / ECF filing # 6 (8<sup>th</sup> Cir.), *cert.den.* 131 S.Ct. 210 (2010).

#### *Second Rule 60(b) Motion*

In May 2012, Sims filed a second motion for Rule 60(b) relief in the district court. The district court denied Sims relief noting three grounds:



- First, the factual basis for Sims' assertion—that his state post-conviction counsel was ineffective for not reading the bill of exceptions of the trial so that he could assert additional claims of ineffective assistance of trial and appellate counsel and otherwise—was known to Sims before the entry of judgment in this case.
- Second, the reasoning of the *Martinez* decision, which forms the legal basis for Sims' Rule 60(b) Motion, does not present an extraordinary circumstance justifying reopening the defaulted claims, particularly because this federal case has been final for more than three years and murder cases like this one are especially deserving of finality. *Lopez v. Ryan*, No. 12-99001, 678 F.3d 1131, 2012 U.S. App. LEXIS 9779, 2012 WL 1676696, at \* 5 (9th Cir. May 15, 2012) (affirming denial of Rule 60(b) motion in a death penalty case and holding that *Martinez v. Ryan* was not an extraordinary circumstance justifying reopening of the petitioner's claims).
- Third, Sims' underlying ineffective assistance of counsel claims are not "substantial" regarding one or both prongs of the *Strickland* standard. *Martinez*, 132 S. Ct. at 1318 ("To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."); see also, *Lopez*, 2012 U.S. App. LEXIS 9779, 2012 WL 1676696 at \* 6-7. The same lack of substantiality is true for Sims' other claims.

*Sims v. Houston*, 2012 U.S. Dist. LEXIS 80945, 1-3 (D. Neb. June 12, 2012).

The district court denied Sims relief and a certificate of appealability. *Sims v. Houston*, 2012 U.S. Dist. LEXIS 107223 (D. Neb. Aug. 1, 2012). The Circuit Court also

denied Sims a certificate of appealability. *Sims v. Houston*, Case No. 12-2826, CM / ECF filing # 5. We assume it is the circuit court's denial of a certificate of appealability that underlies Sims' current petition to this Court.

## **REASONS FOR DENYING THE WRIT**

### **Rule 10 considerations**

Sims appears to concede that no split of authority exists between the circuit court's on the question of whether this Court's opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) represents an "extraordinary circumstance" meriting Rule 60 relief. Petition, p. 9. Therefore, the granting of the writ prayed for is not appropriate under Rule 10.

### **Question #1**

**Does this Court's opinion in *Martinez v. Ryan* have any application in a jurisdiction which mandates, under the facts of petitioner's case, that claims of ineffective assistance of counsel be raised in the course of direct appellate review?**

### **A.**

**Nebraska and Arizona procedures are distinct and require a distinct result.**

The petitioner appears to argue this Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309, 1311 (2012), is somehow relevant to his latest Rule 60(b) motion. Because the rules for addressing IAC claims are not the same in Nebraska and Arizona, the Court's opinion in *Martinez* is not relevant to an appropriate analysis of Sims' petition.

In *Martinez*, the State of Arizona had chosen to affirmatively prohibit consideration of any IAC claims in the course of direct appellate review.<sup>2</sup>

The State of Nebraska has chosen to *require* that trial counsel IAC claims be raised in the course of direct appellate review in circumstances like *Sims*'--where distinct counsel assumed responsibility for *Sims*' direct appeal.

A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney on direct appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record.

*Sims II*, 272 Neb. at 825.

Unlike *Martinez*, *Sims*' first opportunity to challenge the performance of his trial counsel occurred in the course of direct appellate review. *Sims* had an affirmative obligation to raise any trial counsel-related IAC claims in the course of direct appellate review and *Sims* did so. *Sims I*, 258 Neb. at 372.

As this Court stated, its holding in *Martinez* has application only "where the State barred the defendant from raising the [IAC] claims on direct appeal." *Martinez*, 132 S. Ct. at 1320. "The rule of *Coleman* governs in all but the limited circumstances recognized here." *Martinez*, 132 S.Ct. at 1320. Nebraska did not bar *Sims* from raising trial counsel-related IAC claims on direct appeal, as Arizona did. Nebraska required it.

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<sup>2</sup> "The State of Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings." *Martinez v. Ryan*, 132 S. Ct. 1309, 1313 (2012).

Thus, *Martinez* has no relevance to the appropriate disposition of Sims' latest Rule 60(b) motion.

**B.**

***Martinez* is not retroactive**

Even if the Nebraska and Arizona processes for evaluation of trial counsel IAC claims were identical, *Martinez* has no application to Sims' situation because the judgment denying Sims federal habeas corpus relief is final and this Court has given no indication that its decision in *Martinez* is to be applied retroactively. One of the many reasons we believe *Martinez* may not be applied retroactively is because *Martinez* did not resolve a federal constitutional question.

This is not the case, however, to resolve whether [the *Coleman v. Thompson*] exception exists as a constitutional matter. The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding . . .

*Martinez*, 132 S. Ct. at 1315.

*Martinez* is not a ruling of constitutional dimension. Instead, *Martinez* is a ruling procedural in nature, addressing the appropriate procedure when a habeas petitioner asserts cause to excuse a state court procedural default of a claim. For that reason alone, Sims has no basis to assert that *Martinez* has retroactive application to his long-closed case under *Teague v. Lane*, 489 U.S. 288 (1989) or any other authority.



## Question #2

**If so, does this Court's opinion in *Martinez v. Ryan* represent an "extraordinary circumstance" which might entitle a movant to relief under Rule 60(b)(6)?**

Even if one assumed (1) that *Martinez* were applicable to Sims' situation and (2) further assumed that this Court's decision in *Martinez* had retroactive application to Sims' dismissed habeas corpus petition, those assumptions would not form a legitimate basis for granting Sims Rule 60(b) relief.

Sims relies upon Rule 60(b)(6).<sup>3</sup> Does the Court's opinion in *Martinez* create "any other reason justifying relief from the operation of the judgment"? Rule 60(b)(6) should only be applied in "extraordinary circumstances," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988), citing, *Ackermann v. United States*, 340 U.S. 193 (1950). The threshold question in this respect is whether *Martinez* has any application to Sims' case whatsoever. As we have noted above, there are at least two reasons why *Martinez* has no application to this case before we reach the merits of Rule 60(b)(6).<sup>4</sup>

The following reasons, found by the district court, demonstrate *Martinez* does not represent an "extraordinary circumstance" meriting Rule 60 relief.

- The factual basis for Sims' assertion was known to Sims before the entry of judgment in this case. Petitioner's Appendix B, p. 1.

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<sup>3</sup> Petition, p. 9.

<sup>4</sup> See respondent's argument in response to Question #1.

- The original judgment “has been final for more than three years and murder cases like this one are especially deserving of finality. Petitioner’s Appendix B, p. 1.
- The “underlying ineffective assistance of counsel claims are not ‘substantial’ regarding one or both prongs of the *Strickland* standard” citing *Martinez*, 132 S.Ct. at 1318. Petitioner’s Appendix B, p. 2.

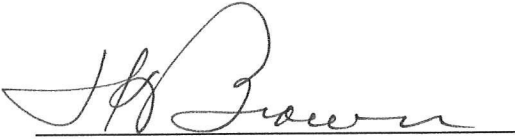
### CONCLUSION

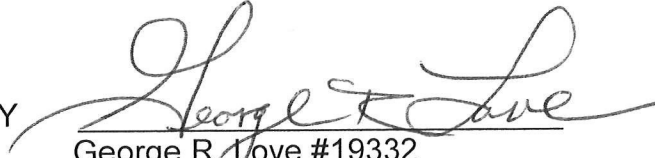
For all the foregoing reasons, the Respondent respectfully requests that the writ prayed for be denied.

Respectfully submitted,

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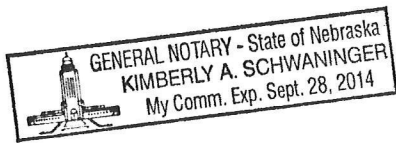
PROOF OF SERVICE

STATE OF NEBRASKA                    )  
  ) ss.  
COUNTY OF LANCASTER            )

I, Stephanie Yeager, being first duly sworn, depose and state that two copies of the brief in the above entitled case were served upon Petitioner by depositing said copies in the United States Mail, postage prepaid, addressed to Michael Joseph Sims, pro se, Inmate # 51850, Nebraska State Penitentiary, P.O. Box 2500, Lincoln, NE 68542-2500, on April 22, 2013.

Stephanie Yeager  
Affiant

Subscribed in my presence and sworn to before me this 22nd day of April, 2013.



Kimberly A. Schwaninger  
Notary Public