No.

In the Supreme Court of the United States

OSCAR SMITH,

Petitioner,

v.

ROLAND COLSON, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL R. BOTTEI
Office of the Federal Public Defender
810 Broadway, No. 200
Nashville, TN 37203
(615) 736-5047

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Sixth Circuit misunderstood the import of this Court's order that it reconsider its prior judgment in light of *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012).

2. Whether the Court should grant certiorari to resolve confusion about the scope of the rule announced in *Martinez* or, alternatively, should hold this case pending decision in *Balentine* v. *Thaler*, No. 12-70023 (5th. Cir. 2012), *petition for cert. filed*, No. 12-5906 (Aug. 21, 2012).

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Oscar Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals upon remand from this Court (App., *infra*, 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2012. The court of appeals denied a petition for rehearing on May 2, 2012. On July 20, 2012, Justice Kagan extended the time for filing a petition for a writ of certiorari to September 28, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C. § 2254 provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT

In *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), this Court held that, for federal habeas purposes, the ineffective assistance of state post-conviction counsel provides "cause" for failure to assert a claim of ineffective assistance of trial counsel when the post-conviction proceeding was the prisoner's first opportunity to advance the trial ineffective-assistance claim. Prior to the decision in *Martinez*, the Sixth Circuit had rejected just such an argument advanced by petitioner in this case. Petitioner sought review in this Court, and after the *Martinez* decision, the Court granted certiorari in this case, vacated the Sixth Circuit's decision, and remanded the case for reconsideration in light of *Martinez*.

On remand, however, the Sixth Circuit committed a plain error: it failed to recognize that petitioner had advanced a claim closely analogous to the one in *Martinez* (perhaps because the court of appeals ruled before this Court issued its mandate, and failed to give the parties the opportunity to address the import of *Martinez*). The court of appeals accordingly held that *Martinez* has no bearing on this case at all and reinstated its prior judgment.

That decision should not stand. At a minimum, this Court should again vacate the Sixth Circuit's judgment, directing it to consider the impact of *Martinez* on petitioner's ineffective-assistance claim that, prior to *Martinez*, had been held procedurally defaulted by the courts below. But beyond that, it would be appropriate for this Court either (1) to hold

this case pending any grant of certiorari in *Balentine* v. *Thaler*, No. 12-70023 (5th. Cir. 2012), *petition for cert. filed*, No. 12-5906 (Aug. 21, 2012), a case that presents a closely related claim; or (2) to grant plenary review in this case (whether or not certiorari is granted in *Balentine*) so that this Court can address the full range of circumstances to which *Martinez* applies, a question that has confused the lower courts.

A. Initial proceedings

Petitioner Oscar Smith was convicted in Tennessee state court on charges that he murdered three members of his family. At trial the State did not offer any direct evidence connecting petitioner to the murders, and "[a]ll of the evidence connecting [petitioner] to the killings of his estranged wife and step children was circumstantial." See *State* v. *Smith*, 868 S.W.2d 561, 566 (Tenn. 1993). Petitioner's conviction and sentence of death was affirmed on direct appeal, see *id.* 582-583, and he was denied state habeas corpus relief. See *Smith* v. *State*, 1998 WL 345353 (Tenn. Crim. App. 1998).

Petitioner then sought federal habeas relief. Among other claims, he contended that his trial counsel was ineffective for failure to investigate and present significant exculpatory evidence that could show another man had murdered petitioner's family. *Smith* v. *Bell*, 2005 WL 2416504 *15 (M.D. Tenn. 2005).[1] But relying on this Court's decision in *Cole-*

[1] As detailed in the petition for certiorari that petitioner filed in this Court last year, trial counsel failed to pursue significant exculpatory evidence, including (1) that petitioner's spouse had a drug-dealing relationship with an African American male (petitioner is Caucasian) who had a motive

man v. *Thompson*, 501 U.S. 722 (1991), the district court rejected this ineffective-assistance claim on the ground that it was barred by the failure of petitioner's state habeas counsel to raise this specific ineffective-assistance challenge during state habeas review. *Id.* at *26.[2]

To appeal from a district court's denial of habeas relief, a federal habeas petitioner must obtain a certificate of appealability from the district court or court of appeals.[3] Here, the district court declined to issue a certificate of appealability for any of petitioner's claims, including the ineffective-assistance claim that the district court had concluded was procedurally barred. *Smith* v. *Bell*, 2006 WL 1881358, at *7 (M.D. Tenn. 2006).

---

to kill her because she had stolen his car; (2) that one or more African American males were seen near the house at the putative time of the crime and the next day when the victims' bodies were found inside the home; and (3) that at least one fingerprint and shoeprints taken near the scene did not match those of petitioner. App., *infra*, 47a.

[2] Petitioner had contended that his ineffective-assistance-of-trial-counsel claim should not be procedurally barred because his state post-conviction counsel had been ineffective in failing to raise this challenge. *Smith* v. *Bell*, 2005 WL 2416504, at *26 n.26 (M.D. Tenn. 2005).

[3] See 28 U.S.C. § 2253(c) (statutory certificate-of-appealability requirement); see also *Slack* v. *McDaniel*, 529 U.S. 473, 478 (2000) ("[W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.").

The court of appeals similarly declined to grant a certificate of appealability on petitioner's ineffective-assistance claim, although it did permit appeal of two other claims (a *Brady* suppression-of-evidence claim and a different ineffective-assistance claim involving trial counsel's failure to challenge certain medical evidence).[4] The court of appeals later rejected those claims on the merits. App., *infra*, 4a-17a.

B. Petitioner's initial certiorari petition

On January 24, 2011, petitioner sought certiorari from the Sixth Circuit's denial of habeas corpus relief. His petition raised three claims, including as the third of his "Questions Presented" that the inadequacy of his state habeas counsel constituted "cause" to excuse any procedural default of his challenge to the effectiveness of his trial counsel. App., *infra*, 74a-78a. His petition described in detail the failure of trial counsel to pursue evidence that another man committed the crimes and how this claim was wrongly deemed by the district court to have been procedurally barred. App., *infra*, 47a-52a. Acknowledging that ineffective assistance of habeas counsel does not ordinarily constitute "cause" to excuse a state procedural bar, petitioner contended that this Court's decision in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), "left open the question whether there 'must be an exception to the rule * * * in cases where state collater-

---

[4] See App., *infra*, 20a-22a, (granting certificate of appealability limited to *Brady* claim of suppression of exculpatory evidence but declining appeal for remaining claims); App., *infra*, 19a (granting certificate of appealability for claim of ineffective assistance of trial counsel stemming from counsel's failure to investigate and challenge prosecution medical evidence concerning the time of the victims' deaths in support of an alibi defense).

al review is the first place a prisoner can present a challenge to his conviction.'" App., *infra*, 75a (quoting *Coleman*, 501 U.S. at 755).[5] Petitioner emphasized that his first opportunity to raise his ineffectiveness claims was in post-conviction because "[t]rial counsel were [petitioner's] counsel on direct appeal and thus could not raise their own ineffectiveness on direct appeal." App., *infra*, 49a n.54.

This Court eventually re-listed petitioner's petition for certiorari five times, and the petition remained pending on the docket for more than a year. See *Smith* v. *Bell*, No. 10-8629 (electronic docket sheet). In the meantime, the Court decided *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), another case involving the issue whether the failure of state habeas counsel to challenge trial counsel's ineffectiveness may establish "cause" for a prisoner's failure to raise such a claim during state habeas review. The Court in *Martinez* recognized an exception to *Coleman*'s rule that the ineffectiveness of state habeas counsel generally cannot be cause to excuse procedural default: If "collateral proceedings * * * provide the first occasion to raise a claim of ineffective assistance at trial," then "[i]nadequate assistance of counsel at [such] proceedings may establish cause for a prison-

---

[5] Petitioner specifically noted that his challenge was properly before this Court even though the district court and the court of appeals had declined to grant a certificate of appealability on the "cause" issue because "[t]his Court has jurisdiction to review 'questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.'" App., *infra*, 68a n.64 (quoting *Major League Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001)); see also App., *infra*, 74a.

er's procedural default of a claim of ineffective assistance at trial." *Id.* at 1315.

On the afternoon of March 20, 2012, within several hours of this Court's issuance of its decision in *Martinez*, petitioner filed a supplemental brief requesting that the Court grant, vacate, and remand (GVR) his case in light of its decision in *Martinez*, specifically noting *Martinez*'s bearing on the third question presented in his petition. App., *infra*, 23a.

Six days later the Court entered an order granting the petition for certiorari, vacating the judgment below, and remanding petitioner's case to the Sixth Circuit "for further consideration in light of *Martinez* v. *Ryan*, 566 U.S. __ (2012)." App., *infra*, 3a. By letter dated the same day, the Clerk of Court advised the clerk of the court of appeals of the GVR order and further advised that "[t]he judgment or mandate of this Court will not issue for at least twenty-five days pursuant to [Supreme Court] Rule 45."

C. The court of appeals' response to the GVR order

On April 11, 2012, the court of appeals issued its ruling in response to this Court's GVR order, concluding that *Martinez* has no bearing on the case and reinstating its prior judgment. App., *infra*, 1a-2a. The court of appeals ruled without seeking or receiving the views of either party about the applicability of *Martinez*. So far as the record reflects, the court of appeals was not aware of what specific questions petitioner had presented in his petition for certiorari. In addition, notwithstanding the letter from the Clerk of this Court, the court of appeals ruled long before this Court issued its judgment in accordance with Rule 45. See *Smith* v. *Colson*, No. 10-8629 (elec-

tronic docket sheet showing judgment issued on May 14, 2012).

In reinstating its prior judgment, the Sixth Circuit acknowledged that *Martinez* "recognized an equitable remedy for circumstances where *state habeas counsel*'s mistakes precluded review of a claim that *trial counsel* performed in a constitutionally deficient manner." App., *infra*, 1a. But the court observed that "[t]he two claims granted a certificate of appealability in this appeal [the *Brady* claim involving prosecutorial suppression of evidence and an ineffective-assistance claim involving trial counsel's failure to challenge the prosecution's medical evidence] did not involve the circumstances addressed in *Martinez*." *Ibid.* It explained that "[w]e denied the ineffective assistance claim on the merits after conducting de novo review" and that "[p]etitioner did not claim ineffective assistance of state habeas counsel—the harm addressed in *Martinez*—as cause for the procedural default of the *Brady* claim." App., *infra*, 2a. Accordingly, the court deemed *Martinez* "inapposite to our assessment of the issues presented in this appeal." *Ibid.*

The ruling did not discuss or evaluate the applicability of *Martinez* to the additional claim advanced by petitioner and advanced as the third question presented in his certiorari petition—the claim on which the court of appeals had earlier denied a certificate of appealability—that the inadequacy of his state post-conviction counsel constituted "cause" to excuse any procedural default in his other challenges to the effectiveness of his trial counsel.

REASONS FOR GRANTING THE PETITION

On remand from this Court, the Sixth Circuit committed an obvious error. It seems manifest that

this Court meant the court of appeals to reconsider its resolution of the issue presented as the *third question* in petitioner's initial petition for certiorari, a claim that closely parallels and directly implicates the one addressed in *Martinez*. But the Sixth Circuit entirely ignored that question, instead expressly limiting its analysis to two *other* issues that are wholly unrelated to the question resolved in *Martinez*. At a minimum, the Court should correct this error by again vacating the court of appeals' decision and directing that court to resolve the question it should have addressed on the initial post-*Martinez* remand: whether the inadequacy of petitioner's state habeas counsel constituted "cause" that excused any procedural default in his challenge to the effectiveness of trial counsel.

Beyond that, however, more recent developments suggest that further action by this Court also would be appropriate. Since the decision in *Martinez*, the lower courts have been divided on the meaning and application of the Court's holding in that case. And now pending before this Court is a petition for certiorari in another capital case, *Balentine* v. *Thaler*, No. 12-70023 (5th. Cir. 2012), *petition for cert. filed*, No. 12-5906 (Aug. 21, 2012), which addresses the scope of the *Martinez* rule; the Court has stayed the petitioner's execution and called for the record in that case. If the Court grants review in *Balentine*, it should, at the least, hold this petition pending resolution of *Balentine*, which will shed additional light on the meaning of the *Martinez* rule. And whether or not the Court grants the *Balentine* petition, it should consider granting plenary review in this case so that it can address the full spectrum of circumstances in which the *Martinez* rule applies.

I. The Court Should Grant, Vacate, And Remand For Consideration Of Petitioner's Claim Of Ineffective Assistance Of Trial Counsel In Light Of *Martinez*.

At the outset, it seems obvious that, when the Court issued its initial GVR order in this case, it intended the Sixth Circuit to consider the impact of *Martinez* on petitioner's right to challenge the effectiveness of his trial counsel, the issue raised by the third question presented in petitioner's initial petition for certiorari. *Martinez* recognized "a narrow exception" to the usual rule of *Coleman* v. *Thompson* that the ineffective assistance of state habeas counsel does not constitute "cause" to excuse a procedural default. Under *Martinez*, the inadequate assistance of counsel at so-called "initial-review collateral proceedings," those "which provide the first occasion to raise a claim of ineffective assistance at trial," "may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S. Ct. at 1315. The third question presented in petitioner's initial petition was whether this exception to *Coleman* applies in closely analogous circumstances, when state law makes it impossible as a practical matter for a defendant to raise an ineffective-assistance claim prior to the initiation of collateral proceedings. See App., *infra*, 29a.

There also is no doubt about the import of a GVR order like the one issued in this case, which specifically remanded the case to the court of appeals "for further consideration in light of *Martinez* v. *Ryan*." App., *infra*, 3a. As this Court has explained, "a GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations." *Stutson* v. *United States*, 516 U.S. 193,

197 (1996) (per curiam). Other courts of appeals accordingly have initiated just such a review on remand from *Martinez*.[6]

Here, however, the Sixth Circuit did not engage in any such review as it relates to the third question presented in petitioner's certiorari petition; indeed, it failed to consider that question at all. Instead, it confined its consideration on remand to those questions that, on the face of it, were not affected by *Martinez*. We can imagine only two reasons why the Sixth Circuit might have taken such a tack; neither supports its decision.

First, it appears that the court of appeals was unaware that the petitioner's third question was presented to this Court, and therefore was within the scope of the GVR order. Having limited its grant of a certificate of appealability to two other issues, the Sixth Circuit had itself addressed the merits only of petitioner's claims on those issues. So far as can be determined from the record, the court of appeals did not have petitioner's certiorari petition before it when it held that *Martinez* has no bearing here, and therefore does not appear to have seen the third question presented. And the Sixth Circuit did not re-

---

[6] In *Martinez* itself, on remand from this Court the Ninth Circuit issued an order remanding the case to the district court to consider the impact of this Court's holding. See *Martinez* v. *Ryan*, 680 F.3d 1160 (9th Cir. 2012) (per curiam). And in response to a GVR order identical to the one issued in this case, two other courts of appeals—including a different panel of the Sixth Circuit—remanded ineffective-assistance claims for initial consideration by the district court. See *Cantu* v. *Thaler*, 682 F.3d 1053, 1054 (5th Cir. 2012) (per curiam); *Middlebrooks* v. *Colson*, No. 05-5904 (order on remand) (6th Cir. May 17, 2012).

ceive briefing or hear argument from either party on the relevance of *Martinez* before issuing its ruling on remand from this Court. In fact, the Sixth Circuit jumped the gun, ruling even before this Court issued its mandate.[7] It therefore seems likely that the Sixth Circuit simply misunderstood the scope of this Court's GVR order.

Second, it is possible that the Sixth Circuit was aware of petitioner's third question presented but believed it to be outside the scope of the GVR order because the court of appeals had not granted a certificate of appealability on the issue. If so, however, the court of appeals was wrong as a matter of law. There is no doubt that this Court has the "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). See also, *e.g.*, *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (per curiam) ("We now consider all of the substantial federal questions determined in the earlier stages of the litigation * * * for it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second

---

[7] In fact, in ruling before the judgment issued from this Court, it is questionable whether the court of appeals had jurisdiction to issue its order. Cf. *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (filing and pendency of appeal divests a federal district court of jurisdiction over those aspects of case involved in appeal). In any event, "[o]f course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day* v. *McDonough*, 547 U.S. 198, 210 (2006). This the court of appeals plainly failed to do.

appeal") (internal quotations and citations omitted); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955) (same in context of death penalty case). And the Court regularly reviews the denial of certificates of appealability. See, *e.g.*, *Tennard* v. *Dretke*, 542 U.S. 274 (2004); *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003). If the Sixth Circuit believed that the GVR order had no application to petitioner's third question presented, it was unquestionably incorrect.

Accordingly, because this Court undoubtedly had authority to consider—and actually did review on certiorari—petitioner's ineffective-assistance claim, the court of appeals was not at liberty to "reinstat[e] its judgment without seriously confronting the significance of the cases called to its attention" by this Court's GVR order. *Cavazos* v. *Smith*, 132 S. Ct. 2, 7 (2011) (per curiam).

In these circumstances, the Court should, at the least, again vacate the Sixth Circuit's decision and remand the case to that court for reconsideration in light of *Martinez*, making clear the nature of the court of appeals' obligation. Cf. *Cone* v. *Bell*, 556 U.S. 449, 476 (2009) (vacating erroneous court of appeals judgment and directing a remand to the district court for consideration of capital defendant's *Brady* claim).

II. Alternatively, The Court Should Grant Certiorari To Consider The Scope of *Martinez* Or Hold This Case Pending Its Resolution Of *Balentine* v. *Thaler*.

Although that is enough to demonstrate that the decision below should not stand, we also submit that further action by the Court beyond a renewed GVR in light of *Martinez* is appropriate. In the wake of

Martinez, the courts of appeals have reached divergent conclusions or expressed considerable uncertainty about how the rule of that decision should apply to varying state laws. A petition in one of those cases, *Balentine* v. *Thaler*, is currently before the Court; in that case, the Court has called for the record and stayed the petitioner's execution pending action on the petition. If the Court grants the petition in *Balentine*, it should, if nothing else, hold this petition pending resolution of that case. But it also should consider granting plenary review in this case so that it can be considered along with *Balentine*, which would allow the Court to address the full spectrum of circumstances in which the rule of *Martinez* applies. And if the Court denies review in *Balentine*, it should hear this case on the merits to settle the broader application of *Martinez*.

A. If the Court grants certiorari in *Balentine*, it should, at a minimum, hold this petition pending resolution of that case.

As we have noted, the Court in *Martinez* recognized an exception to the usual preclusion rule of *Coleman* v. *Thompson* for "initial-review" collateral proceedings that "provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1315. This rule avoids the danger that no forum—state or federal—would be available to consider the merits of a prisoner's challenge to the ineffectiveness of his or her trial counsel. *Id.* at 1316. But the Court did not precisely define the circumstances in which state habeas proceedings satisfy this "first occasion" requirement, other than those involving the strict Arizona rule (at issue in *Martinez*) that wholly bars assertion of ineffective-assistance claims on direct review.

Not surprisingly, the federal courts of appeals have diverged over how *Martinez* should apply to states other than Arizona. Compare *Ibarra* v. *Thaler*, 687 F.3d 222 (5th Cir. 2012) (*Martinez* does not apply to Texas even though Texas discourages ineffective-assistance claims on direct appeal, because Texas law technically allows them), with *Sexton* v. *Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) (*Martinez* does apply to Oregon, even though Oregon sometimes allows ineffective-assistance claims on direct appeal, when those claims can be adduced from the record), and *Lindsey* v. *Cain*, 2012 WL 1366040, at *1 (5th Cir. 2012) (*Martinez* does apply to Louisiana even though it, like Texas, technically allows ineffective-assistance claims on direct appeal[8]). See generally *Ibarra*, 687 F.3d at 228-231 (Graves, J., concurring in part and dissenting in part) (discussing courts' confusion over when *Martinez* applies).

Balentine v. *Thaler*, 2012 WL 3570772 (5th Cir. 2012), is one of those decisions. There, the court applied Fifth Circuit precedent to hold that the *Martinez* rule does not apply in Texas because Texas law does not categorically foreclose a defendant from challenging the effectiveness of his trial counsel on direct appeal. See *Ibarra*, 687 F.3d at 227 ("Ibarra is not entitled to the benefit of *Martinez* for his ineffectiveness claims, as Texas procedures entitled him to review through counseled motions for new trial and

[8] See *State* v. *Brashears*, 811 So. 2d 985, 990 (La. Ct. App. 2002) ("A claim of ineffective assistance of counsel is *most appropriately* addressed through an application for post-conviction relief rather than direct appeal, so as to afford the parties an adequate record for review." (emphasis added)).

direct appeal."). The *Balentine* petition remains pending.[9]

If review is granted in *Balentine*, it would be appropriate for the Court to hold the petition in this case pending the *Balentine* decision. The Tennessee law at issue in this case is, in some respects, similar to the Texas law addressed in that case: As in Texas, in Tennessee evidentiary hearings are unavailable on direct appeal (see *State* v. *Turner*, 1997 WL 312530, at *11 (Tenn. Crim. App. 1997)), and without such hearings "it [is] practically impossible to demonstrate prejudice as required in ineffective assistance claims." *Wallace* v. *State*, 1994 WL 504401, at *3 (Tenn. Crim. App. 1994) (citing *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984)). As a consequence, Tennessee courts, like those in Texas, strongly discourage raising ineffective-assistance claims on direct appeal. *State* v. *Day*, 2012 WL 2926155, at *8 (Tenn. Crim. App. 2012) ("[R]aising a claim of ineffective assistance of counsel on direct appeal is strongly disfavored * * *."); *Thompson* v. *State*, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997) ("[R]aising the issue of ineffective assistance on direct appeal is a 'practice fraught with peril.'" (quoting *State* v. *Sluder*, 1990 WL 26552, at *7 (Tenn. Crim. App. 1990)); *Sluder*, 1990 WL 26552, at *7 (stating that "[t]he better practice is to *not* raise [an ineffective-assistance claim] on direct appeal" and referring to a counsel's attempt to raise an ineffective-

[9] On August 22, 2012, the Court granted a stay of execution of Balentine's death sentence pending disposition of his petition for certiorari. Order, *Balentine* v. *Thaler*, 2012 WL 3599235 (2012). The Court requested the *Balentine* record on August 31, 2012, and received the record on September 18 and 20, 2012.

assistance claim on direct appeal as "ill-advised"). A ruling by this Court in *Balentine* therefore would shed considerable light on the proper outcome in this case.

B. Granting plenary review in this case would allow the Court to provide useful guidance on the application of *Martinez*, whether or not the Court also grants review in *Balentine*.

Having said that, it should be added that petitioner's *Martinez* claim is considerably stronger than that of the defendant in *Balentine*. The Court therefore could appropriately grant plenary review in this case whether or not it also grants certiorari in *Balentine*. If the Court does decide *Balentine*, simultaneous consideration of this case would allow the Court to address the full range of circumstances in which the rule of *Martinez* applies; in fact, petitioner here would be entitled to relief under *Martinez* even if the defendant in *Balentine* is not. And if the Court denies review in *Balentine*, decision of this case would provide necessary guidance on the application of *Martinez*.

Petitioner's request for access to a federal habeas remedy is stronger than that of the *Balentine* defendant in two significant respects. *First*, Texas and Tennessee apply different rules of preclusion once a claim of ineffective assistance is raised on direct appeal. Texas allows defendants to advance ineffective-assistance claims in state habeas proceedings even if those claims have been rejected on direct appeal, so long as there was not an adequate record on direct appeal. See, *e.g.*, *Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004). But in Tennessee, once an ineffective-assistance claim has been rejected on

direct appeal, no future ineffective-assistance claims are permitted, even if a later claim involves new evidence or separate allegations of ineffectiveness. See, *e.g.*, *Troglin* v. *State*, 2011 WL 4790943, at *16 (Tenn. Crim. App. 2011) ("We initially note that the petitioner's claim of ineffective assistance of trial counsel was previously determined by this court on direct appeal and cannot be relitigated in a post-conviction proceeding, even though the petitioner may not have made the same allegations on direct appeal that he now makes in his post-conviction petition."). It therefore would border on malpractice for defense counsel to raise an ineffective-assistance claim on direct review in Tennessee. See *Massaro* v. *United States*, 538 U.S. 500, 504 (2003) ("Applying the usual procedural-default rule to ineffective-assistance claims would * * * creat[e] the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim.").

Second, petitioner here—unlike the defendant in *Balentine*—was represented by the same attorney at trial and on direct appeal. This is the usual practice in Tennessee. See Tenn. Sup. Ct. R. 13 § 1(e)(5). A defendant in such circumstances cannot be expected to advance an ineffective-assistance claim on direct appeal; to the contrary, "ineffective-assistance claims usually should be excused from procedural-default rules because an attorney who handles both trial and appeal is unlikely to raise an ineffective-assistance claim against himself." *Massaro*, 538 U.S. at 503. In fact, it would invite a conflict of interest for a Tennessee attorney to raise such a claim on direct appeal. See *Frazier* v. *State*, 303 S.W.3d 674, 682-683 (Tenn. 2010) (noting that an attorney faces an actual conflict of interest if he is required to challenge his

own ineffectiveness). In combination with a Tennessee defendant's inability to conduct an evidentiary inquiry on appeal and the prospect that failure of an ineffective-assistance claim on appeal will preclude any future such claims, this means that, in this case, "collateral proceedings * * * provide[d] the first occasion to raise a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1315.

Against this background, the considerations that led to the holding in *Martinez*—that the collateral proceeding was "in many ways the equivalent of a prisoner's direct appeal as to the ineffective assistance claim" (132 S. Ct. at 1317)—apply with full force in a case like this one. Accordingly, if this Court does not itself entertain petitioner's claim to that effect, it should give petitioner an opportunity at the appropriate time to advance his claim before the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06522
(203) 432-4992

PAUL R. BOTTEI
Office of the Federal Public Defender
810 Broadway, No. 200
Nashville, TN 37203
(615) 736-5047

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

SEPTEMBER 2012