No. 12-390

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief very notably fails to dispute—or, indeed, to discuss at all—the substance of *any* of the points made in the petition. Respondent thus does not deny (1) that petitioner raised the ineffective-assistance claim at issue here in his initial petition for certiorari; (2) that this Court's decision in *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), has a clear bearing on the proper disposition of that claim; (3) that this Court vacated and remanded the Sixth Circuit's initial decision so that the disposition of petitioner's ineffective-assistance claim could be reconsidered in light of *Martinez*; and (4) that, on remand, the Sixth Circuit evidently misunderstood the import of this Court's GVR order, did not address the specific claim to which the GVR order was directed and, accordingly, failed to measure petitioner's ineffective assistance claim against the requirements of *Martinez*.

Rather than addressing any of these arguments, respondent now contends instead only that petitioner's arguments were waived below. As we will explain, this contention is wholly without merit.

In addition, the Court has now granted certiorari in *Trevino* v. *Thaler*, No. 10-70004 (5th Cir. 2011), petition for cert. granted, No. 11-10189 (Oct. 29, 2012), a case that raises a related claim regarding the application of *Martinez* to Texas law. In light of that development, the Court either should hold petitioner's case pending its decision in *Trevino* or, because of important differences between the laws of Texas and Tennessee that make petitioner's claim materially *stronger* than that of the defendant in

Trevino (see Pet. 17-19), should grant this petition and consolidate this case with *Trevino* for oral argument.[1]

A. Petitioner properly preserved his claim.

In arguing against review by this Court now, respondent first complains that petitioner failed to make a full presentation of his current argument when he sought rehearing in the Sixth Circuit after that court reinstated its judgment following this Court's GVR order. See Opp. 5-7. That contention, however, is insubstantial. As we explained in the petition, the court of appeals ruled upon remand from this Court prematurely, without seeking or receiving the parties' views about how *Martinez* should apply to this case. See Pet. 7-8. Petitioner appropriately filed a petition for rehearing, explaining that the court of appeals had acted prior to the issuance of this Court's mandate and seeking an opportunity to present his arguments about the applicability of *Martinez*. The court of appeals denied this request. This Court should not now fault petitioner for the Sixth Circuit's failure to solicit or consider his arguments.

In any event, even had petitioner *altogether* declined to file a petition for rehearing in the court of appeals following its disposition of the GVR order, that would not have constituted any kind of procedural bar to the filing of a petition for certiorari now. See, *e.g.*, *Nichols* v. *United States*, 563 F.3d 240, 252

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[1] Our petition requested such action in light of the Court's consideration of another Texas case (*Balentine* v. *Thaler*, No. 12-70023 (5th Cir. 2012*),* petition for cert. filed, No. 12-5906 (Aug. 21, 2012)) raising a *Martinez* claim. It appears that the Court is now holding *Balentine* pending decision in *Trevino*.

(6th Cir. 2009) ("[t]he filing of a motion for rehearing before this court is not a prerequisite to the filing of a petition for certiorari"); 6TH CIR. I.O.P. 40(a)(2) ("A party is not required to petition for rehearing—with or without a petition for rehearing en banc—as a prerequisite to a petition for writ of certiorari in the Supreme Court of the United States."). For this reason, respondent's contention that petitioner's court of appeals rehearing petition "seems actually to have been calculated to *avoid* a rehearing in the Sixth Circuit" (Opp. 6) is nonsensical; petitioner had no obligation to request rehearing in that court *at all* before seeking review in this Court.

Second, respondent complains (Opp. 7-8) that petitioner's ineffective-assistance claim was not properly raised before the court of appeals in the first instance on direct appeal. But, as respondent concedes (Opp. 8), he made precisely this argument in opposing petitioner's *initial* petition for certiorari; petitioner explained in his reply brief in support of that petition why that waiver contention is wrong, Reply Brief for Petitioner at 9-10, *Smith* v. *Colson*, 132 S. Ct. 1790 (2012) (No. 10-8629). Presumably, this Court rejected respondent's argument when it granted the initial petition and vacated the Sixth Circuit's initial decision. It should do so again now.

B. The Court should hold this case pending decision in *Trevino* v. *Thaler* or, alternatively, grant plenary review and consider this case along with *Trevino*.

In fact, petitioner's case for relief has become considerably stronger since he filed the petition for certiorari that is now before the Court. On October 29, 2012, the Court granted certiorari in *Trevino* to consider the application of *Martinez* to post-

conviction proceedings under Texas law. As we explained in the petition (Pet. 15-17), such a decision will have a clear bearing on the proper outcome here. Accordingly, the Court should—at a minimum—hold this case pending its decision in *Trevino* to ensure that any future decision by the court of appeals in this case takes into account the guidance provided by this Court's ruling in *Trevino*. A hold is especially warranted because Trevino and petitioner are before this Court seeking the same relief—proper application of *Martinez* to their ineffective-assistance claims.

And for the reasons also explained in the petition (Pet. 17-19), it would be preferable for the Court to grant plenary review in petitioner's case and consolidate this case with *Trevino* for oral argument. That is because there are important differences between the laws of Texas and those of Tennessee, as well as between the facts of this case and those of *Trevino*. These differences should be significant to the Court's consideration of how *Martinez* applies and, in particular, to application of the requirement of *Martinez* that a post-conviction proceeding constitute the "first occasion" in which a defendant could raise a claim that trial counsel was ineffective. 132 S. Ct. at 1320.

As we explained in the petition, Texas (at least as a matter of theory) allows defendants to advance ineffective-assistance claims in state habeas proceedings even if those claims were rejected on direct appeal, so long as there was not an adequate record to resolve those claims on direct appeal; in Tennessee, in contrast, once an ineffective-assistance claim is rejected on direct appeal, no future ineffective-assistance claims are permitted, even if a later claim involves new evidence or separate allegations of inef-

fectiveness. See Pet. 17-18. Moreover, petitioner here was represented by the same attorney both at trial and on direct appeal (a consideration that made the assertion of an ineffective-assistance claim on direct review a practical impossibility), while the petitioner in *Trevino* was not. See Brief of Petitioner-Appellant at iii, *Trevino* v. *Thaler*, 449 Fed. App'x 415 (5th Cir. 2011) (No. 11-10189). Many criminal defendants are represented by the same counsel both at trial and on direct appeal, and this factual difference may be highly significant to the Court's consideration of *Martinez*'s "first occasion" requirement. For these reasons, consideration of this case along with *Trevino* would allow the Court to address a fuller range of circumstances in which the rule of *Martinez* applies.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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