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IN THE SUPREME COURT OF FLORIDA

CASE NO. 13-1280

JOSE ANTONIO JIMENEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY TO APPELLEE'S STATEMENT OF THE CASE AND FACTS

In Appellee's Statement of the Case and Facts, the State recognizes that Mr. Jimenez advised the circuit court that he not been served by the clerk with a copy of the February 11, 2011, order denying his November 29, 2010, motion to vacate under Rule 3.851 and that he intended to file a motion for rehearing when he was served in compliance with Rule 3.851 (Answer Brief at 9). In its Answer Brief, the State failed to acknowledge that Mr. Jimenez's pleading was entitled: "Notice of Non-Compliance With Fla. R. Crim. Pro. 3.851(f)(5)(D) **Or In The Alternative Motion For Rehearing** (3PC-R. 141) (emphasis added). Having skipped over the fact that Mr. Jimenez alternatively filed a motion for rehearing, the State does note that Mr. Jimenez filed a motion to amend the pending Rule 3.851 motion shortly thereafter on April 22, 2011 (Answer Brief at 10). But, the State does not acknowledged that the circuit court did not rule on Mr. Jimenez's pleading. Instead, the State then cites to its opposition to the motion to amend in which it argued that time for filing a motion for rehearing had expired and that the motion to amend was untimely (Answer Brief at 10). But, the State fails to mention in its Answer Brief that the circuit court never issued an order on the motion for rehearing or on the motion to amend.

In addressing Mr. Jimenez's March 20, 2013, Rule 3.851 motion to vacate, the State inaccurately states:

> In support of this claim, Defendant argued *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), required the reconsideration and granting of an evidentiary hearing regarding the denial of the claims raised in his first and third motions for post conviction relief. *Id*. He averred that this Court had already held that *Martinez* did not affect post conviction litigation in Florida courts [sic] **should be ignored** because he believed the manner in which his prior claims had been litigated differed from the litigation in this Court's precedent.

(Answer Brief at 11) (emphasis added).

Mr. Jimenez's motion to vacate recited the collateral history of his case, in particular the actions and inactions of Louis Casuso, his initial court-appointed registry counsel (3PC-R. 166-68). Mr. Jimenez also recited his efforts to challenge the procedural bars erected as a result of Mr. Casuso's woefully deficient collateral representation (3PC-R. 168-69). Then, Mr. Jimenez cited to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), indicating that "[t]he events of []his case played out exactly as the Court in *Martinez* predicted" (3PC-R. 169). Mr. Jimenez then stated:

> It is within the circumstances outlined above that Mr. Jimenez comes before this Court and appeals to this Court's inherent equitable power. A court's inherent equitable powers were recently explained in *Holland v. Florida*, 130 S.Ct. 2549, 2563 (2010).

(3PC-R. 169). Next, Mr. Jimenez cited this Court's recent opinion in *Muehleman v. State*, 3 So.3d 1149, 1165 (Fla. 2009). Then, Mr. Jimenez explained the basis for his Rule 3.851 motion:

> The procedural history of this case mirrors the fact that persuaded the U.S. Supreme Court in finding the equitable right to effective collateral counsel in

> *Martinez*. In light of *Martinez*, Mr. Jimenez challenges the work of his initial registry counsel – which Mr. Jimenez questioned significantly in both his *pro se* motion filed in October 2001 and his second Rule 3.852 motion filed in 2002 – and alleges herein that the registry counsel at his initial-collateral proceeding was ineffective.

(3PC-R. 170).

Clearly, Mr. Jimenez sought to invoke the circuit court's equitable powers, and *Martinez* was cited in support of the appeal to the circuit court's equitable powers, as was *Holland* and *Muehlman*.[1]

Mr. Jimenez then referenced in his Rule 3.851 motion both *Gore v. State*, 91 So.3d 769, 778 (Fla. 2012), and *Howell v. State*, 109 So.3d 763 (Fla. 2013). Mr. Jimenez did not argue that these ruling "should be ignored" as maintained by the State (Answer Brief at 11). He noted that in both *Gore* and *Howell*, an evidentiary hearing had been conducted on the ineffective assistance of trial counsel claims that were presented in the first Rule 3.851 motions.[2] However, Mr. Jimenez had not received

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[1]Of course at the time the motion was filed, the decision in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), had not yet issued.

[2]Mr. Jimenez in discussing this Court's decision in *Gore v. State* in his motion to vacate specifically set forth:

> Gore relied upon *Martinez* to argue that registry counsel's failure to call a particular witness in the initial collateral review proceedings was ineffective assistance under *Martinez*, which required the Florida Supreme Court to permit the claim to be re-litigated. The Florida Supreme Court rejected Gore's claim:

an evidentiary hearing of any kind (3PC-R. 173) ("Unlike either *Gore* or *Howell*, Mr. Jimenez did not have ineffective assistance of counsel claims actually presented and heard in his initial collateral review proceeding and did not have an evidentiary hearing on any ineffectiveness claim.").

In its Answer Brief, the State notes that it did file a response to the motion in which it argued that Mr. Jimenez's "motion was time barred, procedurally barred and meritless" (Answer Brief at 11). However, the State also argued in its response in circuit court that Mr. Jimenez's counsel was "not authorized to file this motion" (3PC-R. 200).[3]

The thrust of the response in circuit court was its contention that this Court had already determined that *Martinez* had no applicability to Florida state court proceedings:

> Here, Gore previously **received full consideration of his ineffective assistance of penalty phase counsel claims in postconviction court** and a comprehensive review of those claims during his appeal before this Court. Gore had received a full collateral review to which he is entitled in the Florida state courts system. We hold that under the facts and circumstances of this case, *Martinez* provides Gore with no basis for relief in this Court.
>
> *Gore v. State*, 91 So.3d at 778 (emphasis added). The same cannot be said regarding Mr. Jimenez's penalty phase ineffective assistance of counsel claims.

(3PC-R. 172).

[3]This argument has seemingly been abandoned by the State since no mention is made of it in the Answer Brief.

> The Florida Supreme Court has already determined that *Martinez* has no effect on post-conviction litigation in state court. *Howell v. State*, 2013 WL 646550 (Fla. 2013); *Gore v. State*, 91 So.3d 769, 777-78 (Fla. 2012). As such, Defendant's claim that *Martinez* permits this Court to grant his relief is meritless.

(3PC-R. 208).

In addressing the *Huff* hearing in its Answer Brief, the State again incorrectly asserts that Mr. Jimenez argued "that this Court's prior rejection of this argument should be ignored because he believed that his post conviction counsel was more ineffective than the counsel in the prior cases." (Answer Brief at 11). In fact at the *Huff* hearing, Mr. Jimenez argued that unlike the circumstances in *Gore* and *Howell*, he had not had an evidentiary hearing on any of his claims in the initial review collateral proceedings (3PC-R. 290-91). Mr. Jimenez noted his circumstances were in fact closer to the circumstances presented in *Martinez* where collateral counsel "did not raise ineffective assistance of trial counsel" (3PC-R. 295).

The State also omits from its Answer Brief any acknowledgment of the fact that Mr. Jimenez advised the circuit court during the *Huff* hearing of the pendency of *Trevino v. Thaler* (3PC-R. 289). Specifically, Mr. Jimenez suggested that the circuit court wait for the ruling in *Trevino* before ruling on Mr. Jimenez's motion to vacate (3PC-R. 295).

At the *Huff* hearing, the State maintained that neither

Martinez nor the then pending case, *Trevino*, had any relevance because this Court had said that *Martinez* concerned federal proceedings and "has nothing to do with us" (3PC-R. 297).

In its Answer Brief, the State omits any reference to the fact that the circuit court's order denying Mr. Jimenez's Rule 3.851 motion found that "[c]ounsel is also prohibited from filing this motion pursuant to §27.711(1)(c), Fla. Stat. and *Kilgore v. State*, 976 So.2d 1066, 1068-1069 (Fla. 2007)." (3PC-R. 213). It also omits any reference to the portion of Mr. Jimenez's motion for rehearing specifically addressing this aspect of the April 25, 2013, order. In his motion for rehearing, Mr. Jimenez noted that this Court contrary to the State's argument and contrary to the circuit court's ruling had not found that the court appointed registry counsel in *Gore v. State* and *Howell v. State* were not authorized to file a successive Rule 3.851 motion that cited to *Martinez v. Ryan* (3PC-R. 216-17).[4]

The State omits from its Answer Brief, any reference to the fact that Mr. Jimenez served a notice of supplemental authority regarding the decision in *Trevino v. Thaler* on May 31, 2013 (3PC-R. 220-22). Thus, a copy of that May 28, 2013, decision in *Trevino* was provided to the circuit court before it ruled on the motion for rehearing.

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[4]In the record on appeal, pages 3 and 4 of the motion for rehearing are inverted for some unknown reason (3PC-R. 216-17).

In referencing the order denying Mr. Jimenez's motion for rehearing, the State omits any acknowledgment that the one sentence order did not address any of Mr. Jimenez's arguments or the US Supreme Court decision in *Trevino v. Thaler* (3PC-R.247).

The State also omits any reference to the Notice of Filing served by Mr. Jimenez on July 8, 2013, which attached a copy of the State's pleading in the US Supreme Court in the case of *Marshall Gore v. Crews* (3PC-R. 250-272). As explained in the Notice of Filing, the State argued in the pleading in *Marshall Gore v. Crews* that "Petitioner could have used the opinion from his own case to argue that Florida was governed by *Martinez* even before *Trevino* (3PC-R. 248, 268).

ARGUMENT IN REPLY

I. JOSE JIMENEZ IS ENTITLED TO EQUITABLE RELIEF AND CONSIDERATION OF THE MERITS REGARDING HIS CLAIMS THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT AND *STRICKLAND V. WASHINGTON* AND *BRADY V. MARYLAND* AT BOTH THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL.

The State begins its argument by stating "Defendant never even acknowledges the reasons why the lower court summarily denied his fifth motion for post conviction relief and offers no argument regarding why these reasons are erroneous." (Answer Brief at 14).[5] In the Standard of Review section of his Initial

[5]Before making this statement in its Answer Brief, the State states: "This Court has held that initial briefs from the denial of postconviction motions do not satisfy this standard when they do not include an 'explanation why summary denial was

Brief, Mr. Jimenez explained:

> The claims presented in this appeal are constitutional issues involving questions of law and fact. Normally, where evidentiary development has been permitted in circuit court, rulings of law are reviewed *de novo* while deference to the trial court is given as to findings of fact. However, here the circuit court denied an evidentiary hearing, and therefore, the facts alleged by Mr. Jimenez must be accepted as true for purposes of this appeal in order to determine whether he is entitled to an opportunity to present evidence in support of his factual allegations. *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

(Initial Brief at 14).

The State does not include a Standard of Review section in the Answer Brief. Of course, Fla. R. App. Pro. 9.210(b)(5) does provide that an initial brief shall include "the applicable appellate standard of review." Fla. R. App. Pro. 9.210(c) indicates the answer brief "shall be prepared in the same manner as the initial brief; provided that the statement of the case and of the facts may be omitted." While the State's Answer Brief

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inappropriate.'" (Answer Brief quoting *Sexton v. State*, 997 So.2d 1073, 1086 (Fla. 2008). The State implies this means the initial brief must address the circuit court's order and the reasons set forth therein for a summary denial. In fact as this Court made clear in *Sexton v. State*, when the snippet quoted by the State is viewed in context, the appellant from a summary denial should address the factual allegations in his Rule 3.851 motion and why, accepting the factual allegations as true, relief would be warranted. *Sexton v. State*, 997 So. 2d at 1085-86 ("Further, despite raising eleven claims that he contends were improperly denied without an evidentiary hearing, Sexton has chosen not to present this Court with specific arguments explaining how, in each instance, counsel was ineffective or what prejudice flows from the deficiency.").

does not indicate that it contests the appellate standard of review set forth by Mr. Jimenez, neither does it concede that the appellate review in this case is *de novo*.

This Court in *Peede v. State* explained *de novo* review in the context of a summary denial of a motion to vacate:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. See Fla. R.Crim. P. 3.850(d). Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record. *See Lightbourne v. Dugger*, 549 So.2d 1364, 1365 (Fla.1989).

Peede v. State, 748 So.2d 253, 257 (Fla. 1999).[6] According to the applicable appellate standard of review set forth by this Court, Mr. Jimenez in his Initial Brief addressed the factual allegations set forth in his motion to vacate and argued why, based on those allegations, he is entitled to an evidentiary hearing. This is in fact in accord with *Sexton v. State*, 997 So.2d at 1086.[7]

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[6]This Court reliance in *Peede v. State* on *Lightbourne v. Dugger* in its formulation of the applicable appellate standard of review demonstrates that the same appellate standard of review applies in appeals from the denial of an initial motion to vacate as applies in a successive motion to vacate, given that *Lightbourne v. Dugger* was an appeal from the denial of a successive motion to vacate.

[7]In making its argument that Mr. Jimenez's Initial Brief should have focused on the circuit court's order summarily denying the motion as opposed to the factual allegations in the Rule 3.851 motion and whether an evidentiary hearing was warranted, the State oddly chooses to ignore that the circuit court erroneously ruled that "Counsel is also prohibited from

At its core, the State's position in its Answer Brief comes down to the same assertion made in circuit court that:

> This Court has repeatedly held that *Martinez* concerns federal habeas proceedings in federal court and provides no basis for relief in state court. *Moore v. State*, 132 So.3d 718, 724 (Fla. 2013); *Mann v. State*, 112 So.3d 1158, 1163-64 (Fla. 2013); *Howell v. State*, 109 So.3d 763, 774 (Fla. 2013); *Gore v. State*, 91 So.3d 769, 777-78 (Fla. 2012); *see also Lambrix v. State*, 2014 WL 1271527, *1 (Fla. Mar 27, 2014; *Chavez v. State*, 129 So.3d 1067 (Fla. 2013); *Atwater v. State*, 118 So.3d 219 (Fla. 2013). As such, the lower court was correct to find that Defendant's attempt to rely on *Martinez* was meritless. It should be affirmed.
>
> In a footnote, Defendant suggests that the prior rejection of the claim that *Martinez* does not create a new claim in state court is no longer good law because the United States Supreme Court subsequently decided *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). **However, *Trevino* does not alter the basis on which [this Court] had already rejected the claim.**

(Answer Brief at 19) (emphasis added).[8]

This Court in *Gore v. State*, 91 So.3d at 778, addressed

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filing this motion pursuant to §27.711(1)(c), Fla. Stat. and *Kilgore v. State*, 976 So.2d 1066, 1068-69 (Fla. 2007)." (3PC-R. 213). Even though the State urged the circuit court to deny Mr. Jimenez's motion on this basis, the State in its Answer Brief by failing to mention this aspect of the circuit court's order seemingly concedes that as to this assertion, the circuit court's order was wrong.

[8]As explained in the remainder of this Reply Brief, *Trevino* greatly expanded the narrow rule announced in *Martinez* and made it clear that the equitable right to effective collateral representation does indeed exist in Florida collateral proceedings because this Court encourages defendants to raised trial counsel ineffectiveness claims and *Brady* claims in collateral proceedings and not in direct appeals. *See Nixon v. State*, 572 So.2d 1336, 1340 (Fla. 1990); *Duest v. State*, 855 So. 2d 33, 39-40 (Fla. 2003).

Martinez immediately after the decision had issued by the United States Supreme Court and indicated:

> It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context.
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> * * * Gore has received a full collateral review to which he is entitled in the Florida state courts system. We hold that under the facts and circumstances of this case, *Martinez* provides Gore with no basis for relief in this Court.

Thus, this Court indicated in *Gore* that 1) *Martinez* was not concerned with state proceedings and 2) Gore had received all that he was "entitled in the Florida state courts system."

This Court was not alone in believing that *Martinez* was limited and had no applicability beyond the very limited and narrow circumstances presented therein. For example, the Fifth Circuit Court of Appeals in *Ibarra v. Thaler*, 687 F.3d 222, 226 (5th Cir. 2012), addressed what it saw as the limited scope of the ruling in *Martinez*, and concluded that *Martinez* had no impact on collateral proceedings in Texas state courts. The Fifth Circuit explained:

> *Martinez*, by its own terms, therefore establishes a specific and narrow exception to the *Coleman* doctrine; it reiterates this not merely once, but again and again, as the Court repeatedly (and exclusively) refers to the scenario of a state in which collateral review is the first time a defendant may raise a claim of ineffective assistance of counsel. Thus, the phrase "initial-review collateral proceeding" is a specifically defined term **referring to states like Arizona in which a defendant is prevented** from raising counsel's ineffectiveness **until he pursues collateral**

relief (normally bereft of a right to counsel).

Id. at 226 (emphasis added).[9] The Fifth Circuit then concluded:

> In short, Texas procedures do not mandate that ineffectiveness claims be heard in the first instance in habeas proceedings, and they do not by law deprive Texas defendants of counsel-and court-driven guidance in pursuing ineffectiveness claims.

Id. at 227.

However, the Fifth Circuit's narrow reading of *Martinez* was specifically reversed in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). There, the Supreme Court specifically addressed the Fifth Circuit's decision *Ibarra* and wrote:

> The Fifth Circuit, without considering the merits of Trevino's ineffective-assistance-of-trial-counsel claim, agreed with the District Court that an independent, adequate state ground, namely Trevino's procedural default, barred its consideration. 449 Fed.Appx., at 426. Although the Circuit decided Trevino's case before this Court decided *Martinez*, the

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[9]It should be noted that within this passage from *Ibarra*, 687 F.3d at 226, the Fifth Circuit read *Martinez* as applying to only states like Arizona in which a defendant is prevented from raising an ineffectiveness claim in his direct appeal. Indeed, the language in *Martinez* was actually in this regard stronger: "From this it follows that, when a State **requires** a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding," a habeas petitioner may establish cause for a default of the claim. *Martinez*, 132 S.Ct. at 1318 (emphasis added). "The very factors that led this Court to create a narrow exception to *Coleman* in *Martinez* similarly argue for the application of that exception here." *Trevino v. Thaler*, 133 S.Ct. at 1921. It was on the basis of the "require" language in *Martinez* that Florida argued in the Amici Curiae Brief it joined in *Trevino* that absent a requirement that ineffectiveness of trial counsel could only be raised in collateral proceedings, the equitable right to effective collateral representation did not arise.

> Fifth Circuit's reasoning in a later case, *Ibarra v. Thaler*, 687 F.3d 222 (2012), makes clear that the Fifth Circuit would have found that *Martinez* would have made no difference.

Trevino v. Thaler, 133 S.Ct. at 1916. The Supreme Court then proceeded to concluded the equitable right to effective collateral counsel applied to initial review collateral proceedings in Texas. Thus, the Supreme Court in deciding *Trevino* was actually reviewing the holding and logic of the Fifth Circuit's opinion *Ibarra* which it rejected. In *Trevino*, the US Supreme Court concluded that "failure to consider a lawyer's ineffectiveness during an initial-review collateral proceeding as a potential cause for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." *Trevino*, 133 S. Ct. at 1921 (citing *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Massaro v. United States*, 538 U.S. 500, 505 (2003)). Thus, *Trevino* recognized that there existed an equitable right to effective collateral representation as to a trial counsel ineffective assistance of counsel claims in states in which defendants were encouraged to present the trial counsel ineffectiveness in collateral proceedings, and not on direct appeal.[10] This included not only the State of Texas, but the

[10]The Supreme Court's logic was that as to claims raised on direct appeal, the criminal defendant had a right to effective appellate representation. However when states circumvented the constitutional right to effective representation as to trial

State of Florida as well as.

In *Trevino*, the State of Florida's joined an amicus brief arguing that the ruling in *Martinez* was applicable in only Arizona and five other states, i.e. just those states that barred the presentation of a trial counsel ineffectiveness claim on direct appeal. The State of Florida made its argument to the Supreme Court in an amicus brief filed in support of the State of Texas in *Trevino v. Thaler*.[11] The Supreme Court in *Trevino* rejected the argument that *Martinez* was limited in the fashion asserted by Florida and the 24 other states that signed the

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counsel ineffectiveness claim by encouraging the claim to be presented in collateral proceedings, the Supreme Court concluded that there should be an equitable right to effective collateral representation because the defendant was not receiving the benefit of the right to effective appellate representation as to the claim shunted off to collateral proceedings.

[11]The State of Florida was a signatory to the Brief of *Amici Curiae* Utah and 24 Other States in Support of Respondent filed in *Trevino v. Thaler* in January of 2013. *See* www.supremecourt.gov In that brief, it was argued that Florida was one of twenty-seven states that permitted "ineffective-assistance claims on direct appeal if those claims are based on the trial record." Brief of *Amici Curiae* at 9. This brief argued that "*Martinez* Should Not Be Extended to States that Do Not Bar Direct Appeals of All Ineffective-Assistance-of-Counsel Claims." Brief of *Amici Curiae* at 11. It was on the basis of the "require" language in *Martinez* that Florida argued in the Amici Curiae Brief that absent a state law requirement that ineffectiveness of trial counsel could only be raised in collateral proceedings, the equitable right to effective collateral representation did not arise in a particular state's initial review collateral proceedings. Indeed, the Brief of *Amici Curiae* noted that record based ineffectiveness claims could be raised on direct appeal in Florida. This was a greater limit on such claims the one provided by the Texas law at issue in *Trevino*.

amicus brief. Thus, it is in the Supreme Court's opinion in *Trevino* that the equitable right first discussed in *Martinez* and applied there to Arizona is also held to apply in a state, like Florida, that encourages, not require as Arizona does, review of certain constitutional claims to be presented in collateral review proceedings.

Thus in *Trevino*, the US Supreme Court recognized an equitable right to effective collateral counsel existed in Florida initial review collateral proceedings because Florida law encourages the presentation of trial counsel ineffectiveness claims in collateral proceedings outside the scope of the Sixth Amendment right to effective appellate counsel. *Trevino* further made it clear that the equitable right at issue was an equitable right that existed at the time of the initial review collateral proceedings occurred, in *Trevino* over 13 years before *Trevino* acknowledge the equitable right's existence. That was not what this Court understood in *Gore v. State*, 91 So.3d at 778, and all this Court's subsequent cases relying on *Gore*. Indeed, the crime at issue in *Trevino* occurred in 1996, and the resulting conviction and death sentence were affirmed on direct appeal in 1999. *Trevino v. State*, 991 S.W.2d 849 (Tex.Crim.App. 1999). The 2013 decision by the US Supreme Court applied to state collateral proceedings conducted between 1999 and 2001 in Texas state courts and recognized that the equitable right had existed at that time.

See Trevino v. Thaler, 449 Fed.Appx. 415 (5th Cir. 2011).

The equitable right to effective representation in the initial review collateral proceedings as to claims that could not been adequately raised in the direct appeal or were discouraged from being raised in direct was found applicable to collateral proceedings occurring between 1999 and 2001. The collateral review proceedings in Mr. Jimenez's case occurred between 1998 and 2001, and the motion for postconviction relief was filed on January 31, 2000. *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001). Certainly if Mr. Trevino received the benefit of an equitable right to effective collateral representation in 2013 at proceedings occurring between 1999 and 2001, Mr. Jimenez should as well. *Trevino v. Thaler* must stand for the proposition that the equitable right, while not previously acknowledged as applying in the State of Texas and other states with similarly procedural rules discouraging the presentation of certain constitutional claims in direct appeals until 2013, did in fact exist as early as 1999, the point in time that Mr. Jimenez's postconviction motion was being prepared and then filed by his court-appointed registry counsel, Louis Casuso, 2000.

After *Trevino* issued, the Fifth Circuit vacated its opinion in *Ibarra* "to the extent inconsistent with *Trevino*" and vacated "the district court's order to the extent inconsistent with *Trevino* and REMAND[ed] to the district court for proceedings

consistent herewith." *Ibarra v. Stephens*, 723 F.3d 59, 60 (11th Cir. 2013). This was in recognition of the fact that the Supreme Court in *Trevino* had greatly expand the narrow *Martinez* rule. Just like the Fifth Circuit in *Ibarra*, this Court in *Gore* and the State in its Answer Brief have both focused on the narrow language of *Martinez* which the US Supreme Court broadened substantially in *Trevino*.[12]

Prior to *Trevino*, courts throughout the country, not just this Court and not just the Fifth Circuit in *Ibarra,* were holding that *Martinez* was limited to states in which defendants were "required" to raise ineffective assistance claims in collateral proceedings. The decision in *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013), addressed the *Martinez* issue raised there saying:

> The [*Martinez*] Court carefully defined "initial review collateral proceeding" to mean state court proceedings that, by operation of state law, "provide the first occasion to raise a claim of ineffective assistance of counsel" **because the state "barred the defendant from raising the claim on direct appeal**." *Id*. at 1315, 1320.

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[12]Even in the most recent decisions cited by the State in its Answer Brief, this Court only addressed *Martinez* and did not address the decision in *Trevino* that substantially broadened the scope of *Martinez* to include Florida where defendants are encouraged to raised trial counsel ineffectiveness claims, and *Brady* claims, in collateral proceedings and not on direct appeal. *Lambrix v. State*, 2014 WL 1271527 (Fla. 2014); *Moore v. State*, 132 So.3d 718, 724 (Fla. 2013). *See Nixon v. State*, 572 So.2d 1336, 1340 (Fla. 1990); *Duest v. State*, 855 So. 2d 33, 39-40 (Fla. 2003).

Moore v. Mitchell, 708 F.3d at 785 (emphasis added). The Sixth Circuit then concluded:

> By its terms, *Martinez* does not address the type of situation that Moore presents here. Not only does Ohio permit ineffective assistance of trial counsel claims to be made on direct appeal, **Moore raised this claim on direct appeal and the Ohio Supreme Court rejected it on the merits**. *Moore*, 689 N.E.2d at 13-14.

Id.[13] The decision in *Banks v. Workman*, 692 F.3d 1133 (10th Cir. 2012) (emphasis added), concluded that *Martinez* did not apply in Oklahoma state courts because ineffectiveness of trial counsel claims could be raised on direct appeal under Oklahoma law. Specifically, the Tenth Circuit wrote:

> [*Martinez*] applies only when "the State barred the defendant from raising the claims on direct appeal," so that post-conviction proceedings are the petitioner's first opportunity to present the claim. *Id.* at 1320. None of this applies here, because Oklahoma law permitted Mr. Banks to assert his claim of ineffective assistance of trial counsel on direct appeal.

Id. at 1148. In *Dansby v. Norris*, 682 F.3d 711 (8th Cir. 2012), the Eighth Circuit identified the issue that the habeas petitioner had raised as follows: "Relying on *Martinez*, Dansby contends that ineffective assistance by his postconviction counsel establishes cause to excuse his procedural default on Claim V [ineffective assistance of trial counsel]." *Id.* at 728.

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[13]The Sixth Circuit in its opinion in *Moore* specifically cited to and relied upon the decision by the Fifth Circuit in *Ibarra v. Thaler*. It also cited to and relied upon the decisions from the Tenth Circuit in *Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012).

As to this issue, the Eighth Circuit held:

> *Martinez* does not apply here, because Arkansas does not bar a defendant from raising claims of ineffective assistance of trial counsel on direct appeal. Arkansas law permitted Dansby to raise a claim of ineffective assistance in a motion for new trial and on direct appeal.

Id. at 729. Subsequently, the US Supreme Court vacated the Eighth Circuit's decision in *Dansby* and remanded for reconsideration in light of its decision in *Trevino*. *Dansby v. Norris*, 133 S.Ct. 2767 (2013).[14]

These decisions from the Fifth Circuit, the Sixth Circuit, the Eighth Circuit, and the Tenth Circuit show that this Court was not alone in reading *Martinez* narrowly. Prior to the

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[14]The Eighth Circuit has since issued its decision in *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013). There, the 8th Circuit found that *Trevino* had significantly expanded the scope of *Martinez:*

> The Supreme Court expanded this exception in *Trevino*, reasoning "a distinction between (1) a State that denies permission to raise [an ineffective assistance of counsel] claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systematic operation, denies a meaningful opportunity to do so is a distinction without a difference." *Trevino*, 569 U.S. at ----, 133 S.Ct. at 1921.

Sasser v. Hobbs, 735 F.3d at 851. Employing the expansion of *Martinez* set forth in *Trevino*, the Eighth Circuit concluded: "we conclude Arkansas did not 'as a systematic matter' afford Sasser 'meaningful review of a claim of ineffective assistance of trial counsel' on direct appeal." *Id*. at 853. Accordingly, it concluded under *Trevino* the equitable right to effective collateral counsel existed in collateral proceedings in Arkansas state courts.

issuances of *Trevino*, each of these Circuit Courts of Appeal ruled that *Martinez* was not applicable to state court collateral proceedings unless the habeas petitioner had been barred from raising an ineffectiveness of trial counsel claim on direct appeal and been required to present in collateral proceedings.

In *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013), the Ninth Circuit surveyed the decisions from its sister circuits and noted that their limited readings of *Martinez* as to the states in which it applied were rejected in *Trevino*: "In rejecting that understanding of *Martinez*, the Court in *Trevino* made clear that the 'limited-circumstances' language in *Martinez* did not limit its holding to the circumstance where a state law categorically forbids claims of trial-counsel IAC on direct appeal. *Trevino*, 133 S.Ct. at 1921." *Ha Van Nguyen*, at 1296.

It is because of *Trevino*'s expansion of the narrow rule announced in *Martinez*, that Mr. Jimenez in his Initial Brief rested his arguments on *Trevino* and not *Martinez* (Initial Brief at 1-2). The State in its Answer Brief tries to minimize the expansion of the narrow *Martinez* rule that occurred in *Trevino*, saying: "while *Trevino* expanded the number of cases to which *Martinez* applied in federal court, it did not create a new rule applicable in state court." (Answer Brief at 20). *Trevino* increased the number of states affected by the *Martinez* rule from

six to forty-one.[15] *Trevino* did expand the narrow *Martinez* rule to cases, it expanded its scope to states, and Florida was one of the states that fell within the scope of the rule after *Trevino*.

The State in its Answer Brief argues that "[t]his Court rejected the [previous] attempts to rely on *Martinez* because *Martinez* applies to federal court proceedings." (Answer Brief at 21). But of course that is an erroneous understanding of *Martinez* and *Trevino*. As the State of Florida argued to the US Supreme Court in *Trevino*, *Martinez* did not apply and had no impact on state court proceedings in Florida. Florida urged the Supreme Court not to expand the scope of *Martinez* to include state court proceedings in Florida. However, Florida's argument was rejected, and the US Supreme Court indicated that an equitable right to effective collateral representation arose in initial review collateral proceedings in any state that encourages trial counsel ineffectiveness claims to be raised in collateral proceedings, which Florida law does.

Thus, *Trevino* established what *Martinez* did not, that there is an equitable right to effective collateral counsel in state court proceedings in Florida. Further, the US Supreme Court in

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[15]In the Brief of *Amici Curiae* filed in US Supreme Court in *Trevino* that Florida joined, it was noted that only Arizona and 5 other states "bar[red] defendants from raising ineffective-assistance claims on direct appeal" and fell within the scope of *Martinez*. Brief of *Amici Curiae* at 2. Nine states were identified as requiring trial counsel ineffectiveness to be raised at the first opportunity. Brief of *Amici Curiae* at 10, n.8.

Trevino provided a remedy in federal court for a violation of that equitable right in the state court collateral proceedings. This Court has yet to acknowledge that such an equitable right exists in the Florida collateral proceedings as found by the US Supreme Court in *Trevino,* and it has yet to address whether it will recognize a remedy for a violation of that equitable right now known to exist under *Trevino*.[16]

Finally, the State argues that the scope *Martinez* does not specifically include claims under *Brady v. Maryland*, 373 U.S. 83 (1963). Of course, the scope of *Martinez* did not include state court proceedings in Texas and Florida. However in *Trevino*, the US Supreme Court found that the logically underpinnings of *Martinez* also applied in states that encouraged trial counsel ineffectiveness claims to be raised in collateral proceedings. Indeed, Justice Scalia in his dissent predicted that *Martinez* could not be limited in the fashion that the majority had stated:

> The Court also seeks to restrict its holding to cases in which the State has "deliberately cho[sen]" to move the asserted claim "outside of the direct-appeal process," *ante*, at 1318. **That line lacks any principled basis, and will not last.** Is there any relevant difference between cases in which the State says that

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[16]Of course, the failure to recognize a remedy available in Florida state courts will mean that findings from those proceedings in which the collateral defendant was denied his equitable right to effective collateral representation will be stripped of the deference federal courts currently accord state court findings under the AEDPA. *See Smith v. Sec'y Dep't of Corrs.*, 572 F.3d 1327, 1332 (11th Cir. 2009).

> certain claims can only be brought on collateral review and cases in which those claims by their nature can only be brought on collateral review, since they do not manifest themselves until the appellate process is complete? Our cases establish that to constitute cause for failure to raise an issue on direct review, the excuse must be "an objective factor external to the defense." See *infra*, at 1324. That the factual basis for a claim was not available until the collateral-review stage is no less such a factor than a State's requiring that a claim be brought on collateral review.

Martinez v. Ryan, 132 S.Ct. at 1321 n.1 (Scalia, J., dissenting) (emphasis added). Justice Scalia was right, the line drawing in *Martinez* did not last.

Justice Scalia also rejected any notion that the logic of the majority opinion only applied to ineffective assistance claims and could be in any rational manner be so limited:

> Moreover, no one really believes that the newly announced "equitable" rule will remain limited to ineffective-assistance-of-trial-counsel cases. **There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of "newly discovered" prosecutorial misconduct, for example, see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),** claims based on "newly discovered" exculpatory evidence or "newly discovered" impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel. The Court's soothing assertion, *ante*, at 1320, that its holding "addresses only the constitutional claims presented in this case," **insults the reader's intelligence.**

Martinez v. Ryan, 132 S.Ct. at 1321 (emphasis added).[17]

[17]Recently Justice Scalia's dissent in *United States v. Windsor*, 133 S.Ct. 2675, 2710 (2013), foretold that the majority

Indeed, this Court encourages defendants to present their *Brady* claims in collateral proceedings where they do not have the constitutional right to effective appellate counsel. In *Duest v. State*, 855 So. 2d 33, 39-40 (Fla. 2003), this Court specifically rebuffed a capital appellant's effort to raise a *Brady* claim on direct appeal from a re-sentencing saying:

> We conclude that Duest's challenge to the murder conviction, which became final in 1985, is not properly before this Court in an appeal from the reimposition of a death sentence after the previous death sentence was vacated. Duest did not object to the testimony below, instead impeaching Dr. Wright on his change in testimony from 1983 to 1998. Nor has Duest filed a motion for postconviction relief asserting that the

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opinion there meant that laws precluding gay marriages could not withstand judicial scrutiny despite the majority's efforts to deny that it was making such a broad ruling in the case:

> As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.
>
> By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is "no legitimate purpose" served by such a law, and will claim that the traditional definition has "the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples, see *ante*, at 2695, 2696. The majority's limiting assurance will be meaningless in the face of language like that, as the majority well knows. That is why the language is there.

Indeed in the year that has past since *Windsor*, Justice Scalia has been proven correct in his assessment of implications of the majority's reasoning. *See e.g.*, *SmithKline Beecham Corp. v. Abbott Laboratories,* 740 F.3d 471, 481-82 (9th Cir. 2014).

> change in testimony constitutes either undisclosed exculpatory evidence or newly discovered evidence entitling him to a new trial. The absence of a pending motion for postconviction relief distinguishes this case from *Way v. State*, 630 So.2d 177 (Fla.1993), in which this Court reversed the summary denial of a motion for postconviction relief raising a *Brady* claim and withheld ruling on the direct appeal from resentencing pending disposition of the postconviction motion. *Id.* at 179. In recognition of Duest's efforts to raise this issue during the direct appeal, our affirmance is without prejudice to Duest raising the issue in the trial court via Florida Rule of Criminal Procedure 3.851 after this appeal.

Under *Duest*, it is clear that a *Brady* is only cognizable in this Court on an appeal from the denial of a Rule 3.851. As a result, the appellant is stripped of his right to effective appellate counsel when forced to litigate the claim Rule 3.851 proceedings. That is precisely the reason that the US Supreme Court found an equitable right to effective collateral counsel.

The simple truth of the matter is that Mr. Jimenez was deprived of the opportunity to develop and present his ineffective assistance and *Brady* claims in a non-successive Rule 3.851 motion and present the evidence in support of his claims and have the claims considered cumulatively under *Parker v. State*, 89 So.3d 844, 867 (Fla. 2011).

CONCLUSION

Mr. Jimenez requests that this Court reverse the lower court and remand for an evidentiary hearing for the reasons set forth in this reply brief and in Mr. Jimenez's initial brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail to Sandra Jaggard, Assistant Attorney General, at her primary email address, Sandra.Jaggard@myfloridalegal.com, on this the 20th day of June, 2014.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Martin J. McClain

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