IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16–1014

DENTRELL BROWN,	)	Appeal from
Petitioner-Appellant	)	the United States District Court
	)	for the Southern District of
v.	)	Indiana, Indianapolis Division
	)	
RICHARD BROWN,	)	Case No. 1:13–cv–1981–JMS–DKL
	)	
Superintendent,	)	The Honorable
Wabash Valley Correctional	)	Jane Magnus-Stinson, Judge.
Facility,	)	
	)	
Respondent-Appellee.	)	

CORRECTED BRIEF AND REQUIRED SHORT APPENDIX OF DENTRELL BROWN, PETITIONER-APPELLANT

Michael K. Ausbrook

P.O. Box 1554
Bloomington, IN 47402

812.322.3218
mausbrook@gmail.com

Counsel for Dentrell Brown,
Petitioner-Appellant

Disclosure Statement

No. 16–1014

Short Caption: **Dentrell Brown v. Richard Brown.**

The undersigned, counsel of record for the Petitioner-Appellant, Dentrell Brown, furnishes the following in compliance with 7th Circuit Rule 26.1:

(1) The full name of every party or amicus the attorney represents in the case:

Dentrell Brown

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Not Applicable

s/ Michael K. Ausbrook
Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

812.322.3218
mausbrook@gmail.com

Counsel for Dentrell Brown,,
Petitioner-Appellant

Dated: April 14, 2016

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No. 16–1014

DENTRELL BROWN, Petitioner-Appellant v. RICHARD BROWN, Superintendent, Wabash Valley Correctional Facility, Respondent-Appellee.	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division Case No. 1:13–cv–1981–JMS–DKL The Honorable Jane Magnus-Stinson, Judge.

BRIEF AND REQUIRED SHORT APPENDIX
OF DENTRELL BROWN, PETITIONER-APPELLANT

Jurisdictional Statement

This is an appeal from the denial and dismissal of Dentrell Brown's petition for a writ of habeas corpus under 28 U.S.C. § 2254. Dentrell is in the custody of Richard Brown, the Superintendent of the Wabash Valley Correctional Facility in Carlisle, Indiana.

On December 16, 2013, Dentrell filed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the district court. D.E. 1.

On March 5, 2015, the district court issued its Entry Dismissing Procedurally Defaulted Claims and Directing Further Proceedings. D.E. 21,

App. 2a. In that entry, the district court rejected Dentrell's argument that he should be entitled to attempt to overcome the procedural default of a trial ineffective assistance claim by application of the rule of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), as expanded by *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). D.E. 21, App 5a-6a. It also dismissed the trial ineffective-assistance claim it found defaulted. D.E. 21 App. 6a.

On December 3, 2016, the district court entered both its opinion regarding its disposition of Dentrell's habeas petition, D.E. 31, App. 10a, and its judgment denying and dismissing Dentrell's petition with prejudice. D.E. 32; App. 31a. In its opinion, the district court granted a certificate of appealability with respect to Dentrell's Confrontation-Clause claim. D.E. 31, App. 30a. It denied a certificate of appealability with respect to Dentrell's *Martinez* claim. D.E. 31, App. 30a.

On December 31, 2015, Dentrell timely a notice of appeal, D.E. 33. 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1); *Browder v. Director*, 434 U.S. 257, 265 n.9 (1978).

On February 9, 2016, Dentrell filed in this Court a request to expand the certificate of appealability to include the question of whether the rule of *Martinez* applies to § 2254 cases in Indiana. Doc. 3.

On February 23, 2016, this Court granted Dentrell's request to expand the certificate of appealability:

> In addition to the claim certified by the district court, we find that Brown has made a substantial showing of the denial of his right to effective assistance of trial counsel. See § 2253(c)(2). The parties

> should also address whether ineffective assistance of counsel in Brown's initial collateral proceeding can excuse his procedural default of this claim."

Doc. 6, App. 32a.

The district court had original jurisdiction of this case under 28 U.S.C. § 2254(a). This Court has jurisdiction of Dentrell's appeal under 28 U.S.C. §§ 1291 & 2253(a).

This is an appeal from a final judgment disposing of all parties' claims.

Statement of the Issues

I. In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the Supreme Court held that the procedural default of a trial ineffective-assistance claim may be overcome by showing that state post-conviction counsel was "ineffective" under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). The rule announced in *Martinez* applied to Arizona and to States that, like Arizona, require, trial ineffective-assistance claims be raised on initial collateral review.

In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Supreme Court extended the rule of *Martinez* to Texas and, more generally. to States that permit trial ineffective-assistance claims to be raised in a direct appeal, but whose legal systems, by their operation and in practice in the typical case, make it highly unlikely that the opportunity to do so will be meaningful.

In *Ramirez v. United States*, 799 F.3d 845, 854 (7th Cir. 2015), this Court applied the rule of *Martinez* to trial ineffective-assistance claims defaulted during initial collateral review in federal cases under 28 U.S.C.

§ 2255. It did so because, at least in this circuit, trial ineffective-assistance claims are almost always doomed when raised in a direct appeal and not deferred to initial collateral review in § 2255 proceedings.

There is no material difference between Indiana's procedural treatment of trial ineffective-assistance claims and the procedural treatment of those claims in this circuit. And whatever differences there may be between the procedural treatment of trial ineffective-assistance claims by Indiana and Texas, it is at least equally unlikely in Indiana and Texas that such a claim has any meaningful chance of success. It is also certainly more dangerous to raise such a claim in Indiana than it is in Texas, which is to say that Indiana's system more certainly deters raising trial ineffective-assistance claims in a direct appeal.

Does the rule of *Martinez*, as extended by *Trevino*, apply to procedurally defaulted trial-ineffective assistance claims in § 2254 cases in Indiana?

II. Under *Martinez* and *Trevino,* a habeas petitioner may only attempt to overcome the procedural default of a trial ineffective-assistance claims that are "substantial"—that have "some merit." *Martinez*, itself, indicates that a claim is "substantial" or has "some merit" if it meets the same low standard required for a certificate of appealability to issue under 28 U.S.C. § 2253(c)(2). In its order expanding the certificate of appealability to include the *Martinez* question, this Court explicitly concluded that Dentrell

had made "a substantial showing of the denial of his right to the effective assistance of trial counsel. *See* 2253(c)(2)."

Additionally, Dentrell was tried together with Joshua Love. At the joint trial, Mario Morris testified, recounting jailhouse conversations he had had with both Dentrell and Love. Dentrell's lawyer joined in a motion for a mistrial based on the violation of Dentrell's federal confrontation rights under *Bruton v. United States*, 391 U.S. 123 (1968) and *Cruz v. New York*, 481 U.S. 186 (1987). The motion was denied.

Having lost the mistrial motion, Dentrell's lawyer did not request a limiting instruction that would have prevented the jury from considering Love's statement to Morris as evidence against Dentrell. Had it been requested, Dentrell would have been entitled to such an instruction. Because Indiana courts, like most jurisdictions, assume that juries follow their instructions, an instruction limiting the use of Love's statement to Morris would have achieved essentially the same thing as the *Bruton* objection. If Love's statement to Morris had been excluded from the jury's consideration in the case against Dentrell, the remaining evidence against Dentrell was circumstantial and thin; without Love's statement to Morris, there is a reasonable probability that the result of Dentrell's trial would have been different.

Dentrell's post-conviction lawyer did not raise as an ineffective-assistance claim Dentrell's trial lawyer's failure to request the limiting instruction to which Dentrell would have been entitled. Instead, she raised the single claim that Dentrell's trial lawyer had been ineffective for failing

to move for severance of Dentrell's trial from Love's. She did so despite there being no federal or Indiana authority that a motion to sever is required to avoid a *Bruton* problem—a problem that, in any event, the Indiana Court of Appeals had said did not exist in Dentrell's direct appeal.

The failure to request a limiting instruction after the *Bruton* mistrial-motion failed, was an obvious ineffective-assistance claim; the failure to move for a severance of Dentrell's trial from Loves was not only not obvious, there was no existing authority to support it as a claim of ineffective assistance. Just as a limiting instruction quite possibly would have changed the result of Dentrell's trial, had the failure to request a limiting instruction been raised as an ineffective-assistance claim in Dentrell's state post-conviction proceedings, there is at least a reasonable probability that Dentrell would have obtained state post-conviction relief.

Is Dentrell's defaulted trial ineffective-assistance claim sufficiently "substantial" that Dentrell may attempt on remand to show that his state post-conviction counsel was "ineffective" under the standards of *Strickland* where: 1) this Court has already concluded that Dentrell has made a substantial showing of the denial of his right to the effective assistance of trial counsel; or 2) on the facts, there can be little excuse for not asking for a limiting instruction after the *Bruton* mistrial motion failed, and there is a reasonable probability that Dentrell would have been acquitted had the limiting instruction to which Dentrell was entitled been requested?

Statement of the Case

References to Documents

"App." will refer to the required short appendix included with this brief. **"Tr."** will refer to pages of the trial transcript.

"*D.B. I*" will refer to the decision of the Indiana Court of Appeals affirming Dentrell's conviction in his direct appeal: *D.B. v. State*, Indiana Court of Appeals No. 20A05-0904-CR-185 (Ind. Ct. App. November 13, 2009) (*mem.*), *trans. denied*. *D.B. I* appears beginning at page 34a of the appendix.

"*D.B. II*" will refer to the decision of the Indiana Court of Appeals affirming the denial of post-conviction relief: *D.B. v. State*, Indiana Court of Appeals No. 20A05-1201-PC-18 (Ind. Ct. App. Oct. 4, 2012) (*mem.*), *trans. denied*. *D.B. II* appears beginning at page 45a of the appendix.

"Entry on Defaulted Claims" will refer to the district court's Entry Dismissing Procedurally Defaulted Claims and Directing Further Proceedings, D.E. 21, entered March 5, 2015, That entry appears beginning at page 2a of the appendix.

"Entry" will refer to the district court's Entry Discussing Petition for Writ of Habeas Corpus and Granting Certificate of Appealability Regarding One Claim, D.E. 31, entered December 3, 2015. That entry appears beginning at page 10a of the appendix.

A. The History of the Case

This is an appeal from the denial and dismissal of Dentrell Brown's petition for a writ of habeas corpus under 28 U.S.C. § 2254. D.E. 1.

B. The Historical Facts as Found by the State Courts

In *D.B. I*, the Indiana Court of Appeals recited the facts as follows:

> On March 8, 2008, Elkhart police responded to a report of gunshots and discovered Gerald Wenger lying dead in the street with a single bullet wound to his head. Police discovered two bullet casings next to Wenger, one from a 9mm handgun and one from a .45 caliber handgun. Forensic analysis revealed Wenger's wound resulted from a 9mm bullet.
>
> Prior to the murder, Wenger had been using cocaine with some friends. Around 1:00 in the morning on March 8, 2008, Wenger left his apartment in a red and black Ford pickup truck to buy more drugs. At approximately 3:30 a.m. on March 8, 2008, Dan Holt, who lived in the same neighborhood where the murder occurred, got up to get ready for work. Holt noticed a red and black Ford pickup truck parked in an alley near his home. Ron Troyer, who also lived in the neighborhood, saw the same truck as he arrived home from work around 9:00 p.m. on March 8, 2009. As Troyer approached, he noticed two individuals near the truck. The individuals ran away when they saw Troyer, and Troyer called the police, who identified the red and black pickup truck as belonging to Wenger. However, forensic analysis of the truck did not reveal any fingerprints other than those belonging to Wenger.
>
> On June 18, 2008, the State charged D.B. with murder, a felony. Although D.B. is a minor, the juvenile court waived his charges to an adult felony court. The trial court held a jury trial from February 2nd to 5th, 2009, at which it tried both D.B. and codefendant Joshua Love. At the trial, the jury heard the testimony of Leiora Davis who lives in an apartment building near the murder scene. Davis testified that sometime between the 22nd and 25th of February, 2008, D.B. visited her apartment. As D.B. bent over, a gun fell from his waist onto the floor. D.B. objected to Davis"s testimony; however, the trial court admitted the testimony over D.B.'s objection,

instructing the jury to consider the evidence "for the limited purpose of showing preparation and plan" and not for any other reason. Transcript at 358.

The State also presented the testimony of Mario Morris. Morris testified regarding individual conversations he had with D.B. and Love, in which each man separately confessed his respective involvement in Wenger's murder. Morris first testified about conversations he had with Love while both were in jail. Love told Morris he met Wenger on the night of the murder because Wenger wanted to buy some drugs. Love got into the back seat of Wenger's truck and attempted to sell Wenger a "gang pack," which is a substance that looks like crack cocaine, but is not really crack cocaine. When Wenger discovered the ruse, he stopped the truck and an argument ensued. Both men exited the truck and Love shot Wenger in the head with a 9mm handgun. Love then got back into Wenger's truck and traveled to a nearby alley. Love got out of the truck and went to hide his gun. He returned later to wipe down the truck so police could not find any fingerprints. During his testimony regarding his conversations with Love, Morris never mentioned the presence of a third party during the commission of the crime and never mentioned D.B. by name or by implication.

Morris next testified about conversations he had with D.B. while both were in jail. D.B. told Morris that he met up with Wenger on the night of the murder because Wenger wanted to buy drugs. D.B. got into the front seat of Wenger's truck and decided to try to sell Wenger a gang pack. When Wenger discovered the drugs were fake, an argument ensued and Wenger demanded his money back. Both Wenger and D.B. got out of the truck and continued arguing. D.B. then pulled out a .45 caliber handgun and struck Wenger on the side of his head. As D.B. struck Wenger with the gun, it fired, grazing Wenger. D.B. then told Morris he got back into Wenger's truck and drove to a nearby alley, where he left the truck. During his testimony regarding his conversations with D.B., Morris never

> mentioned the presence of a third party during the commission of the crime and never mentioned Love by name or by implication.
>
> Although he had not objected to any of Morris's testimony, at the conclusion of Morris's testimony, D.B. moved for a mistrial. The trial court heard extensive arguments from all parties and ultimately denied the motion, noting that Morris's testimony regarding his conversations with each defendant did not inculpate the other defendant. At the conclusion of the trial, the jury found D.B. guilty of murder, a felony. On March 5, 2009, the trial court held a sentencing hearing, after which it sentenced D.B. to an aggregate term of sixty years with fifty-five years executed at the Department of Correction, and five years suspended to probation.

D.B. I, App. 35a-38a. In Dentrell's appeal from the denial of post-conviction relief, the Indiana Court of Appeals restated the facts as follows:

> On March 8, 2008, Elkhart police responded to a report of gunshots and found Gerald Wenger dead with a single bullet wound. The State charged D.B. with murder, a felony, and the juvenile court waived his charges to an adult felony court. A joint jury trial was held for D.B. and codefendant Joshua Love. Among the evidence offered was the testimony of jail house informer Mario Morris. Morris testified that he spoke with D.B. and Love individually and on separate occasions in prison. Morris recounted the details of the conversations for the jury, explaining that each man separately confessed to his respective involvement in Wenger's murder, and that neither codefendant mentioned nor implicated the other in any way. Although no objection was made during Morris's testimony, D.B. moved for a mistrial when Morris finished testifying, arguing that admitting Morris's testimony was a violation of D.B.'s constitutional rights under *Bruton v. U.S.* because he could not compel Love to testify. Since Morris's account of Love's confession made no mention of D.B., and vice versa, the trial court concluded that the defendants' conversations did not inculpate one another

> and thus denied the motion. D.B. was found guilty of murder, a felony, and was sentenced to an aggregate term of sixty years in prison with five years suspended to probation.
>
> D.B. appealed his conviction on several issues, including a claim that the trial court had abused its discretion in denying his motion for a mistrial on account of a Bruton violation. This court found that no Bruton violation occurred and affirmed the trial court. *D.B. v. State*, 916 N.E.2d 750, *3 (Ind. Ct. App. 2010) (Table), *trans. denied*.
>
> D.B. thereafter filed a petition for post-conviction relief, claiming his trial counsel was ineffective because he failed to file a motion to sever D.B.'s trial from that of his codefendant. The post-conviction court concluded D.B. failed to establish his counsel acted unreasonably, and it denied the petition.

D.B. II, App. 46a-47a.

C. Dentrell's Direct Appeal: The Confrontation-Clause Claim

In his direct appeal, Dentrell argued that the admission of his co-defendant Love's statement to Morris, offered through Morris, violated his, Dentrell's, confrontation rights under *Bruton v. United States*, 391 U.S. 123 (1968) and *Cruz v. New York*, 481 U.S. 186 (1987). *See D.B. I*, App. 38a-40a. The Indiana Court of Appeals rejected Dentrell's argument, relying on *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), because Love's statement to Morris did not "facially incriminate" Dentrell—indeed, it did not mention Dentrell at all:

> Morris gave separate testimony regarding statements made to him by Love and D.B. respectively. At no point during his testimony regarding Love's statements did Morris mention D.B. by name or implication. In fact, Morris made no mention of a third-party being present at the crime at all. D.B. argues, however, it would be

> impossible for a reasonable juror hearing testimony about both statements to not connect them into a single crime. This does not create a *Bruton* violation, however. Each codefendant confessed to his respective involvement in the crime and provided essentially identical details. Thus, each was implicated by his own statements to Morris alone, not by the statements of the other codefendant. Love's statements did not facially incriminate D.B., and therefore, no *Bruton* violation occurred. As a result, the trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial on the basis of the alleged *Bruton* violation.

D.B. I., App. 39a-40a.

D. Dentrell's Post-Conviction Claim: Ineffective Assistance for Failure to Sever Dentrell's and Love's Trials

Represented by the Indiana Public Defender, Dentrell raised a single post-conviction claim of trial ineffective assistance. The claim was that his lawyer should have moved for severance of Dentrell's trial from Love's in light of the *Bruton* problem. *See D.B. II*, App. 48a. The *D.B. II* court affirmed the denial of post-conviction relief, saying that Dentrell was merely attempting to revisit the *Bruton* claim of his direct appeal and that that claim was *res judicata*. *D.B. II*, App. 48a-49a. (Even setting aside the question of *res judicata*, no Indiana case had ever required a lawyer to move for severance to avoid a *Bruton* problem—which problem the *D.B. I* court had already decided did not exist.)

E. Dentrell's Federal Claims in His Habeas Petition

In his habeas petition, Dentrell raised three claims. Only one is relevant to this appeal: Dentrell claimed his trial lawyer had been

ineffective for failing to request an instruction limiting the use of Love's statement to Morris to the prosecution's case against Love. That claim, Dentrell openly admitted, had been defaulted, because it had not been presented to the Indiana state courts in his post-conviction litigation. He argued, however, that he should be given the opportunity to overcome that procedural default by application of the rule of *Martinez* as expanded by *Trevino*.

F. The District Court's Treatment of Dentrell's Habeas Claims

The district court denied and dismissed all of Dentrell's habeas claims. With respect to Dentrell's defaulted trial ineffective assistance claim, the court concluded that Indiana provides a meaningful opportunity to raise ineffective assistance claims in a direct appeal. D.E. 31, App. 27a-29a. It therefore held that the rule of *Martinez* is not applicable to § 2254 cases in Indiana. *Id*.

G. Dentrell is abandoning his Confrontation-Clause claim.

As is evident from the Statement of the Issues, Dentrell is abandoning his Confrontation-Clause claim for which the district court granted a certificate of appealability. After the Supreme Court's decision last term in *Ohio v. Clark*, 135 S. Ct. 2173 (2015), Dentrell is unaware of even a creative argument that the jailhouse conversation between Love and Morris was either "primarily testimonial" or would have been inadmissible in a criminal case at the time of the founding. *See id*. at 2180. *See also Vasquez v. United States*, 766 F.3d 373, 378-79 (5th Cir. 2014) (collecting

federal circuit cases holding that informal inmate conversations are not testimonial).

Consequently, Dentrell is putting all of his eggs in the *Martinez* basket.

Summary of the Argument

I. First and most simply, there is no material difference between how this circuit and Indiana treat trial ineffective-assistance claims raised in a direct appeal: in both systems, such a claim is almost always doomed. In the language of *Trevino*, in the typical case in both systems, it is highly unlikely that a trial ineffective-assistance claim will succeed in a direct appeal. Because such claims almost always fail in a direct appeal, there is no meaningful opportunity to present them in that context.

In *Ramirez*, this Court applied the rule of *Martinez* to trial ineffective-assistance claims defaulted in initial collateral-review proceedings under 28 U.S.C. § 2255. Because the rule of *Martinez* applies to § 2255 cases in this circuit, it should also apply to § 2254 cases in Indiana.

Second, even though both Indiana and Texas permit trial ineffective-assistance to be raised in a direct appeal, Indiana is even more insistent than Texas that litigation of trial ineffective-assistance claims be deferred to initial collateral review. Like the Criminal Court of Appeals of Texas, the Indiana Supreme Court has said explicitly that post-conviction proceedings are the preferred vehicle to raise a trial ineffective assistance claim. But in Texas, if a trial ineffective-assistance claim raised in a direct appeal, and if new evidence to support the claim is later developed, the

claim is not *res judicata* if raised again on collateral review. That is not so in Indiana. In Indiana, if *any* trial ineffective-assistance claim is raised in a direct appeal, *every* trial ineffective-assistance claim will be barred as *res judicata* on collateral review.

If the rule of *Martinez* applies to Texas, as *Trevino* says it does, it should also apply to Indiana.

Finally, the district court identified so-called "*Davis* petitions" as a means to raise a trial ineffective assistance claim in a direct appeal. That is simply not so. A *Davis* petition is a procedural timing mechanism to accelerate collateral review by dismissing or suspending a direct appeal so the post-conviction investigation and litigation can begin immediately. Properly viewed, actually, a *Davis* petition is a way of preserving direct-appeal issues for any eventual appeal of the denial of post-conviction relief—not a way of raising post-conviction issues in a direct appeal. And in any event, the Indiana Supreme Court has said that a *Davis* petition should only be used in extraordinary circumstances. The existence of the procedure therefore says nothing about the "typical case" and provides no reason to think the rule of *Martinez* should not apply to § 2254 cases in Indiana.

II. Even though the rule of *Martinez* should apply to § 2254 cases in Indiana, there remains the question of whether Dentrell's defaulted trial ineffective-assistance claims is sufficiently "substantial" to permit him to take advantage of the rule and to attempt to overcome the procedural

default on remand to the district court. Analytically, this Court has determined that it is. In its order expanding the certificate of appealability to include the *Martinez* question, the Court specifically said that Dentrell had made s substantial showing of the denial of his right to the effective assistance of trial counsel. In *Martinez*, the Supreme Court equated the standard necessary to demonstrate a "substantial" claim of ineffective assistance with the standard for granting a certificate of appealability.

On the facts, Dentrell's defaulted trial ineffective-assistance claim is also substantial. A limiting instruction would have precluded the jury from considering Love's statement to Morris as part of the prosecution's cases against Dentrell. Without Love's statement to Morris and the way it interlocked with Dentrell's statement to Morris, no evidence directly implicated Dentrell in Wenger's murder.

Standards of Review

A. *De Novo* Review of the District Court's Decision Generally

This Court reviews a district court's denial of habeas relief *de novo*. *E.g.*, *Coleman v. Hardy*, 690 F.3d 811, 814 (7th Cir. 2012).

B. *De Novo* Review of the Applicability of *Martinez* to § 2254 Cases in Indiana

The Court should review *de novo* the question of whether, under *Trevino*, the rule of *Martinez* applies to § 2254 cases in Indiana. *See Sutton v. Carpenter*, 745 F.3d 787, 790 (6th Cir. 2014) (reviewing *de novo* whether *Martinez* applies to Tennessee convictions). (This Court's decisions in

Ramirez and *Nash v. Hepp*,740 F.3d 1075 (7th Cir. 2014) are unhelpful about the correct standard of review, because they were both complicated by *Martinez* claims raised in the context of Rule 60(b) motions.)

C. *De Novo* Consideration of Whether Dentrell's Defauled Trial Ineffective-Assistance Claim is "Substantial."

Because the district court held that the rule of *Martinez* does not apply to § 2254 cases in Indiana, it never reached the question of whether Dentrell's defaulted ineffective-assistance claim is sufficiently substantial that he may use *Martinez*'s rule to attempt to overcome the procedural default. This Court's consideration of that question is therefore necessarily *de novo*.

Argument

I. Under *Trevino*, the rule of *Martinez* applies to § 2254 cases in Indiana because, both doctrinally and in practice, Indiana provides no meaningful opportunity to raise a trial ineffective-assistance claim in a direct appeal.

As recited in *Trevino*, *Martinez* held that a federal habeas court may find cause to excuse a procedural default of a trial ineffective-assistance claim, if four conditions are met:

> (1) the claim of :ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law **requires** that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino, 133 S. Ct. at 1918 (quoting *Martinez*, 132 S. Ct. at 1318-19). (Emphasis in the original). A "substantial" claim of trial ineffective assistance is one that has "some merit." *Martinez* 132 S. Ct. at 1318–19 (equating "some merit" with the standard for a certificate of appealability by citation to *Miller-El v. Cockrell*, 537 U.S. 322 (2003)); *see also Ramirez*, 799 F.3d at 854.

A. Because *Martinez* applies to § 2255 cases in this circuit, it should apply to § 2254 cases in Indiana.

In *Ramirez*, this Court applied *Martinez* to § 2255 motions invoking collateral review of federal convictions: "The same principles apply in both the section 2254 and the section 2255 contexts, as this case illustrates. Ramirez was effectively unable to raise his ineffective-assistance claim until collateral review because he was in the typical situation of needing to

develop the record more fully before he could proceed." *Ramirez*, 799 F.3d at 854. Indiana's procedural approach to trial ineffective-assistance claims is materially identical to the federal approach in this circuit. In both Indiana and in this circuit, it is possible to raise trial ineffective assistance in a direct appeal, but it is a terrible idea to do so in the typical case. Compare *Woods v. State*, 701 N.E.2d 1208, 1216 (Ind. 1998) ("'It is no surprise that such claims almost always fail.'" (Quoting *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991)) with *United States v. Flores*, 739 F.3d 337, 341 (7th Cir. 2014) (trial ineffective-assistance claims raised on direct appeal are "doomed"). *See also Woods*, 701 N.E.2d at 1220 ("all but the most confident appellants" will wait to raise trial ineffective-assistance claims on collateral review). By its reliance on this Court's decision in *Taglia*, it should be apparent that the Indiana Supreme Court actually intended in *Woods* to reform Indiana practice with respect to trial ineffective-assistance claims to match the practice in this circuit. See *Flores*, 739 F.3d at 341 ("For we held in *United States v. Taglia*, 922 F.2d 413 (7th Cir.1991), and *Peoples v. United States*, 403 F.3d 844 (7th Cir.2005), that, when an ineffective-assistance claim is rejected on direct appeal, it cannot be raised again on collateral review.").

Woods also recognized that plausible record-based ineffective assistance claims are not presented in the typical case: "We agree with the Tenth Circuit that in the context of assessing ineffectiveness claims, **typically a factual record must be developed** in and addressed by the [trial] court in the first instance for effective review." *Woods*, 708 N.E.2d at 1216 (Internal

quotation marks omitted) (citation omitted) (emphasis added). Compare *Ramirez*, 799 F.3d at 854 ("Ramirez was effectively unable to raise his ineffective assistance claim until collateral review **because he was in the typical situation of needing to develop the record** more fully before he could proceed." (Emphasis added).).

Because *Martinez* applies in § 2255 cases in this circuit, it should apply to § 2254 cases in Indiana.

B. Because *Martinez* applies to Texas, it should apply to Indiana.

As in Texas and this circuit, in Indiana it is certainly procedurally permissible to raise trial ineffective-assistance claims in a direct appeal. But just as the Texas courts have clearly expressed their preference that such claims be deferred to post-conviction review, so also has the Indiana Supreme Court explicitly said that post-conviction proceedings are the preferred vehicle to litigate those claims. Compare *Trevino*, 133 S. Ct. at 1920 (Texas courts have determined that collateral review is the preferred method for raising trial ineffective assistance claims) with *Woods*, 708 N.E.2d at 1219 ("[A] postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim."); compare also *Trevino*, 133 S. Ct. at 1920 ("Texas' highest criminal court has explicitly stated that '[a]s a general rule' the defendant 'should not raise an issue of ineffective assistance of counsel on direct appeal,' but rather in collateral review proceedings. *Mata v. State*, 226 S.W.3d 425, 430, n.14 (2007) (internal quotation marks omitted).") with *Woods*, 701 N.E.2d at 1220 ("[A]ll but the

most confident appellants" will wait to raise trial ineffective-assistance claims on collateral review).

Unlike Texas, however, if a trial ineffective-assistance claim is raised in a direct appeal in Indiana, no trial ineffective-assistance claim will be later available in post-conviction proceedings:

> [T]he doors of postconviction must be open to adjudicate ineffective assistance if it is not raised on direct appeal. The defendant must decide the forum for adjudication of the issue—direct appeal or collateral review. The specific contentions supporting the claim, however, may not be divided between the two proceedings.

Woods, 701 N.E.2d at 1220; *see also Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008) (if trial ineffective assistance has been raised on direct appeal, the entire issue will be *res judicata* on collateral review).

This makes it exceptionally dangerous to raise *any* trial ineffective-assistance claim in a direct appeal, because the failure of the claim raised will foreclose any later claim in post-conviction proceedings. And the failure of a trial ineffective-assistance claim raised in a direct appeal, the failure of the claim is almost certain: when there is no testimony or affidavit from trial counsel, an Indiana post-conviction court may infer that trial counsel's testimony, had it been procured, would not support the ineffective-assistance claim. *E.g.*, *Dickson v. State*, 533 N.E.2d 586, 589 (Ind. 1989); *Olvera v. State*, 899 N.E.2d 708, 711 (Ind. Ct. App. 2009).

On the other hand, in Texas, according to *Trevino*, one may raise trial ineffective assistance claims on direct appeal and *again* on collateral review. *See Trevino*, 133 S. Ct. at 1919 ("Texas courts] have held that the

defendant's decision to raise the claim on direct review does not bar the defendant from also raising the claim in collateral proceedings." (Citations omitted).). *See also Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004) (ineffective-assistance claims may be raised a second time on collateral review if more evidence has been developed to support them).

So while it may be equally unlikely in Texas and Indiana that a trial ineffective-assistance claim can possibly succeed when raised in a direct appeal, it is distinctly more dangerous in Indiana to raise such a claim in a direct appeal. Because of the danger, as a matter of Indiana practice, almost never does it make any sense to raise a trial ineffective assistance claim in a direct appeal.

If *Martinez* applies to Texas—and *Trevino* says it does—it should also apply to Indiana.

C. So-called "*Davis* petitions" are not used in "the typical case" and are, in any event, merely a procedural device to accelerate collateral review, not a device to raise post-conviction claims, including trial ineffective-assistance claims, in a direct appeal.

The district court below identified three ways trial ineffective-assistance claims may be raised in Indiana. Entry, D.E. 31 at 19-20. Two ways are on direct appeal and on collateral review in post-conviction proceedings. *Id*. The district court below seized on the availability of so-called "*Davis* petitions" as a third distinct way to raise ineffective assistance:

> [R]ecognizing that ineffective assistance of counsel claims often require the development of the record, the Indiana Supreme Court highlighted that Indiana has a long-standing procedure established

> in *Davis v. State*, 267 Ind. 152[, 368 N.E.2d 1149] (Ind. 1977), 'that allows a defendant to suspend the direct appeal to pursue an immediate petition for postconviction relief.' *Woods*, 701 N.E.2d at 1219; *see also id.* (citing *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993), which 'reiterate[es] the vitality of the *Davis* procedure')."

Entry, D.E. 31 at 20. The court further concluded that a *Davis* petition provides a "meaningful option" "other than via collateral review" to raise an ineffective-assistance claim:

> The fact that there are meaningful options to raise such a claim other than via collateral review—including "on direct appeal by a *Davis* petition," [*Woods*, 701 N.E.2d] at 1220—demonstrates that Indiana does not "either expressly or in practice, confine[] claims of trial counsel's ineffectiveness exclusively to collateral review," *Nash*, 740 F.3d at 1079.

Entry, D.E. 31 at 20.

The district court's conclusion about the significance of *Davis* petitions is incorrect. When granted, a *Davis* petition always results in collateral review; it is not a means for obtaining review in some way "other than via collateral review." Here is a fuller, correct description of what a *Davis* petition is:

> White invoked the *Davis-Hatton* procedure, which is the termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, **to allow a petition for post-conviction relief to be pursued in the trial court.** Where, as here, the postconviction relief petition is denied, the appeal can be reinstated. **Thus, in addition to the issues raised on direct appeal, the issues litigated in the post-conviction-relief proceeding can be raised. In other words, the direct appeal**

and the appeal of the denial of postconviction relief are consolidated.

White v. State, 25 N.E.3d 107, 121 (Ind. Ct. App. 2014), *reh'g denied*, *trans. denied*, *cert. denied sub. nom. White v. Indiana*, 193 L. Ed. 2d 477 (2015) (citations omitted) (emphases added).

Woods, itself, says *Davis* petitions are for the exceptional case, not the typical case: "[A *Davis* petition] should cover the exceptional case in which the defendant prefers to adjudicate a claim of ineffective assistance before direct appeal remedies have been exhausted." 701 N.E.2d at 1219-20.

Even if *Davis* petitions were common—and they aren't—it would not matter. *Woods*, itself, also says that *Davis* petitions are merely a timing device used to accelerate post-conviction proceedings—collateral review—"before direct appeal remedies have been exhausted." *Woods*, 701 N.E.2d at 1220. Additionally, "Appellate counsel's use or non-use of [a *Davis* petition] does not have substantive significance, but serves only to raise at an earlier time an issue that otherwise would be available for later presentation in post-conviction proceedings." *Thomas v. State*, 797 N.E.2d 752, 755 (Ind. 2003) (concluding that appellate counsel cannot be ineffective for failing to pursue a *Davis* petition). *See also Peaver v. State*, 937 N.E.2d 896, 898, 901 (Ind. Ct. App. 2010), *trans. denied* (discussing in separate sections the direct appeal and post-conviction issues in a consolidated appeal after the use of a *Davis* petition.) If anything, a *Davis* petition presents the opportunity to preserve the direct appeal issues for any appeal from the denial of post-conviction relief, not the opportunity to

raise post-conviction issues on direct appeal. *See id*. at 896 (the *Peaver* appellate case number, 02A03-1004-PC-255 designates a post-conviction appeal, not a direct appeal, which would have a "CR" case number instead of "PC").

II. Dentrell's defaulted trial ineffective-assistance claim is "substantial" within the meaning of *Martinez* both analytically and factually.

Although the rule of *Martinez* should apply to § 2254 cases in Indiana, there remains the question of whether Dentrell's defaulted ineffective-assistance claim is "substantial" or has "some merit." *Martinez*, 132 S. Ct. at 1318-19. Martinez equated "substantial" with the standard for a certificate of appealability to issue: "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. *Cf. Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue)." *Martinez*, 132 S. Ct. at 1218-19 (parallel citations omitted). In its order expanding the certificate of appealability to include the *Martinez* question, this Court concluded: "[W]e find that Brown has made a substantial showing of the denial of his right to effective assistance of trial counsel. See § 2253(c)(2)." Order, Doc 6, App. 32a. It follows that the Court has already determined that Dentrell's defaulted trial ineffective-assistance claim is "substantial" within the meaning of *Martinez*.

But on the facts, Dentrell's claim is also "substantial" within the meaning of *Martinez*. The failure to request a limiting instruction was not just a *Marsh* problem; it was also a problem as a matter of state law. Even if Love's statement to Morris was not subject to the Confrontation Clause, although admissible against Love, it was inadmissible hearsay as offered against Dentrell. Ind. Evidence Rule 801© (defining hearsay); Ind. Evidence Rule 802 (making hearsay inadmissible).

Because Love's statement to Morris was admissible against Love but not against Dentrell, Dentrell would have been entitled to an instruction limiting the use of Love's statement to Morris. At the time of Dentrell's trial in 2009, Indiana Evidence Rule 105 provided: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly." *See also Grund v. State*, 671 N.E.2d 411, (Ind. 1996) (under Indiana Evidence Rule 105, "defendant would have been entitled to a limiting instruction had defense counsel requested it"). And, like perhaps all jurisdictions, Indiana courts assume that jurors follow their instructions, *See*, *e.g.*, *Ware v. State*, 816 N.E.2d 1167, 1176 (Ind. Ct. App. 2004) ("When a limiting instruction is given that certain evidence may be considered for only a particular purpose, the law will presume that the jury will follow the trial court's admonitions." (Citation omitted).). So a limiting instruction would have achieved the same result as the failed *Bruton*

mistrial motion—it would have taken from the jury's consideration against Dentrell the entirety of Love's statement to Morris.

Without Love's statement to Morris, the prosecution's case was circumstantial and thin. It should frankly be unimaginable why, having lost on the *Bruton* mistrial motion, any lawyer would not request an instruction limiting the jury's use of Love's hearsay offered through Morris.

With respect to *Strickland* prejudice, it was only Love's story, as related by Morris, that placed Dentrell at the scene of the murder when the murder happened. In closing argument, the State argued, "Dentrell Brown had intimate knowledge of that crime." Tr. 757. But it was only the way Love's story, as told to Morris, interlocked with Dentrell's story, as told to and by Morris, that provided any basis to suggest that Dentrell had any intimate knowledge of the circumstances surrounding Wenger's murder. Indeed, the State was explicit about this in its closing argument:

> In this case the information is that Joshua Love and Dentrell Browneach on different occasions explained their involvement in the murder of Gerald Wenger. How did they know intimate detail? Because they were there. It is absolutely impossible for them to know the things that they knew and provide the information that they provided unless they were there and saw it.

Tr. 761. Dentrell actually only admitted to Morris, if Morris is to be believed, that he hit Wenger with a .45 caliber gun; that in the course of the argument with Wenger, the gun went off; and that the shot grazed Wenger's head. Tr. 556, 557, 558. But the State argued: "Now, Dentrell Brown was actually present at Monroe and Middlebury *when this murder*

occurred, and you know that from the testimony of Mario Morris." Tr. 722 (emphasis added).

But it was Love who admitted to Morris that he, Love, had shot Wenger in the head with a 9 mm pistol. Tr. 548. Without Love's story, as told to and by Morris, and as it coincided with Dentrell's story, as told to and by Morris, there was simply no evidence showing Dentrell was present when the murder occurred.

That is, had a limiting instruction precluded the jury from considering against Dentrell Love's state to Morris, there is a reasonable probability that Dentrell would have been acquitted. Accordingly, the Court should conclude that Dentrell's defaulted trial ineffective-assistance claim is "substantial" within the meaning of *Martinez*.

Conclusion

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the judgment of the district court and remand the case for an evidentiary hearing at which Dentrell may attempt to overcome the procedural default of his trial ineffective assistance claim by the application of *Martinez*.

Respectfully submitted,

s/ Michael K. Ausbrook
Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

812.322.3218
mausbrook@gmail.com

Counsel for Dentrell Brown,
Petitioner-Appellant

Certificate of Service

I hereby certify that on April 22, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Michael K. Ausbrook
Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

812.322.3218
mausbrook@gmail.com

Counsel for Dentrell Brown,
Petitioner-Appellant

Circuit Rule 30(d) Statement

Under Circuit Rule 30(d), undersigned counsel of record for the Petitioner-Appellant, Charles A. Walker, hereby certifies that all material required by Circuit Rules 30(a) & (b) is contained in the Required Short Appendix attached to this brief.

/s Michael K. Ausbrook
Attorney No. 17223-53

Appendix: Table of Contents

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DENTRELL BROWN	)	
	)	
Petitioner,	)	
v.	)	Case No. 1:13-cv-1981-JMS-DKL
	)	
RICHARD BROWN,	)	
	)	
Respondent.	)	

Entry Dismissing Procedurally Defaulted Claims and Directing Further Proceedings

Presently pending before the Court is petitioner Dentrell Brown's petition for a writ of habeas corpus. Mr. Brown raises three grounds for relief in his petition. In brief, his first ground asserts that the Indiana Court of Appeals erred in deciding a *Bruton* claim raised on direct appeal. His second ground is ineffective assistance of trial counsel concerning the *Bruton* issue. Finally, he asserts a *Giglio* violation concerning his testifying co-defendant. The Court addresses only the latter two in this Order. The parties are ordered to submit additional briefing regarding Ground One as set forth at the end of this Order.

As to his second ground, Mr. Brown requests relief in the form of an evidentiary hearing. Regarding his third ground, Mr. Brown asks the Court to stay this case so that he can request permission from the Indiana Court of Appeals to initiate a successive state post-conviction proceeding. For the reasons explained, both of these requested are **denied**. Mr. Brown has procedurally defaulted both of these claims, and they are therefore **dismissed with prejudice**.

I.
Background

In February 2009, Mr. Brown was convicted in an Indiana state court of murder, and he was sentenced to 60 years' imprisonment. On direct appeal to the Indiana Court of Appeals, Mr.

Brown, among other things, argued that his rights set out in *Bruton v. United States*, 391 U.S. 123 (1968), were violated when the trial court denied his motion for a mistrial. Mr. Brown raised his *Bruton* claim in his petition to transfer to the Indiana Supreme Court, but his petition to transfer was denied on January 7, 2010.

Mr. Brown filed a petition for post-conviction relief in state court on March 29, 2010. The post-conviction court denied Mr. Brown's petition. Mr. Brown appealed, arguing that his trial counsel was ineffective in failing to prevent a *Bruton* violation by not moving to sever Mr. Brown's trial from his codefendant's trial. The Indiana Court of Appeals held that Mr. Brown's ineffective assistance of counsel claim was merely an attempt to re-litigate the *Bruton* claim that was rejected on direct appeal, and therefore the claim was barred by res judicata. Mr. Brown filed a petition to transfer to the Indiana Supreme Court, which was denied on December 14, 2012. Mr. Brown then filed the instant petition for a writ of habeas corpus in this Court.

II.
Discussion

Mr. Brown asserts three grounds for relief in his habeas petition: (1) his rights under the Confrontation Clause were violated, and the Indiana Court of Appeals on direct appeal unreasonably applied *Bruton* in reaching the contrary result; (2) his trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Mr. Brown's codefendant's statement as evidence against Mr. Brown; and (3) Mr. Brown's rights under *Giglio v. United States*, 405 U.S. 150 (1972), were violated because Mario Morris, a prisoner who testified against Mr. Brown, stated that he did not receive a benefit for testifying against Mr. Brown when he in fact did. In his petition, he requests an evidentiary hearing regarding his second issue and, as to his third issue, requests that the Court stay this case so that

he can pursue leave to file a successive post-conviction proceeding in state court. The Court addresses each of these two requests in turn.

A. The Second Ground and Mr. Brown's Request for an Evidentiary Hearing

Mr. Brown maintains that his trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Mr. Brown's codefendant's statement as evidence against Mr. Brown. He acknowledges that this claim was not raised in his state post-conviction proceeding and is therefore procedurally defaulted. However, relying on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), he contends that he can overcome this potential procedural default because his state post-conviction counsel provided ineffective assistance by not raising this claim. He further requests that the Court grant him an evidentiary hearing so that he can develop whether his state post-conviction counsel was ineffective.

The State responds that no evidentiary hearing is necessary because Mr. Brown cannot overcome the procedural default. Specifically, the State argues that Seventh Circuit law is clear that ineffective assistance of state post-conviction counsel can only excuse a procedural default if state law generally requires ineffective assistance claims to be raised in state post-conviction proceedings, which is not the case in Indiana.

Procedural default occurs "when a habeas petitioner has failed to fairly present to the state courts the claim on which he seeks relief in federal court and the opportunity to raise that claim in state court has passed." *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004). A habeas petitioner may overcome procedural default by demonstrating cause for the default and actual prejudice or by showing that the habeas court's failure to consider the claim would result in a fundamental

miscarriage of justice. *See House v. Bell,* 547 U.S. 518, 536 (2006); *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). As a general matter, "ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default." *Wooten v. Norris*, 578 F.3d 767, 778 (7th Cir. 2009). The Supreme Court recently articulated an exception to this rule: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 132 S. Ct. at 1320. Stated otherwise, "procedural default caused by ineffective postconviction counsel may be excused if state law, either expressly or in practice, confines claims of trial counsel's ineffectiveness exclusively to collateral review." *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014).

Given the foregoing, whether Mr. Brown can overcome his procedurally defaulted claim based on the alleged ineffective assistance of state post-conviction counsel turns on whether Indiana limits ineffective assistance of counsel claims to post-conviction proceedings. In short, Indiana does not confine ineffective assistance of counsel claims to post-conviction proceedings; such claims can be raised either on direct appeal or in a post-conviction proceeding. *See Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008) ("A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction proceedings."); *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998) (noting that while "a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim," such claims may be brought on direct appeal and that, in some instances, it may be preferable to do so). Two other federal courts in this state have reached the same conclusion. *See Brown v.*

Superintendent, 996 F.Supp.2d 704, 716-17 (N.D. Ind. 2014); *Johnson v. Superintendent*, 2013 WL 3989417, *1 (N.D. Ind. 2013).

In sum, Mr. Brown has procedurally defaulted on his underlying claim that trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Mr. Brown's codefendant's statement as evidence against Mr. Brown. This claim could have been presented in his direct appeal, but was not. Moreover, for the reasons stated, Mr. Brown cannot excuse his procedural default of this claim by arguing that his post-conviction counsel provided ineffective assistance. His request for an evidentiary hearing is therefore denied and his second habeas claim is dismissed.

B. The Third Ground and Mr. Brown's Request to Stay this Case

Mr. Brown argues that his rights under *Giglio* were violated because Mr. Morris, a prisoner who testified against Mr. Brown, stated that he did not receive a benefit for testifying against Mr. Brown when he in fact did. Mr. Brown acknowledges that he failed to raise this claim in state court, but, relying on *Rhines v. Weber*, 544 U.S. 269 (2005), and *Dolis v. Chambers*, 454 F.3d 721 (7th Cir. 2006), he maintains that the Court should stay this federal habeas proceeding so that he can seek leave to file a successive post-conviction petition in state court and exhaust this claim. According to Mr. Brown, such a course is appropriate when, as here, a petitioner presents a mixed petition—that is, one containing both exhausted and unexhausted claims.

The State responds that the Court need not consider whether the stay procedure set forth in *Rhines* should be used, as that procedure is available only when the petitioner presents a mixed petition. Here, says the State, Mr. Brown's *Giglio* claim is procedurally defaulted rather than unexhausted. Therefore, the State maintains that the Court should conclude that Mr. Brown's

Giglio claim is procedurally defaulted and deny his request to assess whether a stay is warranted under *Rhines*.

The parties do not dispute that the stay procedure set forth in *Rhines* applies only when a petitioner presents a mixed petition—that is, a petition "containing both exhausted and unexhausted claims." *Rhines*, 544 U.S. at 273 (citing *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982)). They are right to do so, given that the Supreme Court in *Rhines* made clear that the question before it pertained only to whether a district court may stay a case involving a mixed petition. *See Dolis*, 454 F.3d at 724 ("In *Rhines*[], the Court considered 'whether a federal district court has discretion to stay [a] mixed petition to allow the petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition.'") (quoting *Rhines*, 544 U.S. at 271-72). The parties dispute, however, whether Mr. Brown's *Giglio* claim is unexhausted, which would make his petition mixed, or procedurally defaulted, which would make his petition include only exhausted claims.

Exhaustion and procedural default are related but distinct doctrines. A claim is unexhausted "[w]here state remedies remain available to a habeas petitioner who has not fairly presented his constitutional claim to the state courts," while, as stated above, a procedural default occurs when "the petitioner has already pursued his state-court remedies and there is no longer any state corrective process available to him." *Perruquet*, 390 F.3d at 514; *see also Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992) ("Exhaustion refers only to issues that have not been presented to the state court but still may be presented. Procedural default, on the other hand, occurs when a claim could have been but was not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court."). Therefore, "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical

requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman*, 501 U.S. at 732 (quoting 28 U.S.C. § 2254(b)).

The Court agrees with the State that Mr. Brown's *Giglio* claim is procedurally defaulted rather than unexhausted. Mr. Brown has presented claims to the Indiana courts during both a direct appeal and a post-conviction proceeding, but he admittedly did not present his *Giglio* claim in either one.[1] Given that Mr. Brown "has already pursued his state-court remedies and there is no longer any state corrective process available to him," his *Giglio* claim is procedurally defaulted. *Perruquet*, 390 F.3d at 514; *see Engle v. Issac*, 456 U.S. 107, 125 n.28 (1982) (holding that because the respondents had completed all avenues of state relief available and "could have [brought their claim] on direct appeal, . . . they have exhausted their state remedies with respect to this claim").

Since Mr. Brown's *Giglio* claim is procedurally defaulted rather than unexhausted, he has not presented the Court with a mixed petition. Accordingly, the stay procedure outlined in *Rhines* is inapplicable, and Mr. Brown's request for a stay is denied. Mr. Brown's *Giglio* claim is dismissed.

III.
Conclusion

For the reasons stated, Mr. Brown's requests for an evidentiary hearing and to stay this case are **denied**. Grounds Two and Three are procedurally defaulted and thus **dismissed with prejudice**. No partial final judgment shall issue at this time.

[1] Mr. Brown contends that he failed to raise a *Giglio* claim in state court because the claim was undiscoverable, given that Mr. Morris' criminal case was not resolved until a week before Mr. Brown filed his reply brief in his state post-conviction proceeding. But as the State points out, Mr. Brown was aware of the potential *Giglio* issue at the time of trial; at the very least, Mr. Brown could have attempted to pursue the claim during his state post-conviction proceeding, as Mr. Morris had plead guilty and was sentenced before post-conviction briefing was complete before the Indiana Court of Appeals. Mr. Brown chose not to do so, and thus procedurally defaulted this claim.

The Court must still decide whether Mr. Brown is entitled to habeas relief on Ground One of his petition, but the parties have not fully briefed the merits of that issue. The State must supplement its return to show cause only as to the merits of Ground One of Mr. Brown's petition by **April 13, 2015**. Mr. Brown may file a reply brief regarding only Ground One by **May 13, 2015**. The Court does not anticipate granting extensions to these deadlines.

IT IS SO ORDERED.

Date: 03/05/2015

Jane E. Magnus-Stinson

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution:

Electronically Registered Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DENTRELL BROWN	)	
	)	
Petitioner,	)	
v.	)	Case No. 1:13-cv-1981-JMS-DKL
	)	
RICHARD BROWN,	)	
	)	
Respondent.	)	

Entry Discussing Petition for Writ of Habeas Corpus, and Granting Certificate of Appealability Regarding One Claim

Presently pending before the Court is petitioner Dentrell Brown's petition for a writ of habeas corpus. Mr. Brown raises three grounds for relief in his petition. The Court addressed Grounds Two and Three in a previous Entry, concluding that they were procedurally defaulted, and therefore dismissed them with prejudice. The Court ordered the parties to submit additional briefing regarding Ground One. That briefing is now complete.[1]

For the reasons explained below, Mr. Brown is not entitled to relief on Ground One, and, despite Mr. Brown's request, the Court finds no basis to reconsider its decision with respect to Ground Two. Therefore, Mr. Brown's habeas petition is **denied**. The Court issues a certificate of appealability on Ground One as specified at the end of this Entry.

I.
Background

In February 2009, Mr. Brown was convicted in an Indiana state court of murder, and he was sentenced to 60 years' imprisonment. His conviction was upheld by the Indiana Court of

[1] The Court ordered the respondent to supplement the record in this case. The deadline to do so has passed. Given the Court's resolution of Mr. Brown's Confrontation Clause claim based on *Crawford*, the supplemental record was not ultimately necessary. Nevertheless, the respondent must ensure strict compliance with this Court's orders and deadlines in the future.

Appeals. *See D.B. v. State*, 916 N.E.2d 750, 2009 WL 3806084 (Ind. Ct. App. 2009) ("*Brown I*"). The Indiana Supreme Court denied transfer. *See D.B. v. State*, 929 N.E.2d 781 (Ind. 2010). Mr. Brown then sought post-conviction relief in state court, the denial of which was affirmed by the Indiana Court of Appeals. *See D.B. v. State*, 976 N.E.2d 146, 2012 WL 4713965 (Ind. Ct. App. 2012) ("*Brown II*").

District court review of a habeas petition presumes all factual findings of the state court to be correct, absent clear and convincing evidence to the contrary. *See Daniels v. Knight*, 476 F.3d 426, 434 (7th Cir. 2007). The Indiana Court of Appeals summarized the relevant factual background in *Brown I* as follows:

> On March 8, 2008, Elkhart police responded to a report of gunshots and discovered Gerald Wenger lying dead in the street with a single bullet wound to his head. Police discovered two bullet casings next to Wenger, one from a 9mm handgun and one from a .45 caliber handgun. Forensic analysis revealed Wenger's wound resulted from a 9mm bullet.
>
> Prior to the murder, Wenger had been using cocaine with some friends. Around 1:00 in the morning on March 8, 2008, Wenger left his apartment in a red and black Ford pickup truck to buy more drugs. At approximately 3:30 a.m. on March 8, 2008, Dan Holt, who lived in the same neighborhood where the murder occurred, got up to get ready for work. Holt noticed a red and black Ford pickup truck parked in an alley near his home. Ron Troyer, who also lived in the neighborhood, saw the same truck as he arrived home from work around 9:00 p.m. on March 8, 2009. As Troyer approached, he noticed two individuals near the truck. The individuals ran away when they saw Troyer, and Troyer called the police, who identified the red and black pickup truck as belonging to Wenger. However, forensic analysis of the truck did not reveal any fingerprints other than those belonging to Wenger.
>
> On June 18, 2008, the State charged D.B. with murder, a felony. Although D.B. is a minor, the juvenile court waived his charges to an adult felony court. The trial court held a jury trial from February 2nd to 5th, 2009, at which it tried both D.B. and codefendant Joshua Love. . . .
>
> The State also presented the testimony of Mario Morris. Morris testified regarding individual conversations he had with D.B. and Love, in which each man separately confessed his respective involvement in Wenger's murder. Morris first testified about conversations he had with Love while both were in jail. Love told Morris he met Wenger on the night of the murder because Wenger wanted to buy some drugs.

> Love got into the back seat of Wenger's truck and attempted to sell Wenger a "gang pack," which is a substance that looks like crack cocaine, but is not really crack cocaine. When Wenger discovered the ruse, he stopped the truck and an argument ensued. Both men exited the truck and Love shot Wenger in the head with a 9mm handgun. Love then got back into Wenger's truck and travelled to a nearby alley. Love got out of the truck and went to hide his gun. He returned later to wipe down the truck so police could not find any fingerprints. During his testimony regarding his conversations with Love, Morris never mentioned the presence of a third party during the commission of the crime and never mentioned D.B. by name or by implication.
>
> Morris next testified about conversations he had with D.B. while both were in jail. D.B. told Morris that he met up with Wenger on the night of the murder because Wenger wanted to buy drugs. D.B. got into the front seat of Wenger's truck and decided to try to sell Wenger a gang pack. When Wenger discovered the drugs were fake, an argument ensued and Wenger demanded his money back. Both Wenger and D.B. got out of the truck and continued arguing. D.B. then pulled out a .45 caliber handgun and struck Wenger on the side of his head. As D.B. struck Wenger with the gun, it fired, grazing Wenger. D.B. then told Morris he got back into Wenger's truck and drove to a nearby alley, where he left the truck. During his testimony regarding his conversations with D.B., Morris never mentioned the presence of a third party during the commission of the crime and never mentioned Love by name or by implication.
>
> Although he had not objected to any of Morris's testimony, at the conclusion of Morris's testimony, D.B. moved for a mistrial. The trial court heard extensive arguments from all parties and ultimately denied the motion, noting that Morris's testimony regarding his conversations with each defendant did not inculpate the other defendant. At the conclusion of the trial, the jury found D.B. guilty of murder, a felony. On March 5, 2009, the trial court held a sentencing hearing, after which it sentenced D.B. to an aggregate term of sixty years with fifty-five years executed at the Department of Correction, and five years suspended to probation.

Brown I, 2009 WL 3806084, at *1-2.

After his convictions were affirmed on direct appeal and he was denied post-conviction relief, Mr. Brown filed the instant petition for a writ of habeas corpus in this Court.

II.
Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a).

"Under the current regime governing federal habeas corpus for state prison inmates, the inmate must show, so far as bears on this case, that the state court which convicted him unreasonably applied a federal doctrine declared by the United States Supreme Court." *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001) (citing 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362 (2000); *Morgan v. Krenke*, 232 F.3d 562 (7th Cir. 2000)). Thus, "under AEDPA, federal courts do not independently analyze the petitioner's claims; federal courts are limited to reviewing the relevant state court ruling on the claims." *Rever v. Acevedo*, 590 F.3d 533, 536 (7th Cir. 2010). "A state-court decision involves an unreasonable application of [the Supreme] Court's clearly established precedents if the state court applies [the Supreme] Court's precedents to the facts in an objectively unreasonable manner." *Brown v. Payton*, 544 U.S. 131, 141 (2005) (internal citations omitted). "The habeas applicant has the burden of proof to show that the application of federal law was unreasonable." *Harding v. Sternes*, 380 F.3d 1034, 1043 (7th Cir. 2004) (citing *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)).

In addition to the foregoing substantive standard, "federal courts will not review a habeas petition unless the prisoner has fairly presented his claims 'throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings.'" *Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015) (quoting *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014), and citing 28 U.S.C. § 2254(b)(1)); *see also Anderson v. Benik*, 471 F.3d 811, 814-15 (7th Cir. 2006) ("To avoid procedural default, a habeas petitioner must fully and fairly present his federal claims to the state courts.") (internal quotation marks and citation omitted).

Insofar as pertinent here, procedural default "occurs when a claim could have been but was not presented to the state court and cannot, at the time that the federal court reviews the habeas

petition, be presented to the state court." *Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992). A federal claim is not fairly presented unless the petitioner "put[s] forward operative facts and controlling legal principles." *Simpson v. Battaglia*, 458 F.3d 585, 594 (7th Cir. 2006) (citation and quotation marks omitted). "A federal court may excuse a procedural default if the habeas petitioner establishes that (1) there was good cause for the default and consequent prejudice, or (2) a fundamental miscarriage of justice would result if the defaulted claim is not heard." *Johnson*, 786 F.3d at 505.

III.
Discussion

The Court addresses first Mr. Brown's claim that his rights under the Confrontation Clause were violated, before turning to Mr. Brown's request for the Court reconsider its decision that his ineffective assistance of counsel claim is procedurally defaulted.

A. Sixth Amendment Confrontation Clause Claim

The parties dispute both whether this claim is procedurally defaulted and its merits. The Court will address each contention in turn.

1. Procedural Default

Before the Indiana Court of Appeals in *Brown I*, Mr. Brown argued that his Confrontation Clause rights as set forth in *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny were violated when the trial court permitted Mr. Morris to testify regarding Mr. Love's confession that, together with Mr. Morris's testimony regarding Mr. Brown's confession and other evidence, incriminated Mr. Brown. [*See* Filing No. 14-5 at 10-15.] The Indiana Court of Appeals rejected this claim on the merits. *See Brown I*, 2009 WL 3806084, at *2-3. Mr. Brown sought transfer to the Indiana Supreme Court, and in his transfer petition he raised the same Confrontation Clause claim raised before the Indiana Court of Appeals. [*See* Filing No. 14-8 at 7-11.]

In the instant habeas petition, Mr. Brown again raises a Confrontation Clause claim based on *Bruton* and its progeny. [*See* Filing No. 1 at 10-17.] Part of his argument is that the Indiana Court of Appeals misapplied that case law because it failed to recognize that a limiting instruction stating that Mr. Love's confession could not be considered against Mr. Brown—which was not given by the trial court—was necessary to avoid a Confrontation Clause violation. [*See* Filing No. 1 at 12-13.]

The respondent argues that Mr. Brown's Confrontation Clause claim has morphed from how it was presented in state court because Mr. Brown's habeas petition focuses on the lack of limiting instruction as the source of the constitutional error, rather than the admission of Mr. Love's confession altogether. [Filing No. 22 at 4-7.] Because the basis of the claim has changed, says the respondent, Mr. Brown did not fairly presented this claim in state court and thus it is procedurally defaulted. [Filing No. 22 at 4-7.] Mr. Brown replies that he raised a Confrontation Clause claim based on *Bruton* and its progeny along with the operative facts supporting his claim at every stage of this litigation, and that is all that is required to fairly present the claim to the state courts. [Filing No. 29 at 29 at 2-4.]

As set forth above, "federal courts will not review a habeas petition unless the prisoner has fairly presented his claims throughout at least one complete round of state-court review." *Johnson*, 786 F.3d at 504 (citations and quotation marks omitted). "Fair presentment, however, does not require a hypertechnical congruence between the claims made in the federal and state courts; it merely requires that the factual and legal substance remain the same." *Anderson v. Benik*, 471 F.3d 811, 814-15 (7th Cir. 2006); *see also Picard v. Connor*, 404 U.S. 270, 277-78 (1971) ("[W]e do not imply that respondent could have raised the equal protection claim only by citing 'book and verse on the federal constitution.' We simply hold that the substance of a federal habeas corpus

claim must first be presented to the state courts.") (citations omitted). "If the facts presented do not evoke a familiar constitutional constraint, there is no reason to believe the state courts had a fair opportunity to consider the federal claim." *Anderson*, 471 F.3d at 815. Therefore, the Court considers "four factors when determining whether a petitioner has fairly presented his federal claim to the state courts: 1) whether the petitioner relied on federal cases that engage in a constitutional analysis; 2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; 3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and 4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation." *Id.* (citations and quotation marks omitted).

Here, all four relevant factors demonstrate that Mr. Brown fairly presented his claim to the state courts. As to the first three factors, Mr. Brown relied on both federal and state cases engaging in a constitutional analysis of the Confrontation Clause as applied to similar facts in both his direct appeal brief and his petition to transfer to the Indiana Supreme Court. [*See, e.g.*, Filing No. 14-5 at 12 (citing *Bruton*; *Cruz v. New York*, 481 U.S. 186 (1987); *Fayson v. State*, 726 N.E.2d 292, 294 (Ind. 2000)); Filing No. 14-8 at 7-9 (citing the same cases).] Regarding the fourth and final factor, Mr. Brown detailed facts regarding Mr. Morris's testimony and how, through Mr. Morris, the confession of Mr. Love was admitted against him, which precluded Mr. Brown from cross-examining Mr. Love. [*See* Filing No. 14-5 at 10-11; Filing No. 14-8 at 7.] These facts are similar to those in mainstream constitutional litigation regarding *Bruton* violations and the Confrontation Clause. Finally, the lack of a limiting instruction was specifically noted in a footnote in Mr. Brown's brief, [*see* Filing No. 14-5 at 15 n.1], which undermines the respondent's argument that Mr. Brown's claim has impermissibly morphed into a new claim regarding the limiting instruction

on habeas review. Accordingly, this claim was fairly presented in state court and is not procedurally defaulted.

2. Merits

The parties' arguments primarily focus on two issues: whether the Indiana Court of Appeals reasonably resolved Mr. Brown's *Bruton* claim and, although not discussed by the Indiana Court of Appeals, whether the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), altered the *Bruton* rule such that Mr. Brown's Confrontation Clause claim is meritless. The Court will first address the Indiana Court of Appeals' resolution of Mr. Brown's claim, before turning to whether *Crawford* altered *Bruton*'s rule.

a. The Indiana Court of Appeals Unreasonably Applied Clearly Established Federal Law as Determined by the United States Supreme Court

The Indiana Court of Appeals reasoned as follows in rejecting Mr. Brown's Confrontation Clause claim:

> D.B. argues that Morris's testimony regarding statements made by the codefendant, Love, violated his constitutional right to cross-examination because he could not compel Love to testify. In *Bruton v. United States*, 391 U.S. 123, 126 (1968), the Supreme Court addressed the issue of the admissibility of a codefendant's pre-trial statement during a joint trial. The Court concluded a substantial risk exists that the jury might consider one codefendant's incriminating pre-trial statement against the other codefendant as well. *Id.* Because the former cannot be forced against his will to take the stand, the latter is denied his Sixth Amendment right to confront and cross-examine witnesses against him. *Id.* at 137. However, a codefendant's statements violate Bruton only if they "facially incriminate" another defendant. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Fayson v. State*, 726 N.E.2d 292, 294 (Ind.2000); *Brock v. State*, 540 N.E .2d 1236, 1240 (Ind.1989).
>
> Morris gave separate testimony regarding statements made to him by Love and D.B. respectively. At no point during his testimony regarding Love's statements did Morris mention D.B. by name or implication. In fact, Morris made no mention of a third-party being present at the crime at all. D.B. argues, however, it would be impossible for a reasonable juror hearing testimony about both statements to not connect them into a single crime. This does not create a *Bruton* violation, however. Each codefendant confessed to his respective involvement in the crime and

> provided essentially identical details. Thus, each was implicated by his own statements to Morris alone, not by the statements of the other codefendant. Love's statements did not facially incriminate D.B., and therefore, no *Bruton* violation occurred. As a result, the trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial on the basis of the alleged *Bruton* violation.

Brown I, 2009 WL 3806084, at *2-3.

Mr. Brown argues that the Indiana Court of Appeals unreasonably applied Supreme Court precedent in denying his Confrontation Clause claim in that it ignored the fact that a limiting instruction was required to make Mr. Love's confession offered through Mr. Morris constitutionally permissible. [Filing No. 1 at 12-13.] The respondent contends that the trial court was not required to give a limiting instruction *sua sponte*, and because Mr. Brown did not request a limiting instruction, he cannot now argue that the lack of limiting instruction violated his rights under the Confrontation Clause. [Filing No. 22 at 11-12.] Mr. Brown replies that *Richardson* does not require the defendant to request a limiting instruction; instead, it makes clear that the instruction must be given to avoid a violation of the Confrontation Clause. [Filing No. 29 at 5-6.]

"In *Bruton v. United States*, the Supreme Court held that a defendant's Sixth Amendment right to confront witnesses against him is violated when the confession of a nontestifying codefendant, in which the defendant is expressly implicated as a participant in the crime, is admitted in the joint trial of the two defendants, even if the jury is instructed to consider the confession only against the confessing codefendant." *United States v. Souffront*, 338 F.3d 809, 828 (7th Cir. 2003); *see Bruton*, 391 U.S. at 136 ("Despite the concededly clear instructions to the jury to disregard . . . inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."). Subsequently, the Supreme Court reasoned in *Richardson v. Marsh*, 481 U.S. 200 (1987), that the

rationale driving *Bruton*—namely, when faced with a "facially incriminating confession" by a nontestifying codefendant, a limiting instruction was "inadequate"—does not apply "when confessions that do not name the defendant are at issue." *Id.* at 202. Therefore, the Supreme Court held "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession *with a proper limiting instruction* when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211 (emphasis added); *see Gray v. Maryland*, 523 U.S. 185, 185-86 (1998) (noting that "*Bruton*'s scope was limited by *Richardson* . . . , in which the Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only that defendant's name, but any reference to his or her existence").

The Court agrees with Mr. Brown that the Indiana Court of Appeals unreasonably applied Supreme Court precedents, particularly *Richardson*, in rejecting his Confrontation Clause claim. *Bruton* and the subsequent cases relying on *Bruton* focus on the necessity of a limiting instruction in preventing a violation of the Confrontation Clause. In *Bruton*, the Supreme Court held that the Confrontation Clause is violated when "the confession of a nontestifying codefendant, in which the defendant is expressly implicated as a participant in the crime, is admitted in the joint trial of the two defendants, *even if* the jury is instructed to consider the confession only against the confessing codefendant." *Souffront*, 338 F.3d at 828 (emphasis added); *see Bruton*, 391 U.S. at 136. *Bruton* represented a "narrow exception" to the "assumption of the law that jurors follow their instructions," but an exception that the Supreme Court declined to expand in *Richardson*. *See Richardson*, 481 U.S. at 207. Instead, the Supreme Court reasoned that the calculus regarding the adequacy of a limiting instruction changes "when confession that do not name the defendants are

at issue." *Id.* at 211. Therefore, as explained above, the Supreme Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession *with a proper limiting instruction* when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* (emphasis added). This holding makes clear that two things must occur for a confession to be admissible in similar circumstances: (1) the confession must be redacted to eliminate any reference to the defendant's existence; and (2) a "proper limiting instruction" must be given. *Id.*

The Indiana Court of Appeals cited *Richardson* as standing for the proposition that "a codefendant's statements violate *Bruton* only if they 'facially incriminate' another defendant." *Brown I*, 2009 WL 3806084, at *2 (citing *Richardson*, 481 U.S. at 211). It then went on to analyze only whether Mr. Love's statements facially incriminated Mr. Brown, concluding that they did not. *See id.* at *3. But such an analysis ignores the other key component of *Richardson*—namely, whether a limiting instruction was given. Cases following *Bruton* and *Richardson* have reinforced the necessity of a limiting instruction to ensure that a defendant's confrontation rights are not violated. *See Gray*, 523 U.S. at 185-86 ("*Bruton*'s scope was limited by *Richardson* . . . , in which the Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession *with a proper limiting instruction* when the confession is redacted to eliminate not only that defendant's name, but any reference to his or her existence") (emphasis added); *United States v. Sutton*, 337 F.3d 792, 799 (7th Cir. 2003) ("Proper redaction of the confession to eliminate all references to the co-defendants, *combined with a limiting instruction to the jury that it may not consider the confession against anyone other than the confessing defendant* [was] adequate [to avoid a Confrontation Clause violation].") (emphasis added); *Souffront*, 338 F.3d at 830 ("*If a proper limiting instruction is given to the jury*, a redacted statement which

incriminates a defendant only in conjunction with other evidence in the case does not violate *Bruton*.") (emphasis added); *United States v. Ward*, 377 F.3d 671, 676-77 (7th Cir. 2004) ("When redaction *is coupled with a limiting instruction to the jury that it may not consider the evidence against anyone other than the confessing defendant*, a defendant's Confrontation Clause rights are sufficiently protected.") (emphasis added).

Despite the Indiana Court of Appeals' failure to properly acknowledge and apply the rule from *Richardson* regarding the necessity of a limiting instruction, the respondent maintains that any error regarding the limiting instruction is not a basis for reversal given that Mr. Brown never requested a limiting instruction at trial. There is some support for the respondent's position. *See Montes v. Jenkins*, 626 F.2d 584, 587 (7th Cir. 1980) (holding that the petitioner is not entitled to habeas relief on his *Bruton* claim because he "waived his right to a limiting instruction when he failed to request one"). The Court questions *Montes*'s applicability given that it was decided before *Richardson* and the other cases cited above that make the necessity of a limiting instruction clear to avoid a Confrontation Clause violation. Further, unlike in *Montes*, the State here did not admit during trial that a limiting instruction would be proper, *see id.* at 588, and thus at most, Mr. Brown forfeited the usage of a limiting instruction, instead of waiving it.[2]

[2] The Court also notes that the Seventh Circuit in *Montes* was relying on the plurality decision in *Parker v. Randolph*, 391 U.S. 123 (1968). *See Montes*, 626 F.2d at 587-88. As the Supreme Court explained in *Cruz*, *Parker* "resembled *Bruton* in all major respects save one: Each of the jointly tried defendants had himself confessed, his own confession was introduced against him, and his confession recited essentially the same facts as those of his nontestifying codefendants." 481 U.S. at 190-91. The plurality in *Parker* held that these so-called "interlocking confessions" did not violate the Confrontation Clause. *Id.* The Supreme Court, however, departed from the *Parker* plurality rule in *Cruz*, holding that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193 (citation omitted).

In the end, the Court need not ultimately resolve whether *Montes* governs here, since, as explained below, *Crawford* altered the Confrontation Clause landscape such that Mr. Brown does not have a viable *Bruton* claim. Nevertheless, the Court wishes to highlight that the Indiana Court of Appeals' sole focus on whether Mr. Love's confession facially incriminated Mr. Brown was an unreasonable application of clearly established federal law, as it failed to address the necessity of a limiting instruction even when Mr. Brown explicitly noted the lack of limiting instruction in his brief.

b. Mr. Brown's Confrontation Clause Rights Were Not Violated

Although the Indiana Court of Appeals' analysis was flawed, it does not necessarily follow that Mr. Brown is entitled to habeas relief. A writ of habeas corpus may only issue if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *see Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) (explaining that AEDPA requires a petitioner to show that he is being held in violation of federal law pursuant to 28 U.S.C. § 2254(a) and that his detention resulted from an unreasonable state court decision pursuant to § 2254(d)).

The respondent contends that—irrespective of the Indiana Court of Appeals' analysis, which did not address *Crawford*—Mr. Brown's Confrontation Clause rights were not violated because *Crawford* held that the Confrontation Clause, and therefore *Bruton*'s holding that was rooted in the Confrontation Clause, only applies when the evidence at issue is testimonial hearsay.

Mr. Brown contends that the Indiana Court of Appeals also unreasonably applied clearly established federal law by ignoring the rule in *Cruz* regarding interlocking confessions, which, Mr. Brown says, his and Mr. Love's confessions were. [Filing No. 1 at 12.] The respondent does not meaningfully address the applicability of *Cruz* and the Indiana Court of Appeals' failure to address it. However, given the Court's ultimate decision that *Crawford* forecloses Mr. Brown from obtaining habeas relief, the Court will not address this potential alternative basis for assessing the reasonableness of the Indiana Court of Appeals decision.

[Filing No. 22 at 12-15.] Mr. Brown acknowledges that several circuits have held that *Bruton*, post-*Crawford*, does not apply to nontestimonial confessions of nontestifying codefendants, but argues that the Seventh Circuit in *Jones v. Basinger*, 635 F.3d 1030, 1041 (7th Cir. 2011), implicitly suggested that *Crawford* did not so limit *Bruton*. [Filing No. 29 at 7-8.]

As noted, the Indiana Court of Appeals did not address *Crawford* or its impact on *Bruton*, likely because those issues were not raised by the parties during the direct appeal. Nevertheless, for the reasons explained, the respondent is correct that *Crawford* precludes Mr. Brown from establishing that the introduction of Mr. Love's confession via Mr. Morris's testimony violated his rights under the Confrontation Clause.

The Supreme Court's holding in *Bruton* was rooted in the right of a defendant to cross-examine witnesses against them as established by the Confrontation Clause. *See Bruton*, 391 U.S. at 125 ("We hold that . . . admission of [the nontestifying codefendants's] confession in [a] joint trial violate[s] petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."). Several decades later, the Supreme Court in *Crawford* held that the Confrontation Clause bars "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53. The Supreme Court subsequently explained that "[a] critical portion of [*Crawford*'s] holding . . . is the phrase 'testimonial statements,'" since "[o]nly statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006). In short, this means that only testimonial statements are "subject to the Confrontation Clause." *Id.*; *see United States v. Watson*, 525 F.3d 583, 588-89 (7th Cir. 2008) ("The Confrontation Clause does not . . . apply to statements that are not testimonial in nature."). *Crawford*'s limitation of the Confrontation Clause's applicability to

testimonial hearsay has led at least eight circuits to hold that *Bruton*'s rule only applies to testimonial hearsay as well. *See United States v. Dargan*, 738 F.3d 643, 650-51 (4th Cir. 2013) ("*Bruton* is simply irrelevant in the context of nontestimonial statements. *Bruton* espoused a prophylactic rule designed to prevent a specific type of Confrontation Clause violation. Statements that do not implicate the Confrontation Clause, *a fortiori*, do not implicate *Bruton*."); *United States v. Berrios*, 676 F.3d 118, 128 (3d Cir. 2012) ("[B]ecause *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements."); *see also United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010); *United States v. Pike*, 292 Fed. Appx. 108, 112 (2d Cir. 2008); *United States v. Johnson*, 581 F.3d 320, 326 (6th Cir. 2009); *United States v. Dale*, 614 F.3d 942, 958-59 (8th Cir. 2010); *Smith v. Chavez*, 2014 WL 1229918, at *1 (9th Cir. 2014); *United States v. Clark*, 717 F.3d 790, 816 (10th Cir. 2013).

Mr. Brown does not dispute that Mr. Love's statements offered through Mr. Morris were non-testimonial, nor could he. A statement is testimonial when "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Crawford*, 541 U.S. at 52. Thus an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Applying this rule, the Supreme Court has described statements made "from one prisoner to another" as "clearly nontestimonial." *Davis*, 547 U.S. at 825. And circuits that have been confronted with a *Bruton* claim involving the confession of a nontestifying codefendant to a fellow inmate have held that, pursuant to *Crawford* and *Davis*, the nontestimonial nature of the communication precludes such a claim. *See, e.g.*, *Dargan*, 738 F.3d at 651 (holding that "*Bruton* is simply irrelevant in the context of nontestimonial statements," such a those made

"to a cellmate in an informal setting"); *Berrios*, 676 F.3d at 128 (holding that *Bruton* does not apply to nontestimonial statements such as the "surreptitious record" or a "prison yard conversation").

Mr. Brown acknowledges the authority from other circuits holding that *Bruton* applies only to testimonial hearsay, but argues that the Seventh Circuit's decision *Jones* suggests otherwise. Mr. Brown's reading of *Jones* is not without some force. *See United States v. Vasquez*, 766 F.3d 373, 379 n.16 (5th Cir. 2014) (noting that the Seventh Circuit in *Jones* "arguably applied *Bruton* to non-testimonial statements, although without explicitly acknowledging the resulting split of authority"). The Court, however, disagrees with his characterization of *Jones*. The Seventh Circuit in *Jones* held that petitioner Jones's Confrontation Clause rights were violated pursuant to both *Crawford* and *Bruton* when a police officer was allowed to testify that Lewis informed the police officer that Parks told Lewis that Parks and Jones committed the crimes in question. *See Jones*, 635 F.3d at 1037, 1040-52. The Seventh Circuit addressed at the outset whether Lewis's, and only Lewis's, statement to the police officer was testimonial, concluding that it clearly was given that it was made to the police "for the purpose of helping bring to justice the people responsible for the [crimes]." *Id.* at 1041. After discussing *Crawford* and *Bruton*, the Seventh Circuit concluded that "*Bruton* makes clear that Jones' right to confront Lewis and Parks about that confession was violated by Lewis' and Parks' failure to testify at trial and to subject their testimony to the 'crucible of cross-examination.'" *Id.* at 1051 (quoting *Crawford*, 541 U.S. at 61).

The fact that the Seventh Circuit refers to Jones's right to confront Lewis *and Parks*, says Mr. Brown, demonstrates that Parks's statement to Lewis's—which was clearly nontestimonial—is implicitly a holding that *Bruton* does not apply only to testimonial statements. But the Seventh Circuit was not, at any point in *Jones*, directly addressing whether *Bruton* applies only to

testimonial hearsay post-*Crawford*. Indeed, only at the outset of the opinion did the Seventh Circuit address whether the relevant statements were testimonial, and in doing so, only addressed whether Lewis's statements to the police officer were testimonial, not Parks's statement to Lewis. Moreover, when much later in the opinion the Seventh Circuit states that *Bruton* reveals that Jones's right to confront Lewis *and Parks* was violated, the Seventh Circuit is not discussing the testimonial nature of any of the statements—that issue had already been decided. Taking the testimonial question out of the analysis, the Seventh Circuit's statement that *Bruton* holds that Jones had a right to confront both Lewis and Parks is a correct statement of *Bruton*. But it is *Crawford* that later limits *Bruton*'s rule to testimonial statements—an aspect of the analysis that the Court had already settled by determining that Lewis's statement to the police were testimonial. Given this, the Court does not read the portion of *Jones* on which Mr. Brown relies to hold that *Crawford* does not limit *Bruton*'s rule to testimonial statements. The totality of the opinion reveals that the Seventh Circuit had already resolved the undisputed question of whether Lewis's statements to the police officers were testimonial, and thus was not addressing whether Parks's statements to Lewis were testimonial, let alone the unresolved question in the circuit of whether *Crawford* limited *Bruton*.

In the absence of binding precedent to the contrary, the Court agrees with the circuits who have held that *Crawford* and *Davis* limit *Bruton*'s application to testimonial statements. The Seventh Circuit itself has recognized that the "Confrontation Clause does not . . . apply to statements that are not testimonial in nature." *Watson*, 525 F.3d at 588-89. And, as explained above, *Bruton*'s rule is undoubtedly rooted in the Confrontation Clause. *See Bruton*, 391 U.S. at 125 ("We hold that . . . admission of [the nontestifying codefendants's] confession in [a] joint trial violate[s] petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth

Amendment."). Therefore, "because *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements." *Berrios*, 676 F.3d at 128. As discussed above, because Mr. Love's confession to Mr. Morris was nontestimonial, Mr. Brown's rights under the Confrontation Clause were not violated by its admission. Accordingly, he is not entitled to habeas relief on this claim.

B. Ineffective Assistance of Trial Counsel

Mr. Brown asks the Court to reconsider its decision in its March 5, 2015, Entry that his ineffective assistance of trial counsel claim was procedurally defaulted. [*See* Filing No. 29 at 12-14.] In his habeas petition, Mr. Brown argued that his trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Mr. Love's statement as evidence against Mr. Brown. He acknowledged that he did not raise this claim in his direct appeal or during his post-conviction proceeding, but, relying on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), he contends that he can overcome this potential procedural default because his state post-conviction counsel provided ineffective assistance by not raising this claim. The Court concluded in its previous entry that *Martinez* and *Trevino* were inapplicable in Indiana, reasoning as follows:

> As a general matter, "ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default." *Wooten v. Norris*, 578 F.3d 767, 778 (7th Cir. 2009). The Supreme Court recently articulated an exception to this rule: "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 132 S. Ct. at 1320. Stated otherwise, "procedural default caused by ineffective postconviction counsel may be excused if state law, either expressly or in practice, confines claims of trial counsel's ineffectiveness exclusively to collateral review." *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014).

> Given the foregoing, whether Mr. Brown can overcome his procedurally defaulted claim based on the alleged ineffective assistance of state post-conviction counsel turns on whether Indiana limits ineffective assistance of counsel claims to post-conviction proceedings. In short, Indiana does not confine ineffective assistance of counsel claims to post-conviction proceedings; such claims can be raised either on direct appeal or in a post-conviction proceeding. *See Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008) ("A criminal defendant claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction proceedings."); *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998) (noting that while "a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim," such claims may be brought on direct appeal and that, in some instances, it may be preferable to do so). Two other federal courts in this state have reached the same conclusion. *See Brown v. Superintendent*, 996 F.Supp.2d 704, 716-17 (N.D. Ind. 2014); *Johnson v. Superintendent*, 2013 WL 3989417, *1 (N.D. Ind. 2013).

[Filing No. 21 at 4-5.]

Mr. Brown argues that the Court should reconsider this decision because *Trevino* expanded the *Martinez* rule to apply to states that not only formally restrict ineffective assistance of counsel claims to collateral view, but also to states that have a "procedural framework, by reason of its design and operation, [which] makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921. Mr. Brown argues that the Indiana Supreme Court's statement in *Woods*—that the limitation that defendants can only raise an ineffective assistance of counsel claim *either* on direct appeal or during post-conviction proceedings, but not both, "will likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal," 701 N.E.2d at 1220—supports his position. [Filing No. 29 at 13.]

The Court disagrees that *Woods* provides a basis for the Court to reconsider its previous decision. The Indiana Supreme Court in *Woods* by no means suggested that defendants do not have a meaningful opportunity to raise an ineffective assistance of counsel claim on direct appeal, even if it acknowledged that in most cases collateral review is the preferred route; instead, the

Indiana Supreme Court reiterated that defendants had multiple available routes to raise such claims. First, the Indiana Supreme Court noted that "record-based ineffectiveness claims" could be raised on direct appeal and doing so may in some instances be preferable. *See Woods*, 701 N.E.2d at 1219 ("Resolving record-based ineffectiveness claims on direct review also has some doctrinal appeal because it is more consistent with the residual purpose of postconviction proceedings."). Second, recognizing that ineffective assistance of counsel claims often require the development of the record, the Indiana Supreme Court highlighted that Indiana has a long-standing procedure established in *Davis v. State*, 267 Ind. 152 (Ind. 1977), "that allows a defendant to suspend the direct appeal to pursue an immediate petition for postconviction relief." *Woods*, 701 N.E.2d at 1219; *see also id.* (citing *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993), which "reiterate[es] the vitality of the *Davis* procedure"). Third, the Indiana Supreme Court held that an ineffective assistance of counsel claim may be raised during a post-conviction hearing, which is in most cases "the preferred forum." *Id.*

Although a defendant may raise an ineffective assistance of counsel claim via one, and only one, of these routes, the fact that there are meaningful options to raise such a claim other than via collateral review—including "on direct appeal by a *Davis* petition," *id.* at 1220—demonstrates that Indiana does not "either expressly or in practice, confine[] claims of trial counsel's ineffectiveness exclusively to collateral review," *Nash*, 740 F.3d at 1079. Accordingly, *Martinez*'s rule, as extended in *Trevino*, does not apply in Indiana, and the Court will not alter its ruling that Mr. Brown's ineffective assistance of counsel claim is procedurally defaulted.

IV.
Certificate of Appealability

Rule 11(a) of the *Rules Governing § 2254 Cases* requires the district courts to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and "[i]f

the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." Pursuant to § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Such a showing includes demonstrating "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and quotation marks omitted).

The Court concludes that the resolution of Mr. Brown's Sixth Amendment Confrontation Clause claim discussed in this Entry could be debated by reasonable jurists and is adequate to deserve encouragement to proceed further, particularly given the lack of Seventh Circuit authority regarding *Bruton*'s application after *Crawford*. A certificate of appealability is therefore **granted**, and this Entry shall constitute a certificate of appealability as to that claim. The same is not true for Mr. Brown's other claims that the Court ruled were procedurally defaulted in its Entry dated March 5, 2015, and therefore the Court **denies** a certificate of appealability as to those claims.

IT IS SO ORDERED.

Date: December 3, 2015

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution:

Electronically Registered Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DENTRELL BROWN	)	
	)	
Petitioner,	)	
v.	)	Case No. 1:13-cv-1981-JMS-DKL
	)	
RICHARD BROWN,	)	
	)	
Respondent.	)	

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Court having this day directed the entry of final judgment, the Court now enters FINAL JUDGMENT in favor of the respondent and against the petitioner, Dentrell Brown.

Mr. Brown's petition for writ of habeas corpus is denied and the action is dismissed with prejudice.

Date: December 3, 2015

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Laura Briggs, Clerk of Court

By: _____
Deputy Clerk

Distribution:

Electronically Registered Counsel

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 23, 2016

Before

DIANE P. WOOD, *Chief Judge*

No. 16-1014

DENTRELL BROWN,
Petitioner-Appellant,

v.

RICHARD BROWN,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:13-cv-01981-JMS-DKL

Jane E. Magnus-Stinson,
Judge.

O R D E R

Dentrell Brown has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and a motion to expand a certificate of appealability granted by the district court. This court has reviewed the final order of the district court and the record on appeal. In addition to the claim certified by the district court, we find that Brown has made a substantial showing of the denial of his right to effective assistance of trial counsel. *See* § 2253(c)(2). The parties should also address whether ineffective assistance of counsel in Brown's initial collateral proceeding can excuse his procedural default of this claim.

Accordingly, the request to expand the certificate of appealability is GRANTED.

Briefing shall proceed as follows:

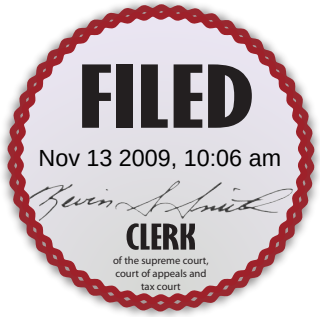
1. Petitioner-Appellant's opening brief and appendix shall be filed on or before March 24, 2016.

2. Respondent-Appellee's brief shall be filed on or before April 25, 2016.

3. Petitioner-Appellant's reply brief, if any, shall be filed on or before May 9, 2016.

Important Scheduling Notice !

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http://www.ca7.uscourts.gov/cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).



ATTORNEY FOR APPELLANT:

KENNETH R. MARTIN
Goshen, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

D.B.,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 20A05-0904-CR-185
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0806-MR-2

November 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

D.B. appeals his conviction, following a jury trial, of murder, a felony, and his resulting sixty-year sentence. For our review, D.B. raises three issues, which we restate as: 1) whether the trial court abused its discretion when it denied D.B.'s motion for a mistrial; 2) whether the trial court abused its discretion when it admitted evidence that D.B. possessed a gun prior to the murder; and 3) whether D.B.'s sentence is inappropriate in light of the nature of his offense and his character. Concluding the trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial or when it admitted evidence he possessed a gun, and D.B.'s sentence is not inappropriate, we affirm.

Facts and Procedural History

On March 8, 2008, Elkhart police responded to a report of gunshots and discovered Gerald Wenger lying dead in the street with a single bullet wound to his head. Police discovered two bullet casings next to Wenger, one from a 9mm handgun and one from a .45 caliber handgun. Forensic analysis revealed Wenger's wound resulted from a 9mm bullet.

Prior to the murder, Wenger had been using cocaine with some friends. Around 1:00 in the morning on March 8, 2008, Wenger left his apartment in a red and black Ford pickup truck to buy more drugs. At approximately 3:30 a.m. on March 8, 2008, Dan Holt, who lived in the same neighborhood where the murder occurred, got up to get ready for work. Holt noticed a red and black Ford pickup truck parked in an alley near his home. Ron Troyer, who also lived in the neighborhood, saw the same truck as he arrived home from work around 9:00 p.m. on March 8, 2009. As Troyer approached, he noticed

two individuals near the truck. The individuals ran away when they saw Troyer, and Troyer called the police, who identified the red and black pickup truck as belonging to Wenger. However, forensic analysis of the truck did not reveal any fingerprints other than those belonging to Wenger.

On June 18, 2008, the State charged D.B. with murder, a felony. Although D.B. is a minor, the juvenile court waived his charges to an adult felony court. The trial court held a jury trial from February 2nd to 5th, 2009, at which it tried both D.B. and codefendant Joshua Love. At the trial, the jury heard the testimony of Leiora Davis who lives in an apartment building near the murder scene. Davis testified that sometime between the 22nd and 25th of February, 2008, D.B. visited her apartment. As D.B. bent over, a gun fell from his waist onto the floor. D.B. objected to Davis's testimony; however, the trial court admitted the testimony over D.B.'s objection, instructing the jury to consider the evidence "for the limited purpose of showing preparation and plan" and not for any other reason. Transcript at 358.

The State also presented the testimony of Mario Morris. Morris testified regarding individual conversations he had with D.B. and Love, in which each man separately confessed his respective involvement in Wenger's murder. Morris first testified about conversations he had with Love while both were in jail. Love told Morris he met Wenger on the night of the murder because Wenger wanted to buy some drugs. Love got into the back seat of Wenger's truck and attempted to sell Wenger a "gang pack," which is a substance that looks like crack cocaine, but is not really crack cocaine. When Wenger discovered the ruse, he stopped the truck and an argument ensued. Both men exited the

truck and Love shot Wenger in the head with a 9mm handgun. Love then got back into Wenger's truck and travelled to a nearby alley. Love got out of the truck and went to hide his gun. He returned later to wipe down the truck so police could not find any fingerprints. During his testimony regarding his conversations with Love, Morris never mentioned the presence of a third party during the commission of the crime and never mentioned D.B. by name or by implication.

Morris next testified about conversations he had with D.B. while both were in jail. D.B. told Morris that he met up with Wenger on the night of the murder because Wenger wanted to buy drugs. D.B. got into the front seat of Wenger's truck and decided to try to sell Wenger a gang pack. When Wenger discovered the drugs were fake, an argument ensued and Wenger demanded his money back. Both Wenger and D.B. got out of the truck and continued arguing. D.B. then pulled out a .45 caliber handgun and struck Wenger on the side of his head. As D.B. struck Wenger with the gun, it fired, grazing Wenger. D.B. then told Morris he got back into Wenger's truck and drove to a nearby alley, where he left the truck. During his testimony regarding his conversations with D.B., Morris never mentioned the presence of a third party during the commission of the crime and never mentioned Love by name or by implication.

Although he had not objected to any of Morris's testimony, at the conclusion of Morris's testimony, D.B. moved for a mistrial. The trial court heard extensive arguments from all parties and ultimately denied the motion, noting that Morris's testimony regarding his conversations with each defendant did not inculpate the other defendant. At the conclusion of the trial, the jury found D.B. guilty of murder, a felony. On March 5,

2009, the trial court held a sentencing hearing, after which it sentenced D.B. to an aggregate term of sixty years with fifty-five years executed at the Department of Correction, and five years suspended to probation. D.B. now appeals.

Discussion and Decision

I. Motion for Mistrial

A. Standard of Review

D.B. first argues the trial court abused its discretion when it denied his motion for a mistrial following Morris's testimony. The denial of a motion for mistrial lies within the sound discretion of the trial court and we review the decision only for an abuse of that discretion. Lucio v. State, 907 N.E.2d 1008, 1010 (Ind. 2009). The trial court is in the best position to assess the circumstances of an error and its probable impact on the jury. Id. "The overriding concern is whether the defendant 'was so prejudiced that he was placed in a position of grave peril.'" Id. (quoting Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000)).

B. Bruton Violation[1]

[1] We point out initially the possibility that D.B. waived his Bruton claim by not moving to sever his trial from Love's. Indiana Code section 35-34-1-11(b) allows a defendant to move for a separate trial because another codefendant has made an out-of-court statement which makes reference to the moving defendant. In such a situation, the trial court must require the prosecutor to elect one of three remedies: 1) a joint trial at which the statement is not admitted into evidence; 2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been redacted; or 3) a separate trial for the moving defendant. Id. The trial court discussed the possibility of a Bruton problem prior to the beginning of the trial. The State indicated it could handle the Bruton issue during Morris's testimony. D.B. did not move the trial court to sever his trial from Love's. "[I]t is a well settled principle of law that a defendant may waive his right to confront and cross-examine witnesses." Norton v. State, 772 N.E.2d 1028, 1031-32 (Ind. Ct. App. 2002). "It has also been established in Indiana that a defendant may waive his claim of a Bruton violation through error." Id. at 1032 (citing Latta v. State, 743 N.E.2d 1121, 1126 (Ind. 2001) (defendant waived post-conviction relief claim of Bruton violation by not arguing the issue on direct appeal)). In Norton, this court found a defendant waived his Bruton claim when he moved the trial court to admit a codefendant's entire statement pursuant to the doctrine of completeness despite his knowledge the previously redacted portions of the statement would implicate him in the crime. Id. at 1036. The Indiana Code provides a pre-trial remedy for a defendant who is aware of a possible Bruton issue, and it is possible the defendant's failure to seek out such a remedy, especially when combined with the defendant's failure to object to the

D.B. argues that Morris's testimony regarding statements made by the codefendant, Love, violated his constitutional right to cross-examination because he could not compel Love to testify. In Bruton v. United States, 391 U.S. 123, 126 (1968), the Supreme Court addressed the issue of the admissibility of a codefendant's pre-trial statement during a joint trial. The Court concluded a substantial risk exists that the jury might consider one codefendant's incriminating pre-trial statement against the other codefendant as well. Id. Because the former cannot be forced against his will to take the stand, the latter is denied his Sixth Amendment right to confront and cross-examine witnesses against him. Id. at 137. However, a codefendant's statements violate Bruton only if they "facially incriminate" another defendant. See Richardson v. Marsh, 481 U.S. 200, 211 (1987); Fayson v. State, 726 N.E.2d 292, 294 (Ind. 2000); Brock v. State, 540 N.E.2d 1236, 1240 (Ind. 1989).

Morris gave separate testimony regarding statements made to him by Love and D.B. respectively. At no point during his testimony regarding Love's statements did Morris mention D.B. by name or implication. In fact, Morris made no mention of a third-party being present at the crime at all. D.B. argues, however, it would be impossible for a reasonable juror hearing testimony about both statements to not connect them into a single crime. This does not create a Bruton violation, however. Each codefendant confessed to his respective involvement in the crime and provided essentially identical details. Thus, each was implicated by his own statements to Morris alone, not by the statements of the other codefendant. Love's statements did not facially incriminate D.B.,

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questionable testimony during the trial, may result in a waiver of the Bruton issue on direct appeal. However, because we find no Bruton violation in this case, we need not address the waiver issue.

and therefore, no Bruton violation occurred. As a result, the trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial on the basis of the alleged Bruton violation.

II. Admission of Evidence

A. Standard of Review

D.B. next argues the trial court abused its discretion when it admitted evidence he possessed a gun approximately two weeks prior to the murder. The admissibility of evidence is within the sound discretion of the trial court, and we will not reverse its decision absent a showing of abuse of discretion. Gibson v. State, 777 N.E.2d 87, 89 (Ind. Ct. App. 2002). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the court has misinterpreted the law. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2009), trans. denied.

B. Prior Possession of a Handgun

Indiana Evidence Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ….

Evidence Rule 404(b) prevents the State from punishing a defendant for his character by relying upon evidence of uncharged misconduct. Rogers, 897 N.E.2d at 960. D.B. argues that evidence he possessed a handgun falls within the purview of Evidence Rule

404(b) because he was a minor. See Ind. Code § 35-47-2-3(g)(3) (prohibiting the issuance of a license to carry a handgun to any person under eighteen years of age).

Accepting as true D.B.'s assertion the evidence falls within Evidence Rule 404(b), evidence that D.B. possessed a weapon of the type used in the charged crime is nonetheless relevant to a matter at issue other than D.B.'s propensity to commit murder. See Dickens v. State, 754 N.E.2d 1, 4 (Ind. 2001) (evidence defendant carried a gun two days prior to the shooting was relevant to show opportunity to commit the crime); Rogers, 897 N.E.2d at 960-61 (evidence defendant possessed a steak knife similar to the murder weapon was admissible); Pickens v. State, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002) (evidence defendant possessed an assault rifle two years prior to the murder was admissible). Similarly here, evidence D.B. possessed a handgun a couple of weeks prior to the murder is relevant to his opportunity to commit the crime. Therefore, the trial court did not abuse its discretion when it admitted the evidence.

III. Inappropriateness of Sentence

A. Standard of Review

Finally, D.B. argues his sentence is inappropriate in light of the nature of his offense and his character. D.B.'s sixty-year sentence is five years above the advisory sentence for murder, a felony. See Ind. Code § 35-50-2-3(a). Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence "is inappropriate in light of the nature of the offense and the character of the offender." Id. When making this decision, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct.

App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). However, the defendant bears the burden to "persuade the appellate court that his … sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

B. Nature of the Offense

This murder resulted from D.B.'s attempt to sell counterfeit drugs to Wenger. Wenger discovered the ruse, became angry, and demanded his money back. An argument ensued between Wenger, D.B., and Love. There is no evidence Wenger became violent, possessed a weapon, or threatened harm to D.B. and Love. The only threat apparently made by Wenger was to report D.B. and Love to the police. Nonetheless, D.B. struck Wenger in the head with a handgun that fired upon impact grazing Wenger, and Love shot Wenger in the head from behind. D.B. and Love then took Wenger's truck and left him to die in the street. These facts depict the particularly heinous murder of an unarmed man after he discovered the defendants' scheme to sell him counterfeit drugs. Because of this, we cannot say D.B.'s sentence is inappropriate in light of the nature of his offense.

C. Character of the Offender

D.B. was thirteen years old at the time of the murder. His criminal history consists of a single juvenile adjudication for what would have been burglary, a Class B felony, if committed by an adult. The burglary occurred close in time to the murder. D.B.'s youth

and the fact this is apparently his first foray into serious crime weigh in favor of his character.

However, D.B. admitted he had used marijuana on a daily basis since he was eleven and drank alcohol almost every weekend. There is evidence that D.B. possessed a handgun two weeks prior to the murder and he struck Wenger with a handgun just prior to the murder. D.B. was also engaged in the sale of illegal drugs and attempted to sell Wenger counterfeit drugs on the night of the murder. After the murder, D.B. drove Wenger's truck away from the scene and hid it in a nearby alley. D.B. also attempted to dispose of the murder weapon by selling it. D.B. bragged about the details of the murder to friends in jail and laughed when asked about it. These facts weigh heavily against D.B.'s character. As a result, we cannot say D.B.'s sentence is inappropriate in light of his character.

D.B. bears the burden of demonstrating the inappropriateness of his sentence, and he has failed to do so. Although he was only thirteen at the time of the murder, his life was heading full speed down a dangerous path. The trial court ordered D.B. to serve the advisory sentence executed at the Department of Correction and added an additional five years of supervised probation. The trial court advised D.B. to use this time to pursue an education and addictions counseling so he would be prepared to reenter society as a productive citizen. His sentence is not inappropriate in light of the nature of his offense and his character.

Conclusion

The trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial or when it admitted evidence that D.B. possessed a handgun prior to the murder. In addition, D.B.'s sentence is not inappropriate in light of the nature of his offense and his character. Therefore, we affirm his conviction and sentence.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.

ATTORNEYS FOR APPELLANT:

STEPHEN T. OWENS
Public Defender of Indiana

LINDA G. NICHOLSON
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

D.B.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 20A05-1201-PC-18
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-1003-PC-10

October 4, 2012

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

D.B. was convicted of murder, a felony, and sentenced to sixty years in prison with five years suspended to probation. The post-conviction court denied his claim that he received ineffective assistance of trial counsel. He raises one issue for our review, which we restate as whether the post-conviction court erred in denying his petition for post-conviction relief. Concluding the post-conviction court did nor err, we affirm.

Facts and Procedural History

On March 8, 2008, Elkhart police responded to a report of gunshots and found Gerald Wenger dead with a single bullet wound. The State charged D.B. with murder, a felony, and the juvenile court waived his charges to an adult felony court. A joint jury trial was held for D.B. and codefendant Joshua Love. Among the evidence offered was the testimony of jail house informer Mario Morris.

Morris testified that he spoke with D.B. and Love individually and on separate occasions in prison. Morris recounted the details of the conversations for the jury, explaining that each man separately confessed to his respective involvement in Wenger's murder, and that neither codefendant mentioned nor implicated the other in any way. Although no objection was made during Morris's testimony, D.B. moved for a mistrial when Morris finished testifying, arguing that admitting Morris's testimony was a violation of D.B.'s constitutional rights under Bruton v. U.S. because he could not compel Love to testify.[1] Since Morris's account of Love's confession made no mention of D.B., and vice versa, the trial court concluded that the defendants' conversations did not inculpate one another and thus denied the motion. D.B. was found guilty of murder, a

[1] Bruton, 391 U.S. 123 (1968). Violation criteria will be explained in the discussion.

felony, and was sentenced to an aggregate term of sixty years in prison with five years suspended to probation.

D.B. appealed his conviction on several issues, including a claim that the trial court had abused its discretion in denying his motion for a mistrial on account of a Bruton violation. This court found that no Bruton violation occurred and affirmed the trial court. D.B. v. State, 916 N.E.2d 750, *3 (Ind. Ct. App. 2010)(Table), trans. denied.

D.B. thereafter filed a petition for post-conviction relief, claiming his trial counsel was ineffective because he failed to file a motion to sever D.B.'s trial from that of his codefendant. The post-conviction court concluded D.B. failed to establish his counsel acted unreasonably, and it denied the petition. D.B. now appeals.

Discussion and Decision

I. Standard of Review

D.B. argues that the post-conviction court erred in denying his petition for post-conviction relief. On post-conviction relief, the petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

> A petitioner who appeals the denial of PCR faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. If a PCR petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court.

Roberts v. State, 953 N.E.2d 559, 562 (Ind. Ct. App. 2011) (citations omitted), trans. denied.

II. D.B's Ineffective Assistance of Trial Counsel Claim

D.B. argues that he did not receive effective assistance of trial counsel based on his counsel's failure to move to sever D.B.'s trial from that of his codefendant.

> In order to prevail on a claim of ineffective assistance of counsel, defendant must show that (i) defense counsel's representation fell below an objective standard of reasonableness and (ii) there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation.

Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

D.B. argues that admission of Morris's testimony of the two conversations was a Bruton violation and that counsel, if acting reasonably, would have moved to sever the trial from that of his codefendant. In Bruton, the Supreme Court found that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial[.]" Richardson v. Marsh, 481 U.S. 200, 207 (1987) (citing Bruton, 391 U.S. at 135-136). In our previous opinion on D.B.'s direct appeal, we recognized that, had a Bruton violation occurred, trial counsel would have waived the right to appeal that issue by failing to move to sever the trial from that of D.B.'s codefendant. Whether counsel's failure would have been unreasonable, however, is irrelevant as this court went on to decide that no Bruton violation occurred.

D.B. tries to revisit the issue of whether there was a Bruton violation. "[R]es judicata bars relitigation of a claim after a final judgment has been rendered when the subsequent action involves the same claim between the same parties[.]" Hermitage Ins. Co. v. Salts, 698 N.E.2d 856, 859 (Ind. Ct. App. 1998). "The doctrine of res judicata

prevents the repetitious litigation of that which is essentially the same dispute." Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000) (emphasis and citations omitted)(cert. denied, 534 U.S. 1164 (2002)).

D.B. tries to circumvent res judicata by arguing that the issue of ineffective assistance of counsel is separate from the issue of whether a Bruton violation occurred. However, "[a] petitioner for post-conviction relief cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error." Shepherd v. State, 924 N.E.2d 1274, 1281 (Ind. Ct. App. 2010) (quoting Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006)), trans. denied. This is precisely what D.B. is attempting to do, as the only error D.B. alleges counsel made was failing to avert a Bruton violation.

D.B. also attempts to avoid res judicata by arguing that the Bruton issue was not previously decided on the merits because this court did not address the holdings of Cruz v. New York, 481 U.S. 186 (1987), and Lee v. Illinois, 476 U.S. 530 (1986). In Cruz, the Supreme Court held:

> where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him."

481 U.S. at 193 (reference omitted); see also Lee v. Illinois, 476 U.S. at 541 (stating "the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."). D.B. argues that Morris was an unreliable informant and that his testimony lacked sufficient indicia of reliability under the Lee standard. The Cruz and Lee analyses, however, only apply to a "nontestifying

codefendant's confession incriminating the defendant." Cruz 481 U.S. at 193 (emphasis added). Neither Cruz nor Lee modify the Bruton violation requirement that the codefendant's pretrial statement be "facially incriminating" to the defendant. Richardson, 481 U.S. at 207. As this court stated previously, "[e]ach codefendant confessed to his respective involvement in the crime and provided essentially identical details. Thus, each was implicated by his own statements to Morris alone, not by the statements of the other codefendant." D.B v. State, 916 N.E.2d at *3.

D.B. fails to prove his counsel's representation fell below an objective standard of reasonableness. As counsel's representation has not been shown to have been unreasonable, we need not address whether there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's alleged inadequate representation.

Conclusion

In support of his claim that he received ineffective assistance of trial counsel, D.B. fails to raise any issue apart from that of an alleged Bruton violation, an issue already decided and barred from reconsideration by res judicata. The post-conviction court did not err when it denied D.B.'s petition for post-conviction relief. Therefore, we affirm the denial of his petition.

Affirmed.

BAKER, J., and BRADFORD, J., concur.