

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

ROBERT EUGENE JOHNSON
ADC#78181

PETITIONER

VS.

5:12CV00370 KGB/JTR

RAY HOBBS, Director,
Arkansas Department of Correction

RESPONDENT

ORDER

Petitioner has filed a Motion (*doc. #11*) requesting the appointment of counsel. He relies on the Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In *Martinez*, the United States Supreme Court recognized a "limited" and "narrow" equitable exception to the procedural default doctrine in jurisdictions where an ineffective assistance of trial counsel claim must be raised for the first time 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."¹ *Id.* at 1320.

¹ In *Dansby v. Norris*, 682 F.3d 711 (8th Cir. 2012), the Eighth Circuit considered the *Martinez* exception, in the context of a federal habeas claim arising in Arkansas, and concluded that, because an ineffective assistance of counsel claim may be raised in a motion for new trial and on direct appeal in Arkansas, *Martinez* was inapplicable. However, in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the United States Supreme Court held that *Martinez* was

Petitioner argues that, pursuant to *Martinez*, he is entitled to the appointment of counsel and a stay so that appointed counsel can investigate his procedurally-defaulted ineffective assistance claims. He also requests counsel to investigate his claim of actual innocence.

While *Martinez* establishes an equitable exception to procedural default, it does not provide an independent basis to appoint counsel in a habeas case. It is well settled that a habeas petitioner in a non-capital case does not have a constitutional or statutory right to counsel. *See Morris v. Dormire*, 217 F.3d 556, 558 (8th Cir. 2000).

Instead, the Court may, in its discretion, appoint counsel if: (1) the habeas action is factually or legally complex; or (2) the petitioner is unable to investigate or articulate his claims without court-appointed counsel. *Id.* After careful consideration, the Court concludes that the factual and legal issues presented in this non-capital habeas case are not complex, and that Petitioner has demonstrated his ability to investigate and articulate his claims.

applicable in Texas, where the procedural rules only “theoretically” allowed for ineffective-assistance claims to be raised on direct appeal: “where, as here, a state procedural framework, by reason of its design and operation, 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, our holding in *Martinez* applies.” Afterwards, the United States Supreme Court vacated the *Dansby* decision and remanded the case to the Eighth Circuit “for further consideration in light of *Trevino v. Thaler*[.]” *Dansby v. Hobbs*, 133 S. Ct. 2767 (2013).

The Eighth Circuit’s reconsideration of *Dansby* is currently pending. However, in a recent capital habeas case, *Sasser v. Hobbs*, 735 F.3d 833, 852-853 (8th Cir. 2013), the Court held that the Arkansas procedural system did not “as a systematic matter” afford the petitioner “meaningful review of a claim of ineffective assistance of trial counsel” on direct appeal. Accordingly, it held that *Martinez* and *Trevino* were applicable.

IT IS THEREFORE ORDERED THAT Petitioner's Motion for Stay and Appointment of Counsel (*doc. #11*) is DENIED.

Dated this 5th day of March, 2015.



UNITED STATES MAGISTRATE JUDGE