# IN THE UNITED STATES DISTRICT COURT
# FOR THE SOUTHERN DISTRICT OF OHIO
# WESTERN DIVISION AT DAYTON

ANTONIO SANCHEZ FRANKLIN,

Petitioner, : Case No. 3:04-cv-187

\- vs -

Magistrate Judge Michael R. Merz

NORMAN ROBINSON, Warden,

Respondent. :

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## DECISION AND ORDER DENYING COUNSELED MOTION FOR RELIEF FROM JUDGMENT

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This capital habeas corpus case is before the Court on a Motion for Relief from Judgment filed by appointed counsel on Franklin's behalf (Doc. No. 159). The Warden opposes the Motion (Doc. No. 161) and Franklin's counsel have filed a Reply in support (Doc. No. 170).

This post-judgment Motion is properly decided by the Magistrate Judge because the case was referred under 28 U.S.C. § 636(c) with the unanimous consent of the parties (Doc. No. 26).

**Procedural History**

Franklin was indicted for the aggravated murders of two of his grandparents and an uncle. A Montgomery County trial jury convicted him and recommended the death sentence which Judge James Gilvary imposed. The convictions and sentence were affirmed by the Supreme Court of Ohio on direct appeal. *State v. Franklin*, 97 Ohio St. 3d 1, 2002-Ohio-5304 (2002). Upon notice of his intent to seek habeas relief, this Court appointed counsel who filed the Petition on June 1, 2004, seeking

relief on fifty-one grounds (Doc. No. 21). The Court denied habeas corpus relief. *Franklin v. Bradshaw*, 2009 U.S. Dist. LEXIS 23715 (S.D. Ohio Mar. 9, 2009)(copy at Doc. No. 104). Franklin appealed to the Sixth Circuit and this Court granted a certificate of appealability on nine grounds for relief, including Ground Fourteen, the claim in issue in this Motion (Doc. No. 139). The Sixth Circuit then affirmed the dismissal. *Franklin v. Bradshaw*, 695 F.3d 439 (6th Cir. 2012), and the Supreme Court denied certiorari. *Franklin v. Robinson*, 133 S. Ct. 1724 (Apr. 1, 2013). The instant Motions followed.

## Analysis

In the Fed. R. Civ. P. 60(b) Motion filed by his counsel (Doc. No. 159), Franklin seeks relief from this Court's final judgment on his Fourteenth Ground for Relief, ineffective assistance of trial counsel for failing to request a second competency hearing (Motion, Doc. No. 159, PageID 2458).

This Court decided the Fourteenth Ground for Relief on the merits:

> In his fourteenth ground for relief, Franklin argues that his counsel were ineffective when they failed to request a second competency hearing in response to his peculiar behavior during his trial. (Petition, Doc. No. 21 at 25.) This Court addressed and denied the underlying claim which Franklin raised in his second ground for relief, supra. There being no merit to the underlying claim, there can be none to the claim of ineffective assistance of trial counsel, either. Accordingly, Franklin's fourteenth ground for relief is denied.

(Decision, Doc. No. 104, PageID 1560-61.) Franklin's Second Ground for Relief alleged that his behavior at trial was so bizarre that the trial court had a duty to order a second competency hearing *sua sponte*. This Court also denied that claim on the merits (Decision, Doc. No. 104, PageID 1506-09).

The Sixth Circuit noted that this Court had decided Ground Two on the merits and affirmed on the same basis. *Franklin*, 695 F.3d at 449-50. In ruling on the Fourteenth Ground for Relief, it wrote:

> Franklin argues that trial counsel were ineffective in the guilt phase in failing to request another competency hearing. The district court denied this claim because, there being no merit to the underlying claim (trial-court error in not *sua sponte* ordering another hearing), there could be no merit to this claim either. We agree.
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> To establish trial counsel's ineffectiveness, petitioner must show: (1) that counsel's performance was deficient, i.e., objectively unreasonable under prevailing professional norms; and (2) that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id*. at 694.
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> Because this claim was raised on direct appeal and Franklin abandoned the post-conviction version of the claim, *see Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998), he can only rely on the record evidence that was before the Ohio Supreme Court on direct appeal. Based on this evidence and the presumptions attendant to the state supreme court's findings, Franklin was competent. There was no reason to hold a second competency hearing. It causes no prejudice not to raise an argument that would have lost anyway. Hence, counsel caused Franklin no prejudice when they did not request another competency hearing. The Ohio Supreme Court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent, was not based on an unreasonable determination of the facts in light of the evidence presented, and was not clearly erroneous. Franklin fails to demonstrate prejudice.

695 F.3d at 451-52. To paraphrase, both this Court and the Sixth Circuit held there was no prejudice in failing to move for a second competency evaluation because there was no duty to order such a hearing and therefore no ineffective assistance of trial counsel in failing to move for a hearing. Both courts denied this claim on the merits.

Franklin now moves to reopen the judgment under Fed. R. Civ. P. 60(b). He does not

specify which subsection he believes supports his claim, but it could only plausibly be Rule 60(b)(6)("any other reason that justifies relief") because the Motion was made well outside the one-year jurisdictional limit on motions under 60(b)(1), (2), or (3), it does not allege the judgment is void (4), or that it has been satisfied or discharged (5). The Warden infers that the Motion is made under 60(b)(6) (Memo in Opp., Doc. No. 161, PageID 2484) and Franklin implicitly concedes the classification in his Reply (Doc. No. 170, PageID 2603).

Subsection (b)(6) is properly invoked only in "unusual and extreme situations where principles of equity mandate relief." *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 597 (6th Cir. 2006) (internal quotation marks omitted). Motions seeking extraordinary relief under this subsection must be brought within a reasonable time after judgment. Fed. R. Civ. P. 60(c)(1); *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009). Although the Warden challenges the timeliness of the Motion (Memo in Opp., Doc. No. 161, PageID 2492), the Court finds the explanation of circumstances in Franklin's Reply (Doc. No. 170, PageID 2603-04) to be persuasive.

Relief should be granted under Rule 60(b)(6) only in unusual circumstances where principles of equity mandate relief, *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990), and the district court's discretion under 60(b)(6) is particularly broad. *Johnson v. Dellatifa,* 357 F.3d 539 (6th Cir. 2004); *McDowell v. Dynamics Corp.*, 931 F.2d 380, 383 (6th Cir. 1991); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989).

A change in decisional law is usually not, by itself, an extraordinary circumstance. *McGuire v. Warden*, 738 F.3d 741 (6th Cir. 2013), *citing Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007); *Agostini v. Felton*, 521 U.S. 203, 239 (1997); *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001). The decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance

numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009), *quoting Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefits Fund,* 249 F.3d 519, 529 (6th Cir. 2001).

Without question, the United States Supreme Court on March 20, 2012, significantly changed the law regarding ineffective assistance of trial counsel claims barred from merits consideration in federal habeas proceedings by a procedural default in presenting them to the state courts. Prior to that date, such a procedural default was a complete bar and had been for twenty years in accordance with *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

However, in *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), the Supreme Court held:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington,* 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). 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, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (describing standards for certificates of appealability to issue).

132 S. Ct. at 1318-1319. The harm the Supreme Court sought to remedy in *Martinez* was the possibility a substantial claim of ineffective assistance of trial counsel would never receive merit consideration because a state required that claim to be raised in a collateral attack, and not on direct appeal, but did not have to provide counsel for the collateral attack. Justice Kennedy

wrote:

> To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statements in Coleman that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. . . . Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

*Id.* at 1315. The Court did not create a new constitutional right to counsel in post-conviction, but the degree of counsel neglect at that stage had to meet the standard of *Strickland*, *supra*. *Id.* at 1318.

Ohio does not require ineffective assistance of trial counsel claims to be brought in post-conviction in the same way that Arizona and the federal criminal system do, so there was no immediate understanding that *Martinez* applied in Ohio. However, in *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), the Court extended *Martinez* to the Texas system. In *McGuire v. Warden*, 738 F.3d 741 (6th Cir. 2013), the Sixth Circuit considered the impact of *Trevino* on the Ohio system:[1]

> Thus, Ohio law suggests two different ways to look at *Trevino*. On the one hand, certain claims can for practical purposes only be brought in an initial-review collateral attack in a post-conviction petition. And *Trevino* recognized that a "meaningful opportunity to present a claim of ineffective assistance of trial counsel" includes "the need to expand the trial court record." 133 S. Ct. at 1921. Ohio courts recognize that claims requiring evidence outside the record may only be meaningfully litigated in post-conviction proceedings and may loosen ordinary *res judicata* principles in such cases: "although ineffective assistance of counsel ordinarily should be raised on direct appeal, *res judicata* does not bar a defendant from raising this issue in a petition for postconviction

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[1] McGuire's 60(b) motion arose in this Court but was fully decided in the interval between *Martinez* and *Trevino*. *McGuire v. Robinson,* 2012 U.S. Dist. LEXIS 153403 (S.D. Ohio Oct. 25, 2012)(Report and Recommendations); 2012 U.S. Dist. LEXIS 176815 (S.D. Ohio Dec. 13, 2012)(Supplemental Report and Recommendations); 2013 U.S. Dist. LEXIS 36958 (S.D. Ohio Mar. 18, 2013 (Order Adopting Reports and Recommendations)(Dlott, Ch. J.) *Trevino* was not decided until May 28, 2013.

> relief if the claim is based on evidence outside the record[,] . . . even when the issue of ineffective assistance of counsel was raised on direct appeal." *State v. Richmond*, 2012-Ohio-2511, No. 97616, 2012 WL 2047991, at *1 (Ohio Ct. App. 2012) (citing *State v. Smith*, 17 Ohio St. 3d 98, 17 Ohio B. 219, 477 N.E.2d 1128, 1131 n.1 (Ohio 1985)). Thus, in Ohio, if ineffective assistance cases are divided into two categories, one could argue that the category requiring evidence outside the record must be brought on collateral review in order for review to be meaningful.
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> On the other hand, in the "ordinary" case, "ineffective assistance of counsel at mitigation, just like ineffective assistance at trial, is an issue that can be brought on direct appeal," *State v. Combs*, 100 Ohio App. 3d 90, 652 N.E.2d 205, 212 (Ohio Ct. App. 1994) (collecting cases), with a constitutionally required appellate attorney, *see Franklin v. Anderson*, 434 F.3d 412, 428 (6th Cir. 2006) (citing *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)); *see also State v. Davis*, 119 Ohio St. 3d 422, 2008 Ohio 4608, 894 N.E.2d 1221, 1226 (Ohio 2008); Ohio R. App. P. 26(B). Indeed, such a claim was raised on McGuire's direct appeal, and was treated thoughtfully by the Supreme Court of Ohio on discretionary review, albeit as part of an ineffective assistance of appellate counsel claim. Arguably, then, the review of trial counsel ineffectiveness claims in Ohio is more "meaningful" than in Texas, because in Ohio there is "ordinarily" the availability of direct review with constitutionally required counsel, with the back-up of collateral attack where evidence outside the record is required. All of this shows that the application of *Trevino* to Ohio ineffective-assistance claims is neither obvious nor inevitable.

*McGuire,* 738 F.3d at 751-52. The court declined to decide whether *Trevino* applies to Ohio cases generally, but concluded "it is not obvious *Trevino* applies here." It affirmed this Court's denial of relief as within the permissible range of discretion.

Franklin's counsel make an extended argument that the Ohio procedure for raising ineffective assistance of trial counsel claims is sufficiently parallel to the Texas procedure that *Trevino* applies in Ohio (Reply, Doc. No. 170, PageID 2595-98).

They first quote *McGuire* for the proposition that "*res judicata* does not bar a defendant from raising [ineffective assistance of trial counsel] in a petition for post-conviction relief if the

claim is based on evidence outside the record[,] . . .even when the issue was raised on direct appeal." 738 F.3d at 751-52, *quoting State v. Richmond*, 2012-Ohio-2511, 2012 Ohio App. LEXIS 2194 (8th Dist. June 7, 2012), which in turn cites *State v. Smith*, 17 Ohio St. 3d 98 (1985). The context from which the quotation in *Richmond* was taken is:

> **[*P8]** Generally, an issue that was or could have been raised on direct appeal is not appealable in a petition for postconviction relief, because it is barred by res judicata. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994 Ohio 111, 639 N.E.2d 67 (1994). If an ineffective assistance of counsel issue concerns a matter outside the record, however, an appellate court cannot consider it on direct appeal because the court can only consider matters contained in the record. *State v. Smith*, 17 Ohio St.3d 98, 101, fn. 1, 17 Ohio B. 219, 477 N.E.2d 1128 (1985). Thus, although ineffective assistance of counsel ordinarily should be raised on direct appeal, res judicata does not bar a defendant from raising this issue in a petition for postconviction relief if the claim is based on evidence outside the record. This principle applies even when the issue of ineffective assistance of counsel was raised on direct appeal. *Id.*

This statement of the law seems to imply that, as Franklin did here, an Ohio defendant may raise an ineffective assistance of trial counsel claim on direct appeal and get a decision on the merits of that claim, based on the evidence of record, and then get more evidence that was not in the record and re-file the claim in post-conviction.

*State v. Smith, supra*, supports that position. Justice Wright wrote for the court citing controlling precedent, *State v. Cole*, 2 Ohio St. 3d 112 (1982), where the syllabus reads[2] "Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, res judicata is a proper basis for dismissing defendant's petition for

[2] The syllabus rule prevailed in Ohio from 1858 until it was abolished in 2002. It provided that the Ohio Supreme Court would announce the theoretical propositions of law on which a case was decided. While in force, it announced the controlling law and all lower Ohio courts were bound by the syllabus, as opposed to the full opinion. *State, ex rel. Heck, v. Kessler,* 72 Ohio St. 3d 98, 103 (1995).

postconviction relief." However the court distinguished Smith's situation:

> In the present case, defendant, represented by new counsel on appeal, raised the issue of the competency of trial counsel. Unlike in *Cole*, however, it is possible that the issue of competency herein could not fairly have been determined without resort to evidence dehors the record. This evidence includes trial counsel's previous legal experience and his motivations for failing to follow the notice-of-alibi rule. Under these circumstances, res judicata may not be a bar to postconviction relief.

17 Ohio St. 3d at 101, n. 1.

Thus it appears that in Ohio there are several classes of ineffective assistance of trial counsel claims. First, there will be claims which depend necessarily and entirely on evidence outside the record. For example, if a defendant had twenty bishops[3] as alibi witnesses whose names and willingness to testify he gave to his attorney, virtually all the evidence for the claim that it was ineffective assistance of trial counsel to fail to call them would be outside the appellate record. *Trevino* should apply to this category of cases because Ohio law provides almost no opportunity to supplement the record on appeal: the time for filing a new trial motion in the trial court is very short and matter cannot be added to the appellate record.

Conversely, there will be ineffective assistance of trial counsel claims which depend virtually exclusively on record evidence. For example, if a trial court fails to give a reasonable doubt instruction and counsel fails to object, all that will be needed to prove ineffective assistance of trial counsel is the transcript. *Trevino* should not apply to these cases because a criminal defendant on direct appeal is guaranteed constitutionally effective counsel.

In addition to those two poles, there will be many cases where the basis of the claim appears on the face of the record (e.g., failure to object to possibly damaging hearsay testimony),

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[3] The twenty bishops as witnesses example is from *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911)(Learned Hand, J.)

but evidence outside the record will be necessary to adjudicate it (e.g. counsel's motivation for not objecting). *Trevino* ought also to apply in these cases because there is no practical way to litigate these claims on direct appeal. This conclusion is supported by the Sixth Circuit's decision in *Sutton v. Carpenter,* 745 F.3d 787 (6th Cir. 2014), where the Tennessee procedure for litigating ineffective assistance of trial counsel claims was found to be close enough to that of Texas to come within *Trevino*.

Counsel also rely on *Gunner v. Welch,* 749 F.3d 511 (6th Cir. 2014), in which the court held that failure of appellate counsel to tell a client when the appellate record was filed, triggering the 180-day statute of limitations for filing a post-conviction petition in Ohio, constituted ineffective assistance of appellate counsel, excusing a procedural default in failing to timely file a post-conviction petition to raise an ineffective assistance of trial counsel claim. *Gunner* is not directly applicable to this case because Gunner was denied effective assistance of counsel in a proceeding in which he was constitutionally entitled to such assistance. In *Gunner* the Sixth Circuit did not decide whether Ohio practice for litigating claims of ineffective assistance of trial counsel is sufficiently like Texas as to come within Trevino, but merely what the requirements are for effective assistance of appellate counsel.

Franklin's case does not fit into any of these categories. Franklin's appellate counsel, who were different from his trial counsel, presented this ineffective assistance of trial counsel claim to the Ohio Supreme Court and thereby represented to that court that the claim could be decided on the appellate record. The Ohio Supreme Court agreed and decided the claim on the merits on the same basis as this Court and the Sixth Circuit: since there was no need for a second competency hearing, there was no ineffectiveness in failing to move for one. *State v. Franklin,* 2002-Ohio-5304 at ¶ 41. Unlike the situation in *Smith, supra*, the court did not

hypothesize additional evidence which might be probative on the ineffective assistance of trial counsel claim. Franklin has cited no case authority where a defendant presented an ineffective assistance of trial counsel claim on direct appeal, lost, then re-presented the same claim with additional evidence in post-conviction and obtained a ruling that *res judicata* did not apply.

Franklin attempted to resurrect this claim as part of the Third Ground for Relief in post-conviction. In rejecting the claim, Judge Hall[4] wrote:

> As for any suggestion that counsel was ineffective for not requesting another competency hearing, it also fails. Trial counsel effectively and properly plead the theory of not guilty by reason of insanity. Counsel followed that with a request to determine whether Franklin was competent to stand trial. After being found competent to stand trial, Franklin displayed behavior at trial which has been described as anything from incompetency to bad manners. This behavior, as well as any other outburst, is noted on the record. Whether that behavior, in the face of the observations made by the trial court and the testimony of Dr. Martin, should have signaled to the trial attorney that another competency hearing was called for is a matter for appeal. No evidence outside the record is admitted which supports a claim that counsel had a duty to request a new competency hearing, much less that counsel breached that duty to the prejudice of his client.

(Decision, Order, and Entry Sustaining Plaintiff-Respondent's Motion for Summary Judgment, Appx. Vol. 13, p.30-31.)

This is not a case such as this Court has sometimes seen where the trial judge adopts a prosecutor-drafted set of findings of fact and conclusions of law on a post-conviction petition. Judge Hall's Decision is sixty-nine pages long and shows careful consideration of the issues and of the evidence outside the record presented with the post-conviction petition. *Id.* He expressly found that the third claim for relief, which includes this ineffective assistance of trial counsel claim "is barred by *res judicata*." *Id.* When the record reveals that the state court's reliance on

[4] Judge Michael T. Hall, now of the Second District Court of Appeals, succeeded Judge Gilvary on the Montgomery County Common Pleas Court upon the latter's death in 1999.

its own *res judicata* procedural bar is misplaced, federal habeas review is not be precluded. *White v. Mitchell*, 431 F.3d 517, 527 (6th Cir. 2005), *citing Hill v. Mitchell*, 400 F.3d 308 (6th Cir. 2005); *Greer v. Mitchell,* 264 F.3d 663, 675 (6th Cir. 2001). This is not such a case.

On appeal, the Second District decided:

> **[*P17]** In his third claim for relief, Franklin argued that he was incompetent to stand trial. He argues now that the trial court erred in dismissing this claim based on its finding that it was barred by *res judicata*. In support of this argument, Franklin submitted affidavits from Dr. Sharon Pearson, who examined Franklin following his trial and opined that he had not been competent to stand trial, from Suzanne Lough Wynn, who worked with Franklin's defense counsel and observed strange behavior from Franklin, and from [trial attorneys] Henke and Cumming, who stated that Franklin was unable to assist them in his defense. He also submitted prison records describing his behavior.
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> **[*P18]** The trial court concluded that this claim was barred by *res judicata* because the information in these affidavits amounted to nothing more than disagreement with the trial court's decision. We agree. Whether the trial court erred in concluding that Franklin was competent to stand trial must be ascertained from the record. The fact that Franklin is now submitting affidavits from people who disagree with the trial court's decision in that regard does not save this claim from the application of *res judicata*. As with the Jolstad affidavit, defendants cannot overcome *res judicata* merely by having an expert attest that the trial court erred.
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> **[*P19]** Franklin also argues that his trial counsel were ineffective in failing to request a new competency hearing during the trial. We evaluate ineffective assistance of counsel arguments in light of the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of reasonable assistance. See *id*., 104 S. Ct. at 2064-65. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. See *id.*, 104 S. Ct. at 2064. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the

> basis of a finding of ineffective assistance of counsel. See *id.*, 104 S. Ct. at 2065.
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> **[*P20]** We cannot find that Franklin's attorneys fell below an objective standard of reasonableness in not requesting a new competency hearing during trial. They had already argued Franklin's incompetency to the trial court and lost. With no reason to believe they would be successful on a second attempt, it was a reasonable tactical decision to refrain from requesting a new hearing. Furthermore, as we have no reason to believe that the result would have been different had they done so, Franklin has failed to establish that he was prejudiced. Therefore, we find that the trial court did not err in dismissing this claim without a hearing.

*State v. Franklin,* 2002–Ohio-2370, 2002 Ohio App. LEXIS 2375 (2nd Dist. 2002)(Wolff, P.J.)

The gravamen of these post-conviction decisions is that the ineffective assistance of trial counsel claim for failure to request a second competency hearing could have been properly presented on direct appeal and was therefore barred from presentation on the merits in post-conviction.

Franklin’s counsel now argue:

> Because of their failure to present evidence *de hors* [sic] the record in Franklin’s ‘initial-review collateral proceeding,’ post conviction counsel defaulted Franklin’s only opportunity to support his claim that trial counsel should have requested a second competency hearing with evidence outside the record. Though the post conviction court did not use the phrase ‘procedural default,’ its finding that “no evidence outside the record” was presented is a plain statement that a procedural requirement was not met.

(Motion, Doc. No. 159, PageID 2461.) Judge Hall did not write that no evidence outside the record was **presented**, but rather that no such evidence was **admitted**. It was not admitted because it was barred by the Ohio doctrine of *res judicata* as applied to criminal cases. Franklin was not barred from a decision on the merits of this ineffective assistance of trial counsel claim in post-conviction by procedural default of post-conviction counsel in not submitting more

evidence, but because the matter was *res judicata.*

Because the Court determines that *Trevino* does not apply to this case, it need not decide whether the other factors involved in deciding at Rule 60(b)(6) motion make this a case involving "extraordinary circumstances." Because *Trevino* does not apply, the Court need not decide whether the instant Motion is effectively a second or successive habeas petition or is instead a "true" Rule 60(b) motion as contemplated by *Gonzalez v. Crosby,* 545 U.S. 524 (2005). Finally, the Court need not decide the Warden's claims that the Motion is barred by collateral estoppel or the law of the case doctrine. However, the Court expressly rejects the Warden's *res judicata* defense because that doctrine is not per se applicable habeas corpus cases in federal court. *Salinger v. Loisel*, 265 U.S. 224, 230 (1924); *McCleskey v. Zant*, 499 U.S. 467 (1991).

**Conclusion**

*Martinez* and *Trevino* do not save Franklin's Fourteenth Ground for Relief. He received consideration of the merits of that claim on direct appeal to the Ohio Supreme Court. Furthermore, he was not precluded from merit consideration of the claim in post-conviction by any procedural default of post-conviction counsel, but by Ohio's *res judicata* doctrine.

Because this opinion decides difficult and complex questions, counsel are invited to consider motions for reconsideration if they believe the Court has not adequately dealt with any of the points raised in their memoranda. Any such motion should be filed within the time allowed under Fed. R. Civ. P. 59(e).

Franklin’s counseled Motion for Relief from Judgment is DENIED.

August 25, 2014.

s/ *Michael R. Merz*
United States Magistrate Judge