No. 23-5037

IN THE

Supreme Court of the United States

PATRICK LEONARD MARTINEZ,

Petitioner,

v.

BOBBY LUMPKIN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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REASONS FOR GRANTING THE PETITION

Sgt. Patrick Martinez asks the court to reconsider its denial of his petition for a writ of certiorari with this petition for rehearing. Both intervening circumstances of a substantial effect and substantial grounds for review not previously presented support rehearing in this case. Rule 44.2.

I. Substantial Intervening Circumstances Support Granting the Petitions

Texas prisoners have no realistic opportunity to litigate ineffective assistance of counsel ("IAC") claims despite the fact that—by virtue of suffering the worst consequences of ineffective assistance, such as being locked up in a dangerous and restrictive prison system even by American standards—they are the group that most needs a meaningful opportunity to raise them. Two significant events since the petition for writ of certiorari was filed underscore this point:

A. Texas Department of Criminal Justice ("TDCJ") Imposed a Statewide Lockdown of Its Prisons

On September 6, 2023, while the petition for writ of certiorari was pending, TDCJ instituted a statewide lockdown of all its prisons.[1] This Court denied the petition for certiorari on October 2. Petitioner, incarcerated in the Coffield Unit prison, remained under lockdown until October 16.[2]

[1] *See* https://www.tdcj.texas.gov/news/units_resuming_normal_operations.html. Accessed October 24, 2023.

[2] *See* https://www.tdcj.texas.gov/news/systemwide_lockdown_and_comprehensive_search.html. Accessed October 24, 2023.

Under lockdown, prisoners cannot access the prison law library.[3] As a result, when the Court denied Martinez's petition for a writ of certiorari, it was unclear whether he would have any opportunity to file a petition for rehearing on his own. TDCJ finally ended its lockdown of Coffield Unit on October 16, which would have given Martinez just 11 days to file a petition *pro se*. That short period does not change the fact that Texas ultimately controls—and unpredictably withholds—access to the legal system for prisoners.

The lockdown therefore highlights the impossible situation in which indigent prisoners find themselves: not only do they have no attorney for their single opportunity to litigate IAC claims—as well as no chance to investigate their potential claims—but they also may have no access to legal resources for significant periods of time based on the decisions of the state's prison administrators. Unless the United States Constitution permits a state to "fenc(e) out" its poor from effectively raising ineffective assistance of counsel claims by erecting permanent (*e.g.*, no right to habeas counsel) and random (prison lockdowns) obstacles, the Court should grant this petition.[4] *See M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (citing *Griffin v. Illinois*, 351 U.S. 12, 23 (1956)).

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[3] I cannot find a source to cite for this. That said, I was informed of it by Petitioner and confirmed it with an ex-prison guard, Carlos Amparan, who worked at the Sanchez Unit in El Paso, TX.

[4] To be clear, the legitimacy of the Texas system is contingent on its indigent prisoners' ability to effectively litigate ineffective assistance of counsel and other habeas claims under this Court's precedent. After all, IAC claims are "impossible" on direct appeal when there is a right to counsel. *Trevino v. Thaler*, 569 U.S. 413 (2013). If the only alternative to appeal is the no-right-to-an-attorney-nor-investigation-nor-record-nor-hearing habeas proceeding, then that proceeding must not put indigent prisoners at a material disadvantage to those who can afford counsel and investigation to raise such claims. *See Halbert v. Michigan*, 545 U.S. 605, 618–23 (2005) (explaining why Michigan system required appointment of counsel for defendants seeking first-tier review).

B. Subsequent Texas Habeas Decisions Support Granting the Petition for Writ of Certiorari

The habeas corpus decisions by the Texas Court of Criminal Appeals ("CCA") since Petitioner filed his petition for a writ of certiorari on June 30, 2023 reflect the systemic fencing out of lawyer-less, indigent habeas petitioners from meaningful review.[5] During that roughly 3-4 month period, the state court decided around 300 habeas cases. It granted relief in 24 of them (excluding "out of time" relief, where the court allows a defendant to file a late pleading, such as a notice of appeal). Only two of these 24 cases were *pro se* (notably, that is two more than the court granted to *pro se* clients in the preceding 3-months).[6] In neither of these two *pro se* cases did the court grant relief for ineffective assistance of counsel. *Ex parte Lewis*, No. WR-94,910-01, 2023 WL 6284555, at *1 (Tex. Crim. App. Sept. 27, 2023) (setting aside conviction because defendant agreed to "shock probation" plea offer but was not returned to county to be put on probation); *Ex parte Simpson*, No. WR-15,305-03, 2023 WL

[5] The review of Court of Criminal Appeals cases discussed here is based on the imperfect process of counsel looking at the court's website, going through its "hand down" lists, and then reviewing the webpage for each case. Usually, the case page will name the attorney if the applicant has one. Sometimes, however, the applicant will have counsel, yet the webpage does not list a representative. For example, the *Ex parte Castillo* page lists no attorney, but the opinion states the trial court appointed applicant habeas counsel (case webpage available at https://search.txcourts.gov/Case.aspx?cn=WR-94,546-01&coa=coscca).

[6] The Court of Criminal Appeals lists one *pro se* case from the preceding period under the heading of "habeas corpus relief granted," but the court actually does not grant habeas corpus relief in that case, it conditionally grants mandamus relief. See *In re Traylor*, No. WR-94,494-03, 2023 WL 3487080, at *1 (Tex. Crim. App. May 17, 2023). That case is noteworthy because it illustrates the absurdity of the Texas system, at least as far as it concerns indigent persons. There, the *pro se* prisoner needed the state-mandated form for postconviction habeas corpus applications. The district clerk would not send him the form. Consequently, he had to successfully litigate an action for writ of mandamus just to get the form he needed to then file his claim for habeas corpus relief. *Id*. Indigent Texans will continue to face such obstacles (and it is safe to say not all will successfully litigate mandamus actions) unless this Court intervenes.

5423152, at *1 (Tex. Crim. App. Aug. 23, 2023) (granting relief on time credit issue and denying IAC claims).

The two *pro se* cases where the court granted relief had records where the right to relief was clear. Such cases are rare, however, especially when it comes to IAC—a point this Court has itself made. *See Martinez v. Ryan*, 566 U.S. 1, 11 (2012) (observing, "[c]laims of ineffective assistance at trial often require investigative work…"). Indeed, it is because prisoners in Texas have no lawyers and cannot investigate potential claims that the CCA rarely grants relief for their IAC claims. In other words, it is not that the court erroneously denies their claims; rather, the indigent applicants cannot present adequate grounds.

The proof is in the pudding, so to speak: the CCA did not grant relief to a single *pro se* claim of ineffective assistance of counsel since Sgt. Martinez filed his petition for a writ of certiorari. The complete lack of success for *pro se* IAC litigants validates the reasons Martinez gave for granting his petition.

II. The Court Should Consider a Ground Not Previously Presented: The Texas Postconviction Process Is Fundamentally Inconsistent with Adversarial Process

In theory, the adversarial nature of our criminal justice system "is both fundamental and comprehensive." *United States v. Nixon*, 418 U.S. 683, 708-09 (1974). Adversarial process surely ranks as a "principle of justice" so fundamental that due process guarantees it. *See Dist. Attorney's Office v. Osborne,* 557 U.S. 52, 69 (2009) (limiting intervention into state postconviction procedures to violations of fundamental principles of justice). Although not previously presented, this Court

should ask whether the adjudication of Martinez's IAC claims "within the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" specifically, whether his habeas proceeding was an adversarial proceeding or a sham one. *Id*.

Stuck in prison without an attorney or ability to investigate potential claims, Martinez filed what is undeniably an inadequate petition for habeas corpus relief. It is undeniably inadequate because the CCA said so: it declared the applicant alleged facts that might entitle him to relief and directed the trial court to "develop" the record by ordering Martinez's trial and appellate attorneys to respond to his claims. *Ex parte Martinez*, No. WR-90,751-01, 2020 WL 913296, at *1 (Tex. Crim. App. Feb. 26, 2020). The CCA's order notes that the trial court may use Texas Code of Criminal Procedure Article 11.07 § 3(d) to develop the record, a provision that allows for a hearing and the appointment of counsel. Of course, that is not what happened. What happened is what usually happens, at least in El Paso: the state's attorney (1) obtained the statements from Martinez's attorneys, (2) filed an answer to his claims and drafted findings of facts and conclusions of law recommending that the CCA deny relief, and (3) gave said findings and conclusions to the trial court for its signature.

Thus, it was the CCA that defined how the record would be developed—with statements from the two attorneys against whom Martinez alleged ineffective assistance. Then it was left to the trial judge of conviction to decide whether to hold a hearing and to appoint counsel—no on both counts. Finally, it was Martinez's

prosecutors who obtained the two attorneys' statements for his claims. In short, Martinez was shut out completely from his own case after he filed the writ.[7]

Martinez submits that the writ proceedings described above fall far short of the adversarial testing that forms the basis of our justice system. For one, the courts were too involved, deciding what evidence was needed for the claims and whether the claims needed a hearing. *Cf. NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them"). Two, the adversary process relies primarily on the principle of party presentation. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008). If two sides clash and one of them prevails, one can believe there was a good reason for it. The one-sided proceeding below, however, brooks no presumption that the outcome reached was fair, just, or correct.

For even in this stunted record, it is apparent that Martinez might have successfully presented other viable grounds of IAC in an adversarial proceeding with an advocate for his claims and an investigation designed to support them. For example, trial counsel's affidavit expresses the gravely mistaken opinion that a jury could not convict his client—he swore, "I could not see any way to lose this case." App. at 4a. For that reason, counsel recalled that he "would have recommended against" taking a plea deal. *Id*. That sounds a lot like the attorney's actions in *Lafler* that both

[7] Not that Martinez did not try to respond to the State's filings and the attorneys' statements. He mailed responses to them on May 14, 2020, shortly after he received them in prison. App. at 1a. Unfortunately, the El Paso District Clerk did not file them until February 2021 (only about six months after the CCA had already denied relief). (Docket Entry Feb. 25, 2021.)

sides agreed constituted deficient performance. *Lafler v. Cooper,* 566 U.S. 156, 163 (2012). What is more, his attorney called no punishment witnesses on Martinez's behalf—despite his client's military service record and family support. (Trial Record 5 at 10.) Trial counsel's failure seems only explicable by his unprofessional faith that the case would never reach punishment.

At bottom, the record here only hints at these potential claims. They were neither raised nor investigated, so the record does not support them. They are "what ifs" left over after a habeas process that seems "fundamentally inadequate" and inconsistent with our adversarial system. *See Osborne*, 557 U.S. at 69. The Court should grant review of this case because the inadequate Texas postconviction procedures merit being "upset." *Id.*

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the Court should grant rehearing, grant the petition for writ of certiorari, and review the judgment below.

Respectfully submitted,

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October 26, 2023

CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this petition for rehearing is presented in good faith, not for delay, and restricted to the grounds for rehearing contained in Rule 44.2.

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