1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CARLOS TREVINO, :

4 Petitioner : No. 11-10189

5 v. :

6 RICK THALER, DIRECTOR, TEXAS :

7 DEPARTMENT OF CRIMINAL JUSTICE, :

8 CORRECTIONAL INSTITUTIONS :

9 DIVISION :

10 - - - - - - - - - - - - - - - - - - x

11 Washington, D.C.

12 Monday, February 25, 2013

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14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 11:02 a.m.

17 APPEARANCES:

18 WARREN A. WOLF, ESQ., San Antonio, Texas; on behalf of

19 Petitioner.

20 ANDREW S. OLDHAM, ESQ., Deputy Solicitor General,

21 Austin, Texas; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear next

4 this morning in Case 11-10189, Trevino v. Thaler.

5 Mr. Wolf?

6 ORAL ARGUMENT OF WARREN A. WOLF

7 ON BEHALF OF THE PETITIONER

8 MR. WOLF: Mr. Chief Justice, and may it

9 please the Court:

10 The Texas Court of Criminal Appeals has

11 said, repeatedly, "As a general rule, a defendant should

12 not raise an issue of ineffective assistance of counsel

13 on direct appeal," and has recognized that Texas

14 procedure make it, "virtually impossible for appellate

15 counsel to adequately present such a claim." Those

16 claims are the choices made by the sovereign State of

17 Texas, and it renders this case just like Martinez.

18 This case well illustrates the consequences

19 of that choice. The transcript in this case was not

20 ready -- available for 7 months. That's 4 1/2 months

21 after the trial lost -- trial court lost jurisdiction on

22 any new trial motion.

23 The State itself argued, quote -- in

24 Sprouse -- "Without access to that record, new counsel

25 would have little basis for attacking the performance of

1 trial counsel."

2 JUSTICE GINSBURG: Suppose the State's

3 position were not as you accurately have stated the

4 Texas Court of Criminal Appeal. It didn't say

5 collateral review is the preferred route. It said

6 either way will do. You can bring it up on direct

7 appeal, or you can bring it up on collateral.

8 Would you say that Martinez applies in that

9 situation? Or does it depend on having the -- the State

10 highest court in the matter saying, this is the

11 preferred way to go?

12 MR. WOLF: Texas systemically channels

13 ineffective assistance claims to collateral -- to State

14 habeas.

15 JUSTICE GINSBURG: And if it didn't, if it

16 just said, you can bring it up on direct, but we realize

17 these limitations because the transcript won't be ready,

18 so you can wait and bring it up on habeas.

19 I'm just asking how far -- the rule that you

20 would like us to adopt -- you say this is just like

21 Martinez. Is that where you would draw the line, that

22 the -- the State's highest court has to say, we prefer

23 this matter to be brought up on collateral review?

24 MR. WOLF: It's not just them saying it in

25 words, but it's also saying it in the legislation and in

1 the rules that the State of Texas has adopted.

2 In order to expand the record in a Wiggins

3 claim -- which is what's the basis of Mr. Trevino's

4 claim, in order to expand that record, you have a 30-day

5 window to file a motion for new trial, and 75 days --

6 75 days to have a hearing on it or else the court loses

7 jurisdiction by operation of law.

8 CHIEF JUSTICE ROBERTS: The district court,

9 the trial court?

10 MR. WOLF: That's correct. And so you

11 couldn't expand the record. And, in order to present a

12 Wiggins claim, especially, it takes a considerable

13 amount of extra record investigation.

14 CHIEF JUSTICE ROBERTS: Has the Texas --

15 have the Texas appellate courts ever sent a -- a claim

16 back for an evidentiary hearing?

17 MR. WOLF: After 75 days, the -- the

18 district court loses jurisdiction, and I realize there

19 are some jurisdictions around the country that have that

20 opportunity. But Texas has a finality where there is no

21 provision to expand the record after that 75-day period.

22 CHIEF JUSTICE ROBERTS: So far as you know,

23 the court -- the appellate court's never done that?

24 MR. WOLF: That's correct.

25 CHIEF JUSTICE ROBERTS: Okay. Why does

1 Texas afford people in your client's position a new
2 appellate counsel?
3 MR. WOLF: Well, there's two -- actually,
4 Texas has a dual-track system. It was developed in
5 1995, a year before the Federal system was developed in
6 AEDPA. And the concept -- and the reason for it -- the
7 rationale, was to expedite these type of claims,
8 especially in death penalty claims, under
9 Section 11.071.
10 But the -- and the purpose is that there is
11 two counsels that are appointed. One counsel is
12 appointed to handle the record-based claims, and that's
13 done on direct appeal. The other counsel is appointed
14 in all cases -- there's no question -- on habeas.
15 And that attorney -- that counsel is
16 appointed with the understanding that he's going to have
17 the time to do the extra-record-based claims. In a case
18 like this, the record wasn't even prepared for 7 months
19 after the date of the judgment.
20 JUSTICE SOTOMAYOR: Counsel, I don't know
21 that you've answered Justice Ginsburg's question, and so
22 I'm going to take it up because it interests me.
23 Let's assume, as she did in her
24 hypothetical, that a State says -- doesn't have any case
25 law like Texas does, that says, we prefer you to go that

1 way, for non-record-based claims.

2 Is the difference between that hypothetical

3 State that says, you can do either, and the Texas

4 situation, is that Texas, in your mind, puts up

5 procedural impediments to using the direct appeal

6 mechanism and so that, if the other State hasn't done

7 that, has made the development of evidence, has provided

8 a full opportunity for you to develop a record before

9 the direct appeal is over with, that State wouldn't be

10 subject to Martinez, and Texas is subject to it only

11 because it has the procedural impediments?

12 MR. WOLF: That's correct because the -- the

13 scheme that Texas has developed systemically channels

14 the habeas claim, the IAC claim, the ineffective

15 assistance claim, into habeas. There is no -- to say

16 that it could be done is really an illusion.

17 JUSTICE KENNEDY: How -- how do you want us

18 to formulate the rule if we write the opinion in your

19 favor? If a State does not give a realistic

20 opportunity -- a feasible means for expanding the record

21 on direct review, then Martinez applies because it is

22 the collateral proceeding that is the meaningful one --

23 and then we go through 50 States to see if that rule

24 applies?

25 MR. WOLF: Well, it wouldn't really affect

1 50 States because some States provide a mechanism for an
2 abatement to go back on direct appeal and -- and expand
3 the record. Other States require that it go to direct
4 appeal, and each -- and those States made -- have made a
5 choice.
6 And Texas has made a choice by developing
7 this scheme. And as far as the other States, they would
8 have to compare themselves to the situation that -- that
9 we would -- that would come out of this. This --
10 JUSTICE ALITO: Well, I have the same
11 questions that my colleagues have asked. Could you give
12 us, in a sentence or two, the test that you would like
13 us to apply? Where a State does not, like Arizona,
14 prohibit the raising of this issue on direct appeal,
15 Martinez, nevertheless, applies where the State does
16 blank. Fill in the blank.
17 MR. WOLF: When it makes it impracticable,
18 in the vast majority of cases, to raise the claim on
19 direct appeal.
20 JUSTICE ALITO: Impracticable, in the vast
21 majority of cases. Now, that really would require a
22 case-by-case determination in every other State that
23 doesn't fall within the Martinez category, wouldn't it?
24 MR. WOLF: Well, not necessarily --
25 JUSTICE ALITO: No?

1 MR. WOLF: -- Justice Alito, because
2 there's -- some States require that their -- their cases
3 are directed back to -- to direct appeal, and there's a
4 mechanism to expand the record. There is some -- there
5 is -- some require it to go to direct appeal.
6 But, in Texas, what we have is a limitation
7 that's the rules that the Texas Supreme Court has
8 devised, with Texas --
9 JUSTICE ALITO: Well, I understand that.
10 But -- so -- so the State says, you have to raise this
11 on direct appeal, but you have to comply with our time
12 limits on direct appeal. And they don't appoint -- you
13 know, you don't get a new -- you don't get a new
14 attorney on direct appeal. It's the same attorney who
15 represented you at trial. So that attorney is in the
16 position of arguing that he or she was ineffective at
17 trial.
18 And that would be okay?
19 MR. WOLF: If the -- let me make sure I
20 understand the question.
21 JUSTICE ALITO: You have to raise it on
22 direct appeal or it's lost. You can't wait until
23 collateral -- until the collateral proceeding, and, by
24 the way, you don't get a new attorney. You get the same
25 attorney that represented you at trial. Would that be

1 all right?

2 MR. WOLF: No, because the new -- the old

3 attorney -- the trial attorney is in the worst, really,

4 position to understand his ineffectiveness. There is a

5 disincentive for him --

6 JUSTICE ALITO: All right. So you have the

7 same system where you get a new attorney, but you have

8 to comply with the time limits.

9 MR. WOLF: And that --

10 JUSTICE ALITO: And then you say, well, I

11 can't do all of this social background research that

12 Wiggins requires within the time limits, so that's

13 impracticable. Is that State okay?

14 MR. WOLF: No, because that's --

15 JUSTICE ALITO: That's not okay, either.

16 MR. WOLF: Because that State is -- in the

17 Texas scheme -- in the Texas scheme, the -- Texas gives

18 us another attorney in this dual track -- this system,

19 and it's understood that that attorney is the habeas

20 attorney. And he doesn't -- he doesn't have that time

21 limitation that the direct appeal attorney has,

22 that's -- that 75-day limitation.

23 JUSTICE GINSBURG: But is your point that he

24 has to have one full and fair opportunity to make the

25 Wiggins claim, and it doesn't matter whether it's direct

1 or collateral? I think you mentioned that at least one
2 State requires you to do it on direct, but does provide
3 for developing the record.
4 MR. WOLF: But the -- the bottom line in --
5 in our situation, in Texas, is that we have a scheme.
6 We have a set of -- of laws and -- and rules that
7 channel these type of claims.
8 JUSTICE GINSBURG: What are the rules other
9 than the Texas Court of Criminal Appeals having said, in
10 several decisions, the preferred route is collateral
11 review?
12 MR. WOLF: Well, first of all, the -- the
13 Rule -- the Rules of Appellate Procedure 21.8 talk about
14 the limitations of -- the number of days that you have
15 to expand the record in a motion for new trial.
16 75 days, the -- the district court loses jurisdiction,
17 they cannot hear anything else on this case. The record
18 in this case wasn't even available for 7 months after
19 the date of the trial.
20 So, even with a new attorney that's
21 appointed -- first of all, that new attorney is a
22 stranger to the case. He doesn't know anything about
23 the case. He's not in a position to talk to the client.
24 The client is not the best person to understand the
25 Rules of Appellate Procedure.

1 So he's got to wait on that -- on that trial
2 record, first of all, to see what's there. And then --
3 JUSTICE KENNEDY: I'm -- I'm not sure
4 exactly what Justice Ginsburg's formulation was, but I
5 didn't -- I don't understand why you didn't say, oh,
6 yes, that's right, there has to be one full fair
7 opportunity to raise the issue. And that's what we are
8 arguing here.
9 MR. WOLF: I'm sorry if -- if I missed that,
10 but that's exactly the point. And that's what --
11 JUSTICE KENNEDY: Then the next -- then my
12 question is: Does this apply just to capital cases?
13 MR. WOLF: No.
14 JUSTICE KENNEDY: Could we in a -- oh. So
15 this doesn't apply just to capital cases, in your
16 opinion?
17 MR. WOLF: Not necessarily. But the -- in
18 the capital arena in Texas, we have the dual-track
19 system, where you get an attorney appointed
20 automatically in a habeas setting, where, in a non-death
21 penalty setting, there is a possibility of getting an
22 attorney in the interest of justice, but it's not always
23 guaranteed. And, in that case, the appeal is done in a
24 successive way, not in this dual-track way.
25 And in -- in the death penalty arena, it

1 manifests -- it makes it even more manifestly obvious
2 that there is a systematic channeling by the State
3 referring these type of claims into habeas, while the
4 State attorney, the district appeals attorney, focuses
5 on the record-based claim, and the habeas attorney is
6 dealing with all of the case, not just the trial, but
7 the -- the appeal, to make sure that there was no
8 ineffectiveness on his part, that -- and also to do the
9 investigation on the extra-record-based claims, which
10 takes a substantial amount of time.
11 JUSTICE SOTOMAYOR: Counsel, you -- you
12 started to answer this question, but it is something
13 raised by many of the amici opposing your position,
14 which is that, by adopting your position, we're
15 essentially having to examine the 49-plus -- because we
16 have territories that have collateral and direct review
17 as well -- plus systems to see which apply -- to which
18 Martinez applies and to which -- to which Martinez
19 doesn't apply.
20 And so the question is: How do we write
21 this to sort of give enough guidance, so that we're not
22 examining each of the 49 -- or 49 systems -- or maybe
23 48, after we've decided Martinez?
24 MR. WOLF: Right. Well, I would suggest --
25 JUSTICE SOTOMAYOR: And -- and why should we

1 not fear that outcome?

2 MR. WOLF: Okay. I would suggest the rule

3 to be that Martinez applies when a State channels

4 ineffective assistance of counsel claims to State habeas

5 and makes it impracticable in the vast majority of cases

6 to raise the claim on direct appeal.

7 And, in answer to your question about all of

8 the States, many of the States do make it -- do make

9 habeas available in the direct appeal arena. So it's --

10 JUSTICE ALITO: So the reason why -- the

11 reason why there was a movement to channel ineffective

12 assistance of counsel claims to collateral review is

13 that it is often -- maybe in the great majority of

14 cases -- impracticable to adjudicate them on direct

15 appeal. So, under your standard, it seems to me that

16 covers every State.

17 MR. WOLF: Well, it wouldn't, Justice Alito,

18 for this reason: Many States have a mechanism, unlike

19 the Texas scheme, which permits the expansion of the

20 record. Some States, like Utah, who authored the amicus

21 brief, has a Rule 21.3, which permits the claimant to go

22 back and expand the record. We don't have the -- that

23 ability in Texas.

24 CHIEF JUSTICE ROBERTS: Well, your friend

25 says, page 18 of his brief, that you do. He says,

1 "Under Texas Rule of Appellate Procedure 21, direct
2 appeal counsel can supplement the record with evidence
3 developed by investigators and experts, the ones that
4 are appointed and paid for by the State on appeal."
5 Now, is that just wrong?
6 MR. WOLF: Yes.
7 CHIEF JUSTICE ROBERTS: Okay.
8 MR. WOLF: And the reason I say that is, in
9 order to obtain a record, one, you need to -- when you
10 file your motion for new trial, you have to specifically
11 set out the factual basis for the claim; and, two, the
12 affidavit has to identify the evidence that any further
13 investigation would have revealed.
14 So you've got that 30-day window when you
15 file that motion for new trial that you have to do all
16 of those things, and that's not enough time.
17 JUSTICE KAGAN: So if everything -- if
18 everything in Texas's system were the same, but you had
19 a year, would that flip Texas into a different category?
20 MR. WOLF: If the --
21 JUSTICE KAGAN: Is the problem -- is what
22 makes this impracticable just the amount of time?
23 MR. WOLF: Yes, because the time -- the
24 time -- especially in a Wiggins claim, is prohibitive in
25 order to be able to prepare and -- not just the time

1 there, but the time that is imposed by the Rules of --
2 of Appellate Procedure.
3 That 75-day window, in order to expand the
4 record, is part of this whole system, that it's
5 understood that the habeas claim is the -- the IAC claim
6 is channelled into habeas.
7 JUSTICE ALITO: Well, let me try this one
8 more time. You -- you seem to say, in your brief, that
9 the Kansas procedure and the -- the Michigan procedure
10 take those States outside of the Martinez category; is
11 that correct?
12 MR. WOLF: Yes.
13 JUSTICE ALITO: All right. Now, as I
14 understand the procedure in those cases, it is the
15 following: On direct appeal, the attorney can make a
16 motion for a new trial based on ineffective assistance
17 of counsel, and, if some threshold is met, the appellate
18 court can remand the case to the trial court for a
19 hearing on ineffective assistance.
20 Is that correct?
21 MR. WOLF: Yes.
22 JUSTICE ALITO: Okay. And that would -- in
23 most of those cases, the attorney on direct appeal is
24 going to be the attorney who represented the defendant
25 at trial and is probably not going to be in a very good

1 position to argue that he or she was ineffective at
2 trial, but that would still be okay?
3 MR. WOLF: Well, but it's a --
4 JUSTICE ALITO: And if you don't do that,
5 you've lost it.
6 MR. WOLF: Well, there's a problem with
7 declaring yourself ineffective. One, it's -- it's kind
8 of counterintuitive. In Texas, if you declare yourself
9 ineffective, there's repercussions. You're no longer
10 available to -- you know, be taken off the list to get
11 appointments on these type of claims.
12 And -- and it's also against the Bar rules
13 to -- to have that adverse interest against your client.
14 JUSTICE GINSBURG: Well, if that is the
15 system in Kansas and Michigan, then why -- why is it
16 outside Martinez, if the point is you can't effectively
17 present the ineffective assistance counsel when you've
18 got the same counsel who was alleged to have been
19 ineffective and is not going to condemn himself?
20 MR. WOLF: Well, that -- as far as their
21 State -- you know, other States are concerned -- you
22 know, those are problems within those States. But as
23 far as Texas is concerned -- you know, we are in a
24 situation that we find ourselves in -- in a Martinez
25 situation, where there was no ability to -- to raise --

1 the system that we have prevents you from raising this
2 claim.
3 And, as far as the other States are
4 concerned, some of the States have a more liberal
5 opportunity to -- to expand the record, but that's not
6 the system that we have in Texas. And this --
7 JUSTICE GINSBURG: Explain why the time that
8 you have on direct appeal isn't adequate. So you say
9 you need -- need to investigate. Well, some of the
10 things, like school records, his prison records, it
11 doesn't take a long time to get those, does it?
12 MR. WOLF: Well, it -- it takes a while.
13 I'm not going to say a long while, but releases are
14 required. Sometimes, there's opposition to releasing
15 those records. But the biggest part of -- of this whole
16 problem is getting the record, is also, in our
17 situation, to have Mr. Trevino evaluated regarding
18 his -- there was never a psychological or sociological
19 study done in his case, and to have a psychological eval
20 done, that doesn't happen in 30 days.
21 And one -- you've got to get the records,
22 and, in some of these situations, one record leads to
23 another record and finding one witness leads to another
24 witness. And, by the time you start developing all
25 these other avenues and when you put all that together,

1 then you're in a position to present that to an expert,
2 in order to make that sort of evaluation.
3 CHIEF JUSTICE ROBERTS: Well, surely --
4 surely, the trial court in Texas, when it gets a new
5 trial motion within 30 days, and the new counsel on
6 appeal says, well, I have reason to believe -- well, we
7 can see that there wasn't an adequate investigation of
8 mitigating circumstances or whatever made below, and I
9 would like the time to conduct -- you know, the
10 psychological evaluation or to contact these witnesses,
11 is the trial court going to say no?
12 MR. WOLF: That's correct because the
13 30 days is -- is a limit; it's a bar. That's all he
14 has. And, in addition, the -- the direct appeal
15 attorney has his own responsibilities. There's a
16 division of labor that's here, that the direct appeal
17 attorney is supposed to review the entire record, to
18 look for all of whatever errors that might be there.
19 And while -- and that's why, in Texas, where
20 you have this dual-track system in order to expedite the
21 appeal, there is a new attorney that's appointed to do
22 the habeas work.
23 JUSTICE KENNEDY: And because of the rather
24 sharp disagreements in the briefs on what the actual
25 facts are here, I looked at the brief filed by the State

1 Bar of Texas in support of neither party.

2 Can you tell me -- and that they are

3 critical of having new counsel work simultaneously on a

4 simultaneous timeframe concurrently with the -- with the

5 new direct appeal counsel.

6 Can you tell me how anything that's said in

7 the Texas Bar briefs helps your case?

8 MR. WOLF: Well, it helps our case because

9 it recognizes the dual-track system, and it recognizes

10 that the extra record under Section 12.22 of the

11 guide -- of the Texas guidelines that -- that were

12 formulated that the State Bar was -- one of their

13 committees on indigent defense helped develop.

14 They recognize the fact that extra record

15 investigation is the responsibility of the habeas

16 counsel.

17 I would like to reserve the balance of my

18 time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Oldham?

21 ORAL ARGUMENT OF ANDREW S. OLDHAM

22 ON BEHALF OF THE RESPONDENT

23 MR. OLDHAM: Mr. Chief Justice, and may it please

24 the Court:

25 Texas's procedures for raising

1 ineffectiveness claims are some of the most generous in
2 the country. Those procedures offered Petitioner two
3 bites at the apple.
4 The first bite came in a constitutionally
5 protected direct appeal proceeding. And any deficiency
6 in that proceeding would have been the source of cause
7 under existing cause and prejudice standards to excuse a
8 subsequent default.
9 Allowing the Petitioner to assert cause on
10 the basis of a second bite at the apple -- that is, a
11 State habeas proceeding -- would create an unwarranted
12 and unworkable extension of Martinez.
13 JUSTICE GINSBURG: Why is it a second bite
14 when the Texas Supreme Court -- court of criminal
15 appeals, has said, again and again, as a general rule,
16 defendants should not raise ineffective assistance of
17 trial counsel on direct appeal, should raise it on
18 collateral review?
19 MR. OLDHAM: Justice Ginsburg, the very next
20 sentence of that opinion, Mata v. State, states that the
21 lack of a clear record, usually, will prevent the
22 appellant from meeting the first part of the Strickland
23 test as the reasonableness of counsel's choices and
24 motivations during trial can be proven deficient only
25 through facts that don't normally appear in the

1 appellate record.

2 So the only question presented by those

3 instructions that are quoted over and over again in the

4 Petitioner's briefs is whether and to what extent

5 newly-appointed counsel -- as Justice Alito was pointing

6 out, Texas provides newly-appointed counsel on direct

7 appeal in capital cases -- can supplement the appellate

8 record with an explanation from the trial -- trial

9 counsel.

10 And where the new counsel gets an

11 explanation of the strategies of the trial counsel, the

12 record is then complete --

13 JUSTICE GINSBURG: I don't -- does the

14 statement "defendants should not raise ineffective

15 assistance of trial counsel on direct appeal" doesn't

16 mean what it says?

17 MR. OLDHAM: Oh, yes, ma'am. It does mean

18 that. It's just that what -- what the Court is

19 saying -- the very next sentence following the ones that

20 are quoted in the Petitioner's brief, says, "The reason

21 that one should not raise an issue of ineffective

22 assistance of counsel on direct appeal is because, in

23 cases where there is no explanation from the trial

24 counsel, it will be impossible to adjudicate the first

25 prong of the Strickland test."

1 It doesn't say that, as a general rule, you
2 should just never do it. It just says, if you are
3 actually going to raise a claim of ineffective
4 assistance, you should create the proper record before
5 you do it. And --
6 JUSTICE KENNEDY: But then -- but the
7 comment is that the record has to be done within a very
8 short period of time, and the -- and the trial record
9 isn't even available for -- the transcript, for some 7
10 months.
11 MR. OLDHAM: Yes, Justice Kennedy, and that
12 is why Texas has a procedure for abating and remanding
13 appeals that is materially identical to the one that
14 Kansas provides and the Petitioner concedes is
15 sufficient to satisfy this Court's inquiry in Martinez.
16 So the way that the procedure in Texas would
17 work, as it does in Kansas, is that the newly appointed
18 direct appeal lawyer -- who has no conflict and is,
19 therefore, free to accuse trial counsel of being
20 ineffective -- would file a motion to stay the appeal,
21 abate it, and remand it to the trial court.
22 The showing in both States is roughly the
23 same; it's a facially plausible claim of
24 ineffectiveness.
25 JUSTICE KENNEDY: So the new counsel on

1 direct waits for 7 months, gets the transcript. In the
2 meantime, let's assume has made some investigation, and
3 he said -- and he tells the appellate court, we have
4 some very important material that we want to introduce
5 and we need to supplement the record; please remand this
6 case.
7 MR. OLDHAM: Yes, Your Honor. And one
8 point --
9 JUSTICE KENNEDY: That -- that has never
10 happened in the State of Texas in a capital case, I take
11 it?
12 MR. OLDHAM: I'm not aware of a capital
13 case, but it has been done in many, many noncapital
14 cases. And the Court of Criminal Appeals has
15 specifically blessed it, especially -- particularly in a
16 case involving a Wiggins type ineffective assistance of
17 counsel at punishment phase.
18 That is a case called Cooks v. State. It's
19 cited on pages 32 and 34 of our brief.
20 JUSTICE GINSBURG: And the Fifth Circuit was
21 wrong, the circuit that ruled in favor of Texas, but
22 said, in the Ibarra case, the Texas Court of Criminal
23 Appeals has made it clear that State habeas petitions --
24 and the State habeas petition is the preferred vehicle
25 for developing ineffective assistance claims?

1 Was that wrong?

2 MR. OLDHAM: I believe it just needs to be

3 taken in the context of -- it is the preferred vehicle

4 if you have not developed the record to bring a claim --

5 or to bring a claim appropriately on direct appeal.

6 JUSTICE SOTOMAYOR: Could you just please --

7 JUSTICE KAGAN: Mr. Oldham, I --

8 JUSTICE SOTOMAYOR: I'm sorry.

9 CHIEF JUSTICE ROBERTS: Justice Sotomayor.

10 JUSTICE SOTOMAYOR: Let me understand what

11 you are suggesting. Counsel doesn't have a record. He

12 or she is newly appointed. Can they go into court and

13 say, I don't know if there is an ineffective assistance

14 of counsel claim, but I need to protect my client and

15 abate this hearing now, until I get the trial record,

16 whether it takes 6 months, 7 months, or a year.

17 What will the court do with its rule that

18 requires counsel to provide affidavits setting forth the

19 good-faith basis for a claim?

20 MR. OLDHAM: Well, Justice Sotomayor,

21 many -- many prisoners in Texas, in capital and

22 noncapital contexts alike, have done that within the

23 30 days, but I want to emphasize --

24 JUSTICE SOTOMAYOR: How many were given an

25 indefinite stay until they got the trial record to set

1 forth the affidavits?

2 MR. OLDHAM: Well, if it's done within the

3 first 30 days, you don't need a stay, indefinite or

4 otherwise. You can just file --

5 JUSTICE SOTOMAYOR: So what do you do with

6 the 75-day rule, which I think is absolute, which says,

7 if the court hasn't ruled on the new trial within

8 75 days, the matter ends?

9 MR. OLDHAM: I think the easiest way to

10 think about it is there are basically three stages.

11 There is the first 30-day window, and, as I say, many

12 capital and noncapital prisoners have effectively

13 brought their claims in that 30-day window.

14 JUSTICE SOTOMAYOR: Some of them have the

15 information, and some don't.

16 MR. OLDHAM: That's correct.

17 JUSTICE SOTOMAYOR: All right. So --

18 MR. OLDHAM: So that's the first box, but

19 it's certainly not the last.

20 JUSTICE SOTOMAYOR: The guys who do it, it's

21 because they have the information, and so they've

22 exhausted their claim. But we are talking about the

23 people who don't.

24 MR. OLDHAM: So to the second -- the second

25 box. After the new trial motion has been denied by an

1 operation of law, you can make, effectively, a factual
2 proffer of -- so the -- the trial court no longer has
3 jurisdiction to grant your motion, but you can make a
4 factual proffer of what you would have shown and what
5 you want to show to the court of appeals.
6 JUSTICE SOTOMAYOR: That assumes you get the
7 transcript.
8 MR. OLDHAM: Well, we are still prior to the
9 transcript because this is still -- this is still --
10 JUSTICE SOTOMAYOR: No, the 75 days has
11 passed.
12 MR. OLDHAM: And then, after that, there is
13 no briefing that has been done in the appellate court at
14 this point because the appellate briefing schedule and
15 the transcript production are tied to one another, so it
16 would never be a case where you're actually litigating a
17 direct appeal without the transcript. You -- the latter
18 doesn't start until you get the former.
19 And, at that point, you can make a motion to
20 stay and abate to return to the district court and to
21 supplement the record with evidence of your trial
22 counsel's ineffectiveness.
23 CHIEF JUSTICE ROBERTS: Even beyond the
24 75 days?
25 MR. OLDHAM: Yes, Your Honor. It

1 effectively restarts the 30-day clock, so the -- the old
2 75 days is obviously gone, and you get a new 35 days on
3 the stay and abate motion. So, in that sense, it's
4 materially identical to the procedure that Kansas
5 applies, although, as I mentioned earlier, in capital
6 cases, the State of Texas guarantees its prisoners a new
7 conflict-free lawyer, who can help with that proceeding.
8 JUSTICE BREYER: So he can do this -- I
9 didn't understand this. I'm sorry.
10 Joe Smith is convicted on day 1. The
11 transcript appears 9 months later. Okay? 9 months
12 later his new lawyer, who is supposed to proceed on
13 appeal, reads the transcript. He thinks, hmm, I think
14 there was a problem with his lawyer at the trial, and I
15 would like to raise this claim and get a new trial.
16 And you are saying what he does is he goes
17 back to the trial court, and he says, Judge, I just read
18 this, it raises some factual matters; will you please
19 give me an evidentiary hearing with the old lawyer there
20 and me there, so we can develop this?
21 Now, that is what -- how Texas works?
22 MR. OLDHAM: Your --
23 JUSTICE BREYER: Because I did not get that
24 impression from the State Bar brief, but you are saying
25 that is how it works?

1 MR. OLDHAM: Almost exactly, except that you
2 go to -- you go to the court of appeals and --
3 JUSTICE BREYER: You go to the court of
4 appeals, and what do you say? You say, court of
5 appeals, will you please direct the trial court to have
6 an evidentiary hearing on the adequacy of trial counsel
7 before you hear the appeal?
8 MR. OLDHAM: You ask for --
9 JUSTICE BREYER: Is that yes or no?
10 MR. OLDHAM: Yes, although it's called a new
11 trial motion.
12 JUSTICE SOTOMAYOR: Even if you haven't made
13 the new trial motion within the 30 days, initially?
14 MR. OLDHAM: That's right. This is the --
15 JUSTICE BREYER: Okay. So you are just
16 saying that they are all wrong about how Texas works, so
17 I guess you -- you could refer to a case where that
18 happened.
19 MR. OLDHAM: Yes, Your Honor.
20 JUSTICE BREYER: Well, in what case did that
21 happen?
22 MR. OLDHAM: It's called Cooks vs. State.
23 JUSTICE BREYER: Cooks vs. State. And they
24 got the transcript, months later, and they looked back,
25 and they said, oh, dear, there was something wrong with

1 the trial performance. So we go to the Federal
2 appeals -- the State appeals court, and we say, State
3 appeals court, please direct an evidentiary hearing.
4 And they directed an evidentiary hearing,
5 and they had an evidentiary hearing before the trial
6 judge -- really, what would have happened on State
7 habeas?
8 MR. OLDHAM: Except that they didn't get
9 actually get the evidentiary hearing in Cooks because
10 there was no facially plausible showing of the claim
11 that they would have raised. But --
12 JUSTICE BREYER: All right. Now, I am
13 puzzled about what I'm supposed to do because I would
14 have thought that the standard's fairly easy, that this
15 individual must always have one full and fair
16 opportunity to present his claim of inadequate
17 assistance at trial.
18 There are certain things that could deprive
19 him of that. One, his lawyer in the habeas State could
20 be incompetent -- all these lawyers could be
21 incompetent. Or the State, at a certain stage, didn't
22 give him enough proceeding. All right?
23 Well, what do I do, where people are
24 disagreeing about how the State procedure works, as to
25 whether it was full and fair? What do I do? What is

1 your suggestion?

2 By the way, if he doesn't get the full and

3 fair, he still has to show to the Federal habeas judge

4 that he has a substantial claim, that that trial was

5 not -- so what do you suggest?

6 MR. OLDHAM: Well, Your Honor, where he

7 doesn't get a full and fair opportunity, whether it's

8 because his new lawyer is ineffective, his old lawyer

9 was ineffective, the transcript wasn't available, the

10 very case that we're talking about, the Cooks case,

11 recognizes that that is a violation of the United States

12 Constitution.

13 And you have -- that prisoner would have a

14 constitutional claim to assert for the failure of his

15 counsel, the failure of the circumstances --

16 JUSTICE BREYER: Right now -- but I'm saying

17 what I would like you to sympathize with my problem. My

18 problem is I have seen -- I have a bunch of briefs. And

19 they seem to me that what you have just described is a

20 full and fair procedure to develop all these evidentiary

21 matters before the appeal even takes place.

22 It exists in Texas, and, therefore, unless

23 he could say his lawyer there was incompetent, he's out

24 of luck. Okay? The other side seems to say, no, it

25 doesn't exist in Texas. And, now, what am I supposed to

1 do, since I am not an expert on Texas procedure?

2 MR. OLDHAM: Well, Your Honor, I think you

3 could do one of two things. You could always certify

4 the question with the Court of Criminal Appeals if you

5 thought that the question -- that the answer turns on

6 what the Texas procedures are and that the parties

7 disagree with them.

8 JUSTICE BREYER: I tried that once in a case

9 involving Pennsylvania, and the result was such that I

10 resolved never to do it again.

11 (Laughter.)

12 JUSTICE BREYER: But -- but don't say never.

13 All right. So one thing we got --

14 JUSTICE ALITO: That was a case in which --

15 that was the case in which the Court unwisely reversed a

16 certain Third Circuit decision.

17 (Laughter.)

18 JUSTICE GINSBURG: Do we have a clue,

19 Mr. Oldham, if the information is correct, that direct

20 appeal counsel in the county involved here gets a very

21 limited amount of money -- gets, they said it's $1,500

22 fixed fee.

23 But, if counsel who's appointed as

24 collateral review gets $25,000, doesn't that suggest

25 that the -- that the counsel on direct appeal is

1 expected to deal with trial errors and the one that gets
2 all this $25,000 can go out and find a psychologist, a
3 sociologist, whoever is going to give us a profile on
4 this person?
5 MR. OLDHAM: No, Your Honor. And that is
6 because the funding thresholds that are cited for the
7 first time in the reply brief are wrong in two respects.
8 One is those -- those only came into effect after the
9 filing of the State habeas and after the filing of the
10 direct appeal in this case.
11 But the second -- and perhaps I think more
12 relevant sense in which they're wrong, is it does apply
13 to the amount of money that are given to the lawyers;
14 whereas the subsection (l) provision that we've cited in
15 our brief applies to the money for investigators and
16 experts.
17 It's reimbursement for investigators and
18 experts. It's not the amount of money they give to the
19 lawyer.
20 JUSTICE GINSBURG: Is it true that it's the
21 county that reimburses the direct appeal counsel and the
22 State reimburses the habeas counsel?
23 MR. OLDHAM: Yes, Your Honor, after 1999.
24 But the State habeas application in this case was filed
25 a month before that statute went into effect.

1 JUSTICE KENNEDY: Well, but you -- you say
2 it's before, but this -- this indicates how Texas views
3 its system. And, as Justice Ginsburg indicates, Texas
4 views this system as being one in which the collateral
5 appeal -- or the collateral proceeding counsel is in the
6 best position to raise IAC claims.
7 That's -- that's just where it is. And
8 the -- the State Bar says -- agrees with the
9 Respondent -- pardon me -- with the Petitioner on this
10 point.
11 MR. OLDHAM: Justice Kennedy, the court of
12 criminal appeals has said that the -- that claims of
13 ineffective assistance of trial counsel properly can be
14 brought on direct appeal.
15 The Texas State legislature has said it by
16 authorizing a new direct appeal attorney and stating,
17 throughout the legislative history -- and I think in the
18 text and structure of the statute -- that they intend
19 for these claims to be able to be brought on direct
20 appeal -- not that they are channeled on direct appeal;
21 they're not channelled either way.
22 JUSTICE KAGAN: Well, able -- able to be
23 brought, Mr. Oldham, but, as Justice Ginsburg started
24 off by saying, many times, the court of criminal appeals
25 has said the preferred method is to bring it on

1 collateral appeal.

2 And, more to the point even, when attorneys

3 try to bring these kinds of claims on a motion for a new

4 trial, the typical response is to say, no, this is not

5 the proper venue for that, go back and do it again on

6 collateral review.

7 So we have -- you say that there's a formal

8 mechanism that could be used. But it seems as though

9 the courts and the lawyers, both, in Texas, are being

10 told continually, don't use that form of mechanism;

11 instead, do this on collateral review.

12 MR. OLDHAM: Justice Kagan, I am aware of no

13 case where someone's brought a new trial motion that --

14 in the procedurally proper way -- and been told not to

15 do it that way. I think what we --

16 JUSTICE KAGAN: Well, isn't the usual

17 response just to dismiss it without prejudice and to

18 say, we don't have time to deal with this, go away, come

19 back again on collateral review?

20 MR. OLDHAM: No, Your Honor. That's --

21 that's the usual response when the record is

22 insufficient. That is, when you haven't -- you haven't

23 given your trial lawyer --

24 JUSTICE KAGAN: Well, because, mostly, the

25 record isn't sufficient for a Wiggins claim. So anytime

1 somebody brings a Wiggins claim on this 30-day window,
2 the Court says -- you know, there's only 30 days, the
3 record is insufficient. Go away, do it again.
4 MR. OLDHAM: Your Honor, that's not what
5 happened in the Armstrong case, where someone brought a
6 Wiggins -- it's not what happened in the --
7 JUSTICE KAGAN: That's your one case, it
8 seems to me. You only have one case. It's Armstrong.
9 Armstrong seems to me sort of like proof as to why it is
10 that the Texas courts don't do that generally because
11 what they did in Armstrong was they ended up trying to
12 adjudicate that on the merits and realizing that there
13 was -- that the record wasn't sufficient.
14 MR. OLDHAM: Your Honor, it's -- it's not
15 the only case -- you know, we have -- a similar claim
16 was raised in the Motley case, which was cited in our
17 brief. It was also raised in a Rosales case, also cited
18 in our brief. Similar to Wiggins kinds of cases.
19 And then -- in the Motley case, they were
20 able to have school teachers testify. There was a
21 neurological examination done. I mean, it's certainly a
22 practical way to do it, and it -- it is as generous or
23 more generous than a lot of the States in the country,
24 including States that Petitioner concedes are --
25 JUSTICE KAGAN: Do you agree, Mr. Oldham,

1 that, if you didn't have the mechanism for a new trial,
2 then you would form under the Martinez rule?
3 MR. OLDHAM: With no new trial and no
4 standing abatement?
5 JUSTICE KAGAN: In other words, no
6 opportunity for factual development.
7 MR. OLDHAM: If there was no opportunity to
8 develop -- to develop the facts and there was
9 practically no opportunity to -- to raise the claim on
10 direct appeal, I think the question would still turn on
11 whether and to what extent there was a constitutional
12 right to have an effective appeal of that issue.
13 And the Texas Court of Criminal Appeals has
14 afforded constitutional protection to that new trial
15 window and to the meaningfulness of the record necessary
16 to raise these claims on direct appeal. And I think
17 that is what is sufficient to move this case out of the
18 Martinez box and into the normal cause and prejudice
19 standards that this Court applies --
20 JUSTICE SOTOMAYOR: Can I -- can I go back
21 to what you are proposing, okay, and what you are saying
22 this system stands for? If an ineffective assistance of
23 counsel claim is brought on direct appeal, with or
24 without a record -- or it says, we don't have a record,
25 it throws it into collateral review, as I have seen it

1 do dozens of times -- are you saying, in that situation,
2 that Martinez applies?
3 Counsel raised it, but was told, we're not
4 going to decide it. Puts them into collateral review.
5 Does Martinez apply there?
6 MR. OLDHAM: If it happened in every single
7 case and there was no opportunity --
8 JUSTICE SOTOMAYOR: No, forget it -- that --
9 when it happens?
10 MR. OLDHAM: Oh, no, Your Honor. I don't
11 believe that Martinez would apply in that circumstance.
12 JUSTICE SOTOMAYOR: Okay. So they haven't
13 gotten a full and fair opportunity because they
14 presented their case, but Texas has said, we don't want
15 to do it here, do it there. You are still saying
16 Martinez doesn't apply?
17 MR. OLDHAM: Precisely, because there is no
18 default upon which to apply Martinez, so there's
19 nothing -- there is no work for Martinez to do in that
20 hypothetical, precisely because the claim can be met --
21 JUSTICE SOTOMAYOR: So because it can, but
22 Texas chose not to, now there's no protection, there is
23 no full and fair opportunity for the petitioner to have
24 had that claim adjudicated?
25 That's really the end result of what you're

1 saying.

2 MR. OLDHAM: Well, I'm certainly not

3 suggesting that the rule needs to turn on the

4 meaningfulness of the opportunity to raise it on direct

5 appeal. I think that Martinez was very clear when it

6 said -- whether it's a complete --

7 JUSTICE SOTOMAYOR: You raised it, and the

8 State said, well, go to collateral review. You're

9 saying, no -- no Martinez protection?

10 MR. OLDHAM: Well, I don't --

11 JUSTICE SOTOMAYOR: The counsel was

12 ineffective in habeas in that -- in State habeas, you --

13 you can do nothing about it.

14 MR. OLDHAM: Well, you don't -- there's

15 nothing to do in the sense that, in that very

16 hypothetical, that very claim could be raised in habeas

17 the first time, but it also could be --

18 JUSTICE SCALIA: There's clearly no Martinez

19 protection. The question you are being asked, I think,

20 boils down to whether we should develop a new case,

21 Martinez plus, in which -- even though there is,

22 technically, the ability to raise it, which is all that

23 Martinez spoke about, the mere fact that the ability to

24 raise it is not effective enough should produce the same

25 result that Martinez produced.

1 I don't think there is any -- I'm not even
2 sure the other side claims that Martinez said what --
3 what he is arguing here.
4 MR. OLDHAM: I think that's exactly right,
5 Justice Scalia, and, in the hypothetical that Justice
6 Sotomayor was asking, the court's ordinary cause and
7 prejudice standards would accommodate for that. There
8 would be no inequity for the court -- for Martinez to do
9 anything.
10 JUSTICE BREYER: What happens -- imagine we
11 have a State supreme court, and it says, okay, you could
12 raise this claim on appeal, we don't advise it, we
13 think -- it's so much easier to do it in State habeas.
14 Please do it in State habeas. It's not absolutely
15 binding, but do it. Okay? That's what they are saying.
16 Now, he raises nine of his ten ineffective
17 assistance of counsel claims in State habeas. And the
18 State habeas court says, no, you are out on all nine,
19 but he never raised the tenth.
20 Now, we are in Federal court, and the
21 prisoner says -- you know, that tenth claim is fabulous.
22 And the judge says, it is substantial. And he says, you
23 know why it wasn't raised before? Because my counsel
24 was incompetent on State habeas, and they didn't raise
25 it on appeal because that's just how people normally do

1 things in Texas, they don't raise it on appeal. They
2 wait until State habeas.
3 Has that person had a full and fair
4 opportunity to raise this tenth claim in the State
5 court?
6 MR. OLDHAM: Well, if the -- if the Court by
7 hypothesis is telling the Bar not to bring claims under
8 any set of circumstances on direct appeal, I think
9 that --
10 JUSTICE BREYER: They are not saying never.
11 They are just saying it works so much better. What they
12 say is we appoint State habeas counsel at the same time,
13 it's easier to develop it. Please. We won't say never.
14 We'll just say hardly ever.
15 Now, what's -- what is the -- what is your
16 view about whether that person has had a full and fair
17 opportunity to develop his tenth ineffective assistance
18 claim in the State courts.
19 MR. OLDHAM: Justice Breyer, Martinez should
20 not apply, even to that hypothetical.
21 JUSTICE BREYER: I'm not even thinking about
22 Martinez at the moment because I don't want to get into
23 whether it is an extension or just an elaboration or
24 just a situation covered, but they didn't think of it or
25 just a lot of other things.

1 I just want to know, given Martinez, what do
2 you think?
3 MR. OLDHAM: I'm not sure how to answer the
4 full and fair opportunity question because that --
5 that's certainly not the standard that we are advocating
6 here.
7 JUSTICE BREYER: What is the standard you
8 are advocating?
9 MR. OLDHAM: We believe that Martinez
10 applies where it said that it applies, and that is where
11 a State makes a deliberate choice to disallow all claims
12 on direct appeal. We understand the necessity to having
13 a Martinez clause to apply to an eventual default.
14 JUSTICE BREYER: But if, in fact, they say,
15 yes, there is a route, never used, but once, filled with
16 minefields, very hard when compared with the other one,
17 there you say, it isn't Martinez, it is a totally -- it
18 is a new thing because Martinez, after all, had no
19 rationale.
20 MR. OLDHAM: Your Honor, I think --
21 JUSTICE BREYER: I'm being sarcastic there,
22 but I don't mean to be. I mean, you see what I'm trying
23 to get to?
24 JUSTICE SCALIA: It was the nose of the
25 camel, which is what Martinez was -- which is what the

1 dissent said, actually.

2 (Laughter.)

3 JUSTICE BREYER: Yes, the dissent said that.

4 (Laughter.)

5 JUSTICE KENNEDY: This is -- this is very

6 amusing in a capital case.

7 Let me ask you this question: Is there

8 anything in the State Bar brief that substantially helps

9 your position? I'm -- I'm very interested in the State

10 Bar brief. It's a little hard for me to parse. It did

11 say there is a conflict of interest in -- between the

12 habeas counsel and the -- and the counsel on direct.

13 And it also -- it also indicates that the

14 habeas counsel has to file the application in the

15 convicting court not later than 180 days after -- or not

16 later than 45 days after the State's original brief,

17 which seems to help the Petitioner here because the

18 original brief in -- in the direct appeal proceeding is

19 deemed important for the habeas counsel.

20 MR. OLDHAM: Justice Kennedy, I don't think

21 there is anything in the State Bar brief that helps

22 either side in this sense because the State Bar agrees

23 that there were no relevant guidelines of any kind at

24 the time of any of the proceedings in this case.

25 The only guideline that any Bar association

1 had promulgated at the time of the direct appeal
2 proceeding or State habeas proceeding in this case was
3 the 1989 American Bar Association guideline, 11.9.2,
4 which specifically told the direct appeal lawyer in this
5 case to raise every colorable claim he could, regardless
6 of any State procedures to the contrary.
7 And, if he had raised a substantial Wiggins
8 claim or if he had even tried his best to raise a
9 Wiggins claim that could be -- could be amplified and
10 further developed on State habeas, we wouldn't be
11 standing here today because it would have been properly
12 exhausted and adjudicated on the merits in State court.
13 So I don't think that the Bar association
14 really has anything one way to say or the other, which
15 is maybe why it filed on behalf of neither party.
16 But to return to Justice Breyer's question,
17 I don't think that what -- what we're talking about is
18 to come up with anything new. I think what we're
19 talking about in this outside-of-Martinez world is
20 actually very old. We are just talking about the
21 Carrier rule, the normal rule that applies to cause and
22 prejudice for all defaults in States across the country.
23 And I think that the best way to understand
24 it is to imagine, in the very hypothetical that you
25 offered, where there is just one person who could get

1 through, that person would have a constitutional claim
2 in the State of -- I'm sorry, the other 900 or however
3 many there were, those people would have constitutional
4 claims in the State of Texas for the deprivation of a
5 meaningful opportunity to press their claims on direct
6 appeal.
7 And as from the Federal -- and that would
8 serve as cause, if the State courts denied it, that
9 would serve as cause to overcome a default in Federal
10 court and to get an adjudication of that claim.
11 JUSTICE KAGAN: Mr. Oldham, I had thought
12 that Martinez was really an equitable rule. It was an
13 equitable rule about giving people an opportunity to
14 raise a trial ineffectiveness claim.
15 And if it's true that, although Texas has a
16 technical possibility of doing that outside of
17 collateral review, but, in fact, that the lawyers are
18 told not to use that route, that the lawyers don't use
19 that route, that, if they do use that route, the
20 likelihood is that they will be thrown out for using
21 that route, the question is why that -- the formal
22 availability of a mechanism that nobody uses and that
23 everybody is told not to use should matter with respect
24 to the application of an equitable rule like Martinez?
25 MR. OLDHAM: Justice Kagan, there is no work

1 for an equitable rule in Martinez to do if you can get
2 there another way. And it's not just that you can raise
3 it on direct appeal, it's also that, if your direct
4 appeal lawyer doesn't do it, you can, under certain
5 circumstances, establish cause against your direct
6 appeal -- direct appeal lawyer to overcome an ensuing
7 default.
8 JUSTICE GINSBURG: Has there ever been such
9 a case, any case in which a direct appeal counsel has
10 been found ineffective for failing to present a Wiggins
11 claim?
12 MR. OLDHAM: I'm not sure about specifically
13 Wiggins claims, but, yes, it is, in fact, established in
14 the leading treatise on Texas practice cited by both
15 sides that is ineffective assistance of appellate
16 counsel to fail to develop the record to allow any claim
17 to be adjudicated on direct appeal.
18 JUSTICE GINSBURG: But I asked, if there was
19 any decisions that said, you should have raised it on
20 appeal, appeals counsel didn't rely on the advice of the
21 Texas Court of Criminal Appeals, and, therefore, because
22 counsel followed the advice of Texas Court of Criminal
23 Appeals, she was ineffective?
24 MR. OLDHAM: No, Justice -- Justice
25 Ginsburg, I am not aware of any particular case on

1 Wiggins in particular. But -- but the claims against
2 appellate ineffectiveness for failure to raise a claim
3 on direct appeal are -- are raised and adjudicated on
4 the merits all the time in Texas courts.
5 And there are specific ones that say that
6 ineffective assistance of appellate counsel to fail to
7 develop the record using the procedures which the State
8 has allowed through the new trial window.
9 JUSTICE GINSBURG: Well, the -- the Texas
10 Court of Criminal Appeals, in addition to saying, as a
11 general rule, bring it up on -- on collateral review,
12 said -- and there's a reason. The reason why is the
13 undeveloped record on direct appeal would be
14 insufficient to establish claims that must be supported
15 by extra-record evidence.
16 So that seems to be an expectation that
17 extra-record evidence will be developed on collateral
18 review, not direct appeal.
19 MR. OLDHAM: No, Justice Ginsburg, I think
20 it's an expectation that the extra-record evidence will
21 be developed, either through the new trial proceeding,
22 through a factual proffer following it, or through a
23 stay and abatement procedure, to make sure that, when
24 the claim actually gets to the court -- the court of
25 appeals, that it has a record upon which to adjudicate

1 the claim.

2 That's all that -- and, to the extent that

3 the appellate lawyer fails to do that, that can

4 constitute cause under the ordinary rules of cause and

5 prejudice without creating another Martinez exception,

6 which we would submit is going to be highly, highly

7 unworkable, given that the court is going to have to

8 determine when is a little bit enough and when is not

9 enough sufficient for Martinez.

10 JUSTICE ALITO: The Respondent says that the

11 Kansas and the Michigan procedures are sufficient to

12 take the case -- to take the States outside of Martinez.

13 You say your stay and abate proceeding is the same,

14 essentially, as those procedures.

15 His response is that Texas has used this

16 remedy in only one situation, and that is when a

17 defendant is deprived of counsel during the new trial

18 window and suffers prejudice from the deprivation.

19 Now, is that correct.

20 MR. OLDHAM: It's when the counsel -- when

21 the prisoner has suffered a deprivation of the

22 opportunity to develop the record in the new trial

23 window. So, in the Cooks case, for example, that was --

24 there was only a lawyer for 10 of the 30 days, and

25 this -- the court said the new trial window is a

1 critical stage for the development of a particular
2 record for raising a Wiggins-style claim on direct
3 appeal, and because that is so --
4 CHIEF JUSTICE ROBERTS: Finish your
5 sentence.
6 MR. OLDHAM: Thank you.
7 And because that is so, where there has been
8 a deprivation of counsel in that circumstance that
9 prohibits the development of that meaningful record, we
10 will allow you to go back, assuming you can show
11 prejudice.
12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Wolf, you have seven minutes remaining.
14 REBUTTAL ARGUMENT OF WARREN A. WOLF
15 ON BEHALF OF THE PETITIONER
16 MR. WOLF: I want to be very clear about
17 this abatement issue. The abatement issue, as
18 Justice Alito just said, is only available -- as
19 referred in our brief on page 6, is only available when
20 there is a denial of the constitutional right to an
21 attorney.
22 And those situations is when there's a delay
23 in appointing the direct appeal attorney after the
24 trial. So, during the 30-day window to file the motion
25 for new trial, that time limitation is -- is -- that

1 clock is running, and, if there's no attorney appointed,
2 the constitutional violation is considered a critical
3 stage of the trial.
4 And since there's -- if there's no attorney
5 appointed during those 30 days, that is the only time,
6 as Justice Kennedy is correct in saying, that that is
7 the time that the abatement procedure is permitted.
8 That is the only time.
9 JUSTICE KAGAN: So you are suggesting that
10 if -- if an attorney is appointed within a few days or
11 within a week, as happened here, that, in that case,
12 there would not be that opportunity, it would be the
13 30 days, that's it, stop?
14 MR. WOLF: And when that new -- that's
15 correct. And, if a new attorney is appointed because
16 there was no attorney appointed, that new attorney, he,
17 himself, also has only 30 days. The clock starts --
18 JUSTICE KENNEDY: But what about -- what
19 about the 75-day --
20 CHIEF JUSTICE ROBERTS: Justice Kennedy.
21 JUSTICE KENNEDY: I understood that, if the
22 30-day rule had been complied with, within the 75 days,
23 you can ask the appellate court to please remand because
24 there is some additional evidence to be --
25 MR. WOLF: That's not true.

1 JUSTICE KENNEDY: -- to be determined.
2 MR. WOLF: That is not a correct statement
3 of the law, and -- and I would refer the Court to our
4 briefs, to the -- to the time that the -- the
5 authorities that we cite and also the amicus brief from
6 the State Bar of Texas.
7 CHIEF JUSTICE ROBERTS: Well, what are --
8 what are these investigators, experts, they're available
9 to the new appellate counsel, what -- what are they
10 supposed to be doing?
11 MR. WOLF: To the direct appeal attorney?
12 CHIEF JUSTICE ROBERTS: Yes, the direct
13 appeal attorney. You say -- basically, you're saying
14 there's no way they can do anything within these time
15 limits, and, yet, the State procedure provides for
16 investigators and experts. It seems to me it would be
17 odd for them to provide for people and to pay for people
18 who can't do anything.
19 MR. WOLF: Well, they don't -- to do a
20 Wiggins claim -- to do -- they're doing things that
21 would -- investigates things that came out of the
22 record because that's what is relegated to the direct
23 appeal. The habeas attorney has more money available
24 and has more time available to do the things, and it
25 becomes a function of time as well.

1 But I want to direct the Court's attention
2 also to the -- to the statement in Sprouse. And -- and
3 the statement --
4 JUSTICE KENNEDY: The statement?
5 MR. WOLF: In the case of Sprouse, in our --
6 where am I?
7 It's page 20 -- 20 of our reply brief, that
8 the position in Sprouse is that there would be no
9 constitutional defect if appellate counsel didn't have
10 time or the record to raise the ineffective assistance
11 claim, and that's because the habeas proceeding is
12 available to direct -- to develop the claim and is the
13 proper place to do so. And that's the State's brief.
14 It's on page 20 of our reply brief.
15 The other thing that I wanted to -- to bring
16 to the Court's attention is that the Respondent cites a
17 couple of cases that are aberrant -- they're
18 aberrations, and they really don't -- shouldn't -- since
19 this Court has -- has brought out a sensible rule in
20 Martinez and this Court has said this Court's rule
21 sensibly speak to the ordinary case, not -- not the
22 aberrational. And that's exactly what we have here.
23 The last thing that I wanted to say is -- is
24 that the direct appeal, if -- if -- there's a choice
25 here that the State has systemically developed a system

1 that has caused -- that has directed attorneys on appeal
2 that the habeas attorney does the extra-record claims,
3 the Wiggins-type claims, and that the -- the claims that
4 are raised on the record go to the direct appeal
5 attorney.
6 That is the system that the State has
7 developed. Those are the rules that govern this system
8 that have been promulgated by the court of criminal
9 appeals and the Supreme Court, and that's the system --
10 the scheme that we are under.
11 And because --
12 JUSTICE GINSBURG: What about the position
13 of the State that says Martinez is relatively new, if
14 there is an extension of Martinez to cover this case,
15 then at least give the Texas courts the first crack at
16 deciding whether there was ineffective assistance of
17 counsel, instead of having that done in the Federal
18 court?
19 MR. WOLF: We're just looking for the --
20 because of the procedural default scenario that we find
21 ourselves in, we tried to do that.
22 And -- and because 11.071 also has -- when
23 they -- when that was promulgated in 1995 in order to
24 expedite these claims, it provided three things: One, a
25 new attorney; two, the money to fund those claims; and,

1 three, an abuse of the writ, which is Section 5a, which
2 is what we met in -- in our case.
3 The Texas scheme, because of that abuse of
4 the writ, proceeds -- causes procedural default, and
5 that puts us in this quandary, where a person like
6 Mr. Trevino is unable to get relief because he has an
7 ineffective trial lawyer. And, now, he is -- that
8 ineffective trial lawyer -- his ineffectiveness is being
9 insulated by the ineffectiveness of his -- of his habeas
10 lawyer.
11 And that's not what should happen. It's --
12 it's just not equitable, it's not fair. And
13 Mr. Trevino, someone in his situation, should have a
14 right to complain about the ineffectiveness of his trial
15 lawyer.
16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 The case is submitted.
18 (Whereupon, at 12:03 p.m., the case in the
19 above-entitled matter was submitted.)
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