IN THE SUPREME COURT OF THE UNITED STATES

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CARLOS TREVINO, :

Petitioner : No. 11-10189

v. :

RICK THALER, DIRECTOR, TEXAS :

DEPARTMENT OF CRIMINAL JUSTICE, :

CORRECTIONAL INSTITUTIONS :

DIVISION :

- x

Washington, D.C.

Monday, February 25, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

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

ANDREW S. OLDHAM, ESQ., Deputy Solicitor General, Austin, Texas; on behalf of Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear next this morning in Case 11-10189, Trevino v. Thaler.

Mr. Wolf?

ORAL ARGUMENT OF WARREN A. WOLF

ON BEHALF OF THE PETITIONER

MR. WOLF: Mr. Chief Justice, and may it please the Court:

The Texas Court of Criminal Appeals has said, repeatedly, "As a general rule, a defendant should not raise an issue of ineffective assistance of counsel on direct appeal," and has recognized that Texas procedure make it, "virtually impossible for appellate counsel to adequately present such a claim." Those claims are the choices made by the sovereign State of Texas, and it renders this case just like Martinez.

This case well illustrates the consequences of that choice. The transcript in this case was not ready -- available for 7 months. That's 4 1/2 months after the trial lost -- trial court lost jurisdiction on any new trial motion.

The State itself argued, quote -- in Sprouse -- "Without access to that record, new counsel would have little basis for attacking the performance of

trial counsel."

JUSTICE GINSBURG: Suppose the State's position were not as you accurately have stated the Texas Court of Criminal Appeal. It didn't say collateral review is the preferred route. It said either way will do. You can bring it up on direct appeal, or you can bring it up on collateral.

Would you say that Martinez applies in that situation? Or does it depend on having the -- the State highest court in the matter saying, this is the preferred way to go?

MR. WOLF: Texas systemically channels ineffective assistance claims to collateral -- to State habeas.

JUSTICE GINSBURG: And if it didn't, if it just said, you can bring it up on direct, but we realize these limitations because the transcript won't be ready, so you can wait and bring it up on habeas.

I'm just asking how far -- the rule that you would like us to adopt -- you say this is just like Martinez. Is that where you would draw the line, that the -- the State's highest court has to say, we prefer this matter to be brought up on collateral review?

MR. WOLF: It's not just them saying it in words, but it's also saying it in the legislation and in

the rules that the State of Texas has adopted.

In order to expand the record in a Wiggins claim -- which is what's the basis of Mr. Trevino's claim, in order to expand that record, you have a 30-day window to file a motion for new trial, and 75 days -- 75 days to have a hearing on it or else the court loses jurisdiction by operation of law.

CHIEF JUSTICE ROBERTS: The district court, the trial court?

MR. WOLF: That's correct. And so you couldn't expand the record. And, in order to present a Wiggins claim, especially, it takes a considerable amount of extra record investigation.

CHIEF JUSTICE ROBERTS: Has the Texas -- have the Texas appellate courts ever sent a -- a claim back for an evidentiary hearing?

MR. WOLF: After 75 days, the -- the district court loses jurisdiction, and I realize there are some jurisdictions around the country that have that opportunity. But Texas has a finality where there is no provision to expand the record after that 75-day period.

CHIEF JUSTICE ROBERTS: So as far as you know, the court -- the appellate court's never done that?

MR. WOLF: That's correct.

CHIEF JUSTICE ROBERTS: Okay. Why does

Texas afford people in your client's position a new appellate counsel?

MR. WOLF: Well, there's two -- actually, Texas has a dual-track system. It was developed in 1995, a year before the Federal system was developed in AEDPA. And the concept -- and the reason for it -- the rationale, was to expedite these type of claims, especially in death penalty claims, under Section 11.071.

But the -- and the purpose is that there is two counsels that are appointed. One counsel is appointed to handle the record-based claims, and that's done on direct appeal. The other counsel is appointed in all cases -- there's no question -- on habeas.

And that attorney -- that counsel is appointed with the understanding that he's going to have the time to do the extra-record-based claims. In a case like this, the record wasn't even prepared for 7 months after the date of the judgment.

JUSTICE SOTOMAYOR: Counsel, I don't know that you've answered Justice Ginsburg's question, and so I'm going to take it up because it interests me.

Let's assume, as she did in her hypothetical, that a State says -- doesn't have any case law like Texas does, that says, we prefer you to go that

way, for non-record-based claims.

Is the difference between that hypothetical State that says, you can do either, and the Texas situation, is that Texas, in your mind, puts up procedural impediments to using the direct appeal mechanism and so that, if the other State hasn't done that, has made the development of evidence, has provided a full opportunity for you to develop a record before the direct appeal is over with, that State wouldn't be subject to Martinez, and Texas is subject to it only because it has the procedural impediments?

MR. WOLF: That's correct because the -- the scheme that Texas has developed systemically channels the habeas claim, the IAC claim, the ineffective assistance claim, into habeas. There is no -- to say that it could be done is really an illusion.

JUSTICE KENNEDY: How -- how do you want us to formulate the rule if we write the opinion in your favor? If a State does not give a realistic opportunity -- a feasible means for expanding the record on direct review, then Martinez applies because it is the collateral proceeding that is the meaningful one -- and then we go through 50 States to see if that rule applies?

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

50 States because some States provide a mechanism for an abatement to go back on direct appeal and -- and expand the record. Other States require that it go to direct appeal, and each -- and those States made -- have made a choice.

And Texas has made a choice by developing this scheme. And as far as the other States, they would have to compare themselves to the situation that -- that we would -- that would come out of this. This --

JUSTICE ALITO: Well, I have the same questions that my colleagues have asked. Could you give us, in a sentence or two, the test that you would like us to apply? Where a State does not, like Arizona, prohibit the raising of this issue on direct appeal, Martinez, nevertheless, applies where the State does blank. Fill in the blank.

MR. WOLF: When it makes it impracticable, in the vast majority of cases, to raise the claim on direct appeal.

JUSTICE ALITO: Impracticable, in the vast majority of cases. Now, that really would require a case-by-case determination in every other State that doesn't fall within the Martinez category, wouldn't it?

MR. WOLF: Well, not necessarily --

JUSTICE ALITO: No?

MR. WOLF: -- Justice Alito, because there's -- some States require that their -- their cases are directed back to -- to direct appeal, and there's a mechanism to expand the record. There is some -- there is -- some require it to go to direct appeal.

But, in Texas, what we have is a limitation that's the rules that the Texas Supreme Court has devised, with the Texas --

JUSTICE ALITO: Well, I understand that. But -- so -- so if the State says, you have to raise this on direct appeal, but you have to comply with our time limits on direct appeal. And they don't appoint -- you know, you don't get a new -- you don't get a new attorney on direct appeal. It's the same attorney who represented you at trial. So that attorney is in the position of arguing that he or she was ineffective at trial.

And that would be okay?

MR. WOLF: If the -- let me make sure I understand the question.

JUSTICE ALITO: You have to raise it on direct appeal or it's lost. You can't wait until collateral -- until the collateral proceeding, and, by the way, you don't get a new attorney. You get the same attorney that represented you at trial. Would that be

all right?

MR. WOLF: No, because the new -- the old attorney -- the trial attorney is in the worst, really, position to understand his ineffectiveness. There is a disincentive for him --

JUSTICE ALITO: All right. So you have the same system where you get a new attorney, but you have to comply with the time limits.

MR. WOLF: And that --

JUSTICE ALITO: And then you say, well, I can't do all of this social background research that Wiggins requires within the time limits, so that's impracticable. Is that State okay?

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

JUSTICE ALITO: That's not okay, either.

MR. WOLF: Because that State is -- in the Texas scheme -- in the Texas scheme, the -- Texas gives us another attorney in this dual track -- this system, and it's understood that that attorney is the habeas attorney. And he doesn't -- he doesn't have that time limitation that the direct appeal attorney has, that's -- that 75-day limitation.

JUSTICE GINSBURG: But is your point that he has to have one full and fair opportunity to make the Wiggins claim, and it doesn't matter whether it's direct

or collateral? I think you mentioned that at least one State requires you to do it on direct, but does provide for developing the record.

MR. WOLF: But the -- the bottom line in -- in our situation, in Texas, is that we have a scheme. We have a set of -- of laws and -- and rules that channel these type of claims.

JUSTICE GINSBURG: What are the rules other than the Texas Court of Criminal Appeals having said, in several decisions, the preferred route is collateral review?

MR. WOLF: Well, first of all, the -- the Rule -- the Rules of Appellate Procedure 21.8 talk about the limitations of -- the number of days that you have to expand the record in a motion for new trial. 75 days, the -- the district court loses jurisdiction, they cannot hear anything else on this case. The record in this case wasn't even available for 7 months after the date of the trial.

So, even with a new attorney that's appointed -- first of all, that new attorney is a stranger to the case. He doesn't know anything about the case. He's not in a position to talk to the client. The client is not the best person to understand the Rules of Appellate Procedure.

So he's got to wait on that -- on that trial record, first of all, to see what's there. And then --

JUSTICE KENNEDY: I'm -- I'm not sure exactly what Justice Ginsburg's formulation was, but I didn't -- I don't understand why you didn't say, oh, yes, that's right, there has to be one full fair opportunity to raise the issue. And that's what we are arguing here.

MR. WOLF: I'm sorry if -- if I missed that, but that's exactly the point. And that's what --

JUSTICE KENNEDY: Then the next -- then my question is: Does this apply just to capital cases?

MR. WOLF: No.

JUSTICE KENNEDY: Could we in a -- oh. So this doesn't apply just to capital cases, in your opinion?

MR. WOLF: Not necessarily. But the -- in the capital arena in Texas, we have the dual-track system, where you get an attorney appointed automatically in a habeas setting, where, in a non-death penalty setting, there is a possibility of getting an attorney in the interest of justice, but it's not always guaranteed. And, in that case, the appeal is done in a successive way, not in this dual-track way.

And in -- in the death penalty arena, it

manifests -- it makes it even more manifestly obvious that there is a systematic channeling by the State referring these type of claims into habeas, while the State attorney, the district appeals attorney, focuses on the record-based claim, and the habeas attorney is dealing with all of the case, not just the trial, but the -- the appeal, to make sure that there was no ineffectiveness on his part, that -- and also to do the investigation on the extra-record-based claims, which takes a substantial amount of time.

JUSTICE SOTOMAYOR: Counsel, you -- you started to answer this question, but it is something raised by many of the amici opposing your position, which is that, by adopting your position, we're essentially having to examine the 49-plus -- because we have territories that have collateral and direct review as well -- plus systems to see which apply -- to which Martinez applies and which -- to which Martinez doesn't apply.

And so the question is: How do we write this to sort of give enough guidance, so that we're not examining each of the 49 -- or 49 systems -- or maybe 48, after we've decided Martinez?

MR. WOLF: Right. Well, I would suggest --

JUSTICE SOTOMAYOR: And -- and why should we

not fear that outcome?

MR. WOLF: Okay. I would suggest the rule to be that Martinez applies when a State channels ineffective assistance of counsel claims to State habeas and makes it impracticable in the vast majority of cases to raise the claim on direct appeal.

And, in answer to your question about all of the States, many of the States do make it -- do make habeas available in the direct appeal arena. So it's --

JUSTICE ALITO: So the reason why -- the reason why there was a movement to channel ineffective assistance of counsel claims to collateral review is that it is often -- maybe in the great majority of cases -- impracticable to adjudicate them on direct appeal. So, under your standard, it seems to me that covers every State.

MR. WOLF: Well, it wouldn't, Justice Alito, for this reason: Many States have a mechanism, unlike the Texas scheme, which permits the expansion of the record. Some States, like Utah, who authored the amicus brief, has a Rule 21.3, which permits the claimant to go back and expand the record. We don't have the -- that ability in Texas.

CHIEF JUSTICE ROBERTS: Well, your friend says, page 18 of his brief, that you do. He says,

"Under Texas Rule of Appellate Procedure 21, direct appeal counsel can supplement the record with evidence developed by investigators and experts, the ones that are appointed and paid for by the State on appeal."

Now, is that just wrong?

MR. WOLF: Yes.

CHIEF JUSTICE ROBERTS: Okay.

MR. WOLF: And the reason I say that is, in order to obtain a record, one, you need to -- when you file your motion for new trial, you have to specifically set out the factual basis for the claim; and, two, the affidavit has to identify the evidence of any further investigation would have revealed.

So you've got that 30-day window when you file that motion for new trial that you have to do all of those things, and that's not enough time.

JUSTICE KAGAN: So if everything -- if everything in Texas's system were the same, but you had a year, would that flip Texas into a different category?

MR. WOLF: If the --

JUSTICE KAGAN: Is the problem -- is what makes this impracticable just the amount of time?

MR. WOLF: Yes, because the time -- the time -- especially in a Wiggins claim, is prohibitive in order to be able to prepare and -- not just the time

there, but the time that is imposed by the Rules of -- of Appellate Procedure.

That 75-day window, in order to expand the record, is part of this whole system, that it's understood that habeas claim is the -- the IAC claim is channeled into habeas.

JUSTICE ALITO: Well, let me try this one more time. You -- you seem to say, in your brief, that the Kansas procedure and the -- the Michigan procedure take those States outside of the Martinez category; is that correct?

MR. WOLF: Yes.

JUSTICE ALITO: All right. Now, as I understand the procedure in those cases, it is the following: On direct appeal, the attorney can make a motion for a new trial based on ineffective assistance of counsel, and, if some threshold is met, the appellate court can remand the case to the trial court for a hearing on ineffective assistance.

Is that correct?

MR. WOLF: Yes.

JUSTICE ALITO: Okay. And that would -- in most of those cases, the attorney on direct appeal is going to be the attorney who represented the defendant at trial and is probably not going to be in a very good

position to argue that he or she was ineffective at trial, but that would still be okay?

MR. WOLF: Well, but it's a --

JUSTICE ALITO: And if you don't do that, you've lost it.

MR. WOLF: Well, there's a problem with declaring yourself ineffective. One, it's -- it's kind of counterintuitive. In Texas, if you declare yourself ineffective, there's repercussions. You're no longer available to -- you know, be taken off the list to get appointments on these type of claims.

And -- and it's also against the Bar rules to -- to have that adverse interest against your client.

JUSTICE GINSBURG: Well, if that is the system in Kansas and Michigan, then why -- why is it outside Martinez, if the point is you can't effectively present the ineffective assistance counsel when you've got the same counsel who was alleged to have been ineffective and is not going to condemn himself?

MR. WOLF: Well, that -- as far as their State -- you know, other States are concerned -- you know, those are problems within those States. But as far as Texas is concerned -- you know, we are in a situation that we find ourselves in -- in a Martinez situation, where there was no ability to -- to raise --

the system that we have prevents you from raising this claim.

And, as far as the other States are concerned, some of the States have a more liberal opportunity to -- to expand the record, but that's not the system that we have in Texas. And this --

JUSTICE GINSBURG: Explain why the time that you have on direct appeal isn't adequate. So you say you need -- need to investigate. Well, some of the things, like school records, his prison records, it doesn't take a long time to get those, does it?

MR. WOLF: Well, it -- it takes a while. I'm not going to say a long while, but releases are required. Sometimes, there's opposition to releasing those records. But the biggest part of -- of this whole problem is getting the record, is also, in our situation, to have Mr. Trevino evaluated regarding his -- there was never a psychological or sociological study done in his case, and to have a psychological eval done, that doesn't happen in 30 days.

And one -- you've got to get the records, and, in some of these situations, one record leads to another record, finding one witness leads to another witness. And, by the time you start developing all these other avenues and when you put all that together,

then you're in a position to present that to an expert, in order to make that sort of evaluation.

CHIEF JUSTICE ROBERTS: Oh, surely -- surely, the trial court in Texas, when it gets a new trial motion within 30 days, and the new counsel on appeal says, well, I have reason to believe -- well, we can see that there wasn't an adequate investigation of mitigating circumstances or whatever made below, and I would like the time to conduct -- you know, the psychological evaluation or to contact these witnesses, is the trial court going to say no?

MR. WOLF: That's correct because the 30 days is -- is a limit; it's a bar. That's all he has. And, in addition, the -- the direct appeal attorney has his own responsibilities. There's a division of labor that's here, that the direct appeal attorney is supposed to review the entire record, to look for all of whatever errors that might be there.

And while -- and that's why, in Texas, where you have this dual-track system in order to expedite the appeal, there is a new attorney that's appointed to do the habeas work.

JUSTICE KENNEDY: And because of the rather sharp disagreements in the briefs on what the actual facts are here, I looked at the brief filed by the State

Bar of Texas in support of neither party.

Can you tell me -- and that they are critical of having new counsel work simultaneously on a simultaneous timeframe concurrently with the -- with the new direct appeal counsel.

Can you tell me how anything that's said in the Texas Bar briefs helps your case?

MR. WOLF: Well, it helps our case because it recognizes the dual-track system, and it recognizes that the extra record under Section 12.22 of the guide -- of the Texas guidelines that -- that were formulated that the State Bar was -- one of their committees on indigent defense helped develop.

They recognize the fact that extra record investigation is the responsibility of the habeas counsel.

I would like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Oldham?

ORAL ARGUMENT OF ANDREW S. OLDHAM

ON BEHALF OF THE RESPONDENT

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

Texas's procedures for raising

ineffectiveness claims are some of the most generous in the country. Those procedures offered Petitioner two bites at the apple.

The first bite came in a constitutionally protected direct appeal proceeding. And any deficiency in that proceeding would have been the source of cause under existing cause and prejudice standards to excuse a subsequent default.

Allowing the Petitioner to assert cause on the basis of a second bite at the apple -- that is, a State habeas proceeding -- would create an unwarranted and unworkable extension of Martinez.

JUSTICE GINSBURG: Why is it a second bite when the Texas Supreme Court -- court of criminal appeals, has said, again and again, as a general rule, defendants should not raise ineffective assistance of trial counsel on direct appeal, should raise it on collateral review?

MR. OLDHAM: Justice Ginsburg, the very next sentence of that opinion, Mata v. State, states that the lack of a clear record, usually, will prevent the appellant from meeting the first part of the Strickland test as the reasonableness of counsel's choices and motivations during trial can be proven deficient only through facts that don't normally appear in the

appellate record.

So the only question presented by those instructions that are quoted over and over again in the Petitioner's briefs is whether and to what extent newly-appointed counsel -- as Justice Alito was pointing out, Texas provides newly-appointed counsel on direct appeal in capital cases -- can supplement the appellate record with an explanation from the trial -- trial counsel.

And where the new counsel gets an explanation of the strategies of the trial counsel, the record is then complete --

JUSTICE GINSBURG: I don't -- does the statement "defendants should not raise ineffective assistance of trial counsel on direct appeal" doesn't mean what it says?

MR. OLDHAM: Oh, yes, ma'am. It does mean that. It's just that what -- what the Court is saying -- the very next sentence following the ones that are quoted in the Petitioner's brief, says, "The reason that one should not raise an issue of ineffective assistance of counsel on direct appeal is because, in cases where there is no explanation from the trial counsel, it will be impossible to adjudicate the first prong of the Strickland test."

It doesn't say that, as a general rule, you should just never do it. It just says, if you are actually going to raise a claim of ineffective assistance, you should create the proper record before you do it. And --

JUSTICE KENNEDY: But then -- but the comment is that the record has to be done within a very short period of time, and the -- and the trial record isn't even available for -- the transcript, for some 7 months.

MR. OLDHAM: Yes, Justice Kennedy, and that is why Texas has a procedure for abating and remanding appeals that is material identical to the one that Kansas provides and the Petitioner concedes is sufficient to satisfy this Court's inquiry in Martinez.

So the way that the procedure in Texas would work, as it does in Kansas, is that the newly appointed direct appeal lawyer -- who has no conflict and is, therefore, free to accuse trial counsel of being ineffective -- would file a motion to stay the appeal, abate it, and remand it to the trial court.

The showing in both States is roughly the same; it's a facially plausible claim of ineffectiveness.

JUSTICE KENNEDY: So the new counsel on

direct waits for 7 months, gets the transcript. In the meantime, let's assume has made some investigation, and he said -- and he tells the appellate court, we have some very important material that we want to introduce and we need to supplement the record; please remand this case.

MR. OLDHAM: Yes, Your Honor. And one point --

JUSTICE KENNEDY: That -- that has never happened in the State of Texas in a capital case, I take it?

MR. OLDHAM: I'm not aware of a capital case, but it has been done in many, many noncapital cases. And the Court of Criminal Appeals has specifically blessed it, especially -- particularly in a case involving a Wiggins type ineffective assistance of counsel at punishment phase.

That is a case called Cooks v. State. It's cited on pages 32 and 34 of our brief.

JUSTICE GINSBURG: And the Fifth Circuit was wrong, the circuit that ruled in favor of Texas, but said, in the Ibarra case, the Texas Court of Criminal Appeals has made it clear that State habeas petitions -- and the State habeas petition is the preferred vehicle for developing ineffective assistance claims?

Was that wrong?

MR. OLDHAM: I believe it just needs to be taken in the context of -- it is the preferred vehicle if you have not developed the record to bring a claim -- or to bring a claim appropriately on direct appeal.

JUSTICE SOTOMAYOR: Could you just please --

JUSTICE KAGAN: Mr. Oldham, I --

JUSTICE SOTOMAYOR: I'm sorry.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Let me understand what you are suggesting. Counsel doesn't have a record. He or she is newly appointed. Can they go into court and say, I don't know if there is an ineffective assistance of counsel claim, but I need to protect my client and abate this hearing now, until I get the trial record, whether it takes 6 months, 7 months, or a year.

What will the court do with its rule that requires counsel to provide affidavits setting forth the good-faith basis for a claim?

MR. OLDHAM: Well, Justice Sotomayor, many -- many prisoners in Texas, in capital and noncapital contexts alike, have done that within the 30 days, but I want to emphasize --

JUSTICE SOTOMAYOR: How many were given an indefinite stay until they got the trial record to set

forth the affidavits?

MR. OLDHAM: Well, if it's done within the first 30 days, you don't need a stay, indefinite or otherwise. You can just file --

JUSTICE SOTOMAYOR: So what do you do with the 75-day rule, which I think is absolute, which says, if the court hasn't ruled on the new trial within 75 days, the matter ends?

MR. OLDHAM: I think the easiest way to think about it is there are basically three stages. There is the first 30-day window, and, as I say, many capital and noncapital prisoners have effectively brought their claims in that 30-day window.

JUSTICE SOTOMAYOR: Some of them have the information, and some don't.

MR. OLDHAM: That's correct.

JUSTICE SOTOMAYOR: All right. So --

MR. OLDHAM: So that's the first box, but it's certainly not the last.

JUSTICE SOTOMAYOR: The guys who do it, it's because they have the information, and so they've exhausted their claim. But we are talking about the people who don't.

MR. OLDHAM: So to the second -- the second box. After the new trial motion has been denied by an

operation of law, you can make, effectively, a factual proffer of -- so the -- the trial court no longer has jurisdiction to grant your motion, but you can make a factual proffer of what you would have shown and what you want to show to the court of appeals.

JUSTICE SOTOMAYOR: That assumes you get the transcript.

MR. OLDHAM: Well, we are still prior to the transcript because this is still -- this is still --

JUSTICE SOTOMAYOR: No, the 75 days has passed.

MR. OLDHAM: And then, after that, there is no briefing that has been done in the appellate court at this point because the appellate briefing schedule and the transcript production are tied to one another, so it would never be a case where you're actually litigating a direct appeal without the transcript. You -- the latter doesn't start until you get the former.

And, at that point, you can make a motion to stay and abate to return to the district court and to supplement the record with evidence of your trial counsel's ineffectiveness.

CHIEF JUSTICE ROBERTS: Even beyond the 75 days?

MR. OLDHAM: Yes, Your Honor. It

effectively restarts the 30-day clock, so the -- the old 75 days is obviously gone, and you get a new 35 days on the stay and abate motion. So, in that sense, it's materially identical to the procedure that Kansas applies, although, as I mentioned earlier, in capital cases, the State of Texas guarantees its prisoners a new conflict-free lawyer, who can help with that proceeding.

JUSTICE BREYER: So he can do this -- I didn't understand this. I'm sorry.

Joe Smith is convicted on day 1. The transcript appears 9 months later. Okay? 9 months later his new lawyer, who is supposed to proceed on appeal, reads the transcript. He thinks, hmm, I think there was a problem with his lawyer at the trial, and I would like to raise this claim and get a new trial.

And you are saying what he does is he goes back to the trial court, and he says, Judge, I just read this, it raises some factual matters; will you please give me an evidentiary hearing with the old lawyer there and me there, so we can develop this?

Now, that is what -- how Texas works?

MR. OLDHAM: Your --

JUSTICE BREYER: Because I did not get that impression from the State Bar brief, but you are saying that is how it works?

MR. OLDHAM: Almost exactly, except that you go to -- you go to the court of appeals and not --

JUSTICE BREYER: You go to the court of appeals, and what do you say? You say, court of appeals, will you please direct the trial court to have an evidentiary hearing on the adequacy of trial counsel before you hear the appeal?

MR. OLDHAM: You ask for --

JUSTICE BREYER: Is that yes or no?

MR. OLDHAM: Yes, although it's called a new trial motion.

JUSTICE SOTOMAYOR: Even if you haven't made the new trial motion within the 30 days, initially?

MR. OLDHAM: That's right. This is the --

JUSTICE BREYER: Okay. So you are just saying that they are all wrong about how Texas works, so I guess you -- you could refer to a case where that happened.

MR. OLDHAM: Yes, Your Honor.

JUSTICE BREYER: Well, in what case did that happen?

MR. OLDHAM: It's called Cooks vs. State.

JUSTICE BREYER: Cooks vs. State. And they got the transcript, months later, and they looked back, and they said, oh, dear, there was something wrong with

the trial performance. So we go to the Federal appeals -- the State appeals court, and we say, State appeals court, please direct an evidentiary hearing.

And they directed an evidentiary hearing, and they had an evidentiary hearing before the trial judge -- really, what would have happened on State habeas?

MR. OLDHAM: Except that they didn't get actually get the evidentiary hearing in Cooks because there was no facially plausible showing of the claim that they would have raised. But --

JUSTICE BREYER: All right. Now, I am puzzled about what I'm supposed to do because I would have thought that the standard's fairly easy, that this individual must always have one full and fair opportunity to present his claim of inadequate assistance at trial.

There are certain things that could deprive him of that. One, his lawyer in the habeas State could be incompetent -- all these lawyers could be incompetent. Or the State, at a certain stage, didn't give him enough proceeding. All right?

Well, what do I do, where people are disagreeing about how the State procedure works, as to whether it was full and fair? What do I do? What is

your suggestion?

By the way, if he doesn't get the full and fair, he still has to show to the Federal habeas judge that he has a substantial claim, that that trial was not -- so what do you suggest?

MR. OLDHAM: Well, Your Honor, where he doesn't get a full and fair opportunity, whether it's because his new lawyer is ineffective, his old lawyer was ineffective, the transcript wasn't available, the very case that we're talking about, the Cooks case, recognizes that that is a violation of the United States Constitution.

And you have -- that prisoner would have a constitutional claim to assert for the failure of his counsel, the failure of the circumstances --

JUSTICE BREYER: Right now -- but I'm saying What do you -- I would like you to sympathize with my problem. My problem is I have seen -- I have a bunch of briefs. And they seem to me that what you have just described is a full and fair procedure to develop all these evidentiary matters before the appeal even takes place.

It exists in Texas, and, therefore, unless he could say his lawyer there was incompetent, he's out of luck. Okay? The other side seems to say, no, it doesn't exist in Texas. And, now, what am I supposed to

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

MR. OLDHAM: Well, Your Honor, I think you could do one of two things. You could always certify the question with the Court of Criminal Appeals if you thought that the question -- that the answer turns on what the Texas procedures are and that the parties disagree with them.

JUSTICE BREYER: I tried that once in a case involving Pennsylvania, and the result was such that I resolved never to do it again.

(Laughter.)

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

All right. So one thing we got --

JUSTICE ALITO: That was a case in which -- that was the case in which the Court unwisely reversed a certain Third Circuit decision.

(Laughter.)

JUSTICE GINSBURG: Mr. Oldham, do we have a clue, Mr. Oldham, if the information is correct, that direct appeal counsel in the county involved here gets a very limited amount of money -- gets, they said it's $1,500 fixed fee.

But, if counsel who's appointed as collateral review gets $25,000, doesn't that suggest that the -- that the counsel on direct appeal is

expected to deal with trial errors and the one that gets all this $25,000 can go out and find a psychologist, a sociologist, whoever is going to give us a profile on this person?

MR. OLDHAM: No, Your Honor. And that is because the funding thresholds that are cited for the first time in the reply brief are wrong in two respects. One is those -- those only came into effect after the filing of the State habeas and after the filing of the direct appeal in this case.

But the second -- and perhaps I think more relevant sense in which they're wrong, is that those apply to the amount of money that are given to the lawyers; whereas the subsection (l) provision that we've cited in our brief applies to the money for investigators and experts.

It's reimbursement for investigators and experts. It's not the amount of money they give to the lawyer.

JUSTICE GINSBURG: Is it true that it's the county that reimburses the direct appeal counsel and the State reimburses the habeas counsel?

MR. OLDHAM: Yes, Your Honor, after 1999. But the State habeas application in this case was filed a month before that statute went into effect.

JUSTICE KENNEDY: Well, but you -- you say it's before, but this -- this indicates how Texas views its system. And, as Justice Ginsburg indicates, Texas views this system as being one in which the collateral appeal -- or the collateral proceeding counsel is in the best position to raise IAC claims.

That's -- that's just where it is. And the -- the State Bar says -- agrees with the Respondent -- pardon me -- with the Petitioner on this point.

MR. OLDHAM: Justice Kennedy, the court of criminal appeals has said that the -- that claims of ineffective assistance of trial counsel properly can be brought on direct appeal.

The Texas State legislature has said it by authorizing a new direct appeal attorney and stating, throughout the legislative history -- and I think in the text and structure of the statute -- that they intend for these claims to be able to be brought on direct appeal -- not that they are channeled on direct appeal; they're not channeled either way.

JUSTICE KAGAN: Well, able -- able to be brought, Mr. Oldham, but, as Justice Ginsburg started off by saying, many times, the court of criminal appeals has said the preferred mechanism is to bring it on

collateral appeal.

And, more to the point even, when attorneys try to bring these kinds of claims on a motion for a new trial, the typical response is to say, no, this is not the proper venue for that, go back and do it again on collateral review.

So we have -- you say that there's a formal mechanism that could be used. But it seems as though the courts and the lawyers, both, in Texas, are being told continually, don't use that formal mechanism; instead, do this on collateral review.

MR. OLDHAM: Justice Kagan, I am aware of no case where someone's brought a new trial motion that -- in the procedurally proper way -- and been told not to do it that way. I think what we --

JUSTICE KAGAN: Well, isn't the usual response just to dismiss it without prejudice and to say, we don't have time to deal with this, go away, come back again on collateral review?

MR. OLDHAM: No, Your Honor. That's -- that's the usual response when the record is insufficient. That is, when you haven't -- you haven't given your trial lawyer --

JUSTICE KAGAN: Well, because, mostly, the record isn't sufficient for a Wiggins claim. So anytime

somebody brings a Wiggins claim on this 30-day window, the Court says -- you know, there's only 30 days, the record is insufficient. Go away, do it again.

MR. OLDHAM: Your Honor, that's not what happened in the Armstrong case, where someone brought a Wiggins -- it's not what happened in the --

JUSTICE KAGAN: That's your one case, it seems to me. You only have one case. It's Armstrong. Armstrong seems to me sort of like proof as to why it is that the Texas courts don't do that generally because what they did in Armstrong was they ended up trying to adjudicate that on the merits and realizing that there was -- that the record wasn't sufficient.

MR. OLDHAM: Your Honor, it's -- it's not the only case -- a similar claim was raised in the Motley case, which was cited in our brief. It was also raised in a Rosales case, also cited in our brief. Similar Wiggins kinds of cases.

And then -- in the Motley case, they were able to have school teachers testify. There was a neurological examination done. I mean, it's certainly a practical way to do it, and it -- it is as generous or more generous than a lot of the States in the country, including States that Petitioner concedes are --

JUSTICE KAGAN: Do you agree, Mr. Oldham,

that, if you didn't have the mechanism for a new trial, then you would form under the Martinez rule?

MR. OLDHAM: With no new trial and no standing abatement?

JUSTICE KAGAN: In other words, no opportunity for factual development.

MR. OLDHAM: If there was no opportunity to develop -- to develop the facts and there was practically no opportunity to -- to raise the claim on direct appeal, I think the question would still turn on whether and to what extent there was a constitutional right to have an effective appeal of that issue.

And the Texas Court of Criminal Appeals has afforded constitutional protection to that new trial window and to the meaningfulness of the record necessary to raise these claims on direct appeal. And I think that is what is sufficient to move this case out of the Martinez box and into the normal cause and prejudice standards that this Court applies --

JUSTICE SOTOMAYOR: Can I -- can I go back to what you are proposing, okay, and what you are saying this system stands for? If an ineffective assistance of counsel claim is brought on direct appeal, with or without a record -- court says, we don't have a record, it throws it into collateral review, as I have seen it

do dozens of times -- are you saying, in that situation, that Martinez applies?

Counsel raised it, but was told, we're not going to decide it. Puts them into collateral review. Does Martinez apply there?

MR. OLDHAM: If it happened in every single case and there was no opportunity --

JUSTICE SOTOMAYOR: No, forget it -- that -- when it happens?

MR. OLDHAM: Oh, no, Your Honor. I don't think that Martinez would apply in that circumstance.

JUSTICE SOTOMAYOR: Okay. So they haven't gotten a full and fair opportunity because they've presented their case, but Texas has said, we don't want to do it here, do it there. You are still saying Martinez doesn't apply?

MR. OLDHAM: Precisely, because there is no default upon which to apply Martinez, so there's nothing -- there is no work for Martinez to do in that hypothetical, precisely because the claim can be met --

JUSTICE SOTOMAYOR: So because it can, but Texas chose not to, now there's no protection, there is no full and fair opportunity for the petitioner to have had that claim adjudicated?

That's really the end result of what you're

saying.

MR. OLDHAM: Well, I'm certainly not suggesting that the rule needs to turn on the meaningfulness of the opportunity to raise it on direct appeal. I think that Martinez was very clear when it said -- whether it's a complete --

JUSTICE SOTOMAYOR: You raised it, and the State said, well, go to collateral review. You're saying, no -- no Martinez protection?

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

JUSTICE SOTOMAYOR: Your counsel was ineffective in habeas in that -- in State habeas, you -- you can do nothing about it.

MR. OLDHAM: Well, you don't -- there's nothing to do in the sense that, in that very hypothetical, that very claim could be raised in State habeas the first time, but it also could be --

JUSTICE SCALIA: There's clearly no Martinez protection. The question you are being asked, I think, boils down to whether we should develop a new case, Martinez plus, in which -- even though there is, technically, the ability to raise it, which is all that Martinez spoke about, the mere fact that the ability to raise it is not effective enough should produce the same result that Martinez produced.

I don't think there is any -- I'm not even sure the other side claims that Martinez said what -- what he is arguing here.

MR. OLDHAM: I think that's exactly right, Justice Scalia, and, in the hypothetical that Justice Sotomayor was asking, the court's ordinary cause and prejudice standards would accommodate for that. There would be no inequity for the court -- for Martinez to do anything.

JUSTICE BREYER: What happens -- imagine we have a State supreme court, and it says, okay, you could raise this claim on appeal, we don't advise it, we think -- it's so much easier to do it in State habeas. Please do it in State habeas. It's not absolutely binding, but do it. Okay? That's what they are saying.

Now, he raises nine of his ten ineffective assistance of counsel claims in State habeas. And the State habeas court says, no, you are out on all nine, but he never raised the tenth.

Now, we are in Federal court, and the prisoner says -- you know, that tenth claim is fabulous. And the judge says, it is substantial. And he says, you know why it wasn't raised before? Because my counsel was incompetent on State habeas, and they didn't raise it on appeal because that's just how people normally do

things in Texas, they don't raise it on appeal. They wait until State habeas.

Has that person had a full and fair opportunity to raise this tenth claim in the State court?

MR. OLDHAM: Well, if the -- if the Court by hypothesis is telling the Bar not to bring claims under any set of circumstances on direct appeal, I think that --

JUSTICE BREYER: They are not saying never. They are just saying it works so much better. What they say is we appoint State habeas counsel at the same time, it's easier to develop it. Please. We won't say never. We'll just say hardly ever.

Now, what's -- what is the -- what is your view about whether that person has had a full and fair opportunity to develop his tenth ineffective assistance claim in the State courts.

MR. OLDHAM: Justice Breyer, Martinez should not apply, even to that hypothetical.

JUSTICE BREYER: I'm not even thinking about Martinez at the moment because I don't want to get into whether it is an extension or just an elaboration or just a situation covered, but they didn't think of it or just a lot of other things.

I just want to know, given Martinez, what do you think?

MR. OLDHAM: I'm not sure how to answer the full and fair opportunity question because that -- that's certainly not the standard that we are advocating here.

JUSTICE BREYER: What is the standard you are advocating?

MR. OLDHAM: We believe that Martinez applies where it said that it applies, and that is where a State makes a deliberate choice to disallow all claims on direct appeal. We understand the necessity to having a Martinez clause to apply to an eventual default.

JUSTICE BREYER: But if, in fact, they say, yes, there is a route, never used, but once, filled with minefields, very hard when compared with the other one, there you say, it isn't Martinez, it is a totally -- it is a new thing because Martinez, after all, had no rationale.

MR. OLDHAM: Your Honor, I think --

JUSTICE BREYER: I'm being sarcastic there, but I don't mean to be. I mean, you see what I'm trying to get to?

JUSTICE SCALIA: It was the nose of the camel, which is what Martinez was -- which is what the

dissent said, actually.

(Laughter.)

JUSTICE BREYER: Yes, the dissent said that.

(Laughter.)

JUSTICE KENNEDY: This is -- this is very amusing in a capital case.

Let me ask you this question: Is there anything in the State Bar brief that substantially helps your position? I'm -- I'm very interested in the State Bar brief. It's a little hard for me to parse. It did say there is a conflict of interest in -- between the habeas counsel and the -- and the counsel on direct.

And it also -- it also indicates that the habeas counsel has to file the application in the convicting court not later than 180 days after -- or not later than 45 days after the State's original brief, which seems to help the Petitioner here because the original brief in -- in the direct appeal proceeding is deemed important for the habeas counsel.

MR. OLDHAM: Justice Kennedy, I don't think there is anything in the State Bar brief that helps either side in this sense because the State Bar agrees that there were no relevant guidelines of any kind at the time of any of the proceedings in this case.

The only guideline that any Bar association

had promulgated at the time of the direct appeal proceeding or State habeas proceeding in this case was the 1989 American Bar Association guideline, 11.9.2, which specifically told the direct appeal lawyer in this case to raise every colorable claim he could, regardless of any State procedures to the contrary.

And, if he had raised a substantial Wiggins claim or if he had even tried his best to raise a Wiggins claim that could be -- could be amplified and further developed on State habeas, we wouldn't be standing here today because it would have been properly exhausted and adjudicated on the merits in State court.

So I don't think that the Bar association really has anything one way to say or the other, which is maybe why it filed on behalf of neither party.

But to return to Justice Breyer's question, I don't think that what -- what we're talking about is to come up with anything new. I think what we're talking about in this outside-of-Martinez world is actually very old. We are just talking about the Carrier rule, the normal rule that applies to cause and prejudice for all defaults in States across the country.

And I think that the best way to understand it is to imagine, in the very hypothetical that you offered, where there is just one person who could get

through, that person would have a constitutional claim in the State of -- I'm sorry, the other 900 or however many there were, those people would have constitutional claims in the State of Texas for the deprivation of a meaningful opportunity to press their claims on direct appeal.

And as from the Federal -- and that would serve as cause, if the State courts denied it, that would serve as cause to overcome a default in Federal court and to get an adjudication of that claim.

JUSTICE KAGAN: Mr. Oldham, I had thought that Martinez was really an equitable rule. It was an equitable rule about giving people an opportunity to raise a trial ineffectiveness claim.

And if it's true that, although Texas has a technical possibility of doing that outside of collateral review, but, in fact, that the lawyers are told not to use that route, that the lawyers don't use that route, that, if they do use that route, the likelihood is that they will be thrown out for using that route, the question is why that -- the formal availability of a mechanism that nobody uses and that everybody is told not to use should matter with respect to the application of an equitable rule like Martinez?

MR. OLDHAM: Justice Kagan, there is no work

for an equitable rule in Martinez to do if you can get there another way. And it's not just that you can raise it on direct appeal, it's also that, if your direct appeal lawyer doesn't do it, you can, under certain circumstances, establish cause against your direct appeal -- direct appeal lawyer to overcome an ensuing default.

JUSTICE GINSBURG: Has there ever been such a case, any case in which a direct appeal counsel has been held ineffective for failing to present a Wiggins claim?

MR. OLDHAM: I'm not sure about specifically Wiggins claims, but, yes, it is, in fact, established in the leading treatise on Texas practice cited by both sides that is ineffective assistance of appellate counsel to fail to develop the record to allow any claim to be adjudicated on direct appeal.

JUSTICE GINSBURG: But I asked, if there was any decisions that says, you should have raised it on appeal, appeals counsel didn't rely on the advice of the Texas Court of Criminal Appeals, and, therefore, because counsel followed the advice of Texas Court of Criminal Appeals, she was ineffective?

MR. OLDHAM: No, Justice -- Justice Ginsburg, I am not aware of any particular case on

Wiggins in particular. But -- but claims against appellate ineffectiveness for failure to raise a claim on direct appeal are -- are raised and adjudicated on the merits all the time in Texas courts.

And there are specific ones that say that ineffective assistance of appellate counsel to fail to develop the record using the procedures which the State has allowed through the new trial window.

JUSTICE GINSBURG: Well, the -- the Texas Court of Criminal Appeals, in addition to saying, as a general rule, bring it up on -- on collateral review, said -- and there's a reason. The reason why is the undeveloped record on direct appeal would be insufficient to establish claims that must be supported by extra-record evidence.

So that seems to be an expectation that extra-record evidence will be developed on collateral review, not direct appeal.

MR. OLDHAM: No, Justice Ginsburg, I think it's an expectation that the extra-record evidence will be developed, either through the new trial proceeding, through a factual proffer following it, or through a stay and abatement procedure, to make sure that, when the claim actually gets to the court -- the court of appeals, that it has a record upon which to adjudicate

the claim.

That's all that -- and, to the extent that the appellate lawyer fails to do that, that can constitute cause under the ordinary rules of cause and prejudice without creating another Martinez exception, which we would submit is going to be highly, highly unworkable, given that the court is going to have to determine when is a little bit enough and when is not enough sufficient for Martinez.

JUSTICE ALITO: The Respondent says that the Kansas and the Michigan procedures are sufficient to take the case -- to take the States outside of Martinez. You say your stay and abate proceeding is the same, essentially, as those procedures.

His response is that Texas has used this remedy in only one situation, and that is when a defendant is deprived of counsel during the new trial window and suffers prejudice from the deprivation.

Now, is that correct.

MR. OLDHAM: It's when the counsel -- when the prisoner has suffered a deprivation of the opportunity to develop the record in the new trial window. So, in the Cooks case, for example, that was -- there was only a lawyer for 10 of the 30 days, and the court said the new trial window is a critical stage

for the development of a particular record for raising a Wiggins-style claim on direct appeal, and because that is so --

CHIEF JUSTICE ROBERTS: Finish your sentence.

MR. OLDHAM: Thank you.

And because that is so, where there has been a deprivation of counsel in that circumstance that prohibits the development of that meaningful record, we will allow you to go back, assuming you can show prejudice.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Wolf, you have seven minutes remaining.

REBUTTAL ARGUMENT OF WARREN A. WOLF

ON BEHALF OF THE PETITIONER

MR. WOLF: I want to be very clear about this abatement issue. The abatement issue, as Justice Alito just said, is only available -- as referred in our brief on page 6, is only available when there is a denial of the constitutional right to an attorney.

And those situations is when there's a delay in appointing the direct appeal attorney after the trial. So, during the 30-day window to file the motion for new trial, that time limitation is -- is -- that

clock is running, and, if there's no attorney appointed, the constitutional violation is considered a critical stage of the trial.

And since there's -- if there's no attorney appointed during those 30 days, that is the only time, as Justice Kennedy is correct in saying, that that is the time that the abatement procedure is permitted. That is the only time.

JUSTICE KAGAN: So you are suggesting that if -- if an attorney is appointed within a few days or within a week, as happened here, that, in that case, there would not be that opportunity, it would be the 30 days, that's it, stop?

MR. WOLF: And when that new -- that's correct. And, if a new attorney is appointed because there was no attorney appointed, that new attorney, he, himself, also has only 30 days. The clock starts --

JUSTICE KENNEDY: But what about -- what about the 75-day --

CHIEF JUSTICE ROBERTS: Justice Kennedy.

JUSTICE KENNEDY: I understood that, if the 30-day rule had been complied with, within the 75 days, you can ask the appellate court to please remand because there is some additional evidence to be --

MR. WOLF: That's not correct.

JUSTICE KENNEDY: -- to be determined.

MR. WOLF: That is not a correct statement of the law, and -- and I would refer the Court to our briefs, to the -- to the time that the -- the authorities that we cite and also the amicus brief from the State Bar of Texas.

CHIEF JUSTICE ROBERTS: Well, what are -- what are these investigators, experts, they're available to the new appellate counsel, what -- what are they supposed to be doing?

MR. WOLF: To the direct appeal attorney?

CHIEF JUSTICE ROBERTS: Yes, the direct appeal attorney. You say -- basically, you're saying there's no way they can do anything within these time limits, and, yet, the State procedure provides for investigators and experts. It seems to me it would be odd for them to provide for people and to pay for people who can't do anything.

MR. WOLF: Well, they don't -- to do a Wiggins claim -- to do -- they're doing things that would -- investigates things that came out of the record because that's what is relegated to the direct appeal. The habeas attorney has more money available and has more time available to do the things, and it becomes a function of time as well.

But I want to direct the Court's attention also to the -- to the statement in Sprouse. And -- and the statement --

JUSTICE KENNEDY: The statement?

MR. WOLF: In the case of Sprouse, in our -- where am I?

It's page 20 -- 20 of our reply brief, that the position in Sprouse is that there would be no constitutional defect if appellate counsel didn't have time or the record to raise the ineffective assistance claim, and that's because the habeas proceeding is available to direct -- to develop the claim and is the proper place to do so. And that's the State's brief. It's on page 20 of our reply brief.

The other thing that I wanted to -- to bring to the Court's attention is that the Respondent cites a couple of cases that are aberrant -- they're aberrations, and they really don't -- shouldn't -- since this Court has -- has brought out a sensible rule in Martinez and this Court has said this Court's rule sensibly speak to the ordinary case, not -- not the aberrational. And that's exactly what we have here.

The last thing that I wanted to say is -- is that the direct appeal, if -- if -- there's a choice here that the State has systemically developed a system

that has caused -- that has directed attorneys on appeal that the habeas attorney does the extra-record claims, the Wiggins-type claims, and that the -- the claims that are raised on the record go to the direct appeal attorney.

That is the system that the State has developed. Those are the rules that govern this system that have been promulgated by the court of criminal appeals and the Supreme Court, and that's the system -- the scheme that we are under.

And because --

JUSTICE GINSBURG: What about the position of the State that says Martinez is relatively new, if there is an extension of Martinez to cover this case, then at least give the Texas courts the first crack at deciding whether there was ineffective assistance of counsel, instead of having that done in the Federal court?

MR. WOLF: We're just looking for the -- because of the procedural default scenario that we find ourselves in, we tried to do that.

And -- and because 11.071 also has -- when they -- when that was promulgated in 1995 in order to expedite these claims, it provided three things: One, a new attorney; two, the money to fund those claims; and,

three, an abuse of the writ, which is Section 5a, which is what we met in -- in our case.

The Texas scheme, because of that abuse of the writ, proceeds -- causes procedural default, and that puts us in this quandary, where a person like Mr. Trevino is unable to get relief because he has an ineffective trial lawyer. And, now, he is -- that ineffective trial lawyer -- his ineffectiveness is being insulated by the ineffectiveness of his -- of his habeas lawyer.

And that's not what should happen. It's -- it's just not equitable, it's not fair. And Mr. Trevino, someone in his situation, should have a right to complain about the ineffectiveness of his trial lawyer.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)

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