No. 11-10189

In the Supreme Court of the United States

CARLOS TREVINO, PETITIONER

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Every person who is sentenced to death in Texas receives (1) a new, conflict-free appellate lawyer; (2) funding for appellate counsel's development of extra-record claims through investigators and experts; (3) an opportunity to challenge his trial counsel's effectiveness in a motion for new trial; and (4) an automatic direct appeal of his claims, including any ineffective-assistance-of-trial-counsel claims, to the Texas Court of Criminal Appeals. Texas extended those rights to ensure that everyone facing the State's ultimate criminal sanction could raise their ineffectiveness claims on direct appeal, without waiting until state-habeas proceedings. The State and its political subdivisions spend millions of dollars every year to provide those additional rights to defendants convicted of capital murder.

Notwithstanding the procedures and resources provided by the State, Carlos Trevino failed to raise his ineffectiveness claim in state court until a successive, procedurally barred habeas application. The question presented is:

Whether a prisoner sentenced to death in Texas can establish cause to excuse a procedural default under *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), after failing to use a new, conflict-free attorney provided by the State, state funding for investigators and experts, a new-trial mechanism, a direct appeal, and a state-habeas proceeding to raise an ineffective-assistance-of-trial-counsel claim.

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INTRODUCTION

In Texas, new-trial motions and direct appeals provide the first opportunity to raise ineffective-assistance-of-trial-counsel claims. And the State has made that opportunity a meaningful one by appointing and paying for new, conflict-free counsel, investigators, and experts whenever a death sentence is imposed. By empowering capital-murder convicts to raise their ineffectiveness claims while memories are still fresh and records are not yet stale — and while the protections of the Sixth Amendment still apply — reformers in Texas created a "model in the [N]ation." Debate on Tex. S.B. 440 on the Floor of the House, 74th Leg., R.S. (May 18, 1995) (Rep. Gallego).

Using the procedures and resources that Texas affords for new-trial motions and direct appeals,

prisoners have brought and won ineffectiveness claims. Those victories include ineffectiveness claims premised on trial lawyers' failures to investigate and introduce mitigating evidence at sentencing. Because Texas affords a meaningful opportunity for prisoners to vindicate their ineffectiveness claims on direct appeal, the State's system creates none of the equitable concerns identified in *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012).

If this Court nonetheless extends *Martinez* to Texas, its holding would be far from "narrow" or "equitable," *Martinez*, 132 S. Ct. at 1315, 1318, or "respect[ful]" of state law, Pet'r Br. 35. Such a holding would undermine the procedural-default doctrine in States across the country. It would allow prisoners to circumvent the relitigation bar codified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. 2254(d), in countless cases. And it would inundate state and federal courts with long-ago defaulted claims.

That is an enormous amount of collateral damage, and it should not be imposed without considering all of the interests involved. For more than two generations, the State and families victimized by violent crime have relied on the promise of finality inherent in the procedural-default doctrine. And existing exceptions to that doctrine already protect the wrongly accused and defendants who receive constitutionally ineffective appellate counsel. This Court should not expand those exceptions to allow further review of a meritless claim by a man who raped and murdered a fifteen-year-old girl.

STATEMENT

A. Legal Background

1. This Court long has held that federal courts should not grant habeas relief until state prisoners properly exhaust their state-law remedies. See, *e.g.*, *Ex parte Royall*, 117 U.S. 241, 252-253 (1886); 28 U.S.C. 2254(b)-(c). As a corollary, where a prisoner fails to follow the State's procedures in exhausting a claim, and where the state court rejects the prisoner's claim on account of that procedural violation, the procedural-default doctrine insulates the state-court judgment from second-guessing by federal courts. *Lambrix* v. *Singletary*, 520 U.S. 518, 522-523 (1997); cf. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 635-636 (1875).

The legitimacy of extending federal habeas to state prisoners depends on the strength of the procedural-default doctrine. As this Court has recognized, it is difficult to reconcile the federal power to invalidate already-final state-court judgments with the concept of coequal sovereignty, principles of comity and federalism, and the imperative of finality in criminal law. See, *e.g.*, *Harrington* v. *Richter*, 131 S. Ct. 770, 786-787 (2011); *Coleman* v. *Thompson*, 501 U.S. 722, 730-731 (1991); *Wainwright* v. *Sykes*, 433 U.S. 72, 87-90 (1977).

That tension is exacerbated when a federal court adjudicates a claim that the state court has held to be barred by a violation of the State's procedural rules. State courts must have a fair opportunity to correct errors in their own proceedings and must be allowed to develop factual records of those errors while the memories of the trial judge, counsel, and

witnesses "are freshest." *Sykes*, 433 U.S. at 88; see also *Coleman*, 501 U.S. at 750-751; *Engle* v. *Isaac*, 456 U.S. 107, 127-129 (1982). When state prisoners deny the State those opportunities by disregarding the State's procedures, avoiding merits adjudications in state court, and then litigating instead in federal court years after the original trial, the tension inherent in federal-habeas review becomes unbearable. See *Sykes*, 433 U.S. at 89-90 (litigating defaulted claims in federal court encourages "'sandbagging' on the part of defense lawyers" and "tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event"); *Murray* v. *Carrier*, 477 U.S. 478, 490-491 (1986).

2. While the State's interests (and the need for federal deference to them) are compelling, a prisoner can overcome a procedural default in two narrow circumstances. First, a federal court can excuse a procedural default by a state prisoner who "probably" is "actually innocent." *Carrier*, 477 U.S. at 496. Second, a state prisoner can overcome a procedural default by proving that "some objective factor external to the defense" caused it and "*actual* and substantial" prejudice resulted from it. *Id.* at 488, 494; see also *Sykes*, 433 U.S. at 90-91.

Until last Term, the alleged ineffectiveness of state-habeas counsel could not constitute cause to excuse a procedural default. See *Coleman*, 501 U.S. at 755-757. Last Term's *Martinez* decision, however, announced a "narrow" "modif[ication]" of that settled rule. 132 S. Ct. at 1315. Exercising its equitable discretion, the Court held that state prisoners should have one opportunity to raise an ineffective-

assistance-of-trial-counsel claim with the assistance of a second (and this time effective) lawyer. See *id.* at 1317. In many States, that holding does not "modify" *Coleman* at all because prisoners can challenge the effectiveness of their trial lawyers on direct appeal, where the constitutional right to counsel still attaches. *Id.* at 1315; see *Evitts* v. *Lucey*, 469 U.S. 387 (1985). If a prisoner in one of those States forgoes an ineffectiveness claim on direct appeal, his only avenue for overcoming a subsequent default is to challenge the efficacy of his direct-appeal lawyer. See *Carrier*, 477 U.S. at 497; *Martinez*, 132 S. Ct. at 1319-1320 (reaffirming *Carrier*).

Arizona, however, imposed a bright-line ban on litigation of ineffective-assistance-of-trial-counsel claims on direct appeal. See *State* v. *Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). By doing so, Arizona forced its prisoners to raise ineffectiveness claims in state habeas — where they have no constitutional right to counsel and hence, under *Coleman*, no recourse when their state-habeas lawyers default substantial claims. To alleviate that potential inequity, this Court held that a State cannot force its prisoners to raise ineffectiveness claims in a forum where they lack the right to an adequate attorney, and then turn around and invoke the procedural-default doctrine to insulate the results of that uncounseled proceeding. See *Martinez*, 132 S. Ct. at 1319-1320.

3. Texas made none of the choices that Arizona made. To the contrary, Texas "deliberately chose" to empower death-row prisoners to raise ineffectiveness claims *either* on direct appeal *or* in state habeas. *Martinez*, 132 S. Ct. at 1318. The Legislature made

that choice because it wanted to provide death-sentenced prisoners with an additional (and constitutionally protected) layer of review for their ineffectiveness claims.

The Legislature recognized that the first prerequisite to challenging trial counsel's effectiveness is appointment of a new, conflict-free lawyer. If the same lawyer is responsible both for the ineffectiveness and for condemning her own misconduct, "it's very difficult to raise that issue and say you're an ineffective attorney and therefore your client received the death penalty." Hearings on Tex. H.B. 1562 at 1, Before House Comm. on Criminal Jurisprudence, 73d Leg., R.S. (May 10, 1993) ("H.B. 1562 Hr'g Tr."). Accordingly, with support from the State Bar of Texas and capital-punishment lawyers from the University of Texas, the Legislature agreed to provide every death-sentenced prisoner with a new appellate lawyer who had no prior involvement in the case and therefore could raise ineffectiveness claims on direct appeal. See Habeas Corpus Reform Act, 74th Leg., R.S., ch. 319, § 2, Tex. Gen. Laws 2764, 2764-2765 (1995) ("1995 Reform Act") (creating Tex. Code Crim. Proc. art. 26.052); House Comm. on Criminal Jurisprudence, Interim Report to the 74th Texas Legislature 63-64 (Nov. 1994) ("Interim Report") (noting support from State Bar and U.T. capital-punishment clinic for new, conflict-free direct-appeal lawyers).

Moreover, where ineffectiveness claims hinge on evidence not presented at trial, the new-trial mechanism allows counsel to develop the record and preserve the claims for direct appeal. As the leading treatise on Texas practice observes, "ineffective

assistance of counsel [is] a frequent issue raised in new trial motions." 43A George E. Dix & John M. Schmolesky, *Texas Practice Series* § 50:15, at 639 (3d ed. 2011) [hereinafter *Texas Practice*]. Direct-appeal counsel are entitled to reimbursement of funds spent on investigators and experts used to develop their ineffectiveness claims. See Tex. Code Crim. Proc. art. 26.052(*l*). Numerous prisoners have raised and won such claims prior to their state-habeas proceedings. See, *e.g.*, *State* v. *Jones*, 2004 WL 231309, at *8 (Tex. Crim. App. Jan. 28, 2004) (collecting cases). It is therefore indisputable that state habeas "is not the only mechanism for developing an ineffectiveness claim. An increasing number of cases * * * use the motion for new trial as a vehicle for developing the necessary record." *Ibid.*

B. Factual Background

In 1996, Carlos Trevino and three of his friends (Santos Cervantes, Brian Apolinar, and Seanido Rey) brutally gang-raped and murdered a fifteen-year-old girl in Bexar County, Texas. The details of the crime are relevant both because Trevino falsely implies that he was a mere bystander to a capital crime committed by others, and because the heinousness of Trevino's actions demonstrates the reasonableness of his lawyers' strategies.

1. On May 9, 1996, Trevino was released from prison on parole. JA377. He had just finished a two-year sentence for unlawful possession of a semiautomatic pistol. 23RR71-73. Trevino served his entire prison sentence in solitary confinement because he is a member of a deadly prison gang called Hermanos de Pistoleros Latinos (or "Brotherhood of Latino Gunmen"). 23RR92-100.

On June 9, 1996, one month after Trevino left prison, he was partying with his friends. When they ran out of beer, Trevino and the others went to buy more. Upon arriving at the convenience store, one of Trevino's friends saw a young girl named Linda Salinas wearing a Bugs Bunny T-shirt and talking on a payphone. JA265. Salinas was on her way to a sleepover at a friend's house. One of the men promised to drive the girl to meet her friend. Instead, Trevino and his friends drove Salinas to a park; gang-raped her vaginally, anally, and orally; severed her carotid artery by stabbing her in the neck; and left her to bleed to death in a creekside ditch.

Forensic evidence from the crime scene linked one and only one man to the crime: Carlos Trevino. Police found Trevino's blood in Salinas's underwear. JA271. They found fibers from Trevino's pants in Salinas's underwear. JA230. And they found fibers from Trevino's pants in Salinas's shorts. JA230-231. The horrific injuries inflicted by the grown men on their 100-pound victim confirmed that Salinas was gang-raped. JA265-270. But the police's rape kits, DNA tests, serology tests, and fiber analyses either eliminated or failed to inculpate everyone except Trevino. Cf. Pet'r Br. 3 (reporting in the passive voice that Salinas "was brutally raped"); *id.* at 4 (blaming three others for the rape); *ibid.* (referring to Trevino's "alleged role[]").

And that's not all. Trevino's cousin, Juan Gonzales, served as a lookout during the crime and told police about Trevino's involvement. According to Gonzales, Trevino pinned Salinas down while his friend anally raped her. JA263. One of Trevino's

friends then said, "We don't need no witnesses." JA258. Trevino replied, "We'll do what we have to do." *Ibid.* After one of Trevino's accomplices remarked that Trevino's murderous actions were "neat," Trevino replied that he "learned how to kill in prison." JA282. Trevino also bragged that "I learned how to use a knife in prison." *Ibid.* And Trevino was covered in blood when he came back to the car. JA260. The record reveals nothing to suggest (and Trevino never has argued) that Gonzales had an ulterior motive to inculpate his own cousin in a capital murder.

After Trevino murdered Salinas, he and his accomplices returned to the party. While the others drank and did drugs, Trevino and a friend went outside and destroyed evidence of the crime. In particular, they burned the backpack Salinas had been wearing when the men picked her up at the convenience store. 16RR159-177.

2. In July 1996, Trevino was indicted for capital murder, and the court appointed Mario Trevino ("Mario," no relation to petitioner) as lead defense counsel. JA370. Mario was a former counsel to the Financial Services Committee of the U.S. House of Representatives and a former prosecutor in the Bexar County District Attorney's Office. JA367. At the time of his appointment, he had seventeen years of criminal-defense work under his belt, and he had served as defense counsel in several capital-murder trials. JA367-368. The court also appointed Gus Wilcox to second-chair the trial; at the time, Wilcox had twenty-five years of criminal-defense experience, in addition to "many years" of experience in the Bexar County District Attorney's Office. JA370-371.

Based on their experience with capital cases, Mario and Wilcox thought a plea bargain offered the best chance to avoid a death sentence. JA372. Defense counsel secured a plea offer from the district attorney, which Trevino accepted. JA378. Mario and Trevino went to the district attorney's office to sign a statement confessing Trevino's role in the rape and murder. JA379-380. But Trevino changed his mind after other members of the Pistoleros gang told him not to cooperate with authorities. JA516-517.

C. Procedural Background

1. After Trevino rejected the State's plea offer, Mario and Wilcox turned their attention to the trial. In August 1996 — almost a year before trial began — Mario moved for appointment of a private investigator "to [e]nsure that defendant receive[s] his rights to effective assistance of counsel." JA194. The trial court granted the motion and appointed Edward Villanueva to work on Trevino's behalf.

Mario, Wilcox, and Villanueva hoped to convince the jury that Trevino "was merely present and did nothing to commit the crime." JA389. When the trial began, the State had no forensic proof to the contrary. The State's principal evidence linking Trevino to the crime was eyewitness testimony from Trevino's cousin, Gonzales. Accordingly, the defense focused its guilt-phase efforts on excluding or impeaching Gonzales's testimony. See JA302-303, 363-364, 376-377, 389-390. Impeaching Gonzales's testimony was a tall task because every witness to the crime agreed that Trevino participated in it, see JA390, and because Mario could not call Trevino to deny the State's allegations without suborning perjury, see JA384.

The trial's landscape shifted during voir dire. Before jury selection began, the State informed Mario that it intended to test a bloodstain in Salinas's underwear. JA224. Mario then conferred with his client:

> So I went back to Mr. Trevino, my client, and said, what do you want me to do? I can go up and ask for a continuance right now. We can do it, or we could roll the dice and let it go. But more importantly, before we do all that, is there any chance, and I mean any chance, that it might come back to you, and he said no.

JA399. On the basis of his client's assurances — and with confidence that the State's additional testing would either exonerate or fail to inculpate Trevino — Mario made a strategic decision not to seek a continuance or conduct his own DNA analysis. *Ibid.*

The test results, however, implicated Trevino and Trevino alone. The lab returned its results near the end of voir dire, and the State immediately shared them with Mario. In response, Mario and Wilcox moved for a mistrial. JA225-226. Then they moved for a continuance. JA310. The trial court denied both motions but granted defense counsel's request for appointment and payment of a DNA expert, GeneScreen Forensic Serology Testing. JA226-229. And the court granted counsel's extraordinary, midtrial request for a continuance to allow a GeneScreen expert to testify. 19RR136. But after the defense conducted its own testing, which presumably confirmed Trevino's guilt, Mario decided not to call GeneScreen to testify.

The jury found compelling the DNA evidence of Trevino's blood in Salinas's underwear. See JA350 (juror interviews); cf. Pet'r Br. 4 (suggesting Trevino's conviction rested exclusively on Gonzales's eyewitness testimony). The jury found Trevino guilty of capital murder.

2. Months before trial, defense counsel began a thorough mitigation investigation. As Mario later testified, the goal of that investigation was to convince the jury "to find that there was a mitigating circumstance that would suggest that the death penalty is not appropriate." JA391-392. Although Trevino refused to provide leads for potentially helpful family members, JA392, the defense team repeatedly interviewed Trevino's aunt, see JA200, 303, and stepfather, JA303, 382, 392. They diligently tried to reach Trevino's mother, but she was an alcoholic and hence unavailable to testify. JA285, 391-392. They also investigated Trevino's educational background, JA277-278, 286, 392-393, and propounded over seventy mitigation-related discovery requests, JA200-222. Cf. Pet'r Br. 6 ("Defense counsel conducted no mitigation investigation * * * .").

After conducting its investigation, the defense decided to present one witness (Trevino's aunt, Juanita DeLeon) at sentencing. DeLeon portrayed Trevino as a hard-working and loving man who grew up on welfare with an alcoholic mother and absent father, but who nonetheless made the best of his difficult circumstances. JA285-289. And DeLeon made an impassioned plea for mercy on Trevino's behalf. JA290. The jury rejected those arguments,

however, and Trevino was sentenced to death on July 3, 1997.

3. After sentencing, defense counsel advised Trevino to accept new, conflict-free appellate counsel, as was Trevino's right under Texas Code of Criminal Procedure article 26.052. JA401-402. Mario did so to allow Trevino to raise an ineffectiveness claim on direct appeal. As Mario explained, "I think it's best to have someone come in from the outside and look at everything." JA402. Trevino accepted that strategy.

Four days after imposition of Trevino's sentence, on July 7, 1997, the trial court appointed Richard Langlois as direct-appeal counsel. JA298-299. Langlois was a prominent criminal-defense attorney with no prior involvement in the case, and he had an extensive track record of raising ineffectiveness claims in direct appeals. Two days after the appointment, the trial court dismissed Mario and Wilcox. JA306-308.

Sixteen days later, on July 25, 1997, the defense moved for a new trial. JA309-311.[1] The motion challenged Mario's allegedly ineffective decision to accept his client's assurances that the blood in Salinas's underwear was not Trevino's. JA309-310. The defense's sole reason for filing the new-trial motion was "[t]o preserve" Trevino's ineffectiveness

[1] Although the motion was signed by Mario, it appears Langlois was involved in filing it. The defense filed the motion eighteen days after Langlois's appointment and sixteen days after the trial court dismissed Mario and Wilcox from the case. JA298-299, 306-308. Moreover, as Mario later explained, it would have been Langlois's responsibility to conduct an evidentiary hearing on the motion, had the trial court ordered one. JA404.

claim so Langlois could raise it on direct appeal. JA403.

On August 4, 1997, after the new-trial window closed, Langlois further laid the groundwork for an ineffectiveness claim by again supplementing the record on appeal. In particular, Langlois asked the trial court to include in the appellate record "defense counsel's copy of personal jury information lists [from voir dire,] along with any notes by defense counsel." JA315. Hinting at his plans to raise an ineffectiveness claim, Langlois emphasized that defense counsel's records were "essential to a fair determination of an issue raised on appeal." *Ibid.*

After reviewing Mario and Wilcox's notes and strategies, Langlois argued that trial counsel's failure to ask questions during voir dire about DNA evidence was constitutional error. See Appellant's Brief, *Trevino* v. *State*, No. AP-72,851, at 3-10 (Tex. Crim. App. Sept. 4, 1998). But in his independent judgment, Langlois argued that fault for the error rested on the trial court's shoulders, not defense counsel's. See *id.* at 8 (arguing, in reliance on defense counsel's notes, that Mario and Wilcox properly requested to reopen voir dire).

Moreover, Langlois was aware of Trevino's difficult upbringing. See JA318-320. But again in his independent judgment, Langlois did not argue that Mario and Wilcox were ineffective in failing to present additional evidence during the punishment hearing. Cf. *Wiggins* v. *Smith*, 539 U.S. 510 (2003). In all, Langlois raised twenty-one claims on Trevino's behalf (two in the new-trial proceeding and nineteen on appeal).

The Texas Court of Criminal Appeals ("CCA") rejected Langlois's arguments and affirmed Trevino's conviction and sentence. JA12-24. Trevino never has argued that Langlois provided ineffective appellate counsel.

4. On January 19, 1998, the CCA appointed Albert Rodriguez to represent Trevino in his state-habeas proceeding. JA2, 427. Rodriguez raised forty-six claims on Trevino's behalf, including sixteen ineffectiveness claims against Mario and Wilcox. JA321-349.

Those claims were not "based only on the trial record." Pet'r Br. 10. To the contrary, Rodriguez requested and received an evidentiary hearing — memorialized in a fifty-eight-page transcript — precisely because his ineffectiveness claims required facts outside of the trial record. JA353-410. At that evidentiary hearing, Rodriguez cross-examined Mario at length regarding the defense's preparations, strategies, and decisions. And Mario explained the defense's thorough mitigation investigation. JA391-402.

Rodriguez did not raise a *Wiggins*-style claim in the state-habeas application and, after hearing Mario's explanation for the defense's punishment-phase strategy, Rodriguez did not amend the application to add such a claim. The state trial court recommended denial of Rodriguez's other forty-six claims, and the CCA adopted that recommendation. JA25-26.

5. More than five years after the trial, on December 26, 2002, Trevino's current counsel filed a second and successive state-habeas application.

There Trevino argued for the first time that Mario and Wilcox were ineffective under *Wiggins* for failing to present the sentencing jury with additional facts about his mother's alcoholism, his poor grades in school, and his absent father. Trevino supported those allegations with affidavits. JA516-581.

The CCA denied Trevino's second state-habeas application on a state procedural ground — namely, the abuse-of-the-writ doctrine. See JA27-28; Tex. Code Crim. Proc. art. 11.071, § 5.

6. Trevino then renewed his procedurally defaulted *Wiggins* claim in federal court. The district court held that Texas's abuse-of-the-writ doctrine constituted an adequate and independent state-law ground, sufficient to bar federal review of the defaulted claim. JA76. Alternatively, the district court held that the claim was meritless because "some of petitioner's purportedly 'new' mitigating evidence was cumulative," and the rest was double-edged because it tended to prove that Trevino is a future danger to society. JA71-72. Balancing Trevino's purportedly "'new' mitigating evidence" against the "particularly brutal and senseless" crime, for which Trevino offered "not even a scintilla of sincere contrition," the district court rejected his ineffectiveness claim on the merits. JA77-78.

The district court did not grant a certificate of appealability ("COA") regarding the effectiveness of Mario, Wilcox, Langlois, or Rodriguez. Nor did it find that jurists of reason could debate that new-trial motions and direct appeals provide meaningful opportunities to vindicate *Wiggins* claims. The district court did find, however, that jurists of reason

could debate whether Trevino is "actually innocent" of the death penalty. JA132.

The Fifth Circuit affirmed. It agreed with the district court that Trevino's purportedly "'new' mitigating evidence" was "somewhat cumulative." JA161-162. The court of appeals further agreed that Trevino fell far short of satisfying the "demanding standard of 'actual innocence.'" JA162.

SUMMARY OF ARGUMENT

I. The dispute in this case turns on whether the State of Texas provided Trevino a meaningful opportunity to raise his ineffective-assistance-of-trial-counsel claim. The State has ensured that every colorable ineffectiveness claim by every death-sentenced prisoner can be adjudicated on the merits by at least one court. Accordingly, the State's invocation of the procedural-default doctrine here creates none of the equitable concerns identified in *Martinez*.

A. In *Martinez*, this Court solved a specific problem. Arizona "deliberately cho[se]" to force all prisoners to raise their ineffectiveness claims in state-habeas proceedings and without a constitutional right to effective counsel. *Martinez*, 132 S. Ct. at 1318. That choice created a potentially inequitable consequence: if the prisoner failed to raise a substantial claim in the one and only forum that the State provided, the procedural-default doctrine would bar the prisoner from litigating it in any forum.

B. Texas's system does not pose that problem because it enables defendants to raise ineffectiveness claims on direct appeal, where they enjoy a

constitutional right to effective assistance of counsel. The State's choice means that every substantial ineffectiveness claim will be adjudicable on the merits in state or federal court.

1. Texas ensures that the direct-appeal opportunity is a meaningful one. It pays for new, conflict-free, and constitutionally guaranteed attorneys to represent every death-sentenced prisoner on direct appeal of his conviction and sentence. And it pays for investigators and experts to develop claims, including ineffectiveness claims, prior to the appeal. Those are extraordinary steps — and Texas took them precisely to ensure that its prisoners could raise their ineffectiveness claims at the earliest possible opportunity, while memories are still fresh and the Sixth Amendment's protections still apply.

2. Texas also equipped its new, conflict-free, and constitutionally guaranteed appellate lawyers with the procedures necessary to raise and win ineffectiveness claims. In particular, a motion for new trial under Texas Rule of Appellate Procedure 21 allows direct-appeal counsel to supplement the record with evidence developed by investigators and experts regarding trial counsel's strategies or negligence. The CCA, the American Bar Association, and the leading treatise on Texas practice all instruct appellate counsel to use the new-trial mechanism to preserve ineffectiveness claims and to raise them on direct appeal.

3. Many lawyers and prisoners have used the resources and procedures provided by Texas's system to pursue ineffective-assistance-of-trial-counsel claims on direct appeal, in capital and non-capital

cases alike. And these efforts have produced successful *Wiggins*-style claims.

While it is true that an "'undeveloped record on direct appeal will be insufficient' for a defendant to raise or a court to evaluate a claim of trial ineffectiveness," Pet'r Br. 24-25 (quoting *Thompson* v. *State*, 9 S.W.3d 808, 814 n.6 (Tex. Crim. App. 1999)), that begs the question. The CCA has held time and again that a motion for a new trial can be employed by a defendant's new, conflict-free lawyer to make an ineffectiveness claim adjudicable on direct appeal. See, *e.g.*, *Jones*, 2004 WL 231309, at *8 (collecting cases).

Contrariwise, the CCA refuses to adjudicate such claims *only* where the defendant chooses not to use his new counsel and new-trial hearing to allow previous counsel to testify regarding her trial strategies. See Pet'r Br. 26-27 n.13 (collecting cases). Texas's provision of new, conflict-free appellate counsel and the State's new-trial procedures allowed Trevino to question Mario and Wilcox about their punishment-phase strategies. Had Trevino used those procedures, his *Wiggins* claim would have been adjudicable on direct appeal. See *Armstrong* v. *State*, 2010 WL 359020, at *5 (Tex. Crim. App. Jan. 27, 2010).

4. Trevino ignores all of this and asserts that Texas law imposes a "division of responsibilities" in capital cases that forces state-habeas counsel to raise ineffectiveness claims, to the exclusion of direct-appeal counsel. That assertion is a fantasy. Trevino's cited authorities do not require (or even recommend) that state-habeas counsel raise any particular claim, much less do they prohibit direct-

appeal counsel from doing anything. To the contrary, the only relevant guideline that existed during Trevino's state-court proceedings instructed his direct-appeal lawyer to raise *all* colorable claims, regardless of any state procedures restricting when and where those claims could be raised. See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") 11.9.2(D) (1989).

C. By equipping direct-appeal lawyers to raise ineffectiveness claims, Texas eliminates the danger that "no court will review [those] claims." *Martinez*, 132 S. Ct. at 1316, 1318. If the direct-appeal lawyer raises the claim, it will be exhausted (and hence reviewable in federal court) no matter what the CCA does with it. And if the direct-appeal lawyer does not raise the claim, the failure to do so can constitute "cause" for a subsequent procedural default. See *Carrier*, 477 U.S. at 488. Neither circumstance demands the remedy announced in *Martinez*.

II.A. Trevino's case illustrates the equity of Texas's system. His direct-appeal lawyer knew how to raise arguably meritorious ineffectiveness claims. He was well aware of Trevino's disadvantaged background, and he investigated whether to raise an ineffectiveness claim in this case.

B. Trevino's direct-appeal lawyer declined to raise his *Wiggins* claim because it was weak. The correctness of that strategic choice was confirmed by the federal district court below, which rejected Trevino's claim on the merits — and found that result so clear it did not even warrant a COA.

III.A. Equitable principles demand that this Court consider the interests of the States and victims of violent crime. For the last thirty-five years, this Court has encouraged States to devise postconviction systems, and it has promised that States' choices will be given effect through the procedural-default doctrine. Congress strengthened those assurances in AEDPA, which ensures that States can invest in their habeas systems without fear that federal courts will allow boundless relitigation of state prisoners' claims. Victims' families have equally valid interests in the finality of state-court judgments. Given the States' and victims' interests, it would be inequitable to allow Trevino and others like him to continue litigating their defaulted claims.

B. If this Court changes the rules of the procedural-default game now, equitable principles demand, at a minimum, that the CCA be given an opportunity to adjudicate Trevino's *Wiggins* claim on the merits. But even that medicine is too strong because Texas already has provided a conflict-free direct-appeal lawyer, funds for investigators and experts, a new-trial proceeding, and a direct appeal — all of which were sufficient to vindicate the *Wiggins* claim that Trevino belatedly asserts.

ARGUMENT

I. "*MARTINEZ* CAUSE" SHOULD NOT EXCUSE A TEXAS PRISONER'S PROCEDURAL DEFAULT OF AN INEFFECTIVENESS CLAIM

Trevino argues that this Court should extend *Martinez* to Texas. To grant such a doctrinal extension, however, would be to allow a "narrow" and "limited" solution to outgrow the equitable problem that occasioned its creation. *Martinez*, 132 S. Ct. at

1315, 1320. *Martinez*'s adjustment of procedural-default doctrine should not reach a State, like Texas, that allows criminal defendants to urge ineffective-assistance-of-trial-counsel claims on direct appeal.

A. *Martinez* Modified The Procedural-Default Doctrine To Solve An Equitable Problem Peculiar To The State System At Issue In That Case

1. *Martinez* concerned a state system in which "collateral proceedings * * * provide[d] the first occasion to raise a claim of ineffective assistance at trial." 132 S. Ct. at 1315. These "initial-review collateral proceedings," *ibid.*, were a product of "Arizona's decision to bar defendants from raising ineffective-assistance claims on direct appeal," *id.* at 1320. See also *id.* at 1314 (noting that "Arizona law * * * did not permit [defendants] to argue on direct appeal that trial counsel was ineffective").

As the *Martinez* Court recognized, a state-law prohibition of this kind is problematic because it shunts ineffectiveness claims to a counsel-free zone. The criminal defendant enjoys a constitutional right to effective assistance of counsel on direct appeal, see *Lucey*, 469 U.S. at 396, but has no such right in state-habeas proceedings, see *Coleman*, 501 U.S. at 755. "By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed," *Martinez*, 132 S. Ct. at 1318, Arizona created an unacceptable risk that no court, state or federal, would entertain a defendant's ineffectiveness claim:

> When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the

> prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, *no court will review the prisoner's claims*.

Id. at 1316 (emphasis added) (citations omitted).[2]

Martinez solved this equitable problem by modifying the procedural-default doctrine to allow review of a substantial ineffectiveness claim in at least one court — the federal habeas court. Cf. *Sykes*, 433 U.S. at 90-91 ("The 'cause'-and-'prejudice' exception * * * will afford an adequate guarantee, we think, that the [procedural-default] rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a

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[2] The leading treatise anticipated the problem identified by the *Martinez* Court, noting the possibility

> that a person who never received competent representation at any stage may be convicted, and perhaps even condemned to death, and never obtain any judicial review of the effectiveness of trial counsel — because in the state postconviction proceedings, the petitioner (who may have been pro se) failed properly to raise the ineffectiveness of trial counsel[.] Can that result be justified?

Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1285 (6th ed. 2009) [hereinafter *Hart & Wechsler*]; see also William F. Young, Jr., *Book Review*, 32 Tex. L. Rev. 483, 484 (1954) (reviewing first edition of *Hart & Wechsler*) ("It is clear, is it not, that some of these question marks are gratuitous?").

defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."). It accomplished that result by announcing what might be called "*Martinez* cause": the concept that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1315; see also *id.* at 1320.

2. The Court took care to note that its holding created a "limited" and "narrow" exception to the general rule "that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Martinez*, 132 S. Ct. at 1315, 1320 (citing *Coleman*, 501 U.S. at 753-755). Accordingly, *Martinez* cause must be understood in the context of the equitable problem it was built to solve, and it should not be extended to a State whose system avoids the problem by allowing defendants to urge ineffectiveness claims on direct appeal.

In a State whose courts stand ready to entertain an ineffectiveness claim on direct appeal, it cannot be said that "no court will review the prisoner's claims" just because they were not presented to the state-habeas court. *Martinez*, 132 S. Ct. at 1316. To the contrary, two other courts will be available. An error by state-habeas counsel no longer makes it "likely that no state court at any level will hear the prisoner's claim," *ibid.*, because the claim will have been presented to the state courts on direct appeal. And even if direct-appeal counsel fails in this task, the federal habeas court will be able to consider the claim because the unconstitutional ineffectiveness of

counsel on direct appeal will serve as cause to excuse the procedural default of the ineffectiveness claim. See *Carrier*, 477 U.S. at 488.

By thus enabling review in both state and federal courts, a State that authorizes consideration of ineffectiveness claims on direct appeal will avoid the equitable problem that *Martinez* cause was meant to solve. Because Texas allows death-sentenced prisoners to pursue ineffectiveness claims on direct appeal, there is no justification for extending *Martinez*'s narrow solution in this case.

B. Texas's System Does Not Pose The Equitable Problem That Prompted The Court To Create *Martinez* Cause

Texas empowers criminal defendants to raise ineffective-assistance-of-trial-counsel claims on direct appeal. To ensure that the direct-appeal opportunity is a meaningful one, the State provides all death-sentenced prisoners with new, conflict-free appellate counsel, a new-trial mechanism, and funding for investigators and experts to develop their claims. Numerous defendants have used those procedures to raise ineffectiveness claims on direct appeal — including *Wiggins*-style claims.

Trevino nevertheless argues that direct-appeal counsel do not use those procedures because the "division of responsibilities" inherent in Texas's "dual-track" system for capital cases assigns sole responsibility for ineffectiveness claims to state-habeas counsel. Pet'r Br. 28-29, 33. But Trevino's division-of-labor theory is imaginary. It is reflected in no state statute, in no state-court decision, and in no State Bar guideline. To the extent the bar offered Trevino's counsel any guidance regarding what

claims to bring and what claims to omit during the direct-appeal proceedings in this case, it was this: "[a]ppellate counsel should seek, when perfecting the appeal, to present *all* arguably meritorious issues" — including, presumably, ineffective assistance of trial counsel. ABA Guideline 11.9.2(D) (emphasis added).

1. Texas provides new, conflict-free counsel and investigative funding for direct appeals in all death-penalty cases

a. Texas does not shunt ineffectiveness claims to a counsel-free zone. See, *e.g.*, *Randle* v. *State*, 847 S.W.2d 576, 580 (Tex. Crim. App. 1993) ("The timely filed appeal to the court of appeals by appellant is a proper procedure for seeking relief [on an ineffectiveness claim]."). By allowing defendants to urge those claims on direct appeal, Texas ensures that they will enjoy the effective assistance of direct-appeal counsel when complaining about the ineffectiveness of trial counsel. Cf. *Martinez*, 132 S. Ct. at 1318 (Arizona does not).

In cases where a death sentence is imposed, Texas goes to even greater lengths to extend the guiding hand of counsel to a defendant with a potential ineffectiveness claim, by providing for a new lawyer to take over the representation on appeal. Texas law obliges a convicting court to appoint direct-appeal counsel "[a]s soon as practicable after a death sentence is imposed." Tex. Code Crim. Proc. art. 26.052(j). The presumption in such a case is that trial counsel will not serve as direct-appeal counsel:

> The court may not appoint an attorney as counsel on appeal if the attorney represented the defendant at trial, unless:

> (1) the defendant and the attorney request the appointment on the record; and
>
> (2) the court finds good cause to make the appointment.

Id. art. 26.052(k); see also App., *infra*, at 1a-6a (showing the operation of this presumption in the state-court proceedings underlying *Ibarra* v. *Thaler*, 687 F.3d 222 (5th Cir. 2012)). By providing a fresh set of eyes on direct appeal to scrutinize trial counsel's performance, article 26.052(k) significantly enhances a death-sentenced prisoner's ability to file ineffectiveness claims.[3] And the Legislature went even further by paying for direct-appeal counsel in death-penalty cases to use investigators and experts — at taxpayer expense — to develop extra-record claims. See Tex. Code Crim. Proc. art. 26.052(*l*) ("direct appeal" counsel shall be reimbursed for "expenses incurred for purposes of investigation or expert testimony"); cf. Br. of Amici Curiae Univ. Tex. Capital Punishment Clinic ("U.T. Br.") 12 ("Appellate counsel has no duty to conduct a factual investigation with regard to the underlying case.").

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[3] Congress likewise recognizes the value of a fresh set of eyes. Chapter 154 of Title 28 of the United States Code "provides certain procedural advantages to qualifying States in federal habeas proceedings," *Calderon* v. *Ashmus*, 523 U.S. 740, 742-743 (1998), which are conditioned upon the creation of a state mechanism for appointing state-habeas counsel for indigent death-row prisoners. Counsel so appointed cannot "have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation." 28 U.S.C. 2261(d).

b. Legislative history confirms that the amendments to article 26.052 were calculated to foster the pursuit of ineffectiveness claims on direct appeal. The Legislature enacted subsection (k) shortly after the CCA rejected a death-sentenced prisoner's argument that his trial counsel "had a conflict of interest that prevented him from assailing his own trial effectiveness." *Ex parte Davis*, 866 S.W.2d 234, 243 (Tex. Crim. App. 1993) (per curiam); see also *Robinson* v. *State*, 16 S.W.3d 808, 812 (Tex. Crim. App. 2000) (noting potential for "conflict of interest"). The Legislature presumably recognized that ineffective-assistance-of-trial-counsel claims after *Davis* might not be adjudicable on direct appeal without the provision of new, conflict-free appellate counsel. See *Miller* v. *State*, 33 S.W.3d 257, 260 (Tex. Crim. App. 2000). Therefore, in its first session after *Davis*, the Legislature enacted article 26.052(k). See 1995 Reform Act § 2.

Confirming its intention to make ineffectiveness claims adjudicable on both direct appeal and in state habeas, the Legislature provided for new, conflict-free lawyers in both proceedings. See 1995 Reform Act §§ 1 (state habeas), 2 (direct appeal). As explained by Representative Gallego during debate over a predecessor to the 1995 Reform Act, the purpose of that new statutory right was to empower death-sentenced prisoners to raise ineffectiveness claims. See H.B. 1562 Hr'g Tr. 1. And the Legislature further confirmed that purpose by paying both direct-appeal and state-habeas lawyers in capital cases to hire investigators and experts to develop and raise ineffectiveness claims. See Act of May 22, 1999, 76th Leg., R.S., ch. 837, § 2, Tex. Gen.

Laws 3495, 3495 (1999) (paying for experts and investigators on direct appeal); Act of May 20, 1999, 76th Leg., R.S., ch. 803, § 3(d), Tex. Gen. Laws 3431, 3432-3433 (making parallel payments for state-habeas counsel); Spangenberg Group, *A Study of Representation of Capital Cases in Texas* 166, 169, 171 (1993) (emphasizing importance of funding for investigators and experts to raise ineffectiveness claims, in a report commissioned by the State Bar of Texas).[4]

Members of the Legislature specifically objected to the fact that prisoners were not raising their ineffectiveness claims until the state-habeas proceedings, and "those claims are being litigated 5-8 years after the trial." Hearings on Tex. H.B. 1562 at 4, Before House Comm. on Criminal Jurisprudence, 73d Leg., R.S. (Apr. 14, 1993) (Rep. Casper). The sponsors of the text that eventually found its way into article 26.052(k) emphasized:

> Common sense dictates that resolution of claims (such as ineffective assistance of trial counsel * * *) as I stated, common sense dictates that the accurate resolution of those claims necessarily depends on witnesses' memories and the availability of those witnesses. The drafters believe that early detection of those errors and litigating those closer in time to the event of the trial

[4] The Act of May 22, 1999, amended article 26.052(*l*) to clarify existing law and to eliminate "delays in payments" that were already being made. Senate Research Center, Bill Analysis 1, Tex. H.B. 1752, 76th Leg., R.S. (May 10, 1999).

> will not only inure to the benefit of the defendant but also would not unduly prejudice the state in re-prosecuting and punishing a guilty defendant in the event a new trial should be granted.

Ibid. The drafters said nothing about allocating particular claims among the lawyers. Rather, their intention was that each lawyer would bring all available claims at the earliest possible time. See, *e.g.*, House Research Organization, Bill Analysis 6, Tex. H.B. 1562, 73d Leg., R.S. (May 10, 1993) (declaring that "all available claims of error" should be timely raised); House Research Organization, After the Death Sentence: Appeals, Clemency and Representation 13, Special Legislative Report No. 188 (Apr. 4, 1994) (emphasizing that "grounds for virtually all *habeas corpus* appeals are known after a trial" and thus can be raised immediately); Interim Report 57 (lamenting that ineffectiveness claims are not resolved "while witnesses' memories are still fresh").

c. Trevino nonetheless repeatedly asserts that Texas law "systematically channels ineffective-assistance-of-trial-counsel claims in death penalty cases to state habeas review." Pet'r Br. 19; see also *id.* at 2-3, 18, 20, 22, 24-34, 35, 43. Yet he makes no effort to square that assertion with article 26.052(k)'s provision of new, conflict-free appellate counsel. Aside from quoting the provision in an appendix, *id.* at 9a, Trevino does not even acknowledge the existence of subsection (k) in his brief, much less explain what purpose it might serve other than to enable the pursuit of ineffectiveness claims on direct appeal. Worse, he misrepresents article 26.052(*l*) by

selectively quoting the statute to argue that the Legislature does not pay for extra-record investigations on direct appeal. Compare Pet'r Br. 31-32 & n.18 (arguing subsection (*l*) does not compensate direct-appeal counsel for "investigation expenses in death-penalty cases"), with subsection (*l*) (reimbursing "direct appeal" counsel for "investigation" expenses in death-penalty cases). His approach is unfaithful to the language that the Legislature enacted. It is inconsistent with the substantial investments that Texas made to provide new lawyers and investigative funding on direct appeal in death-penalty cases. And it cannot be reconciled with the Legislature's stated intention to speed the resolution of ineffectiveness claims, regardless whether they are brought on direct appeal or in state habeas.

2. Texas provides a new-trial mechanism for development of ineffectiveness claims

a. In addition to affording counsel, investigators, and experts who can help defendants urge ineffectiveness claims on direct appeal, Texas provides an important procedural tool toward that end: the motion for new trial. This Court has correctly noted that "[t]he evidence introduced at trial * * * will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis." *Massaro* v. *United States*, 538 U.S. 500, 505 (2003). By filing a motion for new trial under Rule 21 of the Texas Rules of Appellate Procedure, however, a defendant can supplement the trial record with all the information the appellate court will need to pass upon any

ineffectiveness claims. The CCA has made clear that the motion for new trial is properly and frequently used for this purpose. See, *e.g.*, *Jones*, 2004 WL 231309, at *8; *Reyes* v. *State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993); 43A *Texas Practice*, *supra*, § 50:15, at 639.[5]

Given the importance of both the right to counsel at trial and the right to challenge trial counsel's effectiveness on direct appeal, Texas courts long have recognized that a defendant is constitutionally entitled to effective assistance of counsel in connection with the motion for new trial. See *Cooks* v. *State*, 240 S.W.3d 906, 907-908 (Tex. Crim. App. 2007) (holding that the period for filing a motion for new trial is a "critical stage"); *Oldham* v. *State*, 977 S.W.2d 354, 360-361 (Tex. Crim. App. 1998) (collecting decisions to same effect from Texas appellate courts); *Trevino* v. *State*, 565 S.W.2d 938, 940 (Tex. Crim. App. 1978) (holding that the hearing on a motion for new trial is a "critical stage"). Thus, if a lawyer fails to use the new-trial window to develop a colorable ineffectiveness claim, that failure is itself the predicate for an ineffectiveness claim. See *Cooks*, 240 S.W.3d at 910-911.

By filing a motion for new trial, a defendant can secure a hearing and introduce "evidence by affidavit or otherwise." Tex. R. App. P. 21.7. By supplementing the trial record in this way, a defendant allows for appellate consideration of a

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[5] Rule 21 reflects an amendment, effective September 1, 1997, in which former Rules 30-32 were merged and renumbered without any substantive changes.

claim that the record would not otherwise support, such as an ineffectiveness claim. See *Hobbs* v. *State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009) ("The purposes of a new trial hearing are (1) to determine whether the case should be retried or (2) to complete the record for presenting issues on appeal."); *Jordan* v. *State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) ("The purpose of the hearing is for a defendant to fully develop the issues in his motion for new trial.").

"[W]hen an accused presents a motion for new trial raising matters not determinable from the record, upon which the accused could be entitled to relief, the trial judge abuses his discretion in failing to hold a hearing * * * ." *Reyes*, 849 S.W.2d at 816. To secure such a hearing on an ineffectiveness claim, a defendant must file a new-trial motion supported with an affidavit "assert[ing] reasonable grounds for relief which are not determinable from the record." *Jordan*, 883 S.W.2d at 665; see also *Smith* v. *State*, 286 S.W.3d 333, 345 (Tex. Crim. App. 2009) (noting that motion for new trial and supporting affidavit must "raise[] a matter not determinable from the record" and "establish reasonable grounds to believe that [the defendant] could, under *Strickland*, prevail on his claim of ineffective assistance of counsel"). "The affidavit need not reflect each and every component legally required to establish relief, but rather must merely reflect that reasonable grounds exist for holding that such relief could be granted." *Martinez* v. *State*, 74 S.W.3d 19, 21-22 (Tex. Crim. App. 2002); accord *McIntire* v. *State*, 698 S.W.2d 652, 657-658 (Tex. Crim. App. 1985).

b. The motion for new trial is due to be filed within "30 days after[] the date when the trial court

imposes or suspends sentence in open court," Tex. R. App. P. 21.4(a), and it must be "present[ed] * * * to the trial court within 10 days of filing," *id.* R. 21.6; see also *Carranza* v. *State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998) ("present[ation]" means "bringing the motion to the attention or actual notice of the trial court"). The trial court has 75 days after sentencing to rule on a motion for new trial, Tex. R. App. P. 21.8(a), with the motion deemed denied by operation of law upon expiration of that 75-day period, *id.* R. 21.8(c).

Notwithstanding these deadlines, proceedings on a new-trial motion need not be completed within 75 days of sentencing. A trial court can grant a continuance of the hearing on the motion for new trial so that it occurs after the motion has been denied by operation of law. See *Trevino*, 565 S.W.2d at 940-941; *Johnson* v. *State*, 467 S.W.2d 247, 256 (Tex. Crim. App. 1971). Evidence introduced in such a hearing can be considered on direct appeal. See *Aldrighetti* v. *State*, 507 S.W.2d 770, 774 (Tex. Crim. App. 1974) (Onion, J., concurring in part and dissenting in part).

Moreover, a motion for new trial can be used to supplement the record even after the cause has gone up on appeal. If a defendant demonstrates that he did not receive adequate representation during the 30-day period for filing a motion for new trial, and that he has "facially plausible claims" that could have been presented in a motion for new trial, then the appellate court will abate the appeal and remand to the trial court so that a motion can be filed and a hearing held. See, *e.g.*, *Cooks*, 240 S.W.3d at 911-912; *Blumenstetter* v. *State*, 117 S.W.3d 541, 546-547

(Tex. App. 2003); *Garcia* v. *State*, 97 S.W.3d 343, 349 (Tex. App. 2003); *Champion* v. *State*, 82 S.W.3d 79, 83-84 (Tex. App. 2002) (per curiam); *Prudhomme* v. *State*, 28 S.W.3d 114, 120-121 (Tex. App. 2000); *Massingill* v. *State*, 8 S.W.3d 733, 738 (Tex. App. 1999); cf. *Williams* v. *State*, 780 S.W.2d 802, 802-803 (Tex. Crim. App. 1989) (per curiam). Trevino suggests that *Martinez* does not extend to Kansas or Michigan because those States "provide a robust mechanism for expanding the record to permit adjudication of ineffective-assistance claims in the context of direct review." Pet'r Br. 45. Insofar as robustness represents an administrable standard, Texas's abate-and-remand procedure fares no worse than Kansas's "*Van Cleave* hearing," *Rowland* v. *State*, 219 P.3d 1212, 1218 (Kan. 2009) (citing *State* v. *Van Cleave*, 716 P.2d 580 (Kan. 1986)), or Michigan's "*Ginther* hearing," *People* v. *Fackelman*, 802 N.W.2d 552, 581 & n.13 (Mich. 2011) (citing *People* v. *Ginther*, 212 N.W.2d 922 (Mich. 1973)).

3. Prisoners have used Texas's system to raise ineffectiveness claims on direct appeal

a. Texas defendants frequently avail themselves of the motion for new trial as a means of presenting ineffectiveness claims on direct appeal. Indeed, the CCA has noted that a state-habeas proceeding "is not the only mechanism for developing an ineffectiveness claim. An increasing number of cases, including this one, use the motion for new trial as a vehicle for developing the necessary record." *Jones*, 2004 WL 231309, at *8; see also *Thompson*, 9 S.W.3d at 814 n.6 (acknowledging that ineffectiveness claim can be urged on direct appeal). Such claims routinely are considered on direct appeal in Texas courts, usually

following supplementation of the record by way of a new-trial hearing.[6]

As demonstrated by the opinions Trevino quotes in his brief, the record at the close of trial typically will be insufficiently developed to support consideration of ineffectiveness claims on direct appeal.[7] But that means only that the record at the close of trial generally is silent regarding "whether [trial counsel's challenged] actions were of strategic

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[6] See, *e.g.*, *State* v. *Morales*, 253 S.W.3d 686, 689-691, 696-698 (Tex. Crim. App. 2008); *Robertson* v. *State*, 187 S.W.3d 475, 480-481, 484-485 (Tex. Crim. App. 2006); *McFarland* v. *State*, 928 S.W.2d 482, 499-507 (Tex. Crim. App. 1996) (per curiam); *Garcia* v. *State*, 887 S.W.2d 862, 879-881 (Tex. Crim. App. 1994); *Rosales* v. *State*, 841 S.W.2d 368, 375-379 (Tex. Crim. App. 1992); *Motley* v. *State*, 773 S.W.2d 283, 287-292 (Tex. Crim. App. 1989); *Vasquez* v. *State*, 2012 WL 4826966, at *5-*6 (Tex. App. Oct. 11, 2012); *Branch* v. *State*, 335 S.W.3d 893, 904-910 (Tex. App. 2011); *State* v. *Mayfield*, 2010 WL 2373274, at *17-*25 (Tex. App. June 15, 2010); *Pratt* v. *State*, 2010 WL 546529, at *5-*9 (Tex. App. Feb. 17, 2010); *State* v. *Choice*, 319 S.W.3d 22, 24-27 (Tex. App. 2008); *Rosa* v. *State*, 2005 WL 2038175, at *2-*4 (Tex. App. Aug. 25, 2005); *State* v. *Medina*, 2003 WL 21939417, at *1-*3 (Tex. App. Aug. 14, 2003); *State* v. *Pilkinton*, 7 S.W.3d 291, 292-293 (Tex. App. 1999); *State* v. *Gill*, 967 S.W.2d 540, 540-543 (Tex. App. 1998); *State* v. *Thomas*, 768 S.W.2d 335, 336-337 (Tex. App. 1989).

[7] See, *e.g.*, *Menefield* v. *State*, 363 S.W.3d 591, 592-593 (Tex. Crim. App. 2012); *Mata* v. *State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007); *Mitchell* v. *State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *Thompson*, 9 S.W.3d at 813-814; *Jackson* v. *State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (per curiam); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997); *Ex parte Duffy*, 607 S.W.2d 507, 513 (Tex. Crim. App. 1980); *Jackson* v. *State*, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994) (Baird, J., concurring).

design or the result of negligent conduct." *Thompson*, 9 S.W.3d at 814. And Texas courts are understandably reluctant to allow a prisoner to condemn a member of the bar as unconstitutionally ineffective without giving the attorney an opportunity to tell her side of the story. See, *e.g.*, *Goodspeed* v. *State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Rylander* v. *State*, 101 S.W.3d 107, 110-111 (Tex. Crim. App. 2003); *Bone* v. *State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002); *Thompson*, 9 S.W.3d at 813-814 & n.5.

b. Trevino ends his state-law discussion here and concludes that ineffectiveness claims cannot be pursued on direct appeal due to insufficiency of the trial record. But that begs the question because the defendant can supplement the trial record by filing a new-trial motion and introducing the necessary evidence, including testimony from trial counsel, at the ensuing hearing. A defendant who urges an ineffectiveness claim on direct appeal after developing the record via the motion for new trial has not "flout[ed] Texas's procedural scheme," Pet'r Br. 35, but has followed it to the letter, and Texas courts will stand ready to hear him out. See, *e.g.*, *Lopez* v. *State*, 343 S.W.3d 137, 144 (Tex. Crim. App. 2011) ("The record could have been supplemented through a hearing on a motion for new trial, but appellant did not produce additional information about trial counsel's reasons * * * ."); *Reyes*, 849 S.W.2d at 815 ("[W]e hold that ineffective assistance of counsel may be raised in a motion for new trial."). Consider a few of the many cases in which ineffectiveness claims have been pursued in the manner just described.

In *Armstrong* v. *State*, the death-sentenced defendant sought to argue "that he was denied the right to effective assistance of counsel when trial counsel failed to investigate and present substantial mitigating evidence to the sentencing jury." 2010 WL 359020, at *5. Accordingly, he supplemented the record by filing a motion for new trial and eliciting testimony from trial counsel and a mitigation specialist at the ensuing hearing. *Id.* at *5-*6. He then presented his ineffectiveness claim to the CCA for consideration on direct appeal. *Id.* at *5. The CCA did not "routinely dismiss" or "refuse[] to adjudicate" the claim. Pet'r Br. 26, 33. Rather, it explained that "[w]hile a claim of ineffective assistance of counsel generally may not be addressed on direct appeal because the record is not sufficient to assess counsel's performance, the record in this case was developed at the hearing on the motion for a new trial." *Armstrong*, 2010 WL 359020, at *5. The CCA rejected the ineffectiveness claim on the merits, holding that "Armstrong did not meet his

burden of demonstrating both deficient performance and prejudice as required by *Strickland*." *Id.* at *7.[8]

In *Lair* v. *State*, the defendant "contend[ed] that he received ineffective assistance of counsel during the punishment phase of trial." 265 S.W.3d 580, 593 (Tex. App. 2008). He "moved for a new trial, and attached affidavits from almost two dozen witnesses, including appellant's friends, neighbors, and relatives, all of whom stated that they were not contacted by * * * trial counsel and that they were ready, willing, and able to testify on appellant's behalf at the punishment stage." *Ibid.* Testimony from trial counsel was introduced at the ensuing hearing. *Id.* at 594. The court took up the ineffectiveness claim on direct appeal, held that the defendant "received ineffective assistance in the punishment phase of [the] trial," and remanded for a new punishment hearing. *Id.* at 594-596. Similar success stories unfolded in *Shanklin* v. *State*, 190 S.W.3d 154, 163-166 (Tex. App. 2005), *Freeman* v.

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[8] Trevino contends that "*Armstrong* is the classic exception that proves the rule," and insinuates that the CCA dismissed the ineffectiveness claim due to inadequacy of the direct-appeal record. Pet'r Br. 43 n.21. He is wrong. When the CCA dismisses ineffectiveness claims on direct appeal without prejudice to state-habeas efforts — a practice authorized in response to potentially inadequate records, *Torres*, 943 S.W.2d at 475 — it is careful to say so explicitly. *E.g.*, *Bone*, 77 S.W.3d at 837 n.30; *Jackson*, 973 S.W.2d at 957; see *Mallett* v. *State*, 65 S.W.3d 59, 70 (Tex. Crim. App. 2001) (Meyers, J., dissenting) ("[T]he majority should have held that the record was insufficient to evaluate counsel's performance. In such an instance, the appropriate procedure is to overrule the Sixth Amendment claim without prejudice to the appellant's ability to dispute counsel's effectiveness collaterally.").

State, 167 S.W.3d 114, 117-121 (Tex. App. 2005), and *Milburn* v. *State*, 15 S.W.3d 267, 269-271 (Tex. App. 2000), all of which involved ineffectiveness claims concerning punishment-phase failures.

In *Butler* v. *State*, the defendant presented an ineffectiveness claim based on counsel's failure to investigate alibi witnesses and present exculpatory evidence to the jury. 716 S.W.2d 48, 51 (Tex. Crim. App. 1986). "The evidence concerning the effectiveness of trial counsel's representation was developed at a motion for new trial hearing held the month following appellant's trial." *Ibid.* The CCA addressed the claim on direct appeal, held "that the performance of * * * trial counsel did not meet the standard of reasonably effective assistance established by either our own caselaw or the Supreme Court in *Strickland*," and "remanded to the trial court for a new trial." *Id.* at 51-57.

c. Thus, it is "inherently unlikely" that an ineffectiveness claim will be adjudicable on direct appeal *only* where the defendant chooses not to give his trial counsel an opportunity to defend herself in a new-trial hearing.[9] *Torres*, 943 S.W.2d at 475; see

[9] Even that limitation is not absolute, as evidenced by cases in which Texas prisoners prevailed on ineffectiveness claims on direct appeal without supplementing the record through new-trial motions. See, *e.g.*, *Cannon* v. *State*, 252 S.W.3d 342, 348-350 (Tex. Crim. App. 2008); *Andrews* v. *State*, 159 S.W.3d 98, 101-104 (Tex. Crim. App. 2005); *Vasquez* v. *State*, 830 S.W.2d 948, 949-951 (Tex. Crim. App. 1992) (per curiam). The CCA also has rejected ineffectiveness claims on the merits despite the absence of a new-trial motion. See, *e.g.*, *Williams* v. *State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *Shore* v. *State*, 2007 WL 4375939, at *15-*16 (Tex. Crim. App. Dec. 12, 2007).

also Pet'r Br. 26-27 n.13 (collecting a string cite for that proposition). That opportunity may be hard to come by in certain non-capital cases — for example, where trial counsel and direct-appeal counsel are the same and the claim turns on what was said at trial. See *Robinson*, 16 S.W.3d at 812 (noting preparation of trial transcript and identity of trial/appeal counsel made preservation of claim "virtually impossible"). But neither hurdle applies where, as here, a death-sentenced prisoner receives new, conflict-free direct-appeal counsel and money to investigate a *Wiggins* claim that, by definition, does not turn on evidence presented at trial.

4. Trevino's division-of-labor theory has no basis in law or fact

a. Trevino argues that Texas defendants who have been sentenced to death cannot count on their lawyers to urge ineffectiveness claims on direct appeal, as a consequence of what he calls "the dual-track division of responsibilities between appellate and habeas counsel." Pet'r Br. 42 n.21; see also *id.* at 7-8, 28-34. *Martinez* cause should be made available to death-sentenced Texas prisoners, the argument goes, because Texas and Arizona are essentially the same in their treatment of ineffectiveness claims on direct appeal. Trevino's argument rests on three incorrect assertions.

First, it is simply untrue that section 3(a) of article 11.071 stands for the proposition that "the Texas legislature has placed the burden of investigating and developing trial-ineffectiveness claims in death-penalty cases on state habeas counsel." Pet'r Br. 30. Section 3(a) deals with the *when*, not the *who*, of an investigation. Consistent

with the Legislature's purpose of speeding resolution of all claims while memories are still fresh, see *supra* p.29, section 3(a) directs the state-habeas lawyer to begin her investigation without awaiting the conclusion of direct appeal, while saying nothing about the independent duties of the direct-appeal lawyer. But nothing in article 11.071 says that state-habeas counsel bears exclusive responsibility for such claims.[10]

Trevino also asserts that, "[b]y statute, Texas has provided special funding to state habeas counsel to investigate and develop extra-record claims." Pet'r Br. 31-32 (citing Tex. Code Crim. Proc. art. 11.071, §§ 2A(a), 3(b), 3(d)). As explained above, however, there is nothing "special" about that funding mechanism. The Legislature also provides funding for direct-appeal counsel and likewise authorizes "[a]dvance payment of expenses anticipated or reimbursement of expenses incurred for purposes of investigation or expert testimony." Tex. Code Crim. Proc. art. 26.052(*l*).

Second, it is equally untrue that the State Bar of Texas's Guidelines create a division of labor between direct-appeal and state-habeas counsel in capital cases. Cf. Pet'r Br. 29-33; State Bar Br. 6-9. When Langlois handled Trevino's direct appeal in 1997, and when Rodriguez handled the state-habeas

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[10] See Tex. Code Crim. Proc. art. 11.071, § 3(a) ("On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus."); see also *id.* § 3(b) (addressing timing of state-habeas counsel's expense request).

proceeding between 1998 and 2001, the State Bar apparently had no guidelines whatsoever. See State Bar Br. 6-7 (citing only a CLE paper from 2002 and guidelines promulgated in 2006). To the extent that *any* bar guidelines affected counsel's division of labor in this case, they were the ABA's 1989 Guidelines, which prescribed identical roles for both Langlois and Rodriguez. Compare ABA Guideline 11.9.2(D) ("Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules."), with *id*. 11.9.3(C) ("Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.").

Third, in part because Trevino fabricates his division-of-labor-in-capital-cases theory, he also is wrong to suggest that it is easier to win direct-appeal *Wiggins* claims in non-capital cases. See Pet'r Br. 28, 42 n.21. If anything, the opposite is true because it is only in death-penalty cases that the Legislature guarantees the defendant a new, conflict-free lawyer who can raise ineffectiveness claims on direct appeal. Compare Tex. Code Crim. Proc. 26.052(k) (new direct-appeal counsel in death-penalty cases), with *id*. art. 26.04(j)(2) (counsel's appointment in non-capital cases continues until "appeals are exhausted"). And it is only in death-penalty cases that direct-appeal counsel can request and receive funding for investigators and experts to develop ineffectiveness claims. See *id*. art. 26.052(*l*).

At bottom, Trevino invents a distinction that exists nowhere in Texas law and attempts to use that

imaginary distinction to shoehorn Texas into the same "'deliberate choice'" that Arizona made. Pet'r Br. 19 (quoting *Martinez*, 132 S. Ct. at 1318 (alteration omitted)). To the extent that Trevino purports to know "precisely what Texas does *not* want [death-sentenced defendants] to do," he is mistaken. *Id.* at 36.

b. As if the lack of affirmative support were not enough to doom Trevino's division-of-labor theory, he also has failed to explain how it can be reconciled with numerous features of Texas law. If the Legislature sought to make ineffectiveness claims the exclusive province of state-habeas lawyers in death-penalty cases, why did it provide for new, conflict-free lawyers on direct appeal in article 26.052(k)? If Texas wanted to prohibit direct-appeal counsel from raising extra-record ineffectiveness claims, why did it provide them with investigators and experts in article 26.052(*l*)? If the CCA wanted to take responsibility for ineffectiveness claims away from direct-appeal lawyers and give it to state-habeas lawyers, why has that court taken steps to enable such claims on direct appeal? See, *e.g.*, *Lopez*, 343 S.W.3d at 144 ("The record could have been supplemented through a hearing on a motion for new trial, but appellant did not produce additional information about trial counsel's reasons * * * ."); *Robinson*, 16 S.W.3d at 813 (relaxing forfeiture rule of Tex. R. App. P. 33.1(a) to allow consideration of ineffectiveness claim on direct appeal despite failure to raise it in trial court); *Reyes*, 849 S.W.2d at 815 ("[W]e hold that ineffective assistance of counsel may be raised in a motion for new trial.").

Most importantly, if Texas lawyers are not supposed to urge ineffectiveness claims on direct appeal, why do they keep bringing them in Texas courts? See, *e.g.*, *Armstrong*, 2010 WL 359020, at *5. The answer, of course, is that these lawyers realize that nothing about Texas's dual-track system deprives defendants of their constitutional right to effective assistance of counsel on direct appeal. See *Lucey*, 469 U.S. at 396. When a defendant has an arguably meritorious ineffective-assistance-of-trial-counsel claim, direct-appeal counsel has a professional duty to prepare the necessary record and present the claim using the resources and procedural tools Texas has put at her disposal. Direct-appeal counsel would herself be ineffective were she to ignore a viable trial-ineffectiveness claim and leave it in the hands of another lawyer on state habeas, from whom her client is not constitutionally entitled to receive effective assistance. ABA Guideline 11.9.2(D); cf. *Martinez*, 132 S. Ct. at 1318 ("By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims.").

C. *Martinez* Cause Should Not Be Extended To Texas Because There Is No Equitable Problem To Be Solved

Were it extended to capital cases in Texas, *Martinez* cause would represent a solution in search of a problem. Unlike Arizona, whose "deliberate[] cho[ice] to move trial-ineffectiveness claims outside of the direct-appeal process" created an unacceptable danger that "no court will review [those] claims," *Martinez*, 132 S. Ct. at 1316, 1318, Texas has crafted

a system that enables state and federal courts to review its prisoners' ineffectiveness claims.

1. Suppose a defendant and his constitutionally guaranteed lawyer urge an ineffectiveness claim on direct appeal in a Texas court after compiling the necessary appellate record by way of a motion for new trial. No matter what happens with that claim in the state-habeas proceedings, multiple courts will have a chance to review it.

Under the very terms of the hypothetical, the state courts will consider the claim on direct appeal. And there will be no procedural default to bar federal-habeas review, the claim having been properly exhausted. See *Brown* v. *Allen*, 344 U.S. 443, 447 (1953) (holding that exhaustion doctrine does not oblige a prisoner to pursue state habeas relief as to a claim that was fairly presented on direct appeal); *Castille* v. *Peoples*, 489 U.S. 346, 350 (1989) (same). Indeed, the Fifth Circuit has encountered this situation and held that an ineffectiveness claim is properly exhausted, for federal-habeas purposes, where it has been presented to the Texas courts on direct appeal:

> Myers undertook a procedurally proper avenue of review; he raised his ineffective assistance claims on direct appeal in the court of appeals and in his petition for discretionary review before the [Texas] Court of Criminal Appeals. Myers properly exhausted his state remedies as to those grounds of ineffectiveness of counsel that were so raised.

Myers v. *Collins*, 919 F.2d 1074, 1077 (5th Cir. 1990).

2. Now suppose a Texas defendant has the misfortune to draw three bad lawyers in a row. The first lawyer performs so poorly at trial as to give rise to a substantial ineffectiveness claim; the second lawyer fails to press the claim on direct appeal; and the third lawyer neglects to raise the claim during state-habeas proceedings. Despite his rotten luck, this hypothetical defendant will still get a chance to have his claim reviewed by at least one court.

The trial-ineffectiveness claim will be deemed procedurally defaulted on federal habeas due to the failure to present it during the direct appeal and the state-habeas proceedings. But the ineffectiveness of the second (direct-appeal) lawyer in this hypothetical can establish cause to excuse the procedural default, see *Carrier*, 477 U.S. at 488, because the defendant was constitutionally entitled to effective assistance from that lawyer, see *Lucey*, 469 U.S. at 396.[11] Given that *Carrier* cause will open the door to the federal habeas court, there is no reason to use

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[11] The defendant must properly exhaust the ineffective-assistance-of-direct-appeal-counsel claim in state court before he can use it to establish cause for the procedural default. See *Edwards* v. *Carpenter*, 529 U.S. 446, 450-452 (2000); *Carrier*, 477 U.S. at 488-489. It is unclear whether a procedural default of this claim would be a proper object of *Martinez* cause. Compare *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) ("There is not a dime's worth of difference between [ineffective-assistance-of-trial-counsel] cases and * * * claims asserting ineffective assistance of appellate counsel."), with *id.* at 1320 (majority opinion) ("Our holding here addresses only the constitutional claims presented in this case * * * ."). The question, in any event, is academic here because Trevino never has claimed that his direct-appeal counsel was ineffective.

Martinez cause to create a second opening through which to pass the trial-ineffectiveness claim.

II. TREVINO'S CASE ILLUSTRATES THE EQUITY OF TEXAS'S SYSTEM

Texas's new-trial and direct-appeal procedures were not lost on Trevino's various State-appointed and State-funded lawyers. His appellate counsel knew how to use them to vindicate ineffectiveness claims. His failure to do so here is a product of the meritlessness of Trevino's claim, not of the structure of Texas's system for adjudicating it.

A. Trevino's State-Appointed Appellate Counsel Routinely Brought Ineffectiveness Claims On Direct Appeal

Four days after Trevino was sentenced, Texas hired a seasoned veteran of the CCA bar to represent him on appeal. Richard Langlois was well versed in raising ineffectiveness claims on direct appeal. He had pursued such claims in past appeals,[12] and has pursued many more since handling Trevino's.[13]

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[12] See, *e.g.*, *Medeiros* v. *State*, 733 S.W.2d 605 (Tex. App. 1987); *Martinez* v. *State*, 675 S.W.2d 573 (Tex. App. 1984); *Segundo* v. *State*, 662 S.W.2d 798 (Tex. App. 1983).

[13] See, *e.g.*, *Mahavier* v. *State*, 2011 WL 2150429 (Tex. App. June 1, 2011); *Lara* v. *State*, 2010 WL 3249913 (Tex. App. Aug. 18, 2010); *Chapa* v. *State*, 2008 WL 2601823 (Tex. App. July 2, 2008); *Sarabia* v. *State*, 2006 WL 2056109 (Tex. App. July 26, 2006); *Gross* v. *State*, 2005 WL 1552730 (Tex. App. July 6, 2005); *Ramirez* v. *State*, 2004 WL 2997747 (Tex. App. Dec. 29, 2004); *Autry* v. *State*, 27 S.W.3d 177 (Tex. App. 2000); *Chavez* v. *State*, 6 S.W.3d 66 (Tex. App. 1999); *Huizar* v. *State*, 966 S.W.2d 702 (Tex. App. 1998), rev'd, 12 S.W.3d 479 (Tex. Crim. App. 2000).

Langlois even used a new-trial motion and live testimony at an evidentiary hearing to develop an ineffectiveness claim premised on trial counsel's failure to call three witnesses, including a DNA expert. See *Coronado* v. *State*, 2010 WL 1904999 (Tex. App. May 12, 2010).

Indeed, only three weeks before Langlois was appointed to handle Trevino's direct appeal, the CCA adjudicated, on the merits, an ineffectiveness claim that Langlois brought on direct appeal in a different capital case. See *Kerr* v. *State*, No. 72,261 (Tex. Crim. App. June 18, 1997). The opinion nowhere suggests the claim should have been saved for collateral review. *Ibid.* That result would have been fresh in Langlois's mind when he started to work on Trevino's case.

Langlois used the new-trial window in Trevino's case to develop the factual record for two ineffectiveness claims. JA309-310, 315; *supra* note 1. He further supplemented the record with defense counsel's notes from voir dire. JA315. And Langlois was well aware of Trevino's troubled background and the extent to which trial counsel presented evidence of it during the sentencing hearing. JA318-320. Langlois decided not to use that information to fashion a third ineffectiveness claim because it was hopeless. Langlois's professional judgment was later validated by the federal district judge who found Trevino's ineffectiveness claim so lacking in merit that no jurist of reason would find it debatable. See JA76-79, 132-133.

Trevino argues that it would have been impractical to include a *Wiggins* claim in a new-trial motion because it would require "extensive extra-

record investigation." Pet'r Br. 42. But he does not explain what makes a *Wiggins* claim different from the two DNA-based claims of ineffectiveness that Langlois developed during the new-trial window. Nor does he explain how it was practical for Langlois to supplement the record with trial counsel's voir dire notes after the close of the new-trial window. Nor does he explain how it was practical for Langlois to develop ineffectiveness claims for his other clients, including the death-sentenced client in *Kerr*. Nor does he explain how other direct-appeal lawyers were able to use new-trial motions to develop *Wiggins* claims in other cases. See Part I.B.3, *supra*.

Indeed, the very premise of a *Wiggins* claim is that trial counsel failed to discover mitigating evidence that was at her fingertips — evidence that any minimally competent lawyer would have easily grasped. See, *e.g.*, Agreed Findings of Fact and Conclusions of Law at 2, *Ex parte Lucero*, No. 48,593-01-C (251st Dist. Ct., Potter County, Tex. Feb. 9, 2010) (granting relief because "months before trial, lead counsel obtained a detailed affidavit showing the need for a mitigating specialist" and did nothing with it); *Ex parte Kerr*, 2009 WL 874005, at *2 (Tex. Crim. App. Apr. 1, 2009) (granting relief because trial counsel did not timely ask defendant for names of character witnesses). If mitigating evidence requires heroic effort to uncover — akin to the exhaustive work performed at innocence projects and capital-punishment clinics, cf. U.T. Br. — then the evidence by its very nature is beyond *Wiggins*'s domain. See *Rompilla* v. *Beard*, 545 U.S. 374, 382-383 (2005) (noting "this Court's recognition that the duty to investigate does not force defense lawyers to

scour the globe on the off chance something will turn up"); *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987) (holding "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment").

B. Trevino Did Not Raise His *Wiggins* Claim On Direct Appeal Because It Is Far From Substantial

1. Trevino repeatedly claims that his "trial counsel failed to conduct any mitigation investigation at all." Pet'r Br. 21; see also *id.* at 2, 6, 10, 47. That is demonstrably false. Trevino's defense team conducted a thorough mitigation investigation, and they began that investigation many months before trial. Once appointed, they immediately hired a private investigator, who remained a member of the trial team until the very end. JA194, 302-306. Nearly one year before the trial began, Mario, Wilcox, and Villanueva started probing Trevino's past for mitigating evidence. Their goal was "to find a family member that could give us some idea as to where or how Mr. Trevino grew up. What was going on with his life. What were the circumstances * * * regarding his past." JA391.

In pursuit of such evidence, Villanueva interviewed Trevino's aunt nearly one year before trial, and interviewed her again shortly before she testified at the punishment phase. JA200, 303. The defense team twice interviewed Trevino's stepfather. JA303, 382, 392. And Mario testified that they did the "best [they] could" to contact Trevino's mother, JA391-392, who lived less than two hours away, but her alcoholism made her impossible to reach. JA285. This challenge was compounded by Trevino's refusal

to help the team build a mitigation case, leading Villanueva to lament in an e-mail that Trevino "never did furnish us with any leads, other than the cousin that testified against him." JA581; see also JA392 (testimony of Mario that "if he had given us names of anyone, we certainly would have tracked them down").

Undeterred by Trevino's refusal to cooperate, Villanueva dug into his educational background, JA277-278, 286, 393, but did not find anything that "would be beneficial to [the defense]," JA393. The defense also pursued aggressive written discovery for any mitigating evidence in the State's possession. JA203-217 (propounding sixty-nine requests for production); JA220-222 (propounding catch-all requests for mitigating evidence). And the defense was fully aware of Trevino's prior felonies, which the prosecution would use to prove his future dangerousness. JA200-201; cf. *Rompilla*, 545 U.S. at 384.

After conducting its investigation, the defense called Trevino's aunt to testify on his behalf. She knew Trevino "all his life" and portrayed him as a hard-working and loving father who grew up in squalor. She told the jury that Trevino was raised by a single mother. JA285-286. She told the jury that Trevino's mother was only sixteen years old when she gave birth to him, JA286, and that Trevino's mother had such a terrible "alcohol problem" that it disabled her from testifying on her son's behalf, JA285-286. She said that Trevino "did okay" in school until he dropped out. JA286. She told the jury that Trevino "would always" take care of her children while she was at work; that her girls "loved

him [and] were attached to him." JA288. Mario reminded the jury of the aunt's testimony during his closing statement and used it to argue that Trevino was just a "kid [who]'s lost." 24RR25-26.

2. More than eight years after his conviction, JA27-28, Trevino filed a state-habeas application, claiming among other things that his trial counsel were ineffective for failing to discover and present mitigating evidence. Excusing the procedural bar to that claim would be an empty exercise in collateral damage. Much of Trevino's evidence is cumulative of testimony at trial, as the federal district court recognized in refusing even to grant a COA. See JA72-78, 132-133 (repeatedly referring to "Petitioner's 'new' mitigating evidence"); *Bobby* v. *Van Hook*, 558 U.S. 4, 19 (2009) (per curiam) ("[T]here comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.").

To the extent Trevino's "'new' mitigating evidence" is not cumulative, JA77, it is inconsistent with the defense's chosen theory at trial. See, *e.g.*, *Richter*, 131 S. Ct. at 789. The defense argued that Trevino was a good "kid" who grew up in a tough environment but nonetheless managed to be a loving uncle. 24RR25-26. It would have been inconsistent with that strategy to argue — as he now does, using the 20/20 vision of hindsight — that Trevino is a hopeless drug abuser and lifelong gang member with brain damage.

III. TEXAS'S EQUITABLE INTERESTS FAR OUTWEIGH TREVINO'S

It is a "common expression[] that courts of equity delight to do justice, and not by halves." Joseph Story, *Commentaries on Equity Pleadings* § 72, at 74 (1894) (citing *Knight* v. *Knight*, 3 P. Wms. 331, 334, 24 Eng. Rep. 1088, 1089 (Ch. 1734)); see also *Corbet* v. *Johnson*, 6 F. Cas. 524, 525 (C.C.D. Va. 1805) (Marshall, C.J.). Therefore, in deciding whether to extend *Martinez*'s equitable remedy, this Court should consider the interests of the State and victims' families, both of whom have a right to finality in state-court judgments. Those rights must be balanced against the interests of prisoners, like Trevino, who can satisfy neither the actual-innocence nor the existing cause-and-prejudice exceptions to the procedural-default doctrine. That balance tips decidedly in the State's favor.

A. Texas Built Its Postconviction System In Reliance On This Court's Assurances

1. Texas has established robust procedures for postconviction review, largely in response to assurances from the Court. Justice Brennan, an early advocate for state postconviction remedies, urged the States to adopt some version of the Uniform Postconviction Procedures Act, and he promised that if States "assumed this burden," their criminal convictions would enjoy "[g]reater finality," and that "the exhaustion requirement" would assure "state primacy" in adjudicating constitutional claims. *Case* v. *Nebraska*, 381 U.S. 336, 344-347 (1965) (Brennan, J., concurring). Writing for a majority of the Court, Justice Brennan attributed the rising friction between state and federal courts to the

States' refusal to establish these postconviction remedies. *Henry* v. *Mississippi*, 379 U.S. 443, 453 (1965) ("It has been suggested that this friction might be ameliorated if the States would look upon our decisions * * * as affording them an opportunity to provide state procedures, direct or collateral, for a full airing of federal claims."); see also *Case*, 381 U.S. at 339-340 (Clark, J., concurring) (observing "the practical answer to the problem" was "the enactment by the several States of postconviction remedy statutes"). Texas soon responded by granting defendants a procedural right to access postconviction remedies, see *Ex parte Young*, 418 S.W.2d 824 (Tex. Crim. App. 1967), a right that has expanded over time to resemble federal habeas itself.

The Legislature built these structures, at great expense to Texas's taxpayers, in reliance on the Court's repeated assurances that the procedural-default doctrine would protect the meaningfulness of the state-postconviction process. Procedural default does so by channeling claims into the state system and affording state courts an opportunity to "correct[] their own mistakes." *Coleman*, 501 U.S. at 732. The doctrine ensures the accuracy of criminal judgments by forcing habeas applicants to present their arguments to state courts "when the recollections of witnesses are freshest, not years later in a federal habeas proceeding." *Sykes*, 433 U.S. at 88. It allows the trial judge "who observed the demeanor of [the] witnesses" during trial "to make the factual determinations necessary for properly deciding the federal constitutional question." *Ibid.* And, by channeling ineffectiveness claims into state court, the doctrine improves the quality of indigent

representation by allowing state courts to hold accountable state-funded lawyers who botch criminal trials. Cf. Eve B. Primus, *Structural Reform in Criminal Defense*, 92 Cornell L. Rev. 679, 714 (2007) (cited in *Martinez*, 132 S. Ct. at 1318) ("[T]he sooner these claims are raised, the more likely it is that the legal community will remember the case and the circumstances of the conviction. As a result, the trial judge and prosecutor are more likely to be upset at the prospect of retrying the case, which will increase the stigma associated with the offending attorney's failures.").

2. The States also have built their postconviction systems with the assurance that the federal courts would respect both the procedures of state courts and the finality of their judgments. See *Coleman*, 501 U.S. at 729-732; *Isaac*, 456 U.S. at 126-129; *Sykes*, 433 U.S. at 87-88.

Congress strengthened those assurances in AEDPA's relitigation bar, 28 U.S.C. 2254(d). See *Hart & Wechsler*, *supra*, at 1158 (identifying section 2254(d) as "AEDPA's most important provision"). When the relitigation bar operates as Congress intended, federal courts may adjudicate de novo only a vanishingly small set of claims. See *Richter*, 131 S. Ct. at 787 ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions."); *Cone* v. *Bell*, 556 U.S. 449, 476 (2009) (Roberts, C.J., concurring in the judgment) (noting that inapplicability of relitigation bar depended on "unusual facts" and "unique procedural posture"). That assurance allows States to invest heavily in

their postconviction systems with confidence that their efforts will not lightly be undone and ordered redone at even greater expense.

Trevino, however, urges this Court to dramatically alter both the relitigation bar's reach and the rules under which the States have long played. The CCA relied on this Court's procedural-default doctrine and rejected Trevino's *Wiggins* claim on a state procedural ground without adjudicating its merits. See JA27-28; cf. 28 U.S.C. 2254(d) (limiting the relitigation bar "to any claim that was adjudicated on the merits in State court proceedings"). If this Court now excuses that default, Trevino will get to litigate in federal court in the first instance the effectiveness of State-appointed and State-funded lawyers. He could do so without giving those men an opportunity to explain their litigation strategies in state court, without giving the state courts an opportunity to evaluate the effectiveness of the lawyers they appointed, and without giving the CCA's judgment the same protection that AEDPA demands for state-court adjudications of every *Wiggins* claim before this one. And Trevino would accomplish those feats on the basis of an argument (ineffective assistance of state-habeas counsel) that the CCA could not possibly have anticipated. See *Coleman*, 501 U.S. at 752-753. There is nothing equitable about that.

3. The inequities would not end there. Lured by the potential of avoiding AEDPA and the promise of substantially delaying a death sentence, future capital-defense counsel will have incentives to "'sandbag[]'" state courts, *Sykes*, 433 U.S. at 89, reserve their claims until federal habeas, and then

use that purportedly ineffective strategy to overcome the default. Cf. Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 Hofstra L. Rev. 1181, 1191-1193 (2003) (suggesting that defense counsel in capital cases have an ethical obligation to "fall on his or her sword," while insisting that "[t]his is not a plea for counsel to lie or make it up").

These blows to the States' postconviction systems would be made worse by their frequency. In Texas, as in other States, almost half of all capital-habeas applications are dismissed at least in part on procedural-default grounds. See Annual Report for the Texas Judiciary 2011 at 2, http://www.courts.state.tx.us/pubs/AR2011/toc.htm (visited Jan. 13, 2013) (19 of 44 applications); cf. *Hart & Wechsler*, *supra*, at 1217. And ineffective assistance is far and away the most common claim raised in those applications. U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Habeas Corpus Review Challenging State Court Criminal Convictions 14 (1995). Indeed, no case has been cited more often by the federal courts of appeals (or the state courts) than *Strickland*. Frank B. Cross & James F. Spriggs, II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 Emory L.J. 407, 434 (2010).

B. If This Court Changes The Rules, State Courts Should Have An Opportunity To Adjudicate Defaulted Claims On The Merits

When the CCA issued its procedural-default ruling in 2005, it had no reason to doubt the adequacy of the state-law ground supporting its denial of Trevino's habeas application. If this Court

changes the rules now, equity demands at a minimum that the CCA have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's *Wiggins* claim on the merits.

State courts have proven willing to forgive or ignore procedural defaults in response to developments in federal-habeas doctrine. In the wake of *Fay* v. *Noia*, 372 U.S. 391 (1963), some States modified their procedural-default doctrines to mirror the new deliberate-bypass standard. See Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1156-1158 (1986). Others engaged in what Professor Meltzer terms "pragmatic acquiescence," ignoring any procedural default as a matter of expedience and reaching the merits of federal claims. *Ibid.*

Texas courts likewise have a proven track record of hearing once-defaulted claims on the merits under appropriate circumstances. For example, the CCA has created equitable exceptions to the state-law bar on successive petitions — including an exception for ineffective assistance of state-habeas counsel. See, *e.g.*, *Ex parte Medina*, 361 S.W.3d 633, 642-643 (Tex. Crim. App. 2011) (per curiam); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000); *Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). And the CCA has allowed prisoners to reopen their habeas applications and raise defaulted claims. See, *e.g.*, *Ex parte Matamoros*, 2011 WL 6241295 (Tex. Crim. App. Dec. 14, 2011) (per curiam); *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008). Forcing claimants like Trevino to return to state court, and thereby allowing the CCA to adjudicate those claims on the merits, would dilute the strong

medicine of granting habeas review on long-defaulted claims. See *Harris* v. *Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting) (observing that habeas "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority").

Even that tincture, however, is far too potent. Texas already has empowered prisoners to raise ineffectiveness claims in new-trial motions and on direct appeal with conflict-free counsel, and many prisoners have done so under the Sixth Amendment's existing protections. That path was open to Trevino and his State-appointed and State-funded attorneys, who raised 67 claims on his behalf. No principle of equity demands reopening the state or federal courts and allowing Trevino to raise a 68th.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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January 2013

APPENDIX

NO. 96-634-C

THE STATE OF TEXAS	IN THE DISTRICT COURT
V.	54TH JUDICIAL DISTRICT
RAMIRO RUBI IBARRA	McLENNAN COUNTY, TEXAS

HEARING

APPEARANCES:

Hon. Walter Reaves
Hon. Gerald Villarreal
Attorneys at Law
Waco, Texas

Interpreter: Dan Carroll

BE IT REMEMBERED THAT on the 16th day of January, 1998, the following proceedings were held, to-wit:

(whereupon the following proceedings were held on the 16th day of January, 1998.)

COURT: You are Ramiro Rubi Ibarra?

DEFENDANT: Yes, sir.

COURT: Mr. Ibarra, you have previously been sentenced to death for Capital Murder in Cause Number 96-634-C, you are here this morning with Mr. Walter Reaves, who represented you at your trial, is that correct?

DEFENDANT: Yes, sir.

COURT: Also last week I appointed Mr. Gerald Villarreal to assist the Court in determining what you wish to do in reference to your Court appointed Attorney on Appeal. Mr. Reaves represented you, and Mr. Angel Gavito represented you during the trial, is that correct?

DEFENDANT: Yes, sir.

COURT: And were you satisfied with the representation that they rendered for you during the trial of your criminal case?

DEFENDANT: I don't know how to respond to your question, because I don't understand the process. The only thing I know is that they did whatever they were able to do in my favor. It was in their hands.

COURT: And do you think they did whatever they were able to do in reference to your case?

DEFENDANT: The man that was standing here, even though I couldn't understand what he was saying, I think he represented me in good faith.

COURT: You are talking about Mr. Reaves?

DEFENDANT: Yes, sir.

COURT: Now, last week, I believe that Mr. Gerald Villarreal, and Mr. Carroll came to see you.

MR. CARROLL: Yesterday.

COURT: Yesterday they came to see you, is that correct?

DEFENDANT: Yes.

COURT: And you understand that the law provides where you are indigent you are entitled to

an Attorney to represent you in appealing your conviction, do you understand that?

DEFENDANT: Now that you are telling me that I do understand.

COURT: The law provides that the Court may not appoint the Attorney to represent you on appeal who represented you in the trial of your case, unless the Defendant, that is you, and your Attorney request his appointment in the case. Do you understand that?

DEFENDANT: Yes.

COURT: And I appointed Mr. Villarreal to come out and talk to you, and assist you in making that decision, and did he come and talk to you yesterday in reference to your Attorney, your Court appointed Attorney on appeal?

DEFENDANT: Yes, sir, they came and talked to me.

COURT: And Mr. Villarreal is a spanish speaker, is that correct?

DEFENDANT: Yes, sir.

COURT: And also Mr. Carroll who was the Interpreter at your trial, and has been the Interpreter for the Court throughout these proceedings, is that correct?

DEFENDANT: Yes, sir.

COURT: And didy ou go over the fact with Mr. Villarreal that the Court would appoint a different attorney on appeal if you so requested?

DEFENDANT: Yes.

COURT: And the only way that I would appoint Mr. Walter Reaves was, if that was what you wanted me to do?

DEFENDANT: Yes, sir.

COURT: And did you go over that with him, Mr. Villarreal?

MR. VILLARREAL: Yes.

COURT: Now, what decision have you come to in reference to your Court appointed Attorney on appeal?

DEFENDANT: If he will accept to represent me.

COURT: And do you agree to represent him?

MR. REAVES: Yes.

COURT: Is this a decision after you went over this matter with Mr. Villarreal to help you to make this determination of who you wanted on appeal as your Attorney?

DEFENDANT: Yes, sir.

COURT: Well the Court is going to find good cause to make the appointment of Mr. Walter Reaves, and the good cause is that Mr. Reaves is completely familiar with this case. He has represented the Defendant throughout the trial, and throughout the pre-trial procedure. He is an experienced trial Lawyer in McLennan County, and in other Counties. He has handled many Capital Murder cases. He has been appointed by the Court numerous times in representing defendants in Capital Murder cases. He has filed numerous briefs in Capital Murder cases, and in many other cases.

The Court regularly appoints Mr. Reaves as an Attorney representing defendants on appeal and in trial, and is familiar with the work product of Mr. Reaves, and the Court further finds that Mr. Reaves is well qualified and competent, and capable of representing the defendant in this particular case, and that there is good cause to appoint Walter Reaves as the Attorney on appeal. Is there any other matter?

MR. REAVES: Yes, your Honor, I was talking to Mr. Carroll this morning. I might have done this before since I have represented a Spanish speaking person, but I did tell Mr. Ibarra this morning I will communicate, and let him communicate with me, and that I would use Mr. Carroll to translate my correspondence, and translate my motions and brief, if that is all right with the Court.

COURT: That is correct. That's all.

THE STATE OF TEXAS
COUNTY OF McLENNAN

I, KAY SMITH, OFFICIAL REPORTER, 54th Judicial District Court of McLennan County, Texas, do hereby certify that the within and foregoing is a full, true, complete and correct transcript of the proceedings had in the above entitled and numbered cause at the time and place as shown herein, to the best of my knowledge, skill and ability, and was typed by me or under my supervision and direction.

Kay Smith
Certified Shorthand Reporter
Certification No. 116
Certification Expires 12-31-
Official Court Reporter
54th Judicial District Court Courthouse
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