

# ***Incompetent Lawyers and Hapless Appellants: How the “Narrow Exception” in Martinez Applies in Texas***

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## **Introduction**

To British lawyers at least the system of appeals in capital cases in the United States is highly complex. It often reminds me of a macabre and deadly game of snakes and ladders in which an appellant goes up through state and then federal court only to find, after a review at some stage of appeals, that they plunge back down to more or less where they started and the clock keeps ticking on their date with the executioner. The recent decision of the U.S. Supreme Court in *Trevino v. Thaler*<sup>1</sup> raises an important and interesting question. What happens if the reason an appellant failed to raise an ineffective-assistance-of-counsel-at-trial claim is because the lawyer he had for his state initial-review collateral proceeding was also ineffective? But before answering that question, it may help some readers if I start with a simple explanation of at least part of the appeals system and the accompanying terminology.

The federal nature of the government of the United States means that in addition to state courts there are also federal courts. Both have a significant part to play in capital appeals. In capital cases, once convicted and sentenced there is an automatic right of appeal (often referred to as direct review) to the state Supreme Court.<sup>2</sup> This appeal is normally limited to issues that appear on the face of the trial record and this is certainly the position in Texas. An

appellant is also entitled to commence parallel proceedings, known as state habeas corpus or collateral review. As the name suggests, these proceedings are also in state court. In Texas it is usual for an appellant to commence these proceedings before his direct appeal has been completed. In these proceedings an appellant has the chance to raise issues which do not appear in the record of trial and which cannot therefore have been raised on direct appeal. An obvious example would be a claim of ineffective assistance of counsel because the trial attorney failed to call an alibi witness, which by definition will not appear on the trial record. State habeas corpus proceedings can be appealed through state appellate courts and up to the U.S. Supreme Court in an appropriate case.

Once an appellant has exhausted his rights of appeal in state court, he may commence proceedings in federal court. The lower level of federal court is called District Court and cases go on appeal to the U.S. Court of Appeals for the circuit in which the case is held. At its most basic federal courts consider appeals which raise issues relating to the Federal Constitution.

As Chief Justice Roberts put it in his dissenting opinion in *Trevino*:

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In our federal system, the “state courts are the principal forum for asserting constitutional challenges to state convictions.” *Harrington v. Richter*, 562 U. S. \_\_, \_\_ (2011) (slip op.,

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at 13). “Federal courts sitting in habeas,” we have said, “are not an alternative forum for trying . . . issues which a prisoner made insufficient effort to pursue in state proceedings.” *Williams v. Taylor*, 529 U. S. 420, 437 (2000). This basic principle reflects the fact that federal habeas review “intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” *Richter, supra*, at \_\_ (slip op., at 13) (quoting *Harris v. Reed*, 489 U. S. 255, 282 (1989) (Kennedy, J., dissenting)).

This fear of an “intrusion on state sovereignty” is the reason why federal courts are required to pay due respect for and deference to the decisions of state courts. There are strict rules that amongst other things mean that federal courts must usually accept findings of fact and conclusions of law made by state courts unless those decisions can be shown to be clearly wrong. This can substantially impair the ability of the federal courts to review decisions made in state court but this reflects the fact that the rights of states to regulate their own criminal proceedings is given precedence in the U.S. Constitution. Furthermore, a federal court will be debarred from reviewing a case if it is satisfied that the state court’s reasons for rejecting a claim was based on “an independent and adequate state ground” such as the claim being procedurally defaulted. “Procedural default” means, for example, failing to raise a claim of error (ground of appeal) at the correct time according to state procedural rules. However, such a failure may be excused if the appellant can show good reason or cause of the failure.

Another matter unfamiliar to readers in the U.K. is the practice, prevalent in the U.S., that the lawyers who handle an appeal are

almost always different from those who handled the trial. In capital cases in Texas at any event this is a standard requirement. Unlike the U.K., where we like to maintain the fiction that our trial lawyers are rarely to blame for a bad result or miscarriage of justice and our Court of Appeal actively discourages appeals on this basis, in the U.S. the change of counsel means far greater scrutiny of the lawyers’ actions at trial can occur and many appeals are based on claims of ineffective assistance of counsel.

***Martinez v. Ryan***

In order to understand the decision in *Trevino v. Thaler* we need to start with the decision of the U.S. Supreme Court in 2012 in *Martinez v. Ryan*. *Martinez* was a non-capital case from Arizona which also involved the issue of ineffective assistance of counsel. Arizona prisoners may raise such claims only in state collateral proceedings, not on direct review. In petitioner *Martinez*’s first state collateral proceeding, his counsel did not raise such a claim. On federal habeas review with new counsel, *Martinez* argued that he received ineffective assistance both at trial and in his first state collateral proceeding. He also claimed that he had a constitutional right to an effective attorney in the collateral proceeding because it was the first place to raise his claim of ineffective assistance at trial. The District Court denied the petition, finding that Arizona’s preclusion rule was an adequate and independent state-law ground barring federal review, and that under *Coleman v. Thompson*<sup>4</sup>, the attorney’s errors in the post-conviction proceeding did not qualify as cause to excuse the procedural default. The Court of Appeals for the Ninth Circuit affirmed.

On certiorari to the U.S. Supreme Court,

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that Court held that where, under state law, ineffective-assistance-of-trial-counsel claims must be raised in an initial-review collateral proceeding, rather than on direct review, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

The Supreme Court declined to answer the question left open in *Coleman v. Thompson*, whether an appellant has a constitutional right to effective counsel in his initial-review collateral proceedings since that was not the precise question raised in *Martinez*. However the Court held that in order to protect appellants with potentially legitimate ineffective-assistance claims, it was necessary to recognise a narrow exception to *Coleman*'s unqualified statement that an attorney's ignorance or inadvertence in a post-conviction proceedings does not qualify as cause to excuse a procedural default, namely, that inadequate assistance of counsel at initial-review collateral proceedings may establish cause.

The Supreme Court recognised that a federal court could only hear *Martinez*'s ineffective-assistance claim if *Martinez* could first establish cause to excuse the procedural default and secondly that he suffered prejudice from a violation of federal law. *Coleman* held that a post-conviction attorney's negligence "does not qualify as 'cause,'" because "the attorney is the prisoner's agent," and "the principal bears the risk of" his agent's negligent conduct<sup>5</sup>. However, in *Coleman*, counsel's alleged error was on appeal from an initial-review collateral proceeding. Thus, his claims had been addressed by the state habeas trial court. This marked a key difference between initial-review collateral

proceedings and other collateral proceedings. In *Martinez*, where the initial-review collateral proceeding was the first designated proceeding for a prisoner to raise the ineffective-assistance claim, the collateral proceeding was the equivalent of a prisoner's direct appeal as to that claim because the state habeas court decides the claim's merits, no other court had addressed the claim, and defendants "are generally ill equipped to represent themselves" where they have no brief from counsel and no court opinion addressing their claim<sup>6</sup>.

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***The right to effective trial counsel is a "bedrock principle in our justice system".***

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As the Court explained, an attorney's errors during a direct appeal may provide cause to excuse a procedural default because if the attorney appointed by the state is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claim. Without adequate representation in an initial-review collateral proceeding, a prisoner will have similar difficulties establishing a substantial ineffective-assistance-at-trial claim. The same would be true if the state did not appoint an attorney for the initial-review collateral proceeding. A prisoner's inability to present an ineffective-assistance claim was of particular concern, said the Court, because the right to effective trial counsel is a "bedrock principle in our justice system".

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***Inadequate assistance of counsel at initial-review collateral proceedings may establish cause.***

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The Supreme Court went on to explain that allowing a federal habeas court to hear a claim of ineffective assistance at trial when an attorney's errors (or an attorney's absence) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that a collateral proceeding, if undertaken with no counsel or ineffective counsel, may not have been sufficient to ensure that proper consideration was given

to a substantial claim. It therefore follows that, when a state requires a prisoner to raise a claim of ineffective assistance at trial in a collateral proceeding, a prisoner may establish cause for a procedural default of such claim in two circumstances. First, where the state courts did not appoint counsel in the initial-review collateral proceeding for an ineffective-assistance-at-trial claim; and secondly, where appointed counsel in the initial-review collateral proceeding, where that claim should have been raised, was ineffective under *Strickland v. Washington*. To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-at-trial claim is substantial. Most jurisdictions have procedures to ensure counsel is appointed for substantial ineffective-assistance claims. It is likely that such attorneys are qualified to perform, and do perform, according to prevailing professional norms. And where that is so, states may enforce a procedural default in federal habeas proceedings.

The Supreme Court acknowledged that its decision involved a limited qualification to the rule in *Coleman* but considered that this did not affect the status of its decision in *Coleman* or implicate the rule of stare decisis. It believed that its holding in that case remained true except as to initial-review collateral proceedings for claims of ineffective assistance at trial. The limited circumstances recognized in *Martinez* also reflect the importance of the right to effective assistance at trial.

**Martinez – Dissenting Opinion**

The decision in *Martinez* was a 7-2 decision. For the minority, Justice Scalia wrote an opinion with which his inseparable ally Justice Thomas joined. Justice Scalia railed against the majority’s decision to invoke the rules of equity believing that there was little chance that in future the Court’s

present holding would be confined to ineffective assistance of trial counsel claims. He expressed concern that the effect of the Court’s decision would be to put added strain on scarce state resources because, in his opinion, it was guaranteed to lead to more cases being heard on federal habeas review in the future, particularly in capital cases. He described the decision as “a radical alteration of our habeas jurisprudence.”

**Trevino v. Thaler**

It didn’t take long for Justice Scalia’s prediction to come true. In *Trevino v. Thaler*, Carlos Trevino was convicted of capital murder in Texas and sentenced to death. After his conviction and sentence, neither his new counsel appointed for his direct appeal nor other new counsel appointed for state collateral review raised the claim that Trevino’s trial counsel provided ineffective assistance during the penalty phase by failing adequately to investigate and present mitigating circumstances. When that claim was finally raised in Trevino’s federal habeas petition, the District Court stayed the proceedings so Trevino could raise it in state court where such a claim should be raised first. The state court found the claim procedurally defaulted because of Trevino’s failure to raise it in his initial state post-conviction proceedings, and the federal court then concluded that this failure was an independent and adequate state ground barring the federal courts from considering the claim.

*Justice Scalia described the decision as “a radical alteration of our habeas jurisprudence.”*

The Fifth Circuit affirmed. That decision predated *Martinez*, but the Fifth Circuit had later concluded that *Martinez* did not apply in Texas because *Martinez*’s good-cause exception applies only where state law says that a defendant *must* initially raise his ineffective-assistance-of-trial-counsel claim in initial state collateral review proceedings, whereas Texas law



appears to permit a defendant to raise that claim on direct appeal.

On certiorari review, the U.S. Supreme Court held 5-4 that where, as in this case, a state’s procedural framework meant that in practice it was highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal, the exception recognised in *Martinez* also applies.

In setting out its reasoning the Supreme Court noted that a finding that a defendant’s state law “procedural default” rests on “an independent

and adequate state ground” ordinarily prevents a federal habeas court from considering the defendant’s federal constitutional claim<sup>8</sup>. However, the Court in *Martinez* stated that a “prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of the federal law.” In *Martinez*, the Court recognized a “narrow exception” to *Coleman’s* statement “that an attorney’s ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default.” That exception, *Martinez* held, allows a federal habeas court to find “cause” to excuse such default where (1) the ineffective-assistance-of-trial-counsel claim was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law requires that the claim “be raised in an initial-review collateral proceeding.”

The Supreme Court noted that Arizona law differed from Texas law in respect of the

fourth requirement. Unlike Arizona, Texas does not expressly *require* the defendant to raise a claim of ineffective assistance of trial counsel in an initial *collateral review* proceeding. Instead Texas law on its face appears to permit (but not require) the defendant to raise the claim on *direct appeal*.

The Court then asked itself whether this difference mattered and answered its own question “No”.

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***In Martinez, the Court recognized a “narrow exception” to Coleman’s statement “that an attorney’s ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default.”***

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Its reasons for this were based on two characteristics of Texas’ procedures. First, Texas procedures make it nearly impossible for an ineffective-

assistance-of-trial-counsel claim to be presented on direct review. The nature of an ineffective-assistance claim, usually involving a failure by the trial lawyer to do something, means that the trial record is likely to be insufficient to support the claim. If the lawyer for example failed to call a relevant witness, that will not be apparent from the trial record. Alternatively, a motion for a new trial to develop the record is usually inadequate because of Texas rules regarding time limits on the filing, and the disposal, of such motions and the availability of trial transcripts. Thus, a writ of habeas corpus is normally needed to gather the facts necessary for evaluating these claims in Texas. Secondly, were *Martinez* not to apply, the Texas procedural system would create significant unfairness because Texas courts in effect have directed defendants to raise ineffective-assistance-of-trial-counsel claims on collateral, rather than on direct, review.

During argument Texas was only able to point to a few cases in which a defendant has used the motion-for-a-new-trial mechanism to expand the record on appeal. Texas suggests that there are other

mechanisms by which a prisoner can expand the record on appeal, but these mechanisms seem special and limited in their application, and cannot overcome the Texas courts' own well-supported determination that collateral review normally is the preferred procedural route for raising an ineffective-assistance-of-trial-counsel claim.

In the view of the majority the very factors that led the Court to create a narrow exception to *Coleman* in *Martinez* similarly argued for applying that exception here. The right involved — adequate assistance of trial counsel — is similarly and critically important. In both instances practical considerations — the need for a new

lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim — argue strongly for initial consideration of the claim during collateral, not on direct, review. In both instances failure to consider a lawyer's

“ineffectiveness” during an initial-review collateral proceeding as a potential “cause” for excusing a procedural default will deprive the defendant of any opportunity for review of an ineffective-assistance-of-trial-counsel claim. And so the Supreme Court held that, for present purposes, a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that grants permission but denies a fair, meaningful opportunity to develop the claim is a distinction without a difference. Accordingly the decision of the Fifth Circuit Court of Appeals was vacated and remanded for further proceedings consistent with the opinion of the Court.

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**Trevino – Dissenting Opinion**

Chief Justice Roberts and Justice Alito who had voted with the majority in *Martinez* dissented in *Trevino*. Their dissenting opinion makes clear that when they had agreed to the narrow exception to the *Coleman* rule in *Martinez* they had thought that they had made it sufficiently clear that the circumstances in which a court would apply this “narrow exception” would be highly restricted.

“We were unusually explicit about the narrowness of our decision: “The holding in this case does not concern attorney errors in other kinds of proceedings,” and “does not extend

to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial.” *Id.*, at \_\_ (slip op., at 13-14). “Our holding here addresses only the constitutional

claims presented in this case, where the State barred the defendant from raising the claims on direct appeal.” *Id.*, at \_\_ (slip op., at 14). In “all but the limited circumstances recognized here,” we said, “[t]he rule of *Coleman* governs.” *Id.*, at \_\_ (slip op., at 13).”

The Chief Justice and Justice Alito had not thought that the exception would be applied to a case such as the present because the imperative for creating the narrow exception that applied in *Martinez*, namely that an Arizona appellant had no opportunity to raise an ineffective-assistance-of-trial-counsel claim at any stage before initial review collateral proceedings did not apply in *Trevino* because the position in law was arguably different for Texas appellants.

## Conclusion

The decision in *Trevino* is a classic example of the political nature of decisions of the U.S. Supreme Court when it comes to death penalty cases. Whereas Chief Justice Roberts and Justice Alito were prepared to go along with a change in the law that assisted a non-capital appellant such as *Martinez*, their generosity did not extend to a capital appellant such as *Trevino*. Four of the majority in *Trevino* including two Obama nominees (Justices Kagan and Sotomayor) can, it seems, always be counted on to vote in favour of death penalty appellants and these days Justice Kennedy is also a regular ally in such cases. In capital cases there are almost always four justices on the side of the state rather than the appellant. The balance of power however remains unstable and since new justices are appointed on the recommendation of the president, the political make-up of the Supreme Court is liable to change from time to time.

Nonetheless the decision in *Trevino* is undoubtedly a step forward for capital appellants. The Courts have long recognised that death penalty cases require even greater scrutiny than usual, a recognition that “death is different”. It is a denial of justice to refuse an appellant who has an arguable ground of appeal the right to have that ground adjudicated upon particularly if the basis for such refusal is an alleged failure to comply with some state procedural rule, however important compliance may be for the orderly disposal of criminal cases. And since the key or over-riding objective of any criminal justice system has to be to ensure that justice prevails, if it is necessary sometimes to recognise that a rule of law strictly observed will work an injustice in fact, there will be few who would argue that it is wrong to change that law or to create a narrow exception to a rule. And if, occasionally, a narrow exception appears to have grown a little wider than had been thought appropriate at first that may simply be a recognition that justice requires an amendment to the law.

<sup>1</sup> 569 U.S. \_\_ (2013); No.11-10189, May 28, 2013.

<sup>2</sup> In Texas the Supreme Court has a wholly civil jurisdiction so all criminal appeals including capital cases are heard in the Texas Court of Criminal Appeals (TCCA).

<sup>3</sup> 566 U.S.\_\_(2012); 132 S.Ct. 1309 (2012).

<sup>4</sup> 501 U. S. 722 (1991).

<sup>5</sup> *Maples v. Thomas*, 565 U.S.\_\_(2012) .

<sup>6</sup> *Halbert v. Michigan*, 545 U. S. 605, 617 (2005).

<sup>7</sup> 466 U. S. 668 (1984).

<sup>8</sup> *Coleman v. Thompson*, 501 U. S. 722, 729-30.

<sup>9</sup> *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“the penalty of death is different in kind from any other punishment imposed under our system of criminal justice”).