No. 12-5906

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2011 TERM

JOHN LEZELL BALENTINE,
Petitioner,

vs.

RICK THALER, Director,
Texas Department of Criminal Justice
Institutional Division,
Respondent.

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

PETITION FOR FOR WRIT OF *CERTIORARI*

CAPITAL CASE

Mr. Balentine is currently scheduled to be executed on Wednesday, August 22, 2012, after 6:00 p.m.

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QUESTION PRESENTED

In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), decided last term, this Court sought to "ensure that proper consideration [i]s given to [] substantial claim[s]" of ineffective assistance of trial counsel by federal reviewing courts. 132 S.Ct. at 1318. The United States Court of Appeals for the Fifth Circuit has subsequently interpreted *Martinez* to have no applicability as a matter of law to federal habeas corpus cases brought by a person in custody pursuant to the judgment of a Texas court. The question presented by the Fifth Circuit decision is:

> Whether a federal court is required by *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to consider the ineffective assistance of state habeas counsel as cause to excuse default of an ineffective assistance of trial counsel claim raised in a federal habeas corpus petition by a person confined pursuant to a state court judgment in a state which maintains a procedural regime intentionally designed to channel the adjudication of *Strickland* claims into state collateral proceedings?

LIST OF PARTIES

JOHN LEZELL BALENTINE, Petitioner

RICK THALER, Director, Texas Department of Criminal Justice Institutional Division. Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

RULES

STATUTORY PROVISIONS

PETITION FOR WRIT OF CERTIORARI

Petitioner, John Lezell Balentine, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Balentine v Thaler*, No. 12-70023 (5th Cir. 2012) (slip op.).

OPINIONS BELOW

The Fifth Circuit decision sought to be reviewed, *Balentine v. Thaler*, No. 12-70023 (5th Cir. 2012) (slip op.), is attached as Appendix 1. The court's order denying rehearing *en banc* is attached as Appendix 2. Four judges dissented, with written opinions, also attached as part of Appendix 2. The district court order adopting the report and recommendations of the Magistrate Judge and from which Mr. Balentine's appeal was taken, *Balentine v. Thaler*, No.2:03-CV-39-J (N.D. Tex. Aug. 10, 2012), is attached as Appendix 3. The report and recommendation of the Magistrate Judge recommending denial of Mr. Balentine's motion for relief from judgment is attached as Appendix 4.

JURISDICTION

The court of appeals order sought to be reviewed was entered on August 17, 2012. An order denying rehearing *en banc* was entered on August 21, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

In April, 1999, John Balentine was convicted of capital murder. The sentencing phase lasted one day. At the close of the prosecution's case, the defense rested without calling a single witness and without admitting any evidence in mitigation. RR 26:80. The jury heard no mitigating evidence about Mr. Balentine's character or background. The jury returned an affirmative answer to the special issue regarding future dangerousness and a negative answer to the mitigation special issue, and on April 19, 1999, the judge imposed a sentence of death in accordance with Texas law. Defense counsel's failure to present a case for a life sentence was entirely the result of their failure to conduct the kind of life history investigation that, by 1999, was routine in capital cases.

After trial, Mr. Balentine's case became subject to a dual-track review procedure for capital cases that the Texas legislature enacted in 1995 in which his direct appeal and his initial collateral challenge to the judgment occur simultaneously. The mechanism by which this dual-track review procedure was created was the enactment of Article 11.071 of the Texas Code of Criminal Procedure, which establishes the procedures for an application for a writ of habeas corpus in which

the applicant seeks relief from a judgment imposing death. *See* TEX. CODE CRIM PROC. art. 11.071 § 1. The dual-track review structure, accordingly, applies only to capital cases. Before the change in Texas law, a collateral challenge to a criminal judgment could not be filed until the conviction became final. That rule still applies to non-capital cases, but in capital cases in which death has been assessed, the deadline for filing an application for post-conviction relief generally runs well before the direct appeal–which in capital cases is automatic to Texas's highest court–is adjudicated. TEX. CODE CRIM. PROC. art. 11.071 § 4(a) (habeas application must be filed no later than 180 days after counsel is appointed or 45 days after the State's brief on direct appeal is filed, whichever is later).

Pursuant to the dual-track review procedure for capital cases, after a judgment imposing death is entered, the trial court must appoint two different counsel to represent an indigent defendant: appellate counsel and Article 11.071 counsel. TEX. CODE CRIM. PROC. art. 26.05(j); *id.* art. 11.071 § 2(b). The trial court has the duty to appoint both counsel after trial, but Texas law prohibits the trial court from appointing an attorney as appellate counsel if the attorney represented the defendant at trial, unless the defendant and the attorney request the appointment on the record and the court finds good cause for the appointment. TEX. CODE CRIM. PROC. art. 26.052(k). Only persons sentenced to death are afforded the statutory right to collateral counsel for habeas corpus proceedings if indigent; indigent defendants sentenced to less than death have no right to counsel to pursue collateral challenges to their criminal judgments.

Texas law also requires that a motion for a new trial, if any, be filed within 30 days of the date that judgment is entered. TEX. R. APP. PROC. 21.4. Because Texas relies almost exclusively on private attorneys to comply with its constitutional obligations to afford counsel to indigent criminal defendants, post-trial appointments of appellate and Article 11.071 counsel do not always occur

immediately.[1] Where after trial a defendant who has been convicted is not yet represented by appellate counsel, Texas law accordingly imposes a duty on trial counsel to advise the defendant of his or her right to file a motion for new trial and a notice of appeal and, if replacement counsel is not appointed promptly and the defendant wishes to pursue an appeal, file a timely notice of appeal. TEX. CODE CRIM. PROC. art. 26.04(j)(3).

Once appointed, Texas imposes separate duties on appellate counsel and Article 11.071 in capital cases. The State Bar of Texas has outlined these duties in its *Guidelines and Standards for Texas Capital Counsel*. *See* 69 TEX. BAR J. 966 (2006). Appellate counsel has no meaningful investigative duties imposed upon him or her. Appellate counsel's duties include "fully review[ing] the appellate record for all reviewable errors, preparing a well-researched and drafted appellate brief which conforms with Court of Criminal Appeals rules and policies, ensuring that the brief is filed in a timely manner, [and] timely notifying the Court of Criminal Appeals of his [or her] desire to present oral argument in the case, if appropriate." SBOT Guidelines at 976.

Article 11.071, by contrast, imposes a statutory duty on Article 11.071 counsel to "expeditiously" investigate upon appointment "***before and after*** the appellate record is filed." Tex. Code Crim. Proc. art. 11.071 § 3(a) (emphasis supplied). *See also Ex parte Reynoso*, 257 S.W.3d 715, 720 n.4 (Tex. Crim. App. 2008) (statute imposes a duty on Article 11.071 counsel to "diligently pursue the investigation"); SBOT Guidelines at 977 (Article 11.071 counsel has a duty "to conduct a thorough and independent investigation of both the conviction and sentence. Habeas corpus counsel must promptly obtain the investigative resources necessary to examine both phases, including the assistance of a fact investigator and a mitigation specialist, as well as any appropriate

[1] For example, in this case Mr. Balentine was not appointed Article 11.071 counsel until October 1, 1999, almost six months after his judgment sentencing him to death was imposed.

experts."). State law covers the reasonable investigative expenses of Article 11.071 counsel. Tex. Code Crim. Proc. art. 11.071 § 3(d). State law also permits Article 11.071 counsel–but not appellate counsel–to seek not only reimbursement for reasonable investigative expenses already incurred but also prepayment of anticipated investigative expenses so that the statutorily mandated investigation is not unduly impeded by Article 11.071 counsel's inability to finance investigation. *Id. § 3*(b).

In Mr. Balentine's case, trial counsel filed a motion for new trial prior to the appointment of replacement counsel on April 23, 1999. CR 348-351. The motion did not raise as a ground for relief that a new trial was required due to ineffective assistance of counsel at trial ("*Strickland* claim"). Texas courts disfavor use of the motion for new trial for raising and adjudicating *Strickland* allegations. *Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000) ("a post-conviction writ proceeding, rather than a motion for new trial, is the preferred method for gathering the facts necessary to substantiate" a *Strickland* claim). This is in part due to the recognition that the trial lawyer is frequently the attorney who files the motion for new trial and that such counsel have obvious conflicts of interest with respect to adjudication of such claims. *Id.* at 811 (recognizing that"it would be absurd to require trial counsel to litigate his own ineffectiveness in a motion for new trial" to preserve the issue). Texas courts also consider the vehicle simply inadequate for the task. *Id.* at 810 ("[T]here is not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions."); *Sprouse v. State*, 2007 Tex. Crim. App. LEXIS 1862, No. AP-74,933 (Tex. Crim. App. 2007) (recognizing that trial court's failure to appoint appellate counsel within the deadline for filing a motion for new trial thereby rendering defendant's ability to expand the record and litigate Strickland claim on appeal was harmless because the transcript of the trial proceedings had not yet been completed so any appellate counsel could not have been expected to make relevant Strickland allegations). *See also Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997)

(expansion of the record in a motion for new trial is inadequate to adjudicate *Strickland* claims because of time constraints, because the trial record has generally not been transcribed, and because trial counsel may remain counsel during the time required to file such a motion); *Jackson v. State*, 877 S.W.2d 768, 773 n.3 (Tex. Crim. App. 1994) (Baird, J., concurring) (motion for new trial impractical for adjudication of *Strickland* claims because "the time constraints for filing a motion for new trial, TEX. R. APP. PROC. 31, do not provide for adequate investigation … [and] the trial record will generally not be transcribed"). *Accord Martinez*, 132 S.Ct. at 1318 (abbreviated deadlines to expand the record on direct appeal that do not allow adequate time for an attorney to investigate *Strickland* claims is a sound reason for deferring consideration of such claims until the collateral-review stage).

Mr. Balentine's trial counsel who filed the motion had an obvious conflict of interest with respect to raising and adjudicating a *Strickland* claim.[2] The trial court denied the motion on June 9. On July 8, the trial court appointed appellate counsel who would represent Mr. Balentine before the

[2] Trial counsel were precluded by Texas's Rules of Professional Conduct from raising a *Strickland* claim against themselves. *See* TEX. DISC. R. PROF. CONDUCT 1.15(a)(1) (requiring that a lawyer withdraw if the lawyer believes the lawyer may be a witness necessary to establish an essential fact); Professional Ethics Committee of the Supreme Court of Texas, Opinion 565 (Jan. 2006) (same); TEX. DISC. R. PROF. CONDUCT 3.08 ("A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceedings if the lawyers knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client" in all circumstances relevant here); *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003) (in adjudicating *Strickland* claim, trial counsel is ordinarily an essential witness). Trial counsel also had a conflict between their own pecuniary and professional interests and Mr. Balentine's interest in vindicating a *Strickland* claim, because Texas courts are prohibited from appointing an attorney previously determined to have rendered ineffective assistance of counsel in a capital case to act as lead counsel in any capital proceeding absent a special finding by an separate committee. TEX. CODE. CRIM. PROC. § 26.052(d)(2)(C); *id.* § 26.052(d)(3)(C); *id.* § 26.052(n); *id.* §11.071(2)(d). Although one of Mr. Balentine's trial counsel withdrew (and a different counsel was appointed) shortly after filing the motion for new trial, Mr. Balentine remained represented by his other trial counsel beyond the 10-day statutory deadline for amending or submitting evidence in support of the motion.

appellate court, CR 380, and on August 9, the reporter's record containing the transcript of Mr. Balentine's trial was completed and filed.

While Mr. Balentine's direct appeal was pending before the Texas Court of Criminal Appeals ("TCCA"), Mr. Balentine's appointed state habeas attorney filed a habeas corpus application purporting to raise a *Strickland* claim based on trial counsel's failure to call any mitigation witnesses, but the application alleged no extra-record factual allegations in support of the claim. By his own sworn admission, state habeas counsel did not understand that he had a duty to conduct a sentencing investigation and that a habeas corpus proceeding is different from a direct appeal. *See* Exhibit 1 to Motion for Relief from Judgment, *Balentine v. Thaler*, No. 2:03-cv-00039 (N.D.Tex July 12, 2012) (Document 112). As a result, state habeas counsel alleged no facts that could have been discovered through reasonable investigation in support of prejudice. The application also failed to allege a single fact regarding trial counsel's penalty phase investigation or the availability of any witnesses or evidence that could have been presented. The state court denied relief, simply noting the absence of any non-record factual allegations to support the *Strickland* claim. *See Ex parte Balentine*, No WR-54-071-01 (Tex. Crim. App. Dec. 4, 2002) (unpublished) (adopting trial court's findings).

In a federal habeas petition filed by new counsel in December 2003, Mr. Balentine raised a *Strickland* claim based on trial counsel's failure to conduct a reasonable sentencing investigation. In support of prejudice, Mr. Balentine alleged the discovery of evidence concerning Mr. Balentine's having been reared in dire poverty, been exposed to violence in his family and neighborhood, been victimized by multiple kinds of abuse and neglect, and, yet, developed strong positive character traits. This evidence was summarized by the district court:

> The mitigation evidence identified by petitioner was developed during this federal habeas proceeding, and includes the following: (1) Balentine's impoverished background did not meet his basic needs; (2) Balentine's neighborhood was poor, dangerous and filled with racism against African-Americans, and his environment

> growing up was overflowing with crime, drugs and racial tension; (3) Balentine's mother had limited abilities, married abusive husbands, suffered head injuries in a car wreck resulting in mental problems, and struggled to support her children requiring her to be absent from home in order to work; (4) Balentine's father and stepfather were violent and abusive with his mother, his stepfather was verbally, emotionally and physically abusive with both his wife and the children, and other family members committed acts of violence in his presence; (5) the men in Balentine's life were negative role models, one of which attempted to sexually abuse Balentine when he was seven or eight years old; (6) Balentine suffered an untreated head injury when he was six years old, wet the bed until he was ten years old, and was hit in the head by a rock while mowing the lawn; (7) Balentine suffered from learning problems, including difficulty with his speech, math and reading, demonstrated impulsivity, poor decision making, and difficulty thinking about the consequences of his actions, felt stupid because he was in Special Education and dropped out of high school in the eleventh grade; (8) Balentine's siblings demonstrated learning disabilities that were not properly addressed; (9) Balentine suffered from emotional problems, such as inappropriate emotions, a strange sense of humor, sudden unexplained panic, seeing ghosts, and believing that the ghost of his father sometimes inhabited his body; (10) Balentine's family distrusted official authority, such as the police, whom they regarded as racist and unhelpful, and his family frequently took the law into their own hands to deal with crimes rather than reporting anything to the police; and (11) Balentine developed an exaggerated sense of justice and desire to deal with perceived injustices. Petitioner contends there was mitigation evidence regarding the threats that precipitated these murders that he claims were not adequately investigated and presented to the jury.
>
> In addition to the classic mitigation elements identified above, petitioner contends there was positive character evidence available that was not presented at his trial, such as (1) petitioner's skills as a mechanic and handy-man, which he used to help others without compensation, (2) his friendly nature, good sense of humor, and kindheartedness towards others, (3) his respectfulness towards others, (4) his honesty, and (5) his good conduct in class.

Report and Recommendation to Deny Petition for Writ of Habeas Corpus at 27-29, *Balentine v. Thaler*, No. 2:03-cv-00039 (N.D. Tex. Sep. 27, 2007) (Document 53) (citations omitted), adopted by Order Overruling Objections and Adopting Findings and Recommendations of Magistrate Judge (Mar. 31, 2008) (Document 66). Anticipating the Director's assertion of procedural default due to the lack of any factual allegations having ever been presented to the state court, Mr. Balentine argued that he had cause for any alleged default due to state habeas counsel's poor representation. First Amended Petition for Writ of Habeas Corpus at 12-30, *Balentine*, *supra* (N.D. Tex. Aug. 19, 2004)

(Document 27). The district court, although finding the questions raised by trial counsel's alleged deficiencies to be "substantial," nevertheless determined it was powerless under the doctrine of procedural default to consider the merits of the *Strickland* claim and denied relief. Report and Recommendation at 31 (Document 53). Although a certificate of appealability ("COA") was denied, Mr. Balentine continued to pursue his argument that his *Strickland* claim ought to be reviewed on the merits due to the ineffective assistance of state habeas counsel through a petition for writ of *certiorari* in this Court, which was denied. *See Balentine v. Thaler*, No. 09-5128 (Oct. 20, 2009). Eight years after Mr. Balentine first sought equitable relief from his state habeas counsel's deficient representation, this Court decided *Martinez v. Ryan,* 132 S. Ct. 1309 (2012).

The instant proceeding stems from Mr. Balentine's attempt to reopen the federal judgment to obtain merits review of his previously defaulted *Strickland* claim. The district court denied relief, but observed that Mr. Balentine's arguments in favor of review were not frivolous and that it would have been inclined to review Mr. Balentine's claim but for the Fifth Circuit's recent published decision in *Ibarra v. Thaler*, ___ F.3d ___, 2012 U.S. App. LEXIS 13777 (5th Cir. 2012). App. 4 at 9, 10. The district court granted COA. On appeal, a panel of the Fifth Circuit relied on *Ibarra* to affirm the district court's decision that Mr. Balentine could not avail himself of *Martinez* to establish cause for procedural default of a *Strickland* claim. The panel read *Ibarra* to hold that *Martinez* is inapplicable to federal habeas corpus cases arising in Texas as a matter of law. App. 1 at 6. A petition for rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari Because the Court of Appeals Below Has Decided an Important Federal Question in a Way that Conflicts with Relevant Decisions of This Court.

No meaningful equitable difference exists between Mr. Balentine and the petitioner in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Both petitioners arrived in federal court with a defaulted *Strickland* claim. The cause of the default in both instances was the ineffective assistance of counsel in state collateral proceedings. Neither could rely on *Murray v. Carrier*, 477 US 478 (1986), to excuse the default. Both were precluded by *Coleman v. Thompson*, 501 US 722 (1991), from relying on the ineffective assistance of state collateral counsel to establish cause for the default. Accordingly, both had need of an exception to *Coleman* in order to "ensure that proper consideration [i]s given to [] substantial claim[s]" of ineffective assistance of trial counsel by federal reviewing courts. *Martinez*, 132 S.Ct. at 1318.

Despite the lack of any meaningful equitable difference, the Fifth Circuit has ruled that while the *Martinez* petitioner may be entitled to establish cause and obtain merits review of his *Strickland* claim by establishing that his claim was defaulted as a result of ineffective assistance by counsel in state collateral proceedings, Mr. Balentine is not. The Fifth Circuit's overly narrow reading of *Martinez* treats similarly situated prisoners differently and nullifies this Court's attempt to use equity to fill a perceived jurisprudential gap and protect the"bedrock principle in our justice system" that is the right to counsel during criminal trials. 132 S.Ct. at 1315.

A. *Martinez* is an equitable decision intended to ensure federal review of *Strickland* claims defaulted by inadequate representation in state court with respect to such claims.

Martinez, *supra*, decided last term, is an equitable decision intended to "ensure that proper consideration [i]s given to [] substantial claim[s]" of ineffective assistance of trial counsel by federal reviewing courts. 132 S.Ct. at 1318. It holds that when a state court initial-review collateral proceeding is the first proceeding designated by a state to adjudicate a *Strickland* claim, a prisoner may establish cause for default of such claim where, *inter alia*, counsel in the initial-review collateral proceeding was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). 132 S.Ct. at 1318. Collateral proceedings which provide the first occasion to adjudicate a *Strickland* claim are "initial-review collateral proceedings." *Id.* at 1315.

Before *Martinez*, this Court had recognized that ineffective assistance of counsel during a stage at which a defendant has a constitutional right to counsel–trial and direct appeal–could serve as cause to excuse procedural default. *Murray*, 477 US at 488-89. In *Coleman v. Thompson*, 501 US 722 (1991), the Court held that ineffective assistance of counsel in a stage of proceedings during which a prisoner does *not* have a constitutional right to counsel–*e.g.*, state court collateral review proceedings–cannot serve as cause for default. *Id.* at 754. The *Martinez* Court accordingly operated on the premise that where a state court requires *Strickland* claims to be raised on direct appeal, a petitioner is already empowered to rely upon the ineffective assistance of appellate counsel to establish cause in federal court for default of such claims, but where the state court designates the initial review collateral proceeding as the proceeding in which *Strickland* claims are to be first adjudicated, *Coleman* prevented a federal court from relying on the ineffective assistance of state collateral counsel to establish cause to excuse procedural default.

Recognizing that some states defer consideration of *Strickland* claims until collateral proceedings, and in recognition of the "bedrock principle in our justice system" that is the right to counsel during criminal trials, the *Martinez* Court sought to create an exception to *Coleman's* general rule that ineffective assistance of counsel during a stage of proceedings at which a prisoner does not have a Sixth and/or Fourteenth Amendment right to counsel cannot serve as cause for default. 132 S.Ct. at 1315. This exception was intended to fill a jurisprudential gap created by *Coleman* that left federal courts powerless to review *Strickland* claims that were defaulted by inadequate representation in state collateral proceedings where that proceeding was designated by the State as the appropriate forum for adjudication of such claims. The decision accordingly sought to empower federal courts to reach the merits of all defaulted *Strickland* claims where the default was a consequence of no or inadequate assistance of counsel during whatever stage of state court proceedings the state designates as the first appropriate forum to adjudicate the claim–whether direct appeal or collateral proceedings.

B. Texas designates the Article 11.071 proceeding as the proceeding in which *Strickland* claims that are not firmly founded in the appellate record are to be first adjudicated.

Article 11.071 proceedings are the first proceeding designated by Texas for a capitally-sentenced prisoner to adjudicate *Strickland* claims based upon extra-record evidence, *i.e.*, evidence that does not appear in the appellate record. In view of, *inter alia*, the separate and concurrent roles that state law assigns to appellate counsel and Article 11.071 counsel, discussed *supra*, the TCCA has designated Article 11.071 proceedings as the first proceeding for a capitally-sentenced prisoner to adjudicate *Strickland* claims. *See Mata v. State*, 226 S.W.3d 425, 430 n.14 (Tex. Crim. App. 2007) ("As a general rule, one should *not* raise an issue of ineffective assistance of counsel on direct appeal." (emphasis in original)) (citing *Jackson*, 877 S.W.2d at 772 (Baird, J.,

concurring); *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *Mallett v. State*, 65 S.W.3d 59, 62-63 (Tex. Crim. App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999); *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Ex parte Duffy*, 607 S.W.2d 507, 513 (Tex. Crim. App. 1980). *See also Mitchell v. State*, 68 S.W.3d 640, 643 (Tex. Crim. App. 2002) (habeas corpus "is the appropriate vehicle [in Texas] to investigate ineffective-assistance claims"); *Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000) ("a post-conviction writ proceeding, rather than a motion for new trial, is the preferred method for gathering the facts necessary to substantiate" a *Strickland* claim); *Duffy*, 607 S.W.2d 507, 513 (court would be hard pressed to find that habeas corpus petitioner had any other available remedy for a *Strickland* claim in Texas courts besides habeas corpus).

An exception to the TCCA's rule against adjudicating *Strickland* claims on appeal exists. *Strickland* claims alleging deficiencies that are "firmly founded in the [appellate] record" may be adjudicated on direct appeal. *Thompson*, 9 SW 3d at 814. This exception to the general rule is exceedingly narrow. For the "vast majority" of cases, the Article 11.071 proceeding is the designated proceeding for a capital prisoner to adjudicate *Strickland* claims. *Id.* at 814 n.6. *See also id.* at 814 ("where the alleged derelictions primarily are errors of omission *de hors* the record rather than commission revealed in the trial record," collateral attack is the vehicle by which an examination of ineffectiveness may be developed); SBOT Guidelines at 977 ("state habeas corpus is the first opportunity for a capital client to raise challenges to the effectiveness of trial or direct appeal counsel"); State Bar of Texas Task Force on Habeas Counsel Training and Qualification, *Task Force Report* at 3 (Apr. 27, 2007) ("[h]abeas proceedings are the only opportunity available to those sentenced to death to raise post conviction claims of . . . ineffective assistance of trial counsel [in Texas courts]..."). Only "in the ***rare case*** where the record on direct appeal is sufficient to prove that

counsel's performance was deficient [should] an appellate court … address the claim in the first instance." *Robinson*, 16 S.W.3d at 813 n.7 (emphasis supplied).

Martinez's rationale for permitting cause for default of *Strickland* claims to be established by inadequate representation in the initial-review collateral proceeding applies to Texas prisoners whose *Strickland* claims are based on extra-record evidence, as Mr. Balentine's are. The *Martinez* Court recognized that where the collateral proceeding is the first designated proceeding for a prisoner to raise a *Strickland* claim, the proceeding is similar to a prisoner's direct appeal with respect to that claim because (1) the state habeas court looks to the merits of the claim, (2) no other court has addressed the claim, and (3) defendants pursuing first-tier review are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim. *Martinez*, 132 S.Ct. at 1317.

First, Texas courts address the merits of all extra-record *Strickland* claims raised in Article 11.071 proceedings. No extra-record *Strickland* claim raised in an Article 11.071 proceeding is considered defaulted for not having been raised on direct appeal nor barred by *res judicata* if it was raised on direct appeal. *See Duffy*, 607 S.W.2d 507, 512-13 (*Strickland* claim was not waived by failure to raise claim on direct appeal); *Torres*, 943 S.W.2d at 475 *(*doctrine of *res judicata* is not applied to *Strickland* claims because, due to the "inherent nature" of such claims, direct appeal cannot be expected to provide an adequate record to evaluate the claim).

Second, Texas courts will not have addressed the merits of the claim prior to the Article 11.071 proceeding. While Texas's rule against raising *Strickland* claims on direct appeal admits of an exception, when such claims are nevertheless raised there, the TCCA will not adjudicate them except in the "rare case" where the allegations of deficient performance are "firmly founded in the [appellate] record" and the deficiency is "so outrageous that no competent attorney would have

engaged in it." *Robinson*, 16 S.W.3d at 813 n.7; *Thompson*, 9 S.W.3d at 814; *Mata*, 141 S.W.3d at 869. Otherwise, Texas courts do "not decid[e] on [] direct appeal [whether] appellant did or did not receive the effective assistance of counsel during trial." *Thompson*, 9 S.W.3d at 814. *See also id.* at 813 ("Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation"); *Rylander v. State*, 101 S.W.3d 107, 111 n.1 (Tex. Crim. App. 2003) (reversing appeals court's decision on *Strickland* claim but holding that the court was not "deciding on this direct appeal whether appellant did or did not receive effective assistance of counsel). Instead, "the proper procedure will be for the appellate court to overrule an appellant's Sixth Amendment claim without prejudice to appellant's ability to dispute counsel's effectiveness collaterally." *Robinson*, 16 S.W.3d at 813 n.7. In short, denials of *Strickland* claims on direct appeal merely reflect a finding of the record's inadequacy to adjudicate the claim, not that the claim lacks merit.

Third, Texas prisoners pursuing first-tier collateral review are ill-equipped to represent themselves with respect to *Strickland* claims–Texas itself recognizes this and affords a statutory right to counsel to capitally sentenced prisoners for an initial habeas corpus proceeding–and lack a brief from prior counsel or a court opinion addressing the claim. While briefs raising *Strickland* claims on direct appeal in capital cases may occasionally exist, they are the exception to the general rule. Such briefs will necessarily be limited to alleged deficiencies appearing in the record and will not contemplate extra-record evidence of deficient performance nor of prejudice. *See Torres*, 943 S.W.2d at 475 (a writ of habeas corpus is "essential" to gathering the facts necessary to adequately evaluate *Strickland* claims); *Thompson*, 9 S.W.3d at 813 ("Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation"). TCCA opinions

disposing of such claims on direct appeal simply note the inadequacy of the record. *Thompson*, 9 S.W.3d at 814; *Rylander v. State*, 101 S.W.3d 107, 111 n.1 (Tex. Crim. App. 2003). Accordingly, at least for *Strickland* claims raised in capital cases arising from Texas that assert "omissions *de hors* the [appellate] record," *Thompson*, 9 S.W.3d at 814, the Article 11.071 proceeding is the initial review collateral proceeding within the meaning of *Martinez*.

C. The *Ibarra* decision contravenes *Martinez*.

In *Ibarra*, *supra*, the Fifth Circuit held that *Martinez* had no applicability to federal habeas corpus cases arising from Texas as a matter of law. *Ibarra,* over the dissent of one Judge, reasoned that "Texas procedures do not mandate that ineffectiveness claims be heard in the first instance in habeas proceedings, and they do not by law deprive Texas defendants of counsel-and court-driven guidance in pursuing ineffectiveness claims." *Ibarra*, 2012 U.S. App. LEXIS 13777 at 12. *Ibarra* relied on the TCCA's *Thompson* decision for the proposition that "the TCCA sometimes reach the merits of ineffectiveness claims on direct appeal," even though in *Thompson* the TCCA explicitly held that it was ***not*** deciding the merits of the *Strickland* claim in the appeal. *Id*; *Thompson*, 9 S.W.3d at 814. *Ibarra* further observed that "[w]here [the Texas courts] do not [adjudicate the *Strickland* claim on direct appeal], Texas habeas procedures remain open..." *Ibarra*, slip op. at 7. Accordingly, *Ibarra* itself recognized the existence of a class of *Strickland* claims that the TCCA does not adjudicate on appeal and for which the Article 11.071 proceeding must be the initial review collateral proceeding. The TCCA recognizes that within this class is situated the "vast majority" of *Strickland* claims: those alleging "errors *de hors* the [appellate] record." *Thompson*, 9 S.W.3d at 814.

The *Ibarra* decision eviscerates this Court's attempt in *Martinez* to ensure federal review of *Strickland* claims that are defaulted in state court due to inadequate assistance of counsel and fails

to give due respect to Texas's legitimate interests in channeling the resolution of constitutional claims to the most appropriate forum and in the integrity of its judicial procedural regime. During the time at which a capitally sentenced Texas prisoner has a constitutional right to effective assistance of counsel–trial and direct appeal–such counsel have no state law duty to raise *Strickland* claims. In fact, appellate counsel is affirmatively dissuaded by Texas from doing so. The dual-track structure of post-trial proceedings established by Texas's legislature for capital cases clearly allocates the duty to investigate and raise extra-record *Strickland* claims to Article 11.071 counsel. The State Bar of Texas's *Guidelines and Standards for Texas Capital Counsel* also allocate the responsibility for discovering and raising *Strickland* claims to Article 11.071 counsel. SBOT Guidelines at 977 ("state habeas corpus is the first opportunity for a capital client to raise challenges to the effectiveness of trial or direct appeal counsel"). Texas's highest criminal court has adopted a general rule that appellate counsel ought not raise *Strickland* claims on direct appeal, *Mata*, 226 S.W.3d at 430 n.14, and that such claims ought to be raised in Article 11.071 proceedings.

Accordingly, direct appeal counsel in capital cases rarely raise *Strickland* claims on direct appeal, and, when they do, they are even more rarely addressed on the merits by the court. *See Thompson*, 9 S.W.3d at 813 ("Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation"); *Velez v. State*, No. AP-76,051, slip op. at 60-61 (Tex. Crim. App. June 13, 2012) (unpublished) (concluding that "the record is not sufficient to address appellant's ineffective-assistance-of-counsel claims"). Capitally sentenced Texas prisoners depend exclusively upon Article 11.071 counsel to adjudicate (exhaust) *Strickland* claims in Article 11.071 proceedings, at peril of procedural default in federal court. *See* App. 2 at 5 (Dennis, J.,

dissenting from denial of reh'g *en banc*) ("capitally sentenced prisoners are virtually required to first raise a claim of ineffective assistance of trial counsel during collateral proceedings")

Like a state that strictly prohibits *Strickland* claims from being raised on appeal, a failure to raise a *Strickland* claim on appeal in Texas does not create a procedural default in federal court because Texas courts permit *all* extra-record *Strickland* claims to be adjudicated on the merits in an Article 11.071 proceeding. Because Texas courts dissuade appellate counsel from raising *Strickland* claims on direct appeal and because Texas law clearly places the duty to investigate and raise *Strickland* claims on Article 11.071 counsel, appellate counsel in Texas capital cases can never be ineffective for deferring *Strickland* claims to collateral review. *Sprouse v. State*, 2007 Tex. Crim. App. LEXIS 1862, No. AP-74,933 (Tex. Crim. App. 2007) (recognizing that trial court's failure to appoint appellate counsel within the deadline for filing a motion for new trial thereby rendering defendant's ability to expand the record and litigate Strickland claim on appeal was harmless because the transcript of the trial proceedings had not yet been completed so any appellate counsel could not have been expected to make relevant Strickland allegations).Appellate counsel who does not use direct review to try to adjudicate a *Strickland* claim is merely adhering to the capital procedural regime created by Texas. And because no procedural default is created when appellate counsel defers *Strickland* claims to Article 11.071 counsel, *Murray*, *supra*, can afford no relief to a capitally sentenced Texas prisoner whose appellate counsel ***properly*** forgoes raising a *Strickland* claim on appeal.

Such prisoners are therefore equitably situated identically to prisoners with defaulted *Strickland* claims whose cases arise in states that have absolute bars against raising *Strickland* claims on appeal. In both instances, it is the state *habeas* court that looks to the merits of the claim; no other court will have addressed the claim; and prisoners pursuing first-tier review will lack a brief from

counsel or a court opinion addressing the claim. For both prisoners, the procedural default applied in federal court occurs in the state collateral proceeding–the proceeding designated by both as the first-tier review proceeding for *Strickland* claims. Moreover, neither prisoner can rely upon *Murray* to excuse the procedural default. Both therefore equally require the equitable benefit of *Martinez* to "ensure that proper consideration [i]s given to [] substantial claim[s]" of ineffective assistance of trial counsel by federal reviewing courts. The panel decision applying *Ibarra* elevates form over substance and as a result renders the capitally sentenced prisoner in Texas *worse off* than a capitally sentenced prisoner in Arizona after *Martinez*, despite the lack of any meaningful equitable difference between them.

In holding that *Martinez* has no applicability to federal habeas cases arising from Texas, *Ibarra* not only nullifies this Court's intent to fill the gap left by *Murray* and *Coleman*, it also thwarts Texas's legitimate interests in channeling the resolution of claims to the most appropriate forum and in the integrity of its judicial procedural regime. *Coleman*, 501 U.S. at 750; *Wainwright v. Sykes*, 433 US 72, 99 (1977) (Brennan, J., dissenting). The panel decision undermines Texas's procedural rules that designate the Article 11.071 proceeding as the appropriate forum in which to adjudicate extra-record *Strickland* claims. By relying on the motion for new trial as an available means by which to expand the record and adjudicate *Strickland* claims on direct appeal in state court, *Ibarra* undermines Texas's dual track review system by incentivizing appellate counsel in capital cases to try to use the motion for new trial proceeding to do just that–despite the TCCA's admonitions that the motion for new trial is wholly inadequate for this task. *See Robinson*, 16 S.W.3d at 810 ("[T]here is not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions."); *Torres*, 943 S.W.2d at 475 (expansion of the record in a motion for new trial is often inadequate because of time constraints, because the trial record has generally not been transcribed, and because

trial counsel may remain counsel during the time required to file such a motion); *Jackson*, 877 S.W.2d at 773 n.3 (Baird, J., concurring) (motion for new trial impractical for adjudication of *Strickland* claims because "the time constraints for filing a motion for new trial, TEX. R. APP. PROC. 31, do not provide for adequate investigation … [and] the trial record will generally not be transcribed"). *Accord Martinez*, 132 S.Ct. at 1318 (abbreviated deadlines to expand the record on direct appeal that do not allow adequate time for an attorney to investigate *Strickland* claims is a sound reason for deferring consideration of such claims until the collateral-review stage). Appellate counsel's attempts to perform investigative and other duties that Texas statutorily imposes on Article 11.071 counsel would wreak havoc with and impose unnecessary costs on the state court system, which would in capital cases now be faced with competing claims of duties by different lawyers appointed at the same time.

The Director has contended in the proceedings below that, notwithstanding the State of Texas's choice to channel the litigation of *Strickland* claims into collateral proceedings, the mere theoretical availability of the motion for new trial and the lack of an absolute bar against raising record-based *Strickland* claims on direct appeal is sufficient to remove all federal habeas cases brought by prisoners confined pursuant to Texas judgments from the category of cases to which *Martinez* was meant to cover. The Director has even cited a string of cases—mostly non-capital cases and some capital cases, all except for one of which were decided before Texas's adoption of the dual-track review mechanism in capital cases and hence before the process required the appointment of two separate counsel contemporaneously—in which *Strickland* claims were raised and pressed in motions for new trial. The Director's short-sighted argument fails to give due weight to the effect of Texas's choice to channel *Strickland* claims away from direct appeal and into state

habeas proceedings and fails to consider the implications on federal habeas petitioners as a result of Texas's choice.

The differences between the post-trial review mechanisms in capital and non-capital cases—a difference to which the Director appears to pay no attention—explains why Texas courts are more likely to see *Strickland* claims raised on direct appeal in the non-capital context than in the capital context, notwithstanding its admonitions against raising such claims in that posture. Unlike indigent defendants sentenced to death, indigent Texas defendants sentenced to less than death are not subject to a dual-track review mechanism and are not entitled to the appointment of counsel to represent them in collateral proceedings at all. Rather, in non-capital cases, a convicted indigent defendant is appointed appellate counsel to represent the defendant on appeal, and no habeas corpus application may be filed until after the case has become final at the conclusion of direct review. Consequently, only one lawyer is appointed after conviction–appellate counsel–and appellate counsel understands that he or she is all that will stand between the defendant's obtaining relief of any kind and the defendant's serving the sentence as imposed. Appellate counsel in those circumstances may well undertake to raise a *Strickland* claim in a motion for new trial and pursue the claim on direct appeal. Doing so—while still subject to all the obstacles that the TCCA has observed make it a disfavored process—would not in addition to that give rise to competing duties and duplicative undertaking with collateral counsel as it would in the capital dual-track review procedure.

In capital cases, it is simply not expected that appellate counsel—or any counsel other than 11.071 counsel—will undertake to investigate and litigate a *Strickland* claim on behalf of the capitally sentenced client. Appellate counsel can never be found ineffective for deferring such claims to Article 11.071 counsel—the counsel to whom Texas law clearly allocates the responsibility of *Strickland* litigation in the state courts. The Director relied upon the unpublished TCCA decision in

Armstrong v. State, 2010 WL 359020 (Tex. Crim. App. Jan. 27, 2010), as an example of a capital case in which appellate counsel pursued a *Strickland* claim based on trial counsel's failure to conduct a reasonable sentencing investigation in a motion for new trial and on appeal. Far from demonstrating that Texas's choice to channel *Strickland* claims into collateral proceedings should not implicate *Martinez*, *Armstrong* confirms why it must.

Given all the obstacles to developing a record in the abbreviated deadlines to expand the record on direct appeal that the TCCA and this Court in *Martinez* recognized, the *Armstrong* defendant unsurprisingly did not present any evidence of prejudice in his hearing on a motion for new trial. 2010 WL 359020 at *6. The TCCA accordingly denied the claim because "Armstrong ... asks this Court to speculate that additional mitigation evidence does exist." *Id.* at *7. The Court held that it could not grant relief because the claim was ***not*** "firmly founded in the record." *Id.* In other words, it was within the class of cases that is not adjudicable on direct appeal.[3]

Despite the direct appeal decision in *Armstrong*, the *Armstrong* defendant's state habeas counsel is still the person on whom state law directs Armstrong to rely in adjudicating his *Strickland* claim, and, indeed, collateral proceedings remain open to Armstrong to litigate his *Strickland* claim there based upon extra-record evidence and at peril of procedural default in federal court. That is, in fact, precisely what the *Armstrong* defendant's Article 11.071 counsel have done. *See* Application for Postconviction Writ of Habeas Corpus at 43-50, *Ex parte Armstrong*, No. CR-2095-06-G(l) (370th Dist. Ct. Feb. 19, 2009) (raising extra-record *Strickland* claim based on trial counsel's failure to conduct reasonable sentencing investigation that includes extra-record evidence of prejudice). Had

[3] Indeed, the TCCA still made a point to observe in Armstrong that "a claim of ineffective assistance of counsel ***generally may not be addressed on direct appeal*** because the record on appeal is not sufficient to assess counsel's performance." *Armstrong*, 2010 WL 359020 at *65 (emphasis supplied).

Article 11.071 counsel not fulfilled his or her state-imposed duty to litigate this *Strickland* claim in the Article 11.071 proceeding—notwithstanding the fact that appellate counsel was attempting to litigate the claim contemporaneously on direct appeal[4]—Armstrong's extra-record *Strickland* claim would arrive in federal court procedurally defaulted. Without the availability of *Martinez*, the federal reviewing court would be powerless to reach its merits. *Armstrong* accordingly stands an example of *Martinez's* equitable necessity to federal habeas corpus cases brought by Texas capital prisoners.

The State of Texas is now trying to capitalize on Texas's decision to channel *Strickland* claims into collateral proceedings by protesting the applicability of *Martinez* because its direct review process remains nominally open. But it is Texas that has made the decision to dissuade raising such claims on direct appeal, and it is Texas that has made the decision to channel *Strickland* claims into collateral proceedings, especially in capital cases in which it appoints collateral counsel with duties to litigate such claims. While the Director may be correct in asserting that "Texas has not deliberately opted to [absolutely] bar defendants from raising [*Strickland*] claims on direct appeal," Texas has nevertheless chosen to direct defendants where to litigate such claims. That choice is not materially different from the choice Arizona made, because the results are the same: federal habeas petitioners will arrive in court with defaulted *Strickland* claims due to ineffective assistance of counsel in the proceeding in which ***the State*** has chosen for them to litigate it. *See Martinez*, 132 S.Ct. at 1317 (describing relevant criteria for Martinez's applicability as the proceeding in which the State has "designated" as the forum for adjudication of *Strickland* claims).

[4] Unlike in non-capital cases, the habeas application in capital cases is filed before the direct appeal is finally adjudicated. Article 11.071 counsel accordingly cannot wait to see the result of the adjudication. This is one reason why the TCCA dissuades adjudication of *Strickland* claims on direct appeal, because it imposes unnecessary costs on the system in capital cases to have two lawyers duplicating effort and work at the same time.

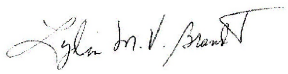
Absent application of *Martinez* to capital federal habeas corpus cases arising from Texas, this Court will continue to see defaulted *Strickland* claims come before it notwithstanding ineffective representation in the forum designated by Texas as the proper forum in which to adjudicate the claim.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari and hold that Martinez is not as a matter of law inapplicable to all federal habeas corpus cases brought by persons confined pursuant to the judgment of a Texas court.

Alternatively, the Court should grant the petition for writ of certiorari, vacate the judgment below, and remand for reconsideration in light of *Martinez*.

Respectfully submitted,



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APPENDICES

Appendix A1 *Balentine v. Thaler*, Slip Op. 12-70023 (Aug. 17, 2012)

Appendix A2 *Balentine v. Thaler*, 5th Cir. No. 12-70023 (Aug. 21, 2012), order on rehearing *en banc*, with written dissenting opinions

Appendix A3 *Balentine v. Thaler*, USDC Judge Amended Order , USDC Northern Dist. Dallas, TX, No. 2:03-CV-39 (August 10, 2012) [Doc #128]

Appendix A4 *Balentine v. Thaler*, U.S. Magistrate's Report & Recommendation, USDC Northern Dist. Dallas, TX, No. 2:03-CV-39 (July 30, 2012) [Doc #122]

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2011 TERM

JOHN LEZELL BALENTINE,
Petitioner,
vs.
RICK THALER, Director,
Texas Department of Criminal Justice, Institutional Division,
Respondent.

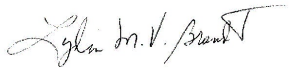
On Petition for a Writ of *Certiorari* to
the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I certify that on August 21, 2012, I have served Petitioner's PETITION FOR WRIT OF CERTIORARI on Ms. Katherine D. Hayes (katherine.hayes@oag.state.tx.us), Assistant Attorney General Office of the Attorney General, 300 West 15th Street, Suite 800, Austin, Texas, 78701, (512) 936-1400 by electronic mail. All parties required to be served have been served. I am a member of the Bar of this Court.

Respectfully submitted,



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