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ORDER
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Court of Criminal Appeals of Texas.

Ex Parte Kimberly Lagayle McCARTHY.

No. WR–50,360–04.
|
June 24, 2013.

On Application for Post–Conviction Writ of Habeas Corpus and Motion to Stay the Execution, From Cause No. F97–34795–V, In the 292nd District Court, Dallas County.

Attorneys and Law Firms

Maurie Levin, for Kimberly Lagayle McCarthy.

ORDER

PER CURIAM.

***1** This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5, and a motion to stay applicant's execution.

In November 2002, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *McCarthy v. State*, No. AP–74,590 (Tex.Crim.App. Sept.22, 2004)(not designated for publication).

Applicant filed her initial post-conviction application for writ of habeas corpus in the convicting court on August 24, 2004. This Court denied applicant relief. *Ex parte McCarthy*, No. WR–50,360–02 (Tex.Crim.App. Sept.12, 2007) (not designated for publication). Applicant filed her first subsequent writ application in the trial court on March 26, 2013, and this Court dismissed it the next day. *Ex parte McCarthy*, No. WR–50,360–03 (Tex.Crim.App. Mar. 27, 2013)(not designated for publication). Applicant filed this her second subsequent writ application in the trial court on June 19, 2013.

In her application, applicant asserts that her right to equal protection was violated when the State used peremptory strikes to exclude qualified non-white venire members from the jury. She also asserts that her trial counsel was ineffective for failing to preserve the issue, and her appellate counsel and initial habeas counsel were ineffective for failing to raise the issue. After reviewing the application, this Court has determined that applicant has failed to meet the dictates of Article 11.071, § 5. Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claim, and we deny applicant's motion to stay her execution.

IT IS SO ORDERED.

PRICE, J., filed a concurring statement in which MEYERS, J., joined.

COCHRAN, J., filed a concurring statement.

ALCALA, J., filed a dissenting statement in which JOHNSON, J., joined.

KEASLER, J., did not participate.

CONCURRING STATEMENT

PRICE, J., filed a concurring statement in which MEYERS, J., joined.

While I cannot agree with all of what Judge Alcala says in her dissenting statement, I am not unsympathetic with her

idea that principles of federalism would justify this Court in taking a second look at the construction it gave to Article 11.071 of the Texas Code of Criminal Procedure in *Ex parte Graves*, in light of the United States Supreme Court's recent decisions in *Martinez v. Ryan* and *Trevino v. Thaler*.[1] However, I am not inclined to regard the instant case as an appropriate vehicle for two reasons.

First, the applicant's *Batson* claim is almost entirely predicated on the appellate record and could easily have been raised on direct appeal.[2] Indeed, even her claim that trial counsel were ineffective for failing to raise the *Batson* issue at trial is predicated on information gleaned from the appellate record; hence, it could have been raised just as effectively on direct appeal as in an initial post-conviction state habeas corpus application.[3] Thus, this applicant's *particular* claim—that we should treat initial state habeas counsel's ineffectiveness as an excuse to reach her claim of ineffective assistance of trial counsel in a subsequent writ application—will almost certainly fail even if we should take the occasion of *Martinez* and *Trevino* to re-examine *Graves*, since initial state habeas was not the only stage at which the applicant's claim could have been vindicated.

***2** Second, the applicant makes no allegation that she suffered prejudice from trial counsel's failure to preserve *Batson* error, as contemplated by this Court's holding in *Batiste v. State*[4]—indeed, she advocates instead that we should overrule *Batiste* as well as *Graves*. Absent an allegation of facts sufficient to make out even a *prima facie* showing of prejudice, the application fails to contain specific facts sufficient to establish that the applicant would prevail on a claim of ineffective assistance of trial counsel even were we to allow her to proceed with such a claim in a subsequent writ application on the basis of the ineffectiveness of her initial state habeas counsel.[5]

For these reasons, I concur in the Court's order dismissing the applicant's subsequent writ application and denying her motion to stay.

COCHRAN, J., filed a statement concurring in the dismissal of the application.

I agree with the Court's decision to dismiss applicant's second subsequent application for a writ of habeas corpus. Applicant filed this application one week before her scheduled execution, alleging that we should address the merits of the very same ineffective-assistance-of-trial-counsel claim that we had previously rejected. She now claims that her original habeas counsel, as well as her trial attorneys, all provided ineffective assistance of counsel in failing to claim that the State exercised its peremptory challenges in a racially-discriminatory manner. At no time during the voir dire, trial, appeal, or original writ proceedings did applicant object to any perceived discrimination by the prosecutors. Article 11.071 § 5 prohibits an applicant from raising a claim in a subsequent application that she could have raised in a previous application. If we are to follow our clear and explicit Texas statute, we are required to dismiss this application.

I respectfully disagree with the dissent that all we are doing is making "[t]he sound of crickets." This Court does not have the inherent authority to commit the State of Texas to the financial responsibility of ignoring or altering our entire statutory post-conviction collateral review system simply to avoid full federal review of our state convictions. The strictures and procedures of the congressionally enacted federal "deferential review" mechanism of AEDPA[1] were essentially overruled in *Martinez v. Ryan*,[2] and *Trevino v. Thaler*.[3] But it is federal courts, not state courts, that must implement this new *de novo* review.

In essence, *Martinez* and *Trevino* hold that all state-court prisoners may have the merits of their claims of ineffective assistance of trial counsel considered *de novo* by federal district and circuits courts unless: (1) the State has provided habeas counsel, *and* (2) that habeas counsel has been deemed by the federal courts to have provided effective assistance.[4] Thus, federal courts will be reviewing all habeas applications filed from state convictions without deference to the state court unless and until they determine that a state-provided habeas attorney did, in fact, provide effective representation even though he did not bring certain ineffective-assistance-of-trial-counsel claims. That federal review will necessarily require analysis of the merits of both the work of the habeas attorney and the work of trial counsel.

***3** And why should the State of Texas spend millions of dollars every year to provide habeas counsel for every inmate when the federal courts will nonetheless be reviewing those claims outside the deferential prism of AEDPA?

Let us look at the practical issues. The total cost of indigent defense in Texas for fiscal year 2012 was over $207 million.[5] In 2012, Texas spent over $96 million in attorney fees to provide trial representation to indigent felony defendants.[6] It spent almost $5 million to provide counsel to 2500 indigent felony defendants on direct

appeal.[7] We do not know how many defendants would want counsel appointed to represent them in a writ of habeas corpus, but if representation is free and there is no risk or cost to the inmate, why would any inmate turn it down?[8] One could fairly assume that at least the same number of defendants who wish for representation on direct appeal would also wish for representation for purposes of bringing a writ of habeas corpus as well.

But, we know for certain that, in the 2012 fiscal year, Texas inmates filed 4,701 original and supplemental writs of habeas corpus in felony cases.[9] If those numbers remained constant even if the State offers to pay for counsel for all inmates who want to file writ applications alleging that their trial counsel did a bad job (As Justice Scalia drily noted, "Has a duly convicted defendant *ever* been effectively represented?"[10]), we can assume at least 4,700 new writs alleging ineffective assistance of trial counsel every year.[11]

Investigating, drafting, and litigating writs of habeas corpus is considerably more labor intensive than writing a direct appeal. Appellate representation for 2500 felony defendants cost $5 million last year, so, on average, each direct-appeal attorney was paid $2,000 per appeal. Attorney costs for habeas proceedings may cost at least twice as much, or $4,000 per non-capital habeas applicant.[12] Assuming no increase in the number of habeas applications per year, 4,700 applications per year at a cost of $4,000 each would add up to more than $16 million per year or $32 million per biennium to provide representation for habeas applicants in Texas.[13] This is an amount that the Texas Legislature would need to allocate before this Court could implement such a system. This Court cannot commit the counties of Texas or the state itself to expenditures of this magnitude—simply to avoid full federal review—without legislative approval and oversight.

What would Texas be getting for its $32 million per biennium investment in a third layer (trial, direct appeal, and habeas) of appointed lawyers for indigent felony defendants? Not much.[14] Under *Martinez*, and *Trevino*, all inmates who are provided with counsel for filing state writs of habeas corpus, if not granted relief on their ineffective-assistance-of-trial-counsel claims in state court, would still be entitled to file writ applications in federal court. There, they could complain that the lawyer that the State of Texas provided for them on habeas corpus review was ineffective because that lawyer failed to allege that the lawyer that the State of Texas provided for them at trial was ineffective in some respect. That is, the habeas lawyer might have alleged that the trial counsel was ineffective in ten different ways, but if he did not allege that the trial lawyer was ineffective in some eleventh or twelfth way, that is sufficient to obtain access to the federal courts. And the federal courts would then review *de novo* the allegation that the state habeas attorney was ineffective. In analyzing that question, the federal courts would necessarily have to address the merits of the underlying claim that trial counsel was ineffective in the specific manner alleged.

***4** Or suppose that this Court jettisoned its prior decision in *Ex parte Graves*,[15] and held that an inmate can bring a subsequent state-court writ alleging that his first habeas counsel was ineffective for failing to raise a specific claim about his trial counsel's performance. The state trial court would then analyze that claim and this Court would review the findings and recommendations of the trial court. But if this Court decided, in this second round of habeas review, that the new allegations of ineffective assistance of trial counsel were without merit, the inmate could still go into federal court and claim that the original habeas counsel was ineffective for failing to allege a specific claim about trial counsel's performance. So having a second round of habeas review in state court would make no difference in deference by the federal courts. Regardless of whether a state court does or does not provide habeas counsel and regardless of whether a state court does or does not provide a second round of habeas review addressing claims that the original habeas attorney was ineffective, the inmate can still obtain *de novo* review in federal court of the *Trevino* claim that he either (1) did not have habeas counsel, or (2) that his habeas counsel provided ineffective assistance of counsel. Such a system requires a huge financial and time investment by the state but achieves little, if anything, in comity and finality.

Perhaps if Congress enacted legislation that absolutely barred the filing of a writ of habeas corpus in federal court by a state prisoner if the state (1) provided both habeas counsel (with federal financial assistance), and (2) permitted a second (uncompensated) round of review for allegations of ineffective assistance of the first habeas counsel, legislators might consider an appropriate shift of resources from federal courts to state courts that took into account finality concerns as well as issues of comity.

The Supreme Court's decision in *Trevino* is not based upon the federal Constitution, but rather the Court's sense of "equity." Its decision affects the application of a federal statute, AEDPA, to federal courts. Its decision affects the authority of federal courts. Its decision does not address the authority of state courts. The implicit suggestion in *Trevino* is that states should provide lawyers to indigent inmates for filing writs of habeas corpus

alleging that their state-provided trial lawyers were ineffective. That is an extremely onerous financial burden on the states. But even when states do provide free representation for habeas review, federal courts will still be required to review the effectiveness of the state-provided habeas attorney and will do so even if the state has both provided an attorney for habeas claims and permitted a second round of habeas review to address the claim that the first habeas attorney provided ineffective assistance of counsel.

Justice Scalia's prediction that the non-capital inmate will complete his sentence before he completes his state and federal habeas review sounds realistic, as does his prediction that, for those on death row, a natural death of old age will come before the completion of state and federal habeas review.[16]

***5** The Solicitor General of Texas has suggested that this Court should have an opportunity to reevaluate its prior rulings and procedures and address the merits of claims brought in subsequent writs despite our Texas statutes barring such review. Unlike the United States Supreme Court, we cannot create "equitable" exceptions to our habeas statutes. We must follow current statutory law. I agree with the Solicitor General, however, that the Texas Legislature may wish to address the issues and concerns that the *Trevino* case raises. If the Legislature deems statutory changes appropriate, it must allocate the financial resources necessary to support any such changes to the current law.

Conclusion

The Texas Legislature has many choices. This Court has few choices and no authority to implement drastic changes that would seriously affect the financial stability of the Texas criminal-justice system. Furthermore, unlike this Court, the various state legislatures may work in tandem with Congress to enact appropriate state and federal legislation that ensures fairness to those state-court inmates who may have a legitimate claim of ineffective assistance of trial counsel while ensuring comity, finality, and the preservation of scarce state resources. I do not desire "a federal take-over,"[17] but I recognize that we do not have the authority to commit the taxpayers of Texas to unanticipated, unapproved, and unfunded mandates as suggested by the applicant in this case.

DISSENTING STATEMENT

ALCALA, J., filed a dissenting statement, in which JOHNSON, J., joins.

***5** The sound of crickets. Silence. That is this Court's response to the Supreme Court's recent decision in *Trevino v. Thaler*, 569 U.S. ——, 133 S.Ct. 1911, —— L.Ed.2d —— (2013), a case that ultimately may prove to expand a defendant's right to counsel in the same way that the right was established in the landmark decision of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).[1] Rather than address the implications of this important decision, this Court, by order and without opinion, cites Kimberly McCarthy, applicant, for abuse of the writ and dismisses her subsequent application for a writ of habeas corpus. *See* Tex.Code Crim. Proc. art. 11.071, § 5(a). In this application, applicant contends that her trial counsel was ineffective for failing to object to the State's allegedly discriminatory use of peremptory challenges during jury selection in her capital-murder trial, and that her initial habeas attorney was also ineffective for failing to raise the issue of trial counsel's deficient performance in her initial application for a writ of habeas corpus.[2] Because I disagree with the Court's cursory dismissal of this application, I respectfully dissent. I conclude that this Court should: (1) grant applicant's motion, which asks this Court to stay her execution in order to reconsider applicant's claim "in the wake and context of *Trevino* "; and (2) write a detailed opinion addressing the implications of *Trevino* on applicant's subsequent writ application. I would hold that this Court has jurisdiction to address her current application under the procedural rules for subsequent writs and resolve her claims on the merits.

I. This Court's Decisions for Subsequent Writs Should Be Reconsidered

***6** In light of *Trevino,* this Court should reconsider its holding in *Ex parte Graves,* 70 S.W.3d 103 (Tex.Crim.App.2002). Prior to *Trevino,* this Court held in *Graves* that a claim of ineffective assistance of prior habeas counsel was not cognizable on habeas corpus. *Id.* at 105. We concluded that such a claim could not, therefore, form the basis for consideration of a subsequent writ under Code of Criminal Procedure article 11.071, nor could it serve as a gateway to consideration of otherwise procedurally barred claims. *See* Tex.Code Crim. Proc. art. 11.071, § 5; *Graves,* 70 S.W.3d at 117–18.

Four of the underlying concepts for the decision in *Graves,* however, no longer apply after *Trevino. Graves,* 70 S.W.3d at 117–18. First, in light of the Supreme Court's decision to permit federal courts to consider the effectiveness of habeas counsel despite its holding that there is no constitutional right to counsel in a habeas proceeding, this Court should reconsider *Graves's* underlying premise that the absence of a constitutional right to counsel necessarily means that an applicant may not challenge the effectiveness of habeas counsel's representation. *Id.* In *Graves,* relying on the principle that a convicted individual has no federal or state constitutional right to habeas counsel, this Court held that a habeas applicant may not challenge the effectiveness of her habeas counsel in a post-conviction proceeding. *Id.* at 116. This Court summarized that,

> neither the United States Supreme Court nor this Court has ever held that a habeas petitioner has a federal or state constitutional right to counsel in a habeas proceeding. Absent such a constitutional right to counsel, there can be no constitutional right to effective assistance of counsel in a habeas proceeding.

Id. But *Martinez v. Ryan,* which became applicable to Texas through Trevino, permits a federal court to consider the ineffectiveness of habeas counsel when deciding whether to excuse a federal habeas petitioner's procedural default of a substantial claim of ineffective assistance of trial counsel. *See Trevino,* 133 S.Ct. at 1921 (citing *Martinez v. Ryan,* 566 U.S. ——, 132 S.Ct. 1309, 1320, 182 L.Ed.2d 272 (2012)). Understanding that the Supreme Court did not change its position that there is no federal constitutional right to habeas counsel, it appears that *Trevino* did carve out a procedural exception for federal courts that will, in effect, permit consideration of what would otherwise be procedurally defaulted claims of ineffective assistance of trial counsel. *Id.* That exception will be triggered whenever a federal court determines that the claim is "substantial" and was procedurally defaulted as a result of ineffective assistance of habeas counsel. *Id.* This Court's holding in *Graves* must be reexamined in light of the change in the law brought about by *Trevino. See Graves,* 70 S.W.3d at 117–18; *Trevino,* 133 S.Ct. at 1920–21.

***7** Second, in light of the Supreme Court's decision to permit federal courts to consider the effectiveness of habeas counsel as a means of overcoming procedural default, this Court should reconsider *Graves's* underlying principle that an applicant may never challenge the effectiveness of habeas counsel because habeas proceedings are limited to complaints about the trial proceedings. *Id.* In *Graves,* this Court explained that,

> an allegation of ineffective assistance of counsel in a habeas proceeding is entirely derivative; it does not attack the validity, fairness, or constitutionality of the original trial proceeding. It is merely a 'gateway' device used to allow an inmate to resurrect a procedurally defaulted claim which he failed to bring at the proper time.

Id. This principle has also been undermined by Trevino. *See Trevino,* 133 S.Ct. at 1919. The Supreme Court has now determined that, in Texas, the proper time to challenge the ineffectiveness of trial counsel is in an application for a writ of habeas corpus. *Id.* at 1920–21. On this basis, the Supreme Court concluded that federal courts may now consider, as an exception to the normal federal procedural-default rules, any substantial claim of ineffective assistance of trial counsel "if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 1921 (citing *Martinez,* 132 S.Ct. at 1320). *See id.* The fact that a claim of ineffective assistance of habeas counsel is a mere "gateway device" to consideration of other claims is no longer a sound reason to decline to consider it.

Third, this Court should reconsider *Graves's* underlying rationale that the State's interest in the finality of convictions weighs against permitting consideration of subsequent writs. *Graves,* 70 S.W.3d at 117. Unless this Court revises its current approach, federal courts will now have the opportunity to decide a vast number of ineffective-assistance claims de novo, without any prior consideration of those claims in state court. The State's interest in the finality of convictions would be better served by permitting state courts to address these ineffective-assistance claims on the merits.[3] This would restore normal procedural-default rules in federal court, as well as reinstate the normally deferential standard of review that federal courts apply to post-conviction claims previously adjudicated on the merits in state court.

Fourth, *Graves* relied on *Coleman v. Thompson* as a basis to limit this Court's consideration of subsequent writs, but that decision has now been modified by the Supreme Court. *See Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Since *Coleman* was

decided, the Supreme Court has held that a " 'narrow exception' should 'modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default.' " *Trevino*, 133 S.Ct. at 1917 (quoting *Martinez*, 132 S.Ct. at 1315). Because *Graves* relied on *Coleman* as a concept underlying its holding, this Court should reconsider *Graves* in light of the Supreme Court's modification of *Coleman.*

***8** Because part of its foundation has been weakened in light of *Trevino*, *Graves* should be reconsidered and modified. *Graves* could be left largely intact to the extent that it holds that, ordinarily, an applicant in a subsequent writ may not raise, as a stand-alone claim, a complaint about the effectiveness of initial habeas counsel. This Court, however, could permit an equitable exception that would mirror the federal exception recognized in *Trevino.* Such an exception would permit this Court to consider a claim of ineffective assistance of habeas counsel as a gateway to considering an otherwise-forfeited claim of ineffective assistance of trial counsel. At the very least, this Court should address applicant's arguments regarding the implications of *Trevino* and write an opinion explaining what approach we will take going forward. Instead, there is only the sound of crickets.

II. *Trevino* May Be the Sequel to *Gideon*

To better understand the potentially expansive application of the *Trevino* decision to ineffective-assistance claims arising from actions in Texas state courts, a brief analysis of *Trevino* and its predecessor, *Martinez v. Ryan*, is essential. *See Trevino*, 133 S.Ct. at 1921–22; *Martinez*, 132 S.Ct. at 1318. In *Martinez*, the Supreme Court, for the first time, recognized that a federal habeas court could consider a procedurally defaulted claim of ineffective assistance of trial counsel if the procedural default was caused by the ineffectiveness of initial habeas counsel in state post-conviction proceedings. *Martinez*, 132 S.Ct. at 1320 (holding that "procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective"). Citing to *Gideon*, the Supreme Court in *Martinez* determined that a "prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel," a right that is "a bedrock principle in our justice system." *Id.* at 1317 (citing *Gideon*, 372 U.S. at 344).

At the time it was decided, *Martinez* did not appear to affect Texas because it was limited to situations in which a state required ineffective-assistance-of-trial-counsel claims to be raised during habeas proceedings, and Texas permitted those claims to be asserted either on direct appeal or on habeas. *Id.* Last month, things changed. *Martinez* now expressly applies to Texas. *Trevino*, 133 S.Ct. at 1921. The Supreme Court decided that, although Texas has a mechanism for challenging the effectiveness of a trial attorney on direct appeal, this Court has (1) discouraged use of that procedure because the record is ordinarily undeveloped within the 30–day period during which the motion for new trial and appeal must be filed, and (2) rarely granted relief on those claims through direct appeal. *Id.* at 1918–20. Texas, said the Supreme Court, effectively has a procedure that requires that habeas counsel raise ineffective-assistance-of-trial-counsel claims in the initial state habeas application. *Id.* And Texas does not ordinarily permit an applicant to raise, in a state habeas proceeding, a claim of ineffective assistance of habeas counsel. *Id.* at 1921. This makes the Texas procedure indistinguishable from the procedure found to be unacceptable in *Martinez.*[4] *Id.* After *Trevino*, in a subsequent application for a writ of habeas corpus, as here, an applicant has the opportunity to have a federal court decide on the merits whether the initial habeas counsel was ineffective in the way that he handled a claim of ineffective assistance of trial counsel. *Id.* If the federal court determines that ineffective assistance of habeas counsel constitutes adequate cause for a procedural default of the underlying ineffective-assistance-of-trial-counsel claim, then the federal court may go on to consider the merits of that otherwise forfeited ineffective-assistance claim. *Id.* at 1917–18 (citing *Coleman*, 501 U.S. at 732). Because Texas state courts decline to hear these complaints, the federal courts will decide these ineffective-assistance claims in the first instance without state courts ever having had the opportunity to review them. *See id.* at 1919–20.

***9** Only time will tell whether *Trevino* is a landmark decision in Texas similar to *Gideon's* requirement that indigent defendants be appointed competent counsel. *Gideon*, 372 U.S. at 335. For now, *Trevino's* holding suggests that it will. It, for the first time, tells Texas inmates that they have the opportunity to challenge the effectiveness of habeas counsel with respect to the handling of an ineffective-assistance-of-trial-counsel claim. *Trevino*, 133 S.Ct. at 1921. That concept, until last month, was foreign to Texas.

Trevino changes the landscape in Texas for all "substantial" claims that trial counsel was ineffective, whether a defendant was sentenced to probation, imprisonment, or death. *Id.* at 1920–21. Texas has now, in a significant number of cases, lost the ability to decide the important matter of the effectiveness of trial counsel in our state courts. That claim will now be addressed in large part by federal courts if Texas does not reassess its current procedures. At the very least, we should write an opinion explaining why the rules for subsequent applications must stay the same or change. But instead there is only the sound of crickets.

III. The Future for Texas State Court Claims on Ineffective Assistance

Option One: Do Nothing

One option for this Court is to do nothing. This Court can leave *Graves* alone, even though current law makes its rationale seriously flawed. *See Graves,* 70 S.W.3d at 117–18. This Court can watch the federal courts decide ineffective-assistance-of-trial-counsel claims for all of Texas's state courts. This is a "You want it, you got it" point of view. For me, picking up my toys and going home has never been a good solution to a problem. I believe we should address this challenge head-on. At the very least, if this is the approach that this Court intends to take, then the litigants in Texas state courts should be able to cite to an opinion that explains that this is our approach so that they can plan accordingly.

Option Two: Re-write the Texas Rules of Appellate Procedure

Another option may be to reconsider the Texas Rules of Appellate Procedure to make litigation of ineffective-assistance claims a realistic option on direct appeal. Part of the rationale in *Trevino* was that "Texas procedure makes it 'virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim' on direct review." *Trevino,* 133 S.Ct. at 1918. The Supreme Court observed that the time limits for motions for new trial make a transcript of the trial unavailable at the time when the motion must be filed, which makes it difficult, if not impossible, to review a transcript to determine whether trial counsel was ineffective. *Id.* Texas may be able to solve this issue with only a slight modification to our rules of appellate procedure. Rather than requiring a motion for new trial and notice of appeal within 30 days, perhaps these could be due in 90 days instead. The Texas rules of appellate procedure could require transcripts to be prepared within 60 days. This may not be as difficult as it might first appear in light of the computer age and real-time court reporting. The attorney appointed to represent a defendant in a direct appeal would have the benefit of the entire transcript in mounting his challenge to the effectiveness of trial counsel. This would make the Texas situation unlike the one in *Martinez* and, I believe, would restore the federal procedural-default rules that normally apply to state prisoners' habeas claims in federal court.

***10** Our Texas rules of appellate procedure are decades old and a re-examination of the time requirements may be in order. At the very least, this Court should form a committee to examine whether a revision of the Texas rules of appellate procedure would be appropriate and feasible to address the concerns of the Supreme Court outlined in *Trevino.*[5]

Option Three: Permit Subsequent Writ on Ineffectiveness of Habeas Counsel

Another possible option for Texas could be to modify *Graves* so that this Court may address the merits of a prisoner's challenge to the effectiveness of the initial habeas counsel as a means of excusing procedural default of ineffective-assistance-of-trial-counsel claims. In her motion for stay of execution and subsequent writ application, applicant contends that the Solicitor General of Texas, representing the State of Texas before the Supreme Court in *Trevino,* argued that this Court should have the opportunity to reevaluate its decisions disallowing subsequent applications for writs of habeas corpus like the one presented here. The Solicitor General has suggested that this Court could carve out its own equitable exception to the state-law bar on subsequent writs, as we have done in several previous cases, to permit consideration of these defaulted claims. *See, e.g., Ex parte*

Medina, 361 S.W.3d 633, 642–43 (Tex.Crim.App.2011) (per curiam) (holding that prior application was so defective that it did not constitute an application for Section 5 purposes); *Ex parte Matamoros*, No. WR–50,791–02, 2011 WL 6241295, 2011 Tex.Crim.App. Unpub. LEXIS 931 (Tex.Crim.App. Dec. 14, 2011) (per curiam) (permitting applicant to reopen defaulted claim); *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex.Crim.App.2008) (same). Applicant quotes the Solicitor General's brief to the Supreme Court as stating,

> When the CCA issued its procedural-default ruling [in Trevino's case] 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 rule now, equity demands at a minimum that the CCA have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's *Wiggins [v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)] claim on the merits.

Perhaps open to this invitation, the Supreme Court's opinion in *Trevino* states, "Given this holding, Texas submits that its courts should be permitted, in the first instance, to decide the merits of Trevino's ineffective-assistance-of-trial-counsel claim. We leave that matter to be determined on remand." *Trevino*, 133 S.Ct. at 1921. At the very least, we should address the concerns of the Texas Solicitor General that he argued to the Supreme Court. We should address whether Texas should create an equitable exception to the state-law bar on successive applications based on an allegation of ineffective assistance of state-habeas counsel, if that ineffectiveness resulted in procedural default of a substantial ineffective-assistance-of-trial-counsel claim.

IV. Conclusion

***11** Texas has many choices. We can do nothing, alter the rules of appellate procedure, modify *Graves* and consider the merits of these types of claims in a subsequent writ, or take some other action that we determine to be appropriate under the circumstances. If we do not take action to address an inmate's right to have her ineffective-assistance-of-trial-counsel claim fully heard, Texas will relegate a substantial number of these claims to be decided by the federal courts rather than by our state courts. It will be a federal take-over. And this Court will stand by watching as it happens, doing nothing, and saying nothing. All that will be heard is the sound of crickets. For that reason, I must, most respectfully, very strongly dissent.

All Citations

Not Reported in S.W.3d, 2013 WL 3283148

Footnotes

1 Tex.Code Crim. Proc. art. 11.071; *Ex parte Graves,* 70 S.W.3d 103 (Tex.Crim.App.2002); *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, —— L.Ed.2d —— (2013).

2 *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

3 The applicant now proffers no extra-record information, such as affidavits from trial counsel, appellate counsel, or initial state habeas counsel, to shed any new light on a potential claim of ineffective assistance of trial counsel for failing to raise *Batson* error.

4 888 S.W.2d 9, 17 (Tex.Crim.App.1994).

5 *Cf. Ex parte Staley,* 160 S.W.3d 56, 63 (Tex.Crim.App.2005) (per curium) ("Under both Article 11.07 and Article 11.071, ... it is not sufficient to allege that a legal claim was unavailable at the time of the applicant's original filing if the facts alleged in the subsequent application do not bring the constitutional claim under the umbrella of that 'new' legal claim.").

1 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) authorizes a federal habeas court to grant relief to a prisoner whose state court conviction "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under AEDPA, a state prisoner's habeas claims could not be entertained by a federal court when (1) "a state court [has] declined to address [those] claims because the prisoner had failed to

meet a state procedural requirement," and (2) "the state judgment rests on independent and adequate state procedural grounds." *Walker v. Martin,* 562 U.S. ——, ——, 131 S.Ct. 1120, 1127, 179 L.Ed.2d 62 (2011).

Just two years ago, in *Harrington v. Richter,* —— U.S. ——, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme Court set out the contours of the congressionally-enacted statutory limitation upon federal habeas review:

> 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. Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C. § 2254(b). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of *Wainwright v. Sykes,* 433 U.S. 72, 82–84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), applies. And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies. Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding, *see id.,* at 90, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594.

Id. at 787. Under *Martinez* and *Trevino,* that statutorily mandated deference is now "Gone with the Wind" when it comes to claims of ineffective assistance of trial counsel.

2 566 U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

3 569 U.S. ——, 133 S.Ct. 1911, —— L.Ed.2d —— (2013).

4 *Trevino,* 133 S.Ct. at 1921; *Martinez,* 132 S.Ct. at 1316 (claims of ineffective assistance of habeas counsel may excuse the procedural default of failing to raise a claim of ineffective assistance of trial counsel in state habeas proceedings).

5 Texas Indigent Defense Commission, Indigent Defense Data for Texas, Combined Statewide Indigent Defense Expenditure Report (fiscal year 2012), *available at* http:// tidc.tamu.edu/public.net/Reports/StateFinancialReport.aspx?fy =2012.

6 *Id.*

7 *Id.*

8 As Justice Scalia noted, if the states provide any counsel on habeas, they should provide counsel to all habeas applicants: "[W]hoever advises the State would himself be guilty of ineffective assistance if he did not counsel the appointment of state-collateral-review counsel in *all* cases—lest the failure to raise that claim in the state proceedings be excused and the State be propelled into federal habeas review of the adequacy of trial-court representation that occurred many years ago." *Martinez v. Ryan,* 566 U.S. ——, 132 S.Ct. 1309, 1322, 182 L.Ed.2d 272 (2012) (Scalia, J., dissenting).

9 Texas Office of Court Administration, Annual Report: Court of Criminal Appeals Activity: FY 2012, *available at* http:// www.txcourts.gov/pubs/AR2012/cca/2–cca–activity.pdf.

10 *Martinez v. Ryan,* 566 U.S. ——, 132 S.Ct. 1309, 1322, 182 L.Ed.2d 272 (2012) (Scalia, J., dissenting).

11 Texas Office of Court Administration, Annual Report: Court of Criminal Appeals Activity: FY 2011, *available at* http://www . txcourts.gov/pubs/AR2011/cca/2–cca–activity.pdf. The number of state post-conviction writ applications had been steadily declining over the past five years, but after *Trevino,* they cannot help but rise dramatically if Texas changes its habeas policies and procedures.

12 As for death-penalty habeas applications, prior to the creation of the Office of Capital Writs, the State allocated attorney fees of $25,000 per death-row inmate, but the county itself could pay more. *See* Tex.Code Crim. Proc. art. 11.071, § 2A(a).

13 And, indeed, if the state is to ensure truly "effective" representation for habeas applicants, the attorney cost might well be double that estimate, and that estimate does not include investigatory expenses, expert witness expenses, or administrative costs.

14 As Justice Scalia pointed out,

> Of course even the *appointment* of state-collateral-review counsel will not guarantee that the State's criminal proceeding can be concluded without years-long federal retrial. Appointment of counsel may, as I have said, avoid federal review of the adequacy of representation that occurred years ago, at the original trial. But since, under today's opinion, the condition for exclusion of federal habeas is the very same condition that would apply if appointment of state-collateral-review counsel were constitutionally required, it will remain to be determined in federal habeas review *whether the state-appointed counsel was effective.* Thus, as a consequence of today's decision the States will *always* be forced to litigate in federal habeas, for *all* defaulted ineffective-assistance-of-trial-counsel claims (and who knows what other claims), either (1) the validity of the defaulted claim (where collateral-review counsel was not appointed), or (2) the effectiveness of collateral-review counsel (where collateral-review counsel was appointed). The Court notes that many States already provide for the appointment of counsel in first collateral challenges—as though this proves that what the Court forces the States to do today is eminently reasonable. But what the Court fails to point out is that currently, when state-appointed counsel does not raise an ineffective-assistance-of-trial-counsel claim, that is the end of the matter: The issue has been procedurally defaulted. By virtue of today's opinion, however, *all* those cases can (and where capital punishment is at issue assuredly *will*) proceed to federal habeas on the issue of whether state-appointed counsel was ineffective in failing to raise the ineffective-assistance-of-trial-counsel issue.

Martinez, 132 S.Ct at 1322–23 (Scalia, J., dissenting).

15 70 S.W.3d 103 (Tex.Crim.App.2002).

16 *Martinez,* 132 S.Ct. at 1323–24 (Scalia, J., dissenting). Justice Scalia noted that regardless of whether the state provides counsel for habeas applicants, federal habeas review will proceed. "[E]xcept for the squandering of state taxpayers' money," this federal habeas review will not effect much difference because the inmate will remain in prison serving out his sentence. But, Justice Scalia predicted,

> [I]n capital cases, it will effectively reduce the sentence, giving the defendant as many more years to live, beyond the lives of the innocent victims whose life he snuffed out, as the process of federal habeas may consume. I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system.

Id.

17 *See* dissenting op. *infra,* at 13.

1 In *Trevino,* the Supreme Court concluded that when a state's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, then the holding in *Martinez v. Ryan* applies. *See Trevino v. Thaler,* 569 U.S. ——, 133 S.Ct. 1911, 1921, ——L.Ed.2d —— (2013) (citing *Martinez v. Ryan,* 566 U.S. ——, 132 S.Ct. 1309, 1316, 182 L.Ed.2d 272 (2012) (holding that ineffective assistance of habeas counsel may serve to excuse procedural default of substantial claim of ineffective assistance of trial counsel)).

2 Applicant claims that the State violated her equal-protection rights by its use of peremptory strikes to exclude three of the four qualified non-white venire members. Applicant further asserts that trial counsel was ineffective for failure to object to the State's discriminatory use of peremptory strikes at trial, and that habeas counsel was ineffective for failure to raise this claim in her initial writ application.

3 As applicant notes in her application, the State of Texas's briefing in *Trevino* reflects that, when "faced with the choice of giving the federal courts sole jurisdiction to review the effectiveness of state habeas counsel—and de novo federal review of trial ineffectiveness claims when state habeas counsel was ineffective—the State of Texas has prioritized its interest in state court review ahead of its finality interest." Applicant further contends that, in the wake of *Trevino,* the State of Texas has filed a brief asking the federal district court to permit this Court to consider Trevino's ineffective-assistance claim in the first instance so that normal procedural-default rules would apply in federal court. On these bases, applicant concludes that "the State of Texas and the applicant agree that this Court can and should fashion a response to *Trevino* " that "reassesses whether the State's comity and federalism interests now outweigh a necessarily limited intrusion on the State's interest in finality."

4 In *Martinez,* the Supreme Court determined that a federal habeas court could find "cause" to excuse a defendant's procedural default in a federal petition for a writ of habeas corpus if (1) the claim of "ineffective assistance of trial counsel" 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 with respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective-assistance-of-trial-counsel [claim] ... be raised in an initial-review collateral proceeding ." *Trevino,* 133 S.Ct. at 1917–18 (citing *Martinez,* 132 S.Ct. at 1316–18). *Trevino* pointed out that the first three circumstances in *Martinez* applied to Texas, and the fourth circumstance, which "on its face" did not seem to apply, also applied "as a matter of course." *Trevino,* 133 S.Ct. at 1921.

5 A revision of the Texas rules of appellate procedure would affect only future cases in which an appeal has not been filed and, therefore, would not be a solution for all cases. Also, I recognize that non-record-based complaints about trial counsel may be more difficult to ascertain within 60 days, and that extending the period of time may initially lengthen the appeals process. It may be, however, that even though the initial direct appeal may take longer, the case would become final sooner because the state and federal post-conviction processes would run more smoothly under operation of normal procedural-default rules. The viability of this option would require close examination and input from a group of stakeholders including trial judges, prosecutors, defense attorneys, court reporters, court clerks, and appellate judges.

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