Nos. 12-5906 & 12A173

In the Supreme Court of the United States

JOHN LEZELL BALENTINE,
Petitioner,

v.

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

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

PROOF OF SERVICE

I certify that on the 22nd day of August, 2012, one copy of Respondent's Brief in Opposition and Opposition to Application for Stay of Execution was emailed to Lydia Brandt, counsel for Petitioner. All parties required to be served have been served. I am a member of the Bar of this Court.

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BRIEF IN OPPOSITION AND OPPOSTION TO APPLICATION FOR STAY OF EXECUTION

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Petitioner is scheduled to be executed at 6 p.m. CST on August 22nd.

INTRODUCTION

This Court has denied all four of John Balentine's previous petitions for certiorari. In the fourth of those denials, the Court declined to review the precise claim that Balentine re-raises here — namely, that under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), he should be allowed to resurrect a long-ago defaulted claim for ineffective-assistance-of-trial-counsel (IATC). *See Balentine v. Texas*, 132 S. Ct. 1791 (2012) (mem.). Balentine's fifth petition for certiorari presents the same splitless, fact-bound call for error-correction-with-no-error-apparent that this Court denied earlier this year. It, along with the application for a stay, should be denied.

Martinez recognized a "narrow exception" to the otherwise ironclad doctrine of procedural default. 132 S. Ct. at 1315. The Court noted that Arizona "deliberately cho[se] to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed," to the state-habeas process, where it is not. *Id.* at 1318. Arizona's choice "significantly diminishes prisoners' ability to file such claims" because state-habeas litigants are "unlearned in the law," likely unable to "comply with the State's procedural rules,"

and unprotected by the constitutional right to effective counsel. *Id*. at 1315, 1317, 1318. Accordingly, the Court imposed an equitable "consequence" for Arizona's "deliberate cho[ice]": It held that Arizona could not assert procedural default where its prisoner failed to raise a substantial IATC claim in the "'one and only'" forum that Arizona provided for it. *Id*. at 1315, 1318 (quoting *Coleman v. Thompson*, 501 U.S. 722, 756 (1991)).

Balentine urges this Court to expand *Martinez* to afford him a "fourth and not-only" shot at raising an IATC claim.[1] To do so, however, would divorce the *Martinez* Court's narrow, equitable remedy from the problem it was designed to address. Far from prohibiting prisoners from raising IATC claims on direct appeal, the State of Texas has taken several steps to encourage them.

Balentine cannot salvage his claim by calling it an "as applied" challenge. Every court to consider the question has properly held that *Martinez*'s remedy applies on a State-by-State, not prisoner-by-prisoner, basis. And even if *Martinez* could afford ad hoc relief, it would not help

[1] Balentine first presented his IATC claim in a federal habeas application that he filed in 2003. Prior to doing so, he forfeited three previous opportunities to raise that claim in a motion for a new trial, on direct appeal, and in state habeas. *See* Part II.B, *infra*.

Balentine. He had *three* court-appointed attorneys — none of whom worked on his trial, and all of whom were free of any conflict that would prevent them from raising an IATC claim — working on his case before the conclusion of his direct appeal. They declined to do so only because his underlying IATC claim is meritless.

STATEMENT OF FACTS

I. FACTS ESTABLISHED AT TRIAL

In the early morning hours of January 21, 1998, Balentine brutally murdered three teenagers in Amarillo, Texas. CR2, 308-14.[2] Balentine armed himself with a .32-caliber automatic pistol and walked several miles to the home he used to share with Misty Caylor. Once inside the home, Balentine shot and killed Misty's 17-year-old brother Mark Caylor, Jr. (who had purportedly threatened Balentine because of his treatment of Misty), and two 15-year-old boys, Kai Geyer and Steven Brady Watson. 22RR132-36; 26RR152. Each boy was asleep when Balentine shot him. 20RR23, 216-20; 22RR78. Balentine fled Amarillo and was later arrested in Houston where he confessed to the triple murder. 22RR124-55. b

[2] "CR" is the Clerk's Record; "RR" is the Reporter's Record of transcribed proceedings and exhibits from trial; "SHCR" is the State Habeas Clerk's Record.

During the punishment phase, the State introduced evidence that Balentine committed burglary and theft of property in 1983; that Balentine was convicted of burglary, criminal attempt, and theft of property and sentenced to five years' imprisonment in 1987; and that in 1989, Balentine's parole was revoked because he committed another robbery for which he received an additional five-year prison sentence. 26RR13-14, 22-29. The jury also learned that in November 1996, Balentine kidnapped a female co-worker from her home; he threatened to bind, rape, and kill his hostage, but she escaped when he stopped the car at a convenience store. 26RR37-66. Finally, the State presented evidence that Balentine was violent and argumentative with police officers while awaiting transfer on the capital murder charge. *Id.* at 71-76. Balentine struck an officer in the mouth, knocking that officer into a wall, and several deputies were needed to restrain Balentine as he kept resisting, kicking, and throwing punches.

At the close of the State's punishment case, Balentine's attorneys informed the court, outside the presence of the jury, that the defense had "about four or five, maybe six" witnesses it had subpoenaed and planned to call; after a recess, however, the defense rested after

presenting no witnesses. 26RR77, 80. Based on the jury's answers to the punishment-phase special issues regarding future dangerousness and mitigation, the trial court sentenced Balentine to death. CR323-30, 334-37; 26RR104-08.

II. PROCEDURAL HISTORY

Balentine was represented at trial by attorneys James Durham (lead counsel), Paul Hermann, and Randall Sherrod. CR334. On April 19, 1999, the trial court sentenced Balentine to death. 26RR108.

On April 23, 1999, Balentine's lead counsel (Durham) filed a motion for a new trial under Texas Rule of Appellate Procedure 21. CR348-351. On April 26, 1999, Durham moved to withdraw as Balentine's counsel; the trial court granted that motion and, on the same day, appointed C.R. Daffern (Balentine's fourth attorney) to replace him. CR357.

On June 9, 1999, the trial court held an evidentiary hearing on Balentine's motion for a new trial; it subsequently denied Balentine's motion. 28RR6. Daffern represented Balentine at the hearing, filed a notice of appeal, and designated the record for appeal. CR358-64.

On July 8, 1999, the trial court granted Daffern's motion to withdraw and appointed a fifth attorney (C.J. McElroy) to handle Balentine's direct appeal to the Texas Court of Criminal Appeals (CCA). CR380. McElroy also filed a designation of the record on appeal, which was granted on July 21, 1999. *Id*. at 371-75. Balentine, through counsel, filed an appellate brief presenting four points of error, which the CCA denied. *Balentine v. State*, 71 S.W.3d 763 (Tex. Crim. App. 2002). The time for filing a petition for certiorari expired, and Balentine's direct appeal thus concluded, on July 2, 2002.

While McElroy was litigating the direct appeal, Balentine had another State-appointed attorney litigating his claims in state habeas. On September 30, 1999, the convicting court appointed Balentine's sixth attorney, Kent Birdsong, to serve as state habeas counsel. Birdsong filed an initial habeas application on January 22, 2001, raising twenty-one grounds for relief on Balentine's behalf. SHCR6-163. The trial court issued written findings of fact and conclusions of law and recommended denying Balentine's claims. The CCA accepted that recommendation and denied habeas relief. *Ex parte Balentine,* No. WR-54,071-01 (Tex. Crim. App. Dec. 4, 2002) (unpublished).

Balentine petitioned for federal habeas relief raising nine claims, including that he received punishment-phase IATC when Durham decided not to call witnesses to testify regarding Balentine's disadvantaged upbringing. The district court held that the IATC claim was procedurally defaulted and denied relief. *Balentine v. Quarterman*, No. 2:03-cv-00039, 2008 WL 862992 (N.D. Tex. March 31, 2008). The district court also denied a certificate of appealability (COA), as did the Fifth Circuit. *Balentine v. Thaler*, 324 F. App'x 304, 305-06 (5th Cir.) (per curiam) ("[The IATC claim is] procedurally defaulted, and no evidentiary hearing is warranted. Reasonable jurists would not find this conclusion 'debatable.' There is no reason to expand the COA." (internal citations omitted)). This Court denied certiorari. *Balentine v. Thaler*, 130 S. Ct. 484 (2009) (mem.).

On August 21, 2009, Balentine filed a successive state habeas application to exhaust his IATC claim. SHCR4-13. Citing Texas's abuse-of-the-writ statute, the CCA dismissed the application. *Ex parte Balentine*, Nos. WR-54,071-01 & 54,071-02, 2009 WL 3042425, at *1 (Tex. Crim. App. Sept. 22, 2009) (unpublished) (citing TEX. CODE CRIM.

P. art. 11.071, § 5, hereinafter "Section 5"). This Court again denied certiorari. *Balentine v. Texas*, 130 S. Ct. 520 (2009) (mem.).

In September 2009, Balentine moved the district court to reopen its final judgment under Federal Rule of Civil Procedure 60(b)(6). The district court denied the motion. The Fifth Circuit affirmed the denial of Rule 60(b)(6) relief. *Balentine v. Thaler*, 626 F.3d 842 (5th Cir. 2009), *reh'g en banc denied*, 629 F.3d 470 (Dec. 29, 2010). This Court denied certiorari a third time. *Balentine v. Thaler*, 131 S. Ct. 2992 (2011) (mem.).

Shortly before Balentine's second scheduled execution date, this Court granted certiorari in *Martinez v. Ryan,* 131 S. Ct. 2960 (2011) (mem.). Relying on the grant of certiorari, Balentine filed an out-of-time motion asking for reconsideration of the denial of his third certiorari petition, but this Court denied the request. *Balentine v. Thaler*, 131 S. Ct. 3017 (2011). Balentine also filed a third-and-successive state habeas application regarding his IATC claim and applied for a stay of execution. The CCA rejected both requests. *Ex parte Balentine*, No. 54,071-03 (Tex. Crim. App. June 14, 2011) (unpublished). But this Court stayed Balentine's execution pending its

decision in *Martinez*. *Balentine v. Texas*, 131 S. Ct. 3017 (2011). Six days after issuing a decision in *Martinez*, the Court denied Balentine's fourth certiorari petition. *Balentine v. Texas*, 132 S. Ct. 1791 (2012) (mem.).

On July 12, 2012, Balentine filed a second opposed Rule 60(b)(6) motion with exhibits, relying on *Martinez* to excuse the procedural default of his IATC claim. The district court denied Balentine's motion, but granted a COA. The Fifth Circuit affirmed the ruling in an unpublished opinion. *Balentine v. Thaler*, No. 12-70023 (5th Cir. Aug. 17, 2012) (unpublished), *reh'g en banc denied* (Aug. 21, 2012).

This petition for certiorari, Balentine's fifth, followed.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE

Of Balentine's five certiorari petitions, this is the poorest candidate for review. Shortly after issuing its opinion in *Martinez*, and unimpeded by the rush of last-minute litigation before an impending execution, this Court denied certiorari regarding the exact same argument that Balentine raises now. *See Balentine v. Texas*, 132 S. Ct. 1791 (2012) (mem.). His claim is no more worthy of this Court's attention now.

To the contrary, even if this Court wanted to revisit *Martinez*, it would be improvident to do so here for three reasons.

1. To overcome a procedural default under *Martinez*, "a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 132 S. Ct. at 1318-19. Here, however, Balentine cannot come close to proving that his trial counsel were deficient or that their performance prejudiced his defense. His trial lawyers, along with a court-appointed investigator, performed a vigorous investigation of Balentine's background, and they were prepared to present "four or five, maybe six" such witnesses at the punishment hearing. 26RR77. And those witnesses included at least one of Balentine's family members. *See* SHCR151-55 (invoice from Balentine's investigator, detailing witnesses brought to testify at the punishment hearing). But after hearing the State's punishment evidence, conferring with co-counsel, and conferring with the witnesses themselves, defense counsel made a last-minute strategic decision not to call them — precisely the sort of judgment that this Court's ineffective-assistance cases are intended to protect. *See,*

e.g., *Harrington v. Richter*, 131 S. Ct. 770, 789 (2011); *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009); *Strickland v. Washington*, 466 U.S. 668, 699 (1984).

And it is easy to understand why defense counsel chose to do so. According to Balentine's post-hoc assertions in his federal habeas pleadings, his family members would have told the jury that Balentine was raised to "distrust[] official authority, such as police" and to "t[ake] the law into [his] own hands," among other things. Pet. 8 (internal quotation marks omitted). Such testimony would be plainly unhelpful to defense counsel's chosen strategy — namely, to convince the jury that Balentine committed the murders only because he was afraid of the three teenagers, who had threatened Balentine and were armed with a gun, and not because Balentine considered himself a vigilante. 26RR95-96. Moreover, portraying their client as a man who is hostile toward official authority would be a patently ineffective way of convincing the jury to spare Balentine the death penalty and impose instead a life sentence in official custody. Again, this Court's IATC cases would preclude Balentine's post-hoc attacks on his trial lawyers' strategic judgments, even if he could get around his procedural default.

See, *e.g.*, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011) (Federal habeas court is "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [defense] counsel may have had for proceeding as they did." (internal quotation marks, citation, and alteration omitted)); *Richter*, 131 S. Ct. at 791 ("*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.").

And, in any event, Balentine is unlikely to establish prejudice from his underlying IATC claim. He crawled into a dark home and shot three teenagers, execution style and in cold blood, while they were sleeping. Balentine has not shown that a jury would consider that triple-homicide less deserving of the death penalty if they had heard that he was raised in a poor neighborhood, got poor grades in school, "wet the bed until he was ten years old, and was hit in the head by a rock while mowing the lawn." Pet. 8.

Given that Balentine's underlying IATC claim is doomed to fail regardless of the answer to the question presented, this Court should not revisit *Martinez* here.

2. Second, the procedural posture of this case makes it particularly difficult to reach the underlying *Martinez* issue. Balentine attempted to raise his *Martinez*/IATC claim in a motion to reopen final judgment under Federal Rule of Civil Procedure 60(b)(6), which the district court, in its discretion, denied. Accordingly, to get the benefit of the equitable remedy announced in *Martinez*, Balentine would have to show *both* (1) that Texas imposes the same bright-line prohibitions that Arizona does on IATC claims raised in direct appeals *and* (2) that this Court's decision in *Martinez* constitutes such an "extraordinary circumstance[]" under Rule 60(b)(6) that the district court abused its discretion in denying Balentine's motion. Balentine cannot possibly satisfy the first half of that showing. *See* Parts II and III, *infra*. And this Court's precedents foreclose the second one. *See Gonzalez v. Crosby*, 545 U.S. 524, 536-37 (2005); *accord Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) (holding that this Court's "decision in *Martinez*, which creates a narrow exception to *Coleman*'s holding regarding cause to excuse procedural default, does not constitute an 'extraordinary circumstance' under Supreme Court and our precedent to warrant Rule 60(b)(6) relief." (citing *Gonzalez*)).

3. Finally, an argument over the scope of *Martinez* is ill-suited for resolution on an emergency basis. In a fully considered and published opinion, unrushed by the demands of last-minute litigation, the Fifth Circuit recently held that *Martinez*'s narrow and equitable remedy does not apply to Texas prisoners. *See Ibarra v. Thaler*, --- F.3d ---, 2012 WL 2620520 (5th Cir. June 28, 2012). And it has called for the State's response to a petition for rehearing en banc regarding that holding. *See* Order, *Gates v. Thaler*, No. 11-70023 (July 30, 2012). The Fifth Circuit wisely prevented Balentine from rushing to the front of the queue using last-minute litigation tactics, and this Court should do likewise. Indeed, this Court already has denied Balentine's *Martinez*-related certiorari petition, and it ought not preempt the Fifth Circuit's deliberative processes on account of Balentine's second such petition. *See Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting) ("As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy.").

II. *MARTINEZ*'S EQUITABLE REMEDY DOES NOT APPLY TO TEXAS PRISONERS

A. In any event, the Fifth Circuit interpretation of *Martinez* is correct because, when it comes to channeling prisoners' IATC claims,

Arizona and Texas hardly could be more different. Arizona "bar[s] defendants from raising ineffective-assistance claims on direct appeal." *Martinez*, 132 S. Ct. at 1320. Instead, Arizona "requires prisoner[s] to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding." *Id.* at 1318; *see State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002) (interpreting ARIZ. R. CRIM. P. 32 to require that result).

1. Arizona arrived at that bright-line prohibition following a decades-long experiment without it. The old rule in Arizona allowed prisoners to consolidate their IATC claims with their direct appeals. *See, e.g.*, *State v. Valdez*, 770 P.2d 313, 319 (Ariz. 1989). But Arizona's sovereign officials were unsatisfied with the results of that rule, which "proved unworkable and resulted in long delays." *Krone v. Hotham*, 890 P.2d 1149, 1151 (Ariz. 1995). For example, when the IATC portion of a consolidated appeal raised a factual issue (such as trial counsel's strategic motivations for doing or not doing something), the courts would remand the entire case to the trial court for an evidentiary hearing, *see, e.g.*, *State v. Watson*, 559 P.2d 121, 135-36 (Ariz. 1976), even when the appeal could have been resolved on "preclusion or waiver" without a hearing, *Spreitz*, 39 P.3d at 526.

Fed up with those "problematic" results, *id.*, Arizona's duly appointed policymakers ended them in 2002. The Arizona Supreme Court held:

> We endeavor today to clarify this issue for trial courts and practitioners. Accordingly, we reiterate that ineffective assistance of counsel claims are to be brought in Rule 32 [state postconviction] proceedings. *Any such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit.* There will be no preclusive effect under Rule 32 by the mere raising of such issues. *The appellate court simply will not address them.* This ensures criminal defendants a timely and orderly opportunity to litigate ineffectiveness claims and, we believe, promotes judicial economy by disallowing piecemeal litigation.

Id. at 527 (emphases added); *see also*, *e.g.*, *State v. Sang Le*, 212 P.3d 918, 918-19 (Ariz. Ct. App. 2009) (summarily dismissing IATC claim on direct appeal).

2. This Court recognized Arizona's sovereign prerogative to impose that bright-line rule. *See Martinez*, 132 S. Ct. at 1318 (noting Arizona's "sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage"). "[B]ut this decision is not without consequences for the State's ability to assert a procedural default in later proceedings." *Id.* Specifically, in "states like Arizona in which a defendant is prevented from raising

counsel's ineffectiveness until he pursues collateral relief (normally bereft of a right to counsel)," the State cannot assert procedural default where the prisoner failed properly to present his substantial IATC claim in those (normally uncounseled) collateral proceedings. *Ibarra*, 2012 WL 2620520, at *2.

That "narrow" and "equitable" remedy must be understood in the context that necessitated it. *Martinez*, 131 S. Ct. at 1315, 1319. The Court long has held that prisoners have a constitutional right to counsel on direct appeal of their convictions. *See, e.g.*, *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387 (1985). Accordingly, where a State allows its prisoners to use their direct appeal to vindicate "[t]he right to the effective assistance of counsel at trial," which "is a bedrock principle in our justice system," *Martinez*, 132 S. Ct. at 1317, the Court can be confident that the prisoner will have the assistance of competent appellate counsel in doing so. And if that confidence is misplaced, the prisoner can obtain relief for his appellate attorney's ineffective assistance. *See Smith v. Murray*, 477 U.S. 527, 535-36 (1986). It is precisely because the prisoner is entitled to effective representation both at trial and on direct appeal that he is *not*

constitutionally entitled to an attorney in state postconviction proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."); *accord Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality op.); *Coleman*, 501 U.S. at 752; *Martinez*, 132 S. Ct. at 1315.

The equities shift, however, where a State's procedures expressly require the prisoner to vindicate "a bedrock principle in our criminal justice system" in state collateral proceedings, where the constitutional right to counsel no longer applies. *See Martinez*, 132 S. Ct. at 1317 ("Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim."). It is only in that context — where the State has barred prisoners, as a matter of law, from bringing IATC claims with the assistance of constitutionally guaranteed direct-appeal counsel — that *Martinez*'s equitable remedy applies. *See Ibarra*, 2012 WL 2620520, at *2 ("[T]he Court repeatedly (and exclusively) refers to the scenario of a state in which collateral review is the first time a defendant may raise a claim of [IATC].").

B. The sovereign policy choices made by the State of Texas for channeling IATC claims in state court implicate none of the equitable concerns expressed in *Martinez*. Far from shuttling IATC claims into a counsel-free zone, Texas allows prisoners to bring such claims both through a motion for new trial and on direct appeal, where the constitutional right to counsel still applies. Not only that, immediately after the trial court imposes a death sentence, Texas provides its prisoners two new and independent attorneys (one for direct appeal and one for state habeas), both of whom are fully equipped to point out trial counsel's ineffectiveness.

1. Immediately after the trial court announces a death sentence, Texas law requires the court to appoint new lawyers to help the prisoner raise, among other things, substantial IATC claims. First, Texas Code of Criminal Procedure Article 26.052 ("Article 26.052") provides that "[a]s soon as practicable after a death sentence is imposed in a capital felony case, the presiding judge of the convicting court shall appoint counsel to represent an indigent defendant on appeal and to apply for a writ of certiorari, if appropriate." TEX. CODE CRIM. PROC. art. 26.052(j). The appointee must have extensive appellate practice,

including "significant" experience in capital appeals, and meet numerous other competency requirements. *Id*. art. 26.052(d)(3). And, crucially here, the Legislature foresaw the need for *new* direct-appeal counsel who would have no qualms about accusing trial counsel of being ineffective:

> The court may not appoint an attorney as counsel on appeal if the attorney represented the defendant at trial, unless:
>
> > (1) the defendant and the attorney request the appointment on the record; and
> >
> > (2) the court finds good cause to make the appointment.

Id. art. 26.052(k). Thus, a death-sentenced prisoner receives a new direct-appeal attorney unless he affirmatively requests to retain his trial counsel and shows good cause for that choice. *See, e.g.*, Hrg. Tr., *State v. Ibarra*, No. 96-634-C (54th Dist. Ct., McLennan County, Tex. Jan. 16, 1998) (attached hereto as Exhibit A).

Balentine's case illustrates the power of Article 26.052. He was sentenced to death in April 1999. He was represented at trial by three lawyers: James Durham (lead counsel) and Paul Hermann; Mr. Hermann eventually withdrew, and the court appointed Randall Sherrod as his second-chair replacement. Immediately after imposing

Balentine's death sentence, the trial court advised Balentine of his rights under Article 26.052:

> THE COURT: . . . I'll make a determination as to who I will appoint [as direct appeal counsel] sometime in the future. Mr. Balentine, it probably will not be one of your two trial attorneys, and the reason for that is that *I would want somebody to be able to take a fresh look at your case*. Would that be all right with you if it were another lawyer to handle your appeal?
>
> THE DEFENDANT: Somebody from here, from this county?
>
> THE COURT: Well, perhaps, probably, yeah.
>
> THE DEFENDANT: I guess I ain't got no say-so, then, do I?
>
> THE COURT: Well, not as to who I choose. I'll entertain any suggestions you may have. Just feel free to send me a note in [sic] from the jail if you would like to do that.

26RR109 (emphasis added). Balentine did not affirmatively choose to retain Durham and Sherrod for his direct appeal; accordingly, less than a week after entering judgment on Balentine's death sentence, the trial court appointed C.R. Daffern to handle the direct appeal. *See* CR357. And shortly thereafter, the trial court appointed *yet another* independent attorney (C.J. McElroy) as direct-appeal counsel. *See* CR380. Of course, neither Daffern nor McElroy had any involvement in

Balentine's trial, and therefore both were ideally suited to "take a fresh look at [the] case" and raise an IATC claim against Balentine's trial lawyers, if one could be raised.

2. Almost simultaneously with the appointment of direct-appeal counsel, the trial court must appoint state-habeas counsel under Texas Code of Criminal Procedure Article 11.071 (Article 11.071). In particular, "immediately after judgment is entered" on a death sentence, the court must conduct a hearing to determine "whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus." TEX. CODE CRIM. PROC. art. 11.071, § 2(b). "At the earliest practical time, but in no event later than 30 days, after the convicting court" finds that the capital prisoner wants state-habeas counsel, the court must appoint one or more competent attorneys to assist him. *Id.* § 2(c).

The Texas Legislature also established a state agency called the Office of Capital Writs (OCW) for the express purpose of ensuring that capital prisoners receive competent counsel in their state-habeas proceedings. *See* TEX. GOV'T CODE § 78.054. The State of Texas authorizes and funds OCW to hire a permanent staff that includes both

competent attorneys and licensed investigators. *Id.* § 78.053(b). For prisoners sentenced prior to the creation of OCW in 2008, or for prisoners that OCW cannot represent for whatever reason, the trial court appoints new private counsel who previously satisfied an exhausting array of competency requirements. *See* TEX. CODE CRIM. PROC. art. 11.071 § 2(f); TEX. GOV'T CODE § 78.056(a).

Texas law further requires that a state habeas application must be filed within 180 days of habeas counsel's appointment or 45 days after the State files its direct-appeal brief, whichever is later. *See* TEX. CODE CRIM. PROC. art. 11.071 § 4(a). As a consequence of those deadlines, the state habeas application almost always will be filed well in advance of the direct-appeal decision of the CCA, and further still in advance of this Court's disposition of a petition for certiorari (which marks the end of the direct-appeal process). That means a Texas prisoner will have not one but two new and independent attorneys laboring on his behalf — and capable of raising any existing substantial IATC claims — *before* he loses his constitutional right to counsel at the conclusion of direct appeal. And any evidence that he develops in the

state habeas proceeding is subject to judicial notice in his direct appeal. *See Hall v. State*, 160 S.W.3d 24, 37-38 (Tex. Crim. App. 2004).

Again, Balentine's case is illustrative. As noted above, Daffern and McElroy handled different portions of Balentine's direct appeal proceedings. McElroy continued to represent Balentine until the conclusion of the direct appeal on July 2, 2002, when the time for filing a petition for certiorari expired and the direct appeal proceedings concluded. *Balentine v. State*, 71 S.W.3d 763 (Tex. Crim. App. 2002). Also, on September 30, 1999, the court appointed Kent Birdsong to represent Balentine in his state habeas proceedings, and Birdsong continued to do so until December 4, 2002, when the CCA denied postconviction relief. *Ex parte Balentine,* No. WR-54,071-01 (Tex. Crim. App. Dec. 4, 2002) (unpublished). So for 33 months (from September 30, 1999 until July 2, 2002), Balentine enjoyed representation by at least two taxpayer-funded attorneys who were free to work together and to raise (without conflict) any substantial IATC claim they could find.

3. The Texas Legislature further has equipped prisoners with the procedures necessary to develop and raise IATC claims prior to direct appeal. Before the appeal of a death sentence is automatically

transferred to the CCA, *see* TEX. CODE CRIM. PROC. art. 37.071, § 2(h), defense counsel can (and often do) move for a new trial, *see* TEX. R. APP. PROC. 21 (Rule 21). Pursuant to such motions, "[t]he court may receive evidence by affidavit or otherwise." *Id.* 21.7; *see also id.* 21.2 (allowing prisoners to "to adduce facts not in the [trial] record"). The trial court must hold a hearing whenever a Rule 21 motion — including one premised on IATC — raises matters that cannot be determined from the trial record. *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006).[3]

Rule 21 proceedings provide fertile ground for developing IATC claims. For example, in *Armstrong v. State*, 2010 WL 359020 (Tex. Crim. App. Jan. 27, 2010), the prisoner moved for a new trial after the court sentenced him to death. He used the Rule 21 proceeding to introduce evidence regarding his trial counsel's failure to investigate

[3] Of course, that does not mean that a trial court *always* must hold an evidentiary hearing whenever a Rule 21 motion raises an IATC claim. *See Holden*, 201 S.W.3d at 764 (holding that a trial court can deny an IATC claim in a Rule 21 hearing without allowing the prisoner to cross-examine his trial counsel where the court had previous opportunities to evaluate counsel's demeanor and credibility). Notwithstanding Judge Higginson's dissent below, the Director never argued to the contrary. *See* Pet. App. A2, at 8-9 (Higginson, J., dissenting). And in any event, to the extent that Judge Higginson thinks that *Holden* is the "single authority" supporting the Director's interpretation of Rule 21, he is plainly mistaken, as demonstrated by the balance of this brief in opposition.

and present mitigating evidence during his punishment hearing — precisely the claim that Balentine wants to resurrect from the procedural-default doctrine. *Id.* at *5. Crucially, the CCA held that "[w]hile 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, *the record in this case was developed at the hearing on the motion for a new trial*." *Id.* (emphasis added). And it proceeded to adjudicate the IATC claim on the merits — on direct appeal. *Id.* at *6-*7.

Likewise, in *Milburn v. State*, 15 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd), the prisoner used a Rule 21 hearing to introduce the testimony of his lawyer and numerous witnesses whom the lawyer never contacted and who would have provided mitigating evidence at the prisoner's sentencing hearing. On the basis of that evidence, the court of appeals found IATC and awarded relief on direct appeal. *See id.* at 271-72. And in *Morales v. State*, 217 S.W.3d 731 (Tex. App.—El Paso 2007, pet. granted), *rev'd*, 253 S.W.3d 686 (Tex. Crim. App. 2008), the prisoner used a Rule 21 motion to introduce affidavits from his trial counsel regarding their strategic judgments,

and the trial court held an evidentiary hearing to receive testimony from both defense lawyers. The Rule 21 record provided ample evidence for the court of appeals to find IATC and for the CCA to reverse — all without questioning whether the claim properly was brought on direct appeal. Numerous other direct-appeal cases have decided IATC claims on the merits based on facts adduced in Rule 21 proceedings.[4] Indeed, there are so many such cases that the CCA has observed that habeas "*is not the only mechanism for developing an ineffectiveness claim.* An increasing number of cases, including this one, use the motion for new trial as a vehicle for developing the necessary record." *State v. Jones*, 2004 WL 231309, at *8 (Tex. Crim. App. Jan. 28, 2004) (emphasis added).

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[4] *See, e.g.*, *Holden*, 201 S.W.3d at 764; *McFarland v. State*, 928 S.W.2d 482, 499-507 (Tex. Crim. App. 1996); *Garcia v. State*, 887 S.W.2d 862, 880-81 (Tex. Crim. App. 1994); *Motley v. State*, 773 S.W.2d 283, 290-92 (Tex. Crim. App. 1989); *Butler v. State*, 716 S.W.2d 48, 55-57 (Tex. Crim. App. 1986); *State v. Bennett*, 2012 WL 11181, at *1 (Tex. App.—Dallas Jan. 4, 2012, no pet.); *State v. Mayfield*, 2010 WL 2373274, at *25 (Tex. App.—Houston [14th Dist.] June 15, 2010, no pet.); *Pratt v. State*, 2010 WL 546529, at *5-*9 (Tex. App.—San Antonio Feb. 17, 2010, pet. ref'd); *State v. Choice*, 319 S.W.3d 22, 23 (Tex. App.—Dallas 2008, no pet.); *Rosa v. State*, 2005 WL 2038175, at *2-*4 (Tex. App.—Dallas Aug. 25, 2005, pet. ref'd); *State v. Medina*, 2003 WL 21939417, at *2 (Tex. App.—Austin Aug. 14, 2003, pet. ref'd); *State v. Papay*, 2002 WL 176359, at *4 (Tex. App.—Dallas Feb. 5, 2002, pet. ref'd); *State v. Kelley*, 20 S.W.3d 147, 155 (Tex. App.—Texarkana 2000, no pet.); *State v. Pilkinton*, 7 S.W.3d 291, 293 (Tex. App.—Beaumont 1999, pet. ref'd); *State v. Gill*, 967 S.W.2d 540, 543 (Tex. App.—Austin 1998, pet. ref'd); *Howard v. State*, 894 S.W.2d 104, 109 (Tex. App.—Beaumont 1995, pet. ref'd); *State v. Thomas*, 768 S.W.2d 335, 337 (Tex. App.—Houston [14th Dist.] 1989, no pet.).

Texas is so serious about ensuring that prisoners can use Rule 21 proceedings to develop IATC claims for direct appeal that the CCA has held, "as a matter of federal constitutional law, that the time for filing a motion for new trial is a critical stage of the proceedings, and that a defendant has a constitutional right to counsel during that period." *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007). If the prisoner's lawyer fails to use the Rule 21 mechanism to develop and raise a "facially plausible claim" for IATC, that failure itself is remediable through a counsel-ineffectiveness claim. *See id.* at 911-12.[5]

While a Rule 21 motion is sufficient to make an IATC claim adjudicable on direct appeal, it is not necessary. For example, in *Holberg v. State*, the death-row prisoner raised on direct appeal fourteen separate IATC claims, one of which had twenty-eight subparts. *See* 38 S.W.3d 137 (Tex. Crim. App. 2000) (full text only in Westlaw). The CCA addressed all of them on the merits without suggesting that direct appeal provided an inadequate vehicle for doing so. Numerous

[5] *See Rogers v. State*, --- S.W.3d ---, 2011 WL 7290492, at *2-*4 (Tex. App.—Houston [14th Dist.] Feb. 8, 2011, no pet.); *Prudhomme v. State*, 28 S.W.3d 114, 121 (Tex. App.—Texarkana 2000, no pet.); *Massingill v. State*, 8 S.W.3d 733, 737-38 (Tex. App.—Austin 1999, no pet.). All of those cases put paid to Balentine's assertion that direct-appeal counsel "can never be found ineffective for deferring [IATC] claims to [state-habeas] counsel." Pet. 21.

other cases have done likewise without requiring further factual development in a Rule 21 or habeas proceeding — often because, even assuming the facts alleged by the prisoner, it would be impossible as a matter of law to demonstrate prejudice.[6]

4. There is only one circumstance in which Texas's courts will *not* adjudicate an IATC claim on direct appeal. That is where the prisoner's claim turns on the facts surrounding his trial counsel's strategies, and the prisoner failed to give his lawyer an opportunity to explain himself. As the CCA has held, "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective. Absent such an opportunity, an appellate court should not find deficient performance unless the challenged conduct was so outrageous that no competent attorney would have

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[6] *See, e.g.*, *Gobert v. State*, 2011 WL 5881601, at *10-*11 (Tex. Crim. App. Nov. 23, 2011); *Fratta v. State*, 2011 WL 4582498, at *13 (Tex. Crim. App. Oct. 5, 2011); *Medina v. State*, 2011 WL 378785, at *15 (Tex. Crim. App. Jan. 12, 2011); *Skinner v. State*, 293 S.W.3d 196, 202-03 (Tex. Crim. App. 2009); *Mata v. State*, 226 S.W.3d 425, 432-33 (Tex. Crim. App. 2007); *Shore v. State*, 2007 WL 4375939, at *15 (Tex. Crim. App. Dec. 12, 2007); *Phillips v. State*, 992 S.W.2d 491, 494-95 (Tex. Crim. App. 1999); *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992); *Gish v. State*, 2011 WL 167076, at *3-*6 (Tex. App.—Fort Worth Jan. 13, 2011, no pet.); *Smith v. State*, 2010 WL 3245438, at *5-*6 (Tex. App.—Dallas Aug. 18, 2010, pet. ref'd); *Curnel v. State*, 2010 WL 323557, at *6-*7 (Tex. App.—Fort Worth Jan. 28, 2010, pet. ref'd); *Alexander v. State*, 2009 WL 4681369, at *6 (Tex. App.—Beaumont Dec. 9, 2009, pet. ref'd); *Bergara v. State*, 2009 WL 2476513, at *12-*14 (Tex. App.—Houston [14th Dist.] Aug. 13, 2009, pet. ref'd); *Gonzalez v. State*, 2008 WL 5083125, at *4 (Tex. App.—San Antonio Dec. 3, 2008, pet. ref'd).

engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). It is *only* because prisoners generally do not extend that courtesy to the trial counsel they are accusing of incompetence that "[d]irect appeal is usually an inadequate vehicle for raising such a claim because the record is generally undeveloped." *Id*. Were it not for Balentine's selective quotations, each of the cases he cites for that proposition would make clear that it is the prisoner's litigation strategy — not Texas's procedures for channeling IATC claims — that sometimes prevents the development of the record. *See* Pet. 12-16.

But responsibility for that failure falls at the prisoner's feet, not Texas's. *Armstrong*, *Milburn*, *Morales*, and the numerous cases collected in nn.4-6, *supra*, demonstrate that Texas's sovereign decisionmakers have implemented substantive and procedural provisions that incentivize prisoners to vindicate their IATC claims through Rule 21 and on direct appeal.[7] Indeed, bringing a substantial IATC claim on direct appeal in Texas is all upside from the prisoner's

[7] Given all of the direct-appeal cases in which Texas courts adjudicate IATC claims on the merits, only a sample of which is provided above, Balentine's assertion that "[c]apitally sentenced Texas prisoners depend exclusively upon [state-habeas] counsel to adjudicate (exhaust) *Strickland* claims" is mystifying. Pet. 17; *see also* Pet. App. A2, at 5 (Dennis, J., dissenting) (crediting Balentine's assertion).

perspective. If the claim is meritorious, the prisoner will win relief while he still enjoys the benefit of the constitutional right to counsel. *E.g.*, *Armstrong*, 2010 WL 359020, at *6-*7. If the claim is *potentially* meritorious but the prisoner failed to give his trial lawyer an opportunity to explain himself, the court will remand and afford counsel that chance without any prejudice to the prisoner's ability to relitigate the claim later. *E.g.*, *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003); *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). It is only where the IATC claim is doomed to fail in any event that the Texas courts will reject it outright. *E.g.*, *Holberg*, 38 S.W.3d 137; *Moreno v. State*, 2010 WL 2698510, at *10-*11 (Tex. App.—Austin 2010, pet. ref'd) (noting "[t]he record is silent as to the reasoning and strategy behind the trial counsel's inaction in not making objections during the punishment phase of the trial" but holding prisoner cannot show prejudice under any set of facts). Aided at every step by the guiding hand of *three independent counsel*, two of whom represented him during his Rule 21 hearing, Balentine chose not to introduce evidence to support an IATC claim or raise an IATC claim on direct

appeal. But it was not for want of resources or procedures under Texas law.

The choices that Texas made — at great cost to its state judicial system, which has to handle IATC claims in both direct appeals and state habeas proceedings, and to its taxpayers, who pay defense lawyers to bring those claims in both forums — create none of the equitable concerns that drove the "narrow" *Martinez* decision. No principle of federalism or the procedural-default doctrine authorizes this Court to paint both States with the same brush. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). And no principle of equity allows this Court to punish Texas for the choices that Balentine made.

III. BALENTINE'S AS-APPLIED ARGUMENT IS MERITLESS

Martinez equitably limits *the State's* ability to assert procedural default as a consequence for *the State's* deliberate choice to impose *state-law* procedural restrictions on IATC claims. Balentine

nonetheless argues that — for reasons that have nothing at all to do with the system Texas created, the choices that its policymakers made, the money its taxpayers spent, or the remedies that any other prisoner in the State enjoys — "[n]o meaningful equitable difference exists between Mr. Balentine and the petitioner in *Martinez*." Pet. 10. He is wrong.

First, every court that has considered the question has held that *Martinez*'s equitable remedy applies on a State-by-State (not prisoner-by-prisoner) basis.[8] And none extends *Martinez* to a State with procedures like Texas's. Balentine never has argued to the contrary, nor has he explained why this Court should grant certiorari on a splitless question to expand *Martinez* to afford prisoner-by-prisoner relief.

Second, Balentine cannot argue that "an obvious conflict of interest" somehow precluded his particular trial counsel (Durham) from

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[8] *See Dansby v. Norris*, 682 F.3d 711, 729 (8th Cir. 2012) (Arkansas); *Sexton v. Cozner*, 679 F.3d 1150, 1160-61 (9th Cir. 2012) (Oregon); *Leberry v. Howerton*, 2012 WL 2999775, at *1 (M.D. Tenn. July 23, 2012) (Tennessee); *Gill v. Atchison*, 2012 WL 2597873, at *5 (N.D. Ill. July 2, 2012) (Illinois); *Collazo v. Curley*, 2012 WL 2026830, at *4 (W.D. Pa. June 5, 2012) (Pennsylvania); *Leavitt v. Arave*, 2012 WL 1995091, at *8 (D. Idaho June 1, 2012) (Idaho); *Felix v. Cate*, 2012 WL 2874398, at *10 (C.D. Cal. May 8, 2012) (California); *Arthur v. Thomas*, 2012 WL 2357919, at *9 (N.D. Ala. June 20, 2012) (Alabama).

raising an IATC claim in his Rule 21 proceeding or his direct appeal. Pet. 6; *see also* Pet. App. A2, at 6 (Dennis, J., dissenting) ("Requiring claims of ineffective assistance of counsel to be raised via a motion for a new trial *by the counsel who allegedly performed deficiently* will create grave conflicts of interest."). As explained above, Article 26.052 requires the opposite. And, to the extent that the particulars of Balentine's case matter, they demonstrate the lengths to which Texas has gone to eliminate any conflict: Balentine had one independent and conflict-free attorney (Daffern) during his Rule 21 proceeding, and he had another independent and conflict-free attorney (McElroy) on direct appeal. Balentine never has argued that either lawyer was constitutionally ineffective for failing to raise an IATC claim.[9]

Third, it is no answer to say that Balentine's IATC claim is "based on extra-record evidence" of his background and Durham's trial strategies. Pet. 14. The same is true of almost *every* IATC claim that the Texas courts have considered on direct appeal. *See* Part II.B.3, *supra*. In particular, the IATC claim that the CCA considered in

[9] Moreover, it is not practically impossible for a trial attorney to impugn his own reputation in a Rule 21 proceeding. *See, e.g.*, *Morales*, 253 S.W.3d at 689-91 (recounting trial counsel's self-immolating testimony during Rule 21 proceeding).

Armstrong is virtually identical to Balentine's and conclusively demonstrates that Texas's procedures are more than sufficient to allow prisoners to vindicate their IATC rights on direct appeal. *See* 2010 WL 359020, at *6-*7. Moreover, if this Court really wanted *Martinez* to apply every time a prisoner defaults an IATC claim that is "based on extra-record evidence," it surely would have said so. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("[I]t does not, one might say, hide elephants in mouseholes."). And, in any event, it would not characterize that breathtakingly broad holding as "narrow"; nor would it "repeatedly (and exclusively) refer[]" to the deliberate choices that Arizona made, rather than the breadth of (and investigations required by) Martinez's particular IATC claim. *Ibarra*, 2012 WL 2620520, at *2.

Fourth, Balentine cannot make the case easier for himself by arguing that *Martinez*'s equitable remedy applies whenever a State suggests that habeas may be "the appropriate forum for adjudication of [IATC] claims." Pet. 12. Again, that vastly overstates this Court's holding. The only relevant question is whether Texas, like Arizona, imposes bright-line procedural prohibitions that bar any and all prisoners from bringing any and all IATC claims on direct appeal. As

explained above and in *Martinez*, that question has a simple answer. *Compare, e.g.*, *Spreitz*, 39 P.3d at 527 (holding that "[t]he appellate court simply will not address [IATC claims]" on direct appeal in Arizona), *with Armstrong*, 2010 WL 359020, at *6-*7 (doing the opposite in Texas).

Finally, Balentine cannot distinguish the scores of direct-appeal cases in which Texas courts have adjudicated IATC claims on the merits by arguing that death-penalty cases like his are somehow different. Pet. 21-24. He cites no case, from any court in Texas or elsewhere, that ever has suggested that Texas recognizes a rule barring capital prisoners (but not non-capital ones) from raising IATC claims on direct appeal. To the contrary, many of the direct-appeal cases cited above involve death-sentenced prisoners' IATC claims that the CCA has adjudicated on the merits. *See*, *e.g.*, *Gobert*, 2011 WL 5881601, at *10-*11; *Fratta*, 2011 WL 4582498, at *13; *Medina*, 2011 WL 378785, at *15; *McFarland*, 928 S.W.2d at 499-507; *Garcia*, 887 S.W.2d at 880-81; *Motley*, 773 S.W.2d at 290-92. And perhaps the most relevant is the CCA's 2010 decision in *Armstrong*, in which the court *specifically endorsed* a death-row prisoner's use of the Rule 21 proceeding to

develop the facts for an IATC claim presented and adjudicated on direct appeal. *See* 2010 WL 359020, at *6-*7. Balentine's suggestion that the CCA somehow could not adjudicate the merits of Armstrong's IATC claim, *see* Pet. 22-23, is surpassing strange because it directly contradicts the plain language of the opinion (and dozens of others like it discussed above).

IV. NO STAY OF EXECUTION IS WARRANTED

Balentine is not entitled to a stay because he cannot demonstrate a substantial denial of a constitutional right that would become moot if he was executed. *Barefoot v. Estelle*, 463 U.S. 880 (1983). In order to make such a showing, an applicant must demonstrate more than the absence of frivolity" or "good faith" on the part of petitioner. *Id.* at 893. Indeed, he must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Id.* at 893 n.4.

Balentine cannot make this showing. As described above, the State of Texas does not prevent prisoners from raising their IATC claims in motions for new trial or on direct appeal and, therefore, he is

not entitled to *Martinez*'s equitable remedy. Accordingly, the Court should deny Balentine's request for a stay of execution.

CONCLUSION

Both the petition for a writ of certiorari and the accompanying application for stay of execution should be denied.

Respectfully submitted.

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EXHIBIT A

Hearing Transcript, *State v. Ibarra*, No. 96-634-C
(54th Dist. Ct., McLennan County, Tex. Jan. 16, 1998)