Fordham Law Review

Volume 82 | Issue 4 Article 6

2014

Giving Meaning to "Meaningful Enough": Why Trevino Requires New Counsel on Appeal

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Recommended Citation

Devon Lash, *Giving Meaning to "Meaningful Enough": Why Trevino Requires New Counsel on Appeal*, 82 Fordham L. Rev. 1855 (2014).
Available at: http://ir.lawnet.fordham.edu/flr/vol82/iss4/6

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GIVING MEANING TO "MEANINGFUL ENOUGH": WHY *TREVINO* REQUIRES NEW COUNSEL ON APPEAL

*Devon Lash**

Generally, defendants cannot raise new claims in a writ of habeas corpus unless they can accomplish the difficult task of showing that they could not have raised the claims earlier. In 2012, the U.S. Supreme Court laid out an equitable exception that allows defendants to claim—for the first time in a writ of habeas corpus—that they had an ineffective trial attorney if their failure to make a timely claim was due to a second ineffective attorney or no attorney whatsoever. The exception, however, only applied to defendants in states that required ineffective assistance claims to be brought in collateral proceedings, as opposed to allowing the claims on direct appeal. However, a year later, when faced with inequity in Texas, the Court broadened the exception, applying it to any state that does not provide a defendant with a meaningful opportunity to initially raise that claim, regardless of the forum they chose.

In doing so, the Court neglected to explain how "a meaningful opportunity" should be measured. This Note seeks to provide that explanation, arguing that it must depend on whether a defendant is provided with a new, unconflicted attorney on appeal. If the same attorney represents a defendant at trial and on appeal, a defendant cannot meaningfully challenge his lawyer's performance at trial. If a defendant does not receive new counsel on appeal, habeas courts should consider claims of ineffective assistance regardless of the procedural history of the case.

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INTRODUCTION

Lawrence Landrum was sentenced to death in 1986 for the murder of eighty-four-year-old Harold White.[1] Landrum was convicted of bludgeoning White and cutting his throat after he stole $80 in cash and more than 200 nerve pills from White's apartment.[2] For the last ten years, Landrum has tried to get courts to consider his lawyer's failings at his murder trial nearly three decades ago.[3] His lawyer thought that the hearsay rule barred the testimony of a man who would have told the jurors that the fourteen-year-old co-defendant, and not Landrum, actually slit White's throat.[4]

Yet, because of Landrum's failure to inform the court of his attorney's inadequate representation in his initial appeals, he was denied the opportunity to challenge his lawyer's negligence.[5] However, a recent U.S. Supreme Court ruling might mean that defendants[6] like Landrum, who otherwise face lengthy prison sentences or the death penalty, can be heard.

The debate turns on which claims a defendant can raise in a writ of habeas corpus. Among the protections for individual liberty in the original Constitution, habeas petitions ask federal courts to decide if a defendant's detention is unlawful.[7] Despite the writ's function as a defendant's final appeal, "[t]he federal court does not (formally) second-guess the state courts that conducted the criminal trial," but instead "focuses exclusively on the legal validity of the prisoner's current detention."[8]

Generally, state defendants are barred from raising new, unheard claims in federal habeas petitions.[9] This is known as the doctrine of procedural default, and it reinforces the state's supremacy in forfeiting claims that are not advanced "at the time and in the manner prescribed by state law."[10]

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1. *See* Landrum v. Mitchell, 625 F.3d 905, 912 (6th Cir. 2010).
2. *Id.* at 909.
3. *Id.* at 914; *see also* State v. Landrum, 720 N.E.2d 524 (Ohio 1999).
4. *Landrum*, 625 F.3d at 915. Courts later ruled that the testimony clearly would have been permitted under Ohio law. *Id.*
5. *Id.* at 914, 919.
6. For ease and clarity, this Note will refer to habeas petitioners as defendants.
7. *See* LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 18, 107 (2d ed. 2010); *see also* 28 U.S.C. § 2254(a) (Supp. III 2010) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). Federal prisoners can also seek habeas relief. *See* 28 U.S.C. § 2255(a) (2006). A federal court's power to grant a writ of habeas corpus is vested in § 2241(a), which provides, in pertinent part, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." *Id.*
8. YACKLE, *supra* note 7, at 84–85.
9. *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.1 (6th ed. 2011). This is only one of many procedural barriers that defendants face in making habeas claims, and Hertz and Liebman note that "[o]ver the course of the past three decades, the Supreme Court—with the concurrence of Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—has erected elaborate procedural obstacles to federal habeas corpus review." *Id.* § 22.1.
10. YACKLE, *supra* note 7, at 263–64.

Intended to advance the central tenets of federalism and finality, this doctrine provides state criminal courts with the opportunity to fully and fairly vet each allegation before examination by a federal court.[11] This includes even those claims that allege violations of individual liberties, including the right to effective counsel.[12] The strict application of the procedural default doctrine disproportionately affects claims of ineffective assistance,[13] and effective counsel is commonly considered one of the most important constitutional protections for criminal defendants.[14]

When faced with this reality in *Martinez v. Ryan*,[15] the Supreme Court sought to balance the interests of federalism and finality advanced by procedural default with a defendant's ability to assert a failure of his or her constitutional right to effective counsel. The Court laid out a new equitable rule excusing a defendant's failure to claim ineffective assistance of counsel and allowing federal courts to bypass the doctrine of procedural default and hear the underlying claim.[16] Under the *Martinez* exception, a defendant can raise a new claim in two situations: when he or she can plausibly allege *two* ineffective attorneys—trial counsel *and* postconviction counsel (for failing to recognize and raise the trial counsel's inadequacies) *or* ineffective trial counsel followed by no counsel at the postconviction level.[17] However, the Court limited the *Martinez* exception to states that require that ineffective assistance of counsel claims be made in postconviction proceedings, as opposed to states that allow such claims to proceed on direct appeal *or* in postconviction proceedings.[18] Postconviction review[19]—also known as collateral review or collateral attack—is distinguished from a direct appeal, because it is a discretionary appeal that is generally sought after a direct appeal is unsuccessful.[20]

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11. HERTZ & LIEBMAN, *supra* note 9, § 26.1.

12. For a general look at how often federal courts rely on procedural default to dismiss claims, see NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 48 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (showing that in 42.2 percent of 368 capital cases, at least one claim was barred by procedural default, and in 16 percent of those cases defendants successfully surpassed the procedural default bar or the judge chose to reach the claim on the merits anyway; in 13.3 percent of 1,986 noncapital cases, at least one claim was barred by default, and in only 1.7 percent of those cases defendants surpassed that bar).

13. *See infra* Part I.D.

14. *See* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) ("[A defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

15. 132 S. Ct. 1309 (2012).

16. *Id.* at 1320.

17. *Id.*

18. *See id.* at 1320–21.

19. The terms postconviction and collateral review will be used interchangeably in this Note.

20. DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 1:2 (2013–14).

Yet, soon after its holding, the Court qualified the *Martinez* exception in *Trevino v. Thaler*.[21] In that case, the Court found that the *Martinez* exception applies—regardless of where ineffective assistance of counsel claims can be raised—if the state's appellate system does not provide defendants with "a meaningful opportunity" to allege that their counsel was inadequate.[22]

This qualification has created more questions than answers.[23] As Chief Justice Roberts points out in his dissenting opinion in *Trevino*: "We are not told, for example, how meaningful is meaningful enough, how meaningfulness is to be measured . . . ."[24]

Now, lower federal courts—once again, seeking to strike the correct balance—must make sense of the "meaningful opportunity" standard as defendants ask them to reconsider new ineffective assistance of counsel claims that were initially barred by procedural default.

Because habeas corpus preserves one of the most important human rights—a person's liberty[25]—this question speaks to a fundamental struggle within the American justice system. There are powerful arguments for an answer that promotes federalism or one that respects individual liberties.

Habeas petitions are one of the rare instances when federal courts can step in and overturn state criminal convictions that are no longer subject to review.[26] A breach of the constitutionally dictated bounds of federalism disrespects the sanctity of state court judgments.[27] Due to concerns about efficiency and fairness, the Supreme Court has instructed federal courts to mostly defer to the states on constitutional issues in state criminal cases, and Congress has codified that principle in the Antiterrorism and Effective Death Penalty Act of 1996[28] (AEDPA).

Furthermore, finality in criminal convictions is necessary to conserve judicial resources, to avoid "routinely second-guessing" state judges, and to prevent the retrial of a defendant after "evidence is lost and memories have faded."[29] On a deeper level, as one scholar has noted, finality is necessary to achieve the basic aims of the criminal justice system:

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21. 133 S. Ct. 1911, 1918 (2013).

22. *Id.* at 1921.

23. *See, e.g.*, Henness v. Bagley, No. 2:01-CV-043, 2013 WL 4017643, at *11 (S.D. Ohio Aug. 6, 2013) ("Because the law on ineffective assistance of post-conviction counsel is in its infancy, reasonable jurists could disagree on whether this Court has applied the correct standard . . . ."); *see also infra* Part III (discussing how Illinois, Ohio, Tennessee and Arkansas have attempted to define meaningful opportunity).

24. *Trevino*, 133 S. Ct. at 1923 (Roberts, C.J., dissenting).

25. DAVID CLARK & GERARD MCCOY, THE MOST FUNDAMENTAL LEGAL RIGHT: HABEAS CORPUS IN THE COMMONWEALTH 3 n.17 (2000).

26. *See* YACKLE, *supra* note 7, at 88–89 (noting that the existence of habeas is "intensely controversial"); Mary Dewey, Comment, Martinez v. Ryan*: A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U. L. REV. 269, 274 (2012).

27. *See* Dewey, *supra* note 26, at 274.

28. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *see also* Dewey, *supra* note 26, at 274.

29. *See* Dewey, *supra* note 26, at 274.

> Surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment. Yet this threat may be undermined if at the same time we so define the processes leading to just punishment that it can really never be finally imposed at all . . . . The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.[30]

Yet, because of the gravity of criminal convictions and the penalty of imprisonment that can attach, finality "raises acute tensions in our society"[31]—especially when finality is achieved by refusing to hear claims that a defendant's trial was flawed because of his or her inadequate attorney. Every person facing criminal judgment in a court of law has the right to *effective* trial counsel.[32] This right has been described as the "foundation for our adversary system."[33] As the Court explained in *Gideon v. Wainwright*,[34] "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not . . . be done."[35] There is good reason why this right is considered to be the most important constitutional protection for criminal defendants: it is the most fundamental check on unfairness, it protects the innocent, and it is "the primary point of entry for most other constitutional protections."[36] As Chief Justice Warren wrote just a year before his Court made its landmark ruling in *Gideon*:

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[37]

How do courts craft a rule that grants defendants the ability to question the actions of the person charged with their defense while still preserving federalism and finality? If the courts allow for exceptions to the hard-edged procedural default doctrine, how can those exceptions operate without destroying the system's very foundation?

30. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

31. *Id.* at 441.

32. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

33. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

34. 372 U.S. 335 (1963).

35. *Id.* at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)) (internal quotation mark omitted).

36. Justin F. Marceau, Gideon*'s Shadow*, 122 YALE L.J. 2482, 2487 (2013). For example, effective trial counsel may preserve claims to be considered on appeal. *See, e.g.*, FED. R. CRIM. P. 51(b).

37. Coppedge v. United States, 369 U.S. 438, 449 (1962).

For Lawrence Landrum, awaiting his death sentence in Ohio, this determination could mean the difference between life and a lethal injection. Now, an Ohio magistrate judge has recommended that the Sixth Circuit reconsider its ruling in light of *Martinez*.[38] If the Sixth Circuit finds that Ohio's appellate framework does not offer a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, Landrum, and others like him, may have the opportunity to convince a federal court to consider their trial counsel's mistakes. If the Sixth Circuit finds that defendants are provided a meaningful opportunity, then Landrum's claim will go unheard.

This Note explores how courts have attempted to interpret this new meaningful opportunity standard and argues for consistent analysis and application among the states despite their unique appellate frameworks. Part I explains writs of habeas corpus, the doctrine of procedural default, ineffective assistance of counsel, and why procedural default uniquely impacts ineffective assistance claims. Part II describes the *Martinez* exception and the Court's expansion of the exception in *Trevino*. Part III examines the attempts of lower federal courts in Illinois, Ohio, Tennessee, and Arkansas to parse the meaningful opportunity standard and determine its application to state defendants. Part IV presents several factors that lower courts should consider when deciding whether the states in which they sit offer a meaningful opportunity, and it evaluates the efforts of the four lower federal courts that have already weighed in. This Part also argues that the key to meaningful opportunity on direct appeal is the automatic provision of new counsel. Although courts must also consider other factors in the state appellate framework, without new counsel, states cannot fulfill the meaningful opportunity standard.

I. THE PROCEDURAL DEFAULT OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN HABEAS PETITIONS

This Part examines the writ of habeas corpus, the doctrines of procedural default and ineffective assistance of counsel, and how those standards interact in habeas petitions. Part I.A briefly describes how writs of habeas corpus function within the criminal justice system. Part I.B explains the rule of procedural default, why federal courts abide by it, and the exceptions the Supreme Court has built in. Part I.C traces the development of the standard for ineffective assistance of counsel. Part I.D describes the unique problems that procedural default can pose for ineffective assistance claims, specifically because of the nature of the claim, and the common tactic of litigating these claims in postconviction proceedings as opposed to on direct appeal. Prior to *Martinez*, the postconviction forum was particularly unkind to ineffective assistance claims, because there is no requirement for effective counsel, and thus no remedy for the actions of inadequate counsel.

38. *See* Landrum v. Anderson, No. 1:96-CV-641, 2013 WL 5423815, at *10 (S.D. Ohio Sept. 26, 2013). *Trevino* "strengthens this Court's conclusion . . . that the *Martinez* exception reaches Ohio cases." *Id.* at *2.

A. Writs of Habeas Corpus

Writs of habeas corpus ask federal courts to consider if a person's detention is "in violation of the Constitution or laws or treaties of the United States."[39] Latin for "you have the body," habeas corpus is known as the "mechanism for challenging the most egregious breaches of individual liberty, when citizens are awakened from sleep, dragged off into the night, and held without explanation."[40] Part of its fame may be traced to its "continuing role in conflicts," including its centrality during wartime and other emergencies, and its use by those avoiding deportation, seeking refuge, or staying a death sentence.[41]

Considered a suit in the nature of a civil action, habeas petitions are a "summary remedy" to restore liberty to one illegally held in custody.[42] In criminal cases contesting detention, a prisoner initiates a civil lawsuit naming a custodian (usually the warden) and attempts to show the custodian has no lawful basis for the prisoner's deprivation of liberty.[43] The federal courts focus on the validity of the prisoner's detention, rather than the underlying issue of guilt or innocence.[44] To do this, federal courts examine the federal issues that the state courts determined during a petitioner's trial and prior appeals.[45] Common habeas corpus claims include Sixth Amendment claims of failure to provide appointed counsel and ineffective assistance of counsel, Fifth Amendment claims concerning statements obtained in violation of *Miranda v. Arizona*,[46] prosecutorial misconduct, significant judicial error, and claims of insufficient evidence.[47] Relief for violations of federal law by the state will be granted only if the violation is "inconsistent with the rudimentary demands of fair procedure" or rises to the level of a "fundamental defect which inherently results in a complete miscarriage of justice."[48]

Habeas petitions are one of the rare instances where federal courts can step in and review rulings in state court that are no longer subject to review.[49] Habeas petitions buck the traditional balance of federalism and

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39. 28 U.S.C. § 2254(a) (Supp. III 2010).

40. *See* YACKLE, *supra* note 7, at 1.

41. CLARK & MCCOY, *supra* note 25, at 1.

42. *See generally* Simmons v. Ga. Iron & Coal Co., 43 S.E. 780, 781 (Ga. 1903).

43. *See* YACKLE, *supra* note 7, at 84.

44. *See id.* at 116. A defendant claiming actual innocence is an exception. *See id.*

45. *Id.* at 115.

46. 384 U.S. 436 (1966).

47. *Habeas Relief for State Prisoners*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 931, 935–38 (2011).

48. *Id.* at 933–34 (quoting Reed v. Farley, 512 U.S. 339, 348 (1994)); *see, e.g.*, Ditch v. Grace, 479 F.3d 249, 257 (3d Cir. 2007) (holding that the claim that the petitioner was denied counsel at preliminary hearing was not cognizable because it did not show fundamental defects); Sanna v. Dipaolo, 265 F.3d 1, 12 (1st Cir. 2001) (holding that the claim of a confusing jury instruction was not cognizable because it did not betray a fundamental principle of justice); Kerr v. Finkbeiner, 757 F.2d 604, 607 (4th Cir. 1985) (holding that the claim that the state violated the Interstate Agreement on Detainers Act was not cognizable because the error was not a fundamental defect).

49. *See* YACKLE, *supra* note 7, at 88–89.

function separately from entrenched legal cornerstones like finality and res judicata.[50] For in habeas writs, all other considerations must be subordinate to life and liberty.[51] Consequently, habeas corpus has been referred to as the most important human right.[52]

B. The Doctrine of Procedural Default

The rule for defendants to remember when deciding which claims to raise on appeal can be deceptively simple: "Use it or lose it."[53] A defendant must raise allegations of constitutional errors at the time or in the manner prescribed by the state, or that defendant may lose the chance to have that claim heard first by state courts, and then again by federal courts in a habeas petition.[54] In other words, when state courts refuse to address a claim on the merits because the defendant did not obey existing state procedures in making that claim, federal courts will also refuse to reach the merits.[55] The doctrine of procedural default is borne of "respect for finality, comity, and the orderly administration of justice."[56] It allows a state to enforce its own laws with the knowledge that those laws will be duly respected by the federal courts.[57] Further, it prevents attempts to circumvent jurisdictional limits of the appellate process.[58] Part I.B.1 sets out the five requirements that must be met for a claim to be barred by

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50. BADSHAH K. MIAN, AMERICAN HABEAS CORPUS: LAW, HISTORY, AND POLITICS 92 (1947).

51. *See id*.

52. *See* CLARK & MCCOY, *supra* note 25, at 3 n.17.

53. *See generally* HERTZ & LIEBMAN, *supra* note 9, § 26.1 (discussing the procedural default doctrine). This simplification also satisfies the doctrine of exhaustion, which requires defendants to generally exhaust all state court avenues of relief prior to petitioning for a writ of habeas corpus. *See* Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel Has Endangered Access to the Writ of Habeas Corpus and What the Supreme Court Can Do in* Maples *and* Martinez *To Restore It*, 45 CREIGHTON L. REV. 185, 196 (2011). However, this rule clashes head-on with the new standards put into place under AEDPA, which, among other things, restricts a defendant's ability to file successive habeas petitions by requiring that claims raised in a previous petition must be dismissed unless they rely on a new retroactive rule or new facts have been discovered that could not have been unearthed before. *See* 28 U.S.C. § 2244(b) (2006). It appears that AEDPA did not affect the number of claims that were defaulted, and the doctrine of procedural default appears to be applied by district courts at roughly the same rate as it was before AEDPA. *See* KING ET AL., *supra* note 12, at 58. This Note focuses on the procedurally defaulted claims. For more information on other procedural barriers, see generally John H. Blume, *AEDPA: The "Hype" and the "Bite*,*"* 91 CORNELL L. REV. 259, 270–74 (2006).

54. *See* Wainwright v. Sykes, 433 U.S. 72, 85–86 (1977) (finding that procedural default occurred because the petitioner failed to make a timely objection under the state contemporaneous objection rule to the admission of inculpatory statements); *see also* Dretke v. Haley, 541 U.S. 386, 388 (2004) (reaffirming the procedural default rule and stating that federal courts will not ordinarily "entertain a procedurally defaulted constitutional claim" in a habeas petition).

55. *See* Lee v. Kemna, 534 U.S. 362, 375 (2002).

56. *Dretke*, 541 U.S. at 388.

57. *See Lee*, 534 U.S. at 388 (Kennedy, J., dissenting) (citing Coleman v. Thompson, 501 U.S. 722, 731 (1991)).

58. *See id.*

procedural default. Part I.B.2 looks to the exceptions that the courts have developed that allow defendants to surmount a procedural default.

1. The Five Requirements for Procedural Default

Five requirements must be satisfied for a federal court to avoid hearing a claim under the doctrine of procedural default.[59] However, applying these five requirements is far from simple.[60] Jeffries and Stuntz called it a doctrine constructed piecemeal—"each part more readily explained by the circumstances of its addition than by its relation to a coherent whole."[61] They illustrated this through the plight of an imaginary defendant:

> Imagine a defendant whose lawyer fails to move to suppress an arguably involuntary confession until the beginning of the trial. The state has a rule requiring that such motions be made before trial but allow[s] trial courts to consider late motions on a discretionary basis. The trial judge decides that the motion should not be heard, both because there is no excuse for the untimeliness and because, in any event, 'the confession plainly appears to be voluntary.' After conviction and appeal, the defendant seeks federal habeas corpus . . . to have the habeas court determine the voluntariness of his confession . . . ."[62]

First, the state must rule, in a timely manner, that the defendant's claim is barred by procedural default.[63] Put differently, the state must apprise the federal courts of the state procedural bar in order for the federal courts to respect it.[64] If state officials fail to do so, the federal courts can reach the merits of the claim.[65] In Jeffries and Stuntz's example, the trial judge's ruling was a timely response to the defendant's motion to suppress.

Second, the state court must have relied on a clearly applicable state procedural rule to deny relief—in other words, the rule must be supported by state law, firmly established, and the case at hand must not qualify as a recognized exception.[66] To do this, the court must ask whether the rule is supported by state law, and whether it has regularly been applied to similar cases.[67] For the purpose of the above example, one can assume that the judge ruled appropriately, because a greater context of the rules and procedures within the imaginary state is necessary to conclude otherwise.

Third, the defendant must have actually violated the state rule.[68] Here, by delaying his motion to suppress his statement to police, the defendant

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59. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.2.

60. John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 679 (1990).

61. *Id.*

62. *Id.* at 688.

63. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.2.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See* Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1114 (1999).

68. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.2.

violated the state rule requiring him to bring such motions before the start of trial.

Fourth, the procedural violation must provide an adequate and independent state ground for denying a petitioner's federal constitutional claim.[69] Thus, the state procedural rule must be both "adequate" to support the state court judgment and "independent" of federal law.[70] If the state rule allows a "reasonable opportunity" for the defendant to have otherwise raised his suppression claim, the courts may find the state rule adequate.[71] To be independent of federal law, the state rule must not "depend[] in some way upon federal law."[72] Both questions are within the purview of federal courts.[73]

Finally, the last state court to rule on the claim must have clearly and unambiguously rejected it because of the procedural violation without reaching the merits.[74] If the state court addressed the merits, the federal court should as well.[75] In Jeffries and Stuntz's example, it is unclear if the state court reached the merits. The trial judge reached the merits of the claim but as an afterthought, likely seeking to rely, first and foremost, on the procedural default. However, as long as the last court to rule "clearly and expressly" stated it chose to rely on the procedural default, the default can apply to bar the defendant from raising a new claim in a habeas petition.[76] In the example, the judge plainly gave the doctrine of default as the reason for dismissing the motion, so the judge's ruling seems to satisfy the final prong.

If all five requirements are satisfied, the court must next examine whether the defendant qualifies for either of the two exceptions that might excuse the procedural default.[77]

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69. *See id.*

70. *See id.*

71. *See id.*

72. *Id.*

73. *See* Cone v. Bell, 556 U.S. 449, 465–66 (2009) (noting that while federal courts will not review federal claims in a habeas petition when the state court's decision rests upon independent and adequate grounds, it is within the federal courts' role to determine whether those grounds are actually independent and adequate).

74. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.2.

75. *See* Jeffries & Stuntz, *supra* note 60, at 689.

76. Harris v. Reed, 489 U.S. 255, 263 (1989) ("Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985))).

77. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.3. The defendant has to show either that (1) there was "cause," or reason, for the default, and that he or she was "prejudiced" by it, or (2) the case falls within a category of cases the Supreme Court has denominated "fundamental miscarriages of justice." *Id.* For further discussion of the first exception, see *infra* Part I.B.2.

2. The Exception: Cause and Prejudice

If the five requirements for a procedural default are met, there are only two ways a defendant can surmount it.[78] First, a defendant can attempt to demonstrate there was a "miscarriage of justice," in order for federal courts to adjudicate his claim on the merits.[79] Second, a defendant can attempt to show cause and prejudice, with "cause" constituting a reason for failing to comply with the state procedural rule, and "prejudice" being the actual disadvantage the defendant suffered.[80] If a defendant can show both cause and prejudice, then the federal court will excuse the procedural default in state court and consider the merits of the underlying constitutional claim.[81]

The Supreme Court first applied the cause-and-prejudice doctrine to habeas cases in 1977,[82] but the court didn't define cause in that context for nearly another decade.[83] The Court held that to meet the standard for cause, a defendant must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[84] To explain "external" and "objective factors," it is useful to understand why the procedural default doctrine is in place.[85]

While the procedural default rule is rooted in federalism, it is also designed to discourage defendants and their lawyers from "sandbagging" the court[86]—in other words, to stop defendants from abusing the system by deciding to raise some claims on state appeal but saving others for federal review in habeas petitions.[87] Yet, the rule is also meant to ensure defendants have a forum in which they can present their claims fairly and meaningfully because the state law barring them has to be "adequate and independent."[88]

When a default is attributable to an objective factor that is external to the defense, both those concerns are satisfied.[89] Because it is external to the defense, the courts are satisfied the default was not "the result of a strategic, tactical, or sandbagging choice" by the defendant.[90] Because it is an

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78. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.3.

79. Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also* Rutherford v. Crosby, 385 F.3d 1300, 1318 (11th Cir. 2004). Courts have found that a demonstration of "actual innocence" fits within the narrow miscarriage of justice exception. *See* Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2609 (2013); *see also* Murray v. Carrier, 477 U.S. 478, 496 (1986) (stating that procedural default would be excused, even in the absence of cause, when "a constitutional violation has probably resulted in the conviction of one who is actually innocent").

80. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.3.

81. *Id.*

82. *See* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977).

83. HERTZ & LIEBMAN, *supra* note 9, § 26.3.

84. Murray v. Carrier, 477 U.S. 478, 488 (1986).

85. *See supra* Part I.A.1; *see also* HERTZ & LIEBMAN, *supra* note 9, § 26.3.

86. *See Murray*, 477 U.S. at 492.

87. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.3.

88. *See id.*

89. *Id.*

90. *Id.*

objective factor, the courts can question whether the defendant's ability to raise the claim in the state courts was fair and meaningful.[91]

Courts have found that cause to excuse a procedural default is satisfied in several instances, such as when counsel did not know—and could not have learned with reasonable diligence—the basis for a defaulted claim before the time to raise it expired,[92] when state action made compliance "impracticable,"[93] or when counsel failed to raise the claim despite the wishes of his client.[94]

But if finding an external, objective reason to constitute cause seems difficult, the second part of the test, explaining why a defendant has been prejudiced, is even more challenging.[95] The Supreme Court has not provided an exact definition of prejudice,[96] but has concluded that it generally means an "actual and substantial disadvantage" in the specific case at hand.[97]

To understand how prejudice is such a case-specific analysis, consider two Supreme Court cases that involved similar fact patterns: *Strickler v. Greene*[98] and *Banks v. Dretke*.[99] In both cases, the defendants failed to raise a motion in their state court postconviction proceeding, but sought to raise it in a habeas corpus petition.[100] They claimed state prosecutors committed a *Brady* violation[101] by withholding evidence that should have been turned over to the defense.[102] In both cases, the Supreme Court found that the exculpatory evidence withheld satisfied the procedural default doctrine's cause requirement because the suppression of material evidence was an objective factor external to the defense.[103] But the Court ruled

91. *See id*.

92. *See* Strickler v. Greene, 527 U.S. 263, 283, 289 (1999) (acknowledging that a prosecutor's suppression of documents favorable to the defense "impeded trial counsel's access to the factual basis for making a *Brady* claim" and also deterred the state postconviction counsel from raising the claim in state postconviction proceedings).

93. *See* Banks v. Dretke, 540 U.S. 668, 691–98 (2004) ("[A] petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence . . . .").

94. *See* Clay v. Dir., Juvenile Div., Dep't of Corr., 749 F.2d 427, 430–31 (7th Cir. 1984).

95. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.3.

96. *See id.*; *see also* Amadeo v. Zant, 486 U.S. 214, 221 (1988) (observing that the Court's "decisions . . . have not attempted to establish conclusively the contours of the 'cause'-and-'prejudice' standard," but instead have left "open 'for resolution in future decisions the precise definition of the . . . standard'" (quoting Wainwright v. Sykes, 433 U.S. 72, 87 (1977))).

97. *See* HERTZ & LIEBMAN, *supra* note 9, § 26.3.

98. 527 U.S. 263 (1999).

99. 540 U.S. 668 (2004).

100. *See Banks*, 540 U.S. at 682–84; *Strickler*, 527 U.S. at 265.

101. A *Brady* violation occurs when the prosecution fails to turn over evidence favorable to the defendant. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). This violates "due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*

102. *See Banks*, 540 U.S. at 690; *Strickler*, 527 U.S. at 266.

103. *See Banks*, 540 U.S. at 698; *Strickler*, 527 U.S. at 289.

differently in each case as to whether it satisfied the requirement of prejudice.[104] In *Banks*, the Court explained the difference:

> Regarding "prejudice," the contrast between *Strickler* and Banks's case is marked. The witness whose impeachment was at issue in *Strickler* gave testimony that was . . . hardly significant . . . . Other evidence in the record, the Court found, provided strong support for the conviction even if the witness' testimony had been excluded entirely: Unlike the Banks prosecution, in *Strickler*, "considerable forensic and other physical evidence link[ed] [the defendant] to the crime" and supported the capital murder conviction . . . . In contrast, Farr's testimony was the centerpiece of Banks's prosecution's penalty-phase case.[105]

Thus, to surmount a procedural default, not only does a defendant have to prove cause, but a defendant must also show how that cause has prejudiced the fairness of the guilt or sentencing phase of the trial in some substantial or material way.[106]

C. Ineffective Assistance of Counsel

The most commonly asserted claim in federal habeas petitions is ineffective assistance of counsel at trial in state court.[107] One reason is because ineffective assistance is often a precondition for raising claims that the courts could not otherwise decide either because of waiver or procedural default.[108] Yet few of these claims actually succeed—some because they are frivolous, some because of the high threshold required to prove constitutionally significant ineffective assistance, and some due to a combination of frivolity and the high threshold.[109] Part I.C.1 explains the

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104. *See Banks*, 540 U.S. at 703; *Strickler*, 527 U.S. at 296.

105. *Banks*, 540 U.S. at 700–01 (third and fourth alterations in original) (quoting *Strickler*, 527 U.S. at 295).

106. Kyles v. Whitley, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

107. *See* KING ET AL., *supra* note 12, at 28 (showing that 81 percent of habeas petitions in capital cases and 50.4 percent of those in noncapital cases raised the claim of ineffective assistance of counsel); *see also* VICTOR E. FLANGO, NAT'L CTR. FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 45–47 (1994), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/0 (showing that 41 percent of state habeas petitions and 45 percent of federal habeas petitions raise the claim of ineffective assistance of counsel); Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic*'s Call To Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 832 n.28 (2003) (citing ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14 (1995)).

108. *See* Marceau, *supra* note 36, at 2487 (noting that effective assistance is the "primary point of entry for most other constitutional protections").

109. *Id.* at 2482 (stating that ineffectiveness requires "a fact-specific showing of deficient performance and prejudice that is much more difficult to prove than a freestanding constitutional error," especially when "the prisoner, most likely litigating pro se, [must] overcome the rationalizations and post hoc strategic justifications of his former defense lawyer who is now working with the state prosecutors so as to thwart this claim and avoid an

constitutional right to effective counsel. Part I.C.2 discusses the standard for ineffective assistance of counsel, as explained in *Strickland v. Washington*.[110]

1. The Constitutional Right to Effective Counsel

The right to counsel is grounded in the Sixth Amendment, which states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[111] In *Gideon v. Wainwright*,[112] a unanimous decision, the Supreme Court "laid the foundation for modern right-to-counsel jurisprudence."[113] *Gideon* required states to provide lawyers to all indigent defendants charged with a felony.[114] In an opinion released the same day, the Court also held that this right continues through a defendant's first direct appeal.[115] Seven years after *Gideon*, the Supreme Court further interpreted assistance of counsel to mean *effective* assistance of counsel at trial and appeal.[116] However, despite finding that lawyers are essential to the justice system, the Court did not outline the basic elements of what constitutes effective assistance.[117]

2. *Strickland v. Washington*: The Standard for Ineffective Assistance of Counsel

Without clear guidance from the Supreme Court, the circuit courts formulated their own tests for what qualified as ineffective assistance of counsel.[118] Finally, in 1984, more than two decades after the decision in *Gideon*, the Supreme Court laid out a framework for what constitutes ineffective assistance of counsel in *Strickland v. Washington*.

In *Strickland*, the defendant went on a ten-day crime spree, racking up an indictment that included three counts of first-degree murder, as well as robbery, kidnapping for ransom, breaking and entering, assault, attempted murder, and conspiracy to commit murder.[119] The defendant confessed, and at his sentencing hearing, the trial judge sentenced him to death.[120] The defendant later brought an ineffective assistance of counsel claim based on his counsel's failure to move for a continuance, request a psychiatric report,

ethical rebuke by the state bar"). *See generally* JOHN M. BURKOFF & NANCY M. BURKOFF, INEFFECTIVE ASSISTANCE OF COUNSEL (2013).

110. 466 U.S. 668 (1984).

111. U.S. CONST. amend. VI.

112. 372 U.S. 335 (1963).

113. Cunningham-Parmeter, *supra* note 107, at 836.

114. *Gideon*, 372 U.S. at 344.

115. Douglas v. California, 372 U.S. 353, 355 (1963) ("For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956))).

116. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[D]efendants cannot be left to the mercies of incompetent counsel . . . .").

117. *See* Cunningham-Parmeter, *supra* note 107, at 836.

118. *Id.* at 836–37.

119. *Strickland*, 466 U.S. at 671–72.

120. *Id.* at 672–75.

investigate or present character witnesses, seek a presentence investigation report, present meaningful arguments to the judge, or cross-examine medical experts.[121]

The Court held that even though defense counsel "understandably felt hopeless,"[122] counsel's belief that the defendant's confession and remorse were enough to save him from the death penalty was reasonable.[123] Furthermore, the Court noted, counsel had moved to exclude specific harmful evidence.[124] After reiterating that the "right to counsel is the right to the effective assistance of counsel,"[125] the Court laid out its two-part analysis for evaluating ineffectiveness claims: a defendant must show both (1) that his counsel performed deficiently, and (2) that his performance actually prejudiced the defendant.[126]

To show deficient performance, a defendant must demonstrate that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[127] The Court allowed lower courts to be "highly deferential"[128] to lawyers' strategic choices, even acknowledging a presumption that a lawyer's performance is "within the wide range of reasonable professional assistance."[129]

Prejudice, however, requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[130] The Court permitted lower courts to end the inquiry when faced with an absence of prejudice alone.[131] This "facilitates the efficient processing of ineffectiveness claims," however it is based on "the assumption that prejudice flowing from an attorney's errors will be detectable from the appellate record."[132]

Although the *Strickland* test remains a high bar, courts have found ineffectiveness when defense counsel conducted no pretrial discovery,[133] failed to object to testimony that was obviously a violation of a defendant's Confrontation Clause rights,[134] or failed to interview alibi witnesses, eyewitnesses, and a codefendant who exonerated the defendant.[135]

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121. *Id.* at 675–78.
122. *Id*. at 699.
123. *Id.*
124. *Id.* at 673.
125. *Id.* at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)).
126. *Id.* at 687 ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.").
127. *Id.*
128. *Id.* at 689.
129. *Id.*
130. *Id.* at 687.
131. *Id.* at 697.
132. *See* Cunningham-Parmeter, *supra* note 107, at 840.
133. *See* Kimmelman v. Morrison, 477 U.S. 365, 385 (1986).
134. *See* Mason v. Scully, 16 F.3d 38, 44–45 (2d Cir. 1994).
135. *See* Bryant v. Scott, 28 F.3d 1411, 1418 (5th Cir. 1994).

D. Procedural Default and Ineffective Assistance

The constitutional right to effective assistance of counsel attaches in pretrial proceedings[136] and extends through the first appeal,[137] so a defendant can claim his or her counsel was ineffective in any action or omission during that time. Perhaps because of the wide window, ineffective assistance of counsel may be the most common ground for all appeals.[138] Indeed, ineffective assistance is the most common claim in habeas petitions.[139] A 2007 survey showed that 81 percent of habeas petitions in capital cases and 50.4 percent of those in noncapital cases raised claims of ineffective assistance of counsel.[140] The next most frequent claim is false, lost, or undisclosed evidence, raised in 43.1 percent of capital cases and about 13 percent of noncapital cases.[141]

Yet, the doctrine of procedural default is particularly unkind to ineffective assistance claims for three reasons discussed in the following sections. First, the claim itself is difficult to prove without the time and resources to investigate or an effective attorney to undertake that investigation.[142] Second, most states push these claims to collateral review, where defendants do not have a constitutional right to counsel, much less effective counsel.[143] Third, prior to 2012, the ineffectiveness of postconviction counsel could not excuse a default under the cause-and-prejudice standard.[144]

1. The Nature of Ineffective Assistance of Counsel Claims

Ineffective assistance of counsel is usually a losing claim.[145] A 2007 survey that reviewed 368 capital cases applying for habeas relief found that of the thirty-three awarded relief, only five were because of an attorney's ineffective assistance.[146] When the defendant was not facing a capital crime, courts granted even fewer ineffective assistance claims.[147] Of the 2,384 noncapital cases in the random sample, with seven being given relief, only one was because of ineffective assistance.[148]

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136. *See* BURKOFF & BURKOFF, *supra* note 109, § 1:1.
137. *Id.* § 9:1.
138. *Id.*
139. *See supra* note 107 and accompanying text.
140. *See* KING ET AL., *supra* note 12, at 28–31, 64.
141. *Id.* at 64.
142. *See infra* Part I.D.1.
143. *See infra* Part I.D.2.
144. *See infra* Part I.D.3.
145. *See* KING ET AL., *supra* note 12, at 51–52; *see also* BURKOFF & BURKOFF, *supra* note 109, § 1:2 (noting an analysis of 4,000 state and federal ineffective assistance of counsel claims between 1970 and 1983 found that only 3.9 percent resulted in a finding of ineffective assistance).
146. *See* KING ET AL., *supra* note 12, at 17, 51.
147. *Id.* at 52.
148. *Id.*

The reason for this is complicated. Ineffective assistance claims are unlike most other claims raised on appeal.[149] Asserting a trial attorney's ineffectiveness nearly always requires development beyond the record at trial, because such claims are usually "predicated on what trial attorneys failed to do."[150] This requires "investigation and an understanding of trial strategy and legal arguments"[151] within the abbreviated deadlines many states set for motions to expand the record in preparation for direct appeals.[152] The Supreme Court has expressed skepticism that this is possible.[153]

Others suggest it is because it is inherently difficult to meet constitutional standards for ineffectiveness.[154] Supreme Court Justice Brennan once observed: "It is accurate to assert that most courts, this one included, traditionally have resisted any realistic inquiry into the competency of trial counsel."[155] Others say the potential of post hoc judicial scrutiny could disrupt attorney-client relationships,[156] even opening attorneys up to legal malpractice claims.[157] Many more indicate that ineffectiveness could stem from the rising caseload and limited funding for defense organizations.[158] The current standards recognize that each attorney must make individualized, fact-specific strategic decisions, and any change to stricter standards could force a one-size-fits-all determination of tactics.[159]

2. The State Postconviction Forum

The forum presents another hurdle for defendants who want to raise claims of ineffective assistance of counsel. First, in most states, appellate courts do not usually consider matters outside the record or matters that involve facts not in evidence.[160] That role belongs to the trial court, as factfinder, since it involves "an assessment of the credibility of the testimony and that is clearly not [an appellate court's] function."[161] For

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149. *See* Primus, *supra* note 79, at 2609.

150. *Id.* Even in those claims that are based on the record, courts usually find that direct testimony or an affidavit from former defense counsel are necessary in order for courts to decide if the trial attorney's decision was a strategic one. *See id.* at 2609 n.17.

151. *See id.* at 2613.

152. *See id.* at 2622 (acknowledging that most states have deadlines of between five and thirty days from the date of conviction to expand the record and "there is not sufficient time" to hire new counsel, obtain a copy of the trial transcript, investigate the trial attorney's performance, and draft a new motion).

153. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012) (noting that deadlines "may not allow adequate time" to investigate ineffective assistance claims).

154. *See* BURKOFF & BURKOFF, *supra* note 109, § 1:2 (quoting Wainwright v. Sykes, 433 U.S. 72, 117 (1977)).

155. *Id.*

156. *See id.* § 1:3.

157. *See id.* § 1:10.

158. *See id.* § 1:3.

159. Strickland v. Washington, 466 U.S. 668, 693 (1984) ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.").

160. *See, e.g.*, Commonwealth v. Grant, 813 A.2d 726, 734 (Pa. 2002).

161. *Id.* (citing Commonwealth v. Pierce, 645 A.2d 189, 198 (Pa. 1994)).

that reason, most courts defer claims of ineffective assistance of trial counsel until collateral review, rather than initial direct appeal.[162]

Collateral review—as opposed to direct review—is the other avenue in which a person convicted of a crime can obtain relief.[163] Generally, collateral review is not sought until a direct appeal has proved unsuccessful or the time allotted to make a direct appeal has expired, although in some jurisdictions defendants may pursue both avenues simultaneously.[164]

Each state provides for collateral review in one or more of its courts, but the particular remedies and procedures vary from state to state.[165] In twelve states, the principal remedy is the writ of habeas corpus.[166] In the District of Columbia and the remaining thirty-eight states, the principal remedy is a modern version of writ of error *coram nobis* created by statute or a judicially promulgated rule of the court.[167] Every state, except for Texas, also provides one or more secondary postconviction remedies in addition to the principal postconviction system.[168] State law instructs where the petition is filed: either the convicting court, an independent trial court, a court in the jurisdiction where the defendant is incarcerated, or an appellate court.[169]

Depending on the laws of the jurisdiction, a defendant may seek relief on collateral review claiming the conviction or sentence is invalid, was imposed in violation of his or her constitutional rights, or was based on grounds unrelated to the validity, such as a claim attacking the conditions of confinement.[170] In all but three states, the defendant has the burden of proving his or her claims by a preponderance of the evidence standard.[171]

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162. *Id.* at 734–36 (summarizing the practices of other jurisdictions and observing that the federal courts and the overwhelming majority of state courts refuse to hear ineffective assistance claims on direct appeal). Even the Supreme Court encourages states to allow defendants to wait until collateral review. *See* Massaro v. United States, 538 U.S. 500, 504–05 (2003) ("In light of the way our system has developed, in most cases a motion brought [during collateral review] is preferable to direct appeal for deciding claims of ineffective assistance. When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.").

163. *See* WILKES, *supra* note 20, § 1:2.

164. *Id.*

165. *Id.* The postconviction systems in each state can be traced back to a modernization that occurred in the 1930s and 1940s in response to an expansion of due process rights for state criminal defendants. *Id.* § 2:5. By the end of 1965, forty states had expanded the availability of postconviction remedies for defendants by case, statutory enactment, or rule of court. *Id.* By 1989, the remaining ten states adopted, either by statute or rule of court, a modern remedy as the state's new postconviction system. *Id.*

166. *See id.* § 1:3 (California, Connecticut, Georgia, Nevada, New Hampshire, New Mexico, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia).

167. *Id.* Other secondary methods include the common law writ of *coram nobis*, the motion to correct illegal sentence, the motion to reduce sentence, the motion to correct clerical error, and the writ of mandamus, among others. *See id.*

168. *See id.* § 1:2.

169. *See id.* § 1:3.

170. *See id.* § 1:2.

171. *Id.* Alaska, Tennessee, and Wisconsin use a clear and convincing evidence standard. *Id.*

Generally, courts only grant relief on one of three grounds: (1) jurisdictional error, (2) constitutional error, or (3) a fundamental or egregious error.[172] State courts have "broad, flexible powers to grant whatever postconviction relief is appropriate," including releasing a defendant from custody, dismissing the charges, granting a retrial, resentencing, or allowing another direct appeal.[173]

The problem with deferring ineffective assistance claims to collateral review is two fold. Generally, postconviction remedies may not be used to relitigate claims, which were—or could have been—raised on direct appeal.[174] Furthermore, on collateral attack, there is no constitutional right to counsel.[175] Unlike in the initial direct appeal, providing postconviction counsel is left up to the states' discretion.[176] In *Ross v. Moffitt*,[177] the Supreme Court noted that before postconviction proceedings take place, defendants' claims have already been "presented by a lawyer and passed upon by an appellate court."[178] Thus, defendants have already had "meaningful access" to state court review.[179]

Therefore, unless the state system provides counsel, indigent defendants must raise their claims pro se on collateral review. This requires a defendant, who presumably has no training in criminal law and is probably incarcerated, to first reasonably recognize possible grounds for that claim without the help of an attorney, and then pursue the necessary extrarecord development, such as securing affidavits.[180]

However, at present, twenty-eight states provide a statutory right to counsel for postconviction remedies.[181] Fifteen more states also provide for

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172. *Id.*

173. *Id.*

174. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 691 (2007).

175. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (finding the right to counsel "extends to the first appeal of right, and no further"); *see also* Murray v. Giarrantano, 492 U.S. 1, 10 (1989) (denying the right to postconviction counsel in capital cases and noncapital cases because "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal").

176. *See* Mundy, *supra* note 53, at 206.

177. 417 U.S. 600 (1974).

178. *Id.* at 614 (quoting Douglas v. California, 372 U.S. 353, 356 (1963)).

179. *Id.* at 615 ("At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.").

180. *See* Voigts, *supra* note 67, at 1104.

181. *See* WILKES, *supra* note 20, § 1:5. Those twenty-eight states are Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. Ten of those states—Alaska, Arizona, Connecticut, Indiana, Iowa, Kansas, Maryland, New Jersey, Pennsylvania, and Tennessee—provide for effective counsel. Illinois provides for a "reasonable level of assistance." *Id.*

postconviction counsel, but only in death penalty cases.[182] Yet even providing counsel is not an automatic cure for deferring all ineffective assistance of trial counsel claims to postconviction review. Some states dismiss pro se petitions before appointing counsel because they are either beyond the filing deadline or successive.[183] In other states, such as Pennsylvania, appointed counsel may be able to withdraw after filing an *Anders* brief.[184] Other states that claim to provide counsel only do so if a judge decides the case has merit or orders a hearing or discovery.[185]

3. The *Coleman* Effect: Ineffective Postconviction Attorneys Did Not Constitute Cause

If for the discussed reasons—lack of extrarecord development, no counsel, conflicted counsel, or ineffective postconviction counsel—defendants do not raise an ineffective assistance claim in a postconviction proceeding, they will "run head-on" into the doctrine of procedural default in a later federal habeas proceeding.[186] Then, defendants typically must show cause and prejudice for courts to hear the defaulted claim.[187] However, before 2012, the Supreme Court did not permit the actions of postconviction counsel to act as cause for failure to raise a claim for ineffective assistance of trial counsel.[188]

In *Coleman v. Thompson*,[189] the defendant, Roger Coleman, was convicted of rape and murder in Virginia and sentenced to death.[190] On collateral review, a state court considered and rejected all of Coleman's claims.[191] Coleman claimed that his counsel failed to investigate and introduce his alibi defense, failed to interview and effectively cross-examine a jailhouse informant, and failed to rebut the prosecution's forensic

182. *See id.*

183. Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2443 n.53 (2013). King cites statutes that allow this practice in Alaska, Tennessee, Arizona, and New Jersey. *Id.*

184. When attorneys find only frivolous issues for appeal, they file an *Anders* brief to alert the court and request withdrawal. *See id.* at 2443–44 (citing Anders v. California, 386 U.S. 738 (1967) (permitting attorneys to withdraw if they determine only frivolous issues for appeal)).

185. *See* King, *supra* note 183, at 2444–45. In states that permit judges to decide when counsel is required, only a small portion of defendants actually receive counsel in postconviction proceedings. *Id.* For example, King cites Mississippi court records between 2008 and 2011 that show that counsel appeared in only 15 percent of cases. *Id.* King cites statistics from Texas, over the same period, that show the proportion is even smaller—about 10 to 12 percent of noncapital habeas petitioners receive counsel. *Id.*

186. *See* Primus, *supra* note 79, at 2609.

187. *See supra* note 79 and accompanying text (discussing the other exception—fundamental miscarriage of justice—which courts have interpreted as a showing of actual innocence).

188. *See* Primus, *supra* note 79, at 2611.

189. 501 U.S. 722 (1991).

190. *Id.* at 726–27.

191. *Id.* at 727.

expert.[192] Coleman's postconviction attorneys appealed the decision, but filed the notice of appeal three days late.[193] The Virginia Supreme Court dismissed the entire appeal, finding the late filing was a procedural bar.[194] Coleman then petitioned for habeas relief in federal court.[195] The district court ruled that Coleman's late filing and resulting bar in state court similarly barred federal review of his claims.[196] The Fourth Circuit affirmed and the Supreme Court granted certiorari.[197] Before the Supreme Court, Coleman argued, inter alia, that his postconviction counsel's ineffectiveness—the late filing of his collateral appeal—constituted cause to excuse his defaulted claims of ineffective assistance of trial counsel.[198]

However, the Court held that because there was no constitutional right to an attorney in a state postconviction proceeding, Coleman could not use his lawyer's failings to excuse his default.[199] Therefore, the late filing did not constitute cause.[200] The majority opinion emphasized that "[i]n the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation."[201] This standard is starkly different on direct appeals, where defendants are guaranteed effective counsel by the Sixth Amendment, and anything less can excuse a default.[202] *Coleman* had important implications for defendants leaving "state prisoners . . . without an important means of overcoming defaults in state postconviction to obtain review on the merits of federal claims in federal habeas."[203]

II. A NEW EQUITABLE EXCEPTION: *MARTINEZ* AND *TREVINO*

This was the landscape defendants had to navigate when they sought to claim that their trial counsel was ineffective in a federal habeas petition prior to the *Martinez* decision. If they could find enough evidence to make the claim at all, many defendants had "only the slimmest hope" to secure counsel or a hearing.[204] That changed with *Martinez v. Ryan*. In *Martinez*, the Supreme Court unexpectedly promulgated a new equitable rule that

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192. *See* Brief for Petitioner at 3, *Coleman*, 501 U.S. 722 (No. 89-7662), 1990 WL 515096, at *3.

193. *See Coleman*, 501 U.S. at 727.

194. *Id.* at 727–28.

195. *Id.* at 728.

196. *Id.*

197. *Id.* at 729.

198. *Id.* at 752.

199. *Id.* (citing Wainwright v. Torna, 455 U.S. 586 (1982) (noting that where there is no constitutional right to counsel there can be no deprivation of effective assistance)); *see also* Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473, 476 (2013) ("[N]o right to counsel, ergo, no right to the effective assistance of counsel.").

200. *Coleman*, 501 U.S. at 752–753.

201. *Id.* at 754.

202. *See* Murray v. Carrier, 477 U.S. 478, 492 (1986) (holding that cause to overcome procedural default "ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim").

203. *See* Shay, *supra* note 199, at 477.

204. *See* King, *supra* note 183, at 2449.

already has proven significant for defendants whose ineffective assistance claims were defaulted.[205] The rule allows ineffective postconviction counsel to act as cause to excuse a procedurally defaulted ineffective assistance claim if the defendant was required by state law to raise this claim in a postconviction proceeding.[206] One question remained unanswered after *Martinez*, however: what about states that only *strongly recommended* ineffective assistance claims be raised in postconviction proceedings, while technically allowing them on direct appeal?[207] Did the *Martinez* exception apply to those states as well?[208] The Court attempted to answer that question a year later in *Trevino v. Thaler*. This Part discusses those two decisions, the effect they may have on ineffective assistance claims, and the question the Court has left for lower courts to resolve.

A. Martinez v. Ryan

Luis Mariano Martinez was tried on two counts of sexual conduct with his stepdaughter, a minor under the age of fifteen.[209] At trial, the prosecution introduced evidence of a videotaped interview with the victim, Martinez's eleven-year-old stepdaughter, as well as her nightgown, which contained traces of Martinez's DNA.[210] As part of his defense, Martinez introduced evidence that his stepdaughter had recanted in a second videotaped interview.[211] Her mother and grandmother also testified about her later recanting.[212] In rebuttal, the prosecution put an expert on the stand, explaining that young victims often recant when they do not have their mother's support.[213] After considering the conflicting evidence, the jury convicted Martinez.[214] He was sentenced to two consecutive terms of life imprisonment without possibility of parole for thirty-five years.[215]

On direct appeal, Martinez was barred from presenting evidence that his trial counsel was ineffective, because Arizona requires such a claim to be brought in a postconviction proceeding.[216] Martinez also failed to raise the claim in his collateral proceeding, the appropriate forum.[217] About a year and a half later, he attempted to rectify that, filing a second notice of postconviction relief in the Arizona trial court that claimed his trial counsel

205. *See infra* Part III.A.
206. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012).
207. *See* Trevino v. Thaler, 133 S. Ct. 1911, 1914–15 (2013) ("We said that the holding applied where state procedural law said that 'claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding.' In this case Texas state law does not say 'must.' . . . We must now decide whether the *Martinez* exception applies in this procedural regime." (quoting *Martinez*, 132 S. Ct. at 1320)).
208. *Id.*, 133 S. Ct. at 1914–15.
209. *Martinez*, 132 S. Ct. at 1313.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 1314.
217. *Id.*

had been ineffective for failing to object to the state's expert testimony or to call an expert witness in rebuttal.[218] Martinez also faulted trial counsel for not pursuing an exculpatory explanation for the DNA on the nightgown.[219] The state court dismissed Martinez's petition, in part because he failed to raise that claim in his first postconviction petition.[220] The federal district court subsequently found the claim had been procedurally defaulted, and his postconviction attorney's failure to raise the claim did not constitute cause because of the Court's holding in *Coleman*.[221] The Court of Appeals for the Ninth Circuit affirmed.[222] The Supreme Court granted certiorari on the question.

With his case before the highest Court in the land, Martinez asked the justices to address the big constitutional question: whether defendants have a constitutional right to effective counsel in initial postconviction proceedings where state law mandates that they raise certain claims in that forum.[223] But the Court declined to answer, and instead acknowledged at oral argument[224] that the real question was whether ineffective postconviction counsel may provide cause to overcome a procedural default, despite a conflicting holding in *Coleman*.[225] The Court found it could in a seven-to-two opinion written by Justice Kennedy.[226] Specifically, the Court held that where a state requires ineffective assistance of trial counsel claims to be raised in postconviction proceedings, further inadequate assistance of postconviction counsel—or no counsel at all—may establish cause for a defendant's procedural default of a substantial ineffective trial counsel claim.[227]

The Court carved out this equitable exception because of the structure of Arizona's postconviction system and the nature of the claim itself. By requiring all ineffective assistance claims to be raised in postconviction proceedings, Arizona has made that proceeding "the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."[228] To make a viable claim of ineffective assistance on collateral review, "a prisoner likely needs an effective attorney."[229] That is not guaranteed in

218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 1315.
222. *Id.*
223. *Id.*; *see also* Petition for Writ of Certiorari, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 398287, at *i ("Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.").
224. Transcript of Oral Argument at 16, *Martinez*, 132 S. Ct. 1309 (No. 10-1001) (Breyer, J.) ("There is an issue about if you do give them counsel, then they have to be able to have an argument later that you did it ineffectively.").
225. *Martinez*, 132 S. Ct. at 1315.
226. *Id.* at 1320.
227. *Id.*
228. *Id.* at 1317.
229. *Id.*

postconviction proceedings.[230] Without effective counsel, and with the rule of procedural default lurking in the background, Justice Kennedy wrote that it is not likely that any court—either state or federal—"will hear the prisoner's claim."[231] That is of particular worry for ineffective assistance of counsel claims, because "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system."[232]

Thus, a defendant can establish cause to excuse a procedural default if: (1) the claim of ineffective assistance of trial counsel was substantial; (2) he had no counsel or only ineffective counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the initial review for ineffective assistance claims; and (4) state law requires that ineffective assistance claims be raised first in a state collateral proceeding.[233]

Martinez's limited holding poses an implicit choice: states must either provide competent postconviction counsel and nullify the *Martinez* exception, or prepare to defend against *substantial* claims of ineffective assistance of trial counsel for years afterward.[234] As Justice Scalia warned in his dissent, both options have "essentially the same practical consequences as a holding that collateral-review counsel is constitutionally required."[235] This, Justice Scalia says, "will impose considerable economic costs on the States and further impair their ability to provide justice in a timely fashion."[236]

Interpreting *Martinez*, lower courts clung to the "narrowness" of the exception, finding it was inapplicable in states that did not require defendants to bring ineffective assistance claims in postconviction proceedings.[237] This meant it was only a matter of time before a defendant

230. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (finding the right to counsel "extends to the first appeal of right, and no further"); *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (denying the right to postconviction counsel in capital cases and noncapital cases because "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal").

231. *Martinez*, 132 S. Ct. at 1316.

232. *Id.* at 1317.

233. Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013) (citing *Martinez*, 132 S. Ct. at 1318–21).

234. *See Martinez*, 132 S. Ct. at 1319–20; *see also* Primus, *supra* note 79, at 2613, 2616.

235. *See Martinez*, 132 S. Ct. at 1322 (Scalia, J., dissenting).

236. *Id.* at 1327.

237. *See* Ibarra v. Thaler, 687 F.3d 222, 224 (5th Cir. 2012) (holding that *Martinez* only applies to states that restrict ineffective assistance claims to postcollateral proceedings), *overruled by Trevino*, 133 S. Ct. 1911; *see also* Moore v. Mitchell, 708 F.3d 760, 785 (6th Cir. 2013) (same); Banks v. Workman, 692 F.3d 1133, 1148 (10th Cir. 2012) (same); Arnold v. Dormire, 675 F.3d 1082, 1087 (8th Cir. 2012) (same). Another consequence of *Martinez* is that district courts have expressly limited the *Martinez* exception to ineffective assistance claims, dispelling Justice Scalia's fear that it could extend to prosecutorial misconduct and *Brady* claims. *See* Felix v. Cate, No. CV 11-7713 (JHN) (RNB), 2012 WL 2874398, at *10 (C.D. Cal. May 8, 2012) ("[T]he narrow exception to *Coleman* recognized in *Martinez* applies only to defaulted ineffective assistance of trial counsel claims."); Hunton v. Sinclair, No. CV-06-0054 (FVS), 2012 WL 1409608, at *1 (E.D. Wash. Apr. 23, 2012); Dunn v. Norman, No. 4:11CV872 (CDP), 2012 WL 1060128, at *5 n.2 (E.D. Mo. Mar. 29, 2012)

from a state that allowed ineffective assistance claims on direct appeal *in theory but not in practice* would test the boundaries of *Martinez*.

B. Trevino v. Thaler

The Supreme Court revisited the equitable exception fourteen months later.[238] The question was predictably straightforward: does *Martinez* extend to states that do not require ineffective assistance claims to be brought in postconviction proceedings?[239]

The issue was thrust into the spotlight when lower courts declined to apply *Martinez* because their state system allowed defendants to raise claims of ineffective assistance in the forum of their choice: either in postconviction proceedings or on direct appeal.[240] In fact, only six states, including Arizona, mandate that all ineffective assistance claims be brought in collateral proceedings.[241] For the remaining forty-three states,[242] whether or not to apply the *Martinez* exception was an "open question."[243] These forty-three states vary in their approach to hearing ineffective assistance claims, with twenty-seven states only permitting ineffective assistance claims on direct appeal when that claim is based on the record, and sixteen states offering some mechanism, at least in theory, to expand the record to pursue an ineffective assistance claim on direct appeal.[244]

In *Trevino*, the defendant, Carlos Trevino, was convicted for brutally raping and stabbing fifteen-year-old Linda Salinas in 1996.[245] Trevino did not raise a claim of ineffective assistance of trial counsel in either his direct appeal or his state postconviction proceeding, where different attorneys represented him.[246] In his federal habeas petition, another new attorney undertook an independent investigation that revealed mitigating evidence that he believed should have been presented at Trevino's sentencing.[247] Trevino then claimed his trial counsel had been constitutionally ineffective, because trial counsel had presented only Trevino's aunt at the sentencing phase and no evidence that, among other things, Trevino suffered from Fetal Alcohol Syndrome, that as a child Trevino had suffered numerous head injuries without receiving adequate medical attention, that Trevino's mother had abused him physically and emotionally, that from an early age

(finding *Martinez* inapplicable to procedurally defaulted claim of insufficient evidence at trial because it is "not a claim that trial counsel was ineffective").

238. *See Trevino*, 133 S. Ct. 1911.

239. *Id.* at 1915.

240. *See supra* note 237 and accompanying text.

241. Brief for Utah and 24 Other States As Amici Curiae Supporting Respondent at 7, *Trevino*, 133 S. Ct. 1911 (No. 11-10189), 2013 WL 314455, at *11. The five other states are: Maine, Missouri, Oregon, Rhode Island, and Virginia. *Id.*

242. *Id.* at 7. *Martinez* has no relevance in Michigan where all ineffective assistance appeals are brought on direct appeal. *Id.*

243. *Id.* at 7.

244. *Id.* at 8–9.

245. *See* Brief for Petitioner at 3–7, *Trevino*, 133 S. Ct. 1911 (No. 11-10189), 2012 WL 6587438, at *3–4.

246. *Trevino*, 133 S. Ct. at 1915.

247. *Id.*

Trevino abused alcohol and drugs, and that Trevino's cognitive abilities were impaired.[248] The federal court stayed proceedings for the state court to consider the new claim.[249] The state court found that because Trevino had not raised it in his first postconviction petition, it was barred.[250] The federal district court resumed proceedings and found that the claim was procedurally barred, and the Fifth Circuit affirmed.[251]

After *Martinez* was decided, Trevino filed a petition for a writ of certiorari on April 30, 2012, seeking reconsideration under *Martinez*.[252] In the meantime, the Fifth Circuit held in *Ibarra v. Thaler*[253] that *Martinez* did not apply to Texas because defendants were not required to bring ineffective assistance claims in a postconviction proceeding but could, in theory, raise them on direct appeal.[254]

Thus, the Court had to decide if the differences between states like Arizona, which required ineffective assistance claims in postconviction proceedings, and states like Texas, which seemed to permit defendants to raise such claims in either forum, was legally significant.[255] In a five-to-four decision, the Supreme Court held that, because of the quirks of the Texas system, the difference was immaterial and the *Martinez* exception applied.[256]

The Court based its holding on two characteristics of the Texas system.[257] First, in Texas, it was "virtually impossible" to present an ineffective assistance claim on direct appeal.[258] Most ineffective assistance claims were difficult to litigate on direct review because the record almost always lacks necessary information to substantiate the claim.[259] Texas did allow defendants to expand the record in a motion for a new trial, but that was often "inadequate."[260] The abbreviated deadline and information required for the motion was one impediment.[261] Texas required that the motion be made within thirty days of sentencing, with a ruling within seventy-five days of sentencing.[262] A forty-five day extension could be granted, but the Court found this would greatly impede newly assigned

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248. *Id.* at 1915–16.
249. *Id.* at 1916.
250. *Id.*
251. *Id.*
252. Petition for Writ of Certiorari at ii, *Trevino*, 133 S. Ct. 1911 (No. 11-10189), 2012 WL 5353864, at *ii.
253. 687 F.3d 222 (5th Cir. 2012) (holding that *Martinez* only applies to states that restrict ineffective assistance claims to postcollateral proceedings), *overruled by Trevino*, 133 S. Ct. 1911.
254. *Id.* at 224.
255. *Trevino*, 133 S. Ct. at 1911, 1916.
256. *Id.* at 1921.
257. *Id.* at 1918.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*

counsel unfamiliar to the case.[263] Furthermore, the motion had to be supported by an affidavit "specifically showing the truth of the grounds of attack"[264] and a trial transcript. However, transcripts were not due until 120 days after sentencing—a deadline that was often liberally extended—so counsel would not have the benefit of reading the transcript to flag any potential claims, much less be able to attach it.[265] Because of these factors, Texas could "point to only a comparatively small number of cases in which a defendant has used the motion-for-a-new-trial mechanism" successfully.[266] The Court similarly dismissed Texas's other methods to expand the record for direct appeal, calling them "special" and "limited" in their application.[267]

Second, the Court also noted that allowing Texas to opt out of the *Martinez* exception "would create significant unfairness."[268] The highest court in Texas, in fact, encouraged defendants to raise these claims in postconviction proceedings.[269] The criminal bar had adopted this advice wholeheartedly.[270]

After laying out the facets of the Texas appellate system, Justice Breyer asked, "How could federal law deny defendants the benefit of *Martinez* solely because of the existence of a theoretically available procedural alternative . . . [that is] all but impossible[] to use successfully, and which Texas courts so strongly discourage defendants from using?"[271] The Court held, "What the Arizona law prohibited by explicit terms, Texas law precludes as a matter of course. And, that being so, we can find no significant difference between this case and *Martinez*."[272]

This decision, however, was much more closely contested than *Martinez*. Justices Roberts and Scalia authored dissents and were joined by Justices Alito and Thomas, respectively. Chief Justice Roberts accused the Court of "tak[ing] all the starch out of its rule with an assortment of adjectives, adverbs, and modifying clauses."[273] The exception in *Martinez*, he argued, was "unusually explicit" and only applied to states that made "a clear choice" to deliberately move ineffective assistance claims to postconviction forums.[274] Chief Justice Roberts added that the new rule would lead to

263. *Id.* at 1919.
264. *Id.*
265. *Id.* at 1918.
266. *Id.* at 1920.
267. *Id.*
268. *Id.* at 1919.
269. *Id.* at 1920 ("'[A]s a general rule' the defendant 'should *not* raise an issue of ineffective assistance of counsel on direct appeal,' but rather in [postconviction] proceedings." (quoting Mata v. State, 226 S.W.3d 425, 430 n.14 (Tex. Crim. App. 2007))).
270. *Id.* Guidelines for Texas capital lawyers state that the first opportunity to raise an ineffective assistance of trial counsel claim is during postconviction review. *Id.*
271. *Id.*
272. *Id.* at 1921.
273. *Id.* at 1923 (Roberts, C.J., dissenting).
274. *Id.* at 1922–23.

endless questions and litigation and that it flew in the face of federalism, finality, and the principles of "equitable balancing" and comity.[275]

Justice Scalia weighed in with a 139-word dissent.[276] The holding in *Trevino*, he implied, had simply proven his criticism of the *Martinez* exception.[277] In addition, he wrote that the *Martinez* "line lacks any principled basis and will not last."[278] In *Trevino*, he intimated, the Court lost sight of the line it had purportedly drawn.[279]

Trevino left lower courts in the forty-two remaining states with this test to apply in deciding whether to extend the *Martinez* exception: "where [a] state 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, our holding in *Martinez* applies."[280]

III. WHAT IS A "MEANINGFUL OPPORTUNITY"?

Since the Supreme Court handed down its decision in *Trevino*, lower courts have struggled to apply it.[281] The holding in *Trevino* prevented lower courts from automatically rejecting the *Martinez* exception if state procedure allowed, at least in theory, defendants to bring ineffective assistance claims on direct appeal, however inadvisable it was.[282] Dismissing a "distinction without a difference" in Texas, the Supreme Court found that the *Martinez* exception applied to any state that does not offer defendants "a meaningful opportunity" to claim ineffective assistance of trial counsel on direct appeal.[283]

Now, when facing a *Martinez* claim, most lower courts must determine whether the state system offers defendants such an opportunity.[284] If it does, they can eschew the *Martinez* exception. If it does not, then those

275. *Id.* at 1922–24. Chief Justice Roberts explained the questions he thought would be raised in state courts, saying, "We are not told, for example, how meaningful is meaningful enough, how meaningfulness is to be measured, how unlikely highly unlikely is, how often a procedural framework's 'operation' must be reassessed, or what case qualifies as the 'typical' case." *Id.* at 1923.

276. *Id.* at 1924 (Scalia, J., dissenting).

277. *Id.*

278. *Id.*

279. *See id.*

280. *Id.* at 1921 (majority opinion).

281. *See supra* note 23 and accompanying text.

282. *See supra* Part II.A.

283. *See Trevino*, 133 S. Ct. at 1921.

284. In the six months since *Trevino* was decided, the Supreme Court has remanded eight cases in the Fifth, Sixth, and Eighth Circuits for reconsideration. *See* Newbury v. Thaler, 133 S. Ct. 2765 (2013); Ayestas v. Thaler, 133 S. Ct. 2764 (2013); Haynes v. Thaler, 133 S. Ct. 2764 (2013); Gates v. Thaler, 133 S. Ct. 2764 (2013); Balentine v. Thaler, 133 S. Ct. 2763 (2013); Washington v. Thaler, 133 S. Ct. 2763 (2013); Smith v. Colson, 133 S. Ct. 2763 (2013); Dansby v. Hobbs, 133 S. Ct. 2767 (2013).

courts must allow defendants to raise a defaulted claim if they can show, among other things, that their claim is substantial.[285]

But what kind of state framework provides a meaningful opportunity? This was the concern Chief Justice Roberts expressed in his *Trevino* dissent, writing that "[w]e are not told, for example, how meaningful is meaningful enough, how meaningfulness is to be measured."[286]

This discussion is starting to emerge in the lower courts of many of the forty-two states that offer defendants an opportunity to bring ineffective assistance challenges either on direct appeal or in a collateral proceeding. This Part examines how courts in four states are endeavoring to answer this question. Because many states have unique appellate rules, this section compares some rules that affect all claims on direct appeal, namely: whether the state automatically provides new counsel; whether the state allows for expansion of the record; if so, whether the motion has reasonable requirements, practical deadlines, and if it is commonly granted; whether the state has any other unique provisions that impact ineffective assistance claims; and whether the state court has encouraged such claims to be relegated to postconviction proceedings.

Part III.A looks to Illinois, where the Northern District of Illinois has found that defendants do have a meaningful opportunity to raise ineffective assistance claims on direct appeal. Part III.B explains Ohio's appellate procedure and notes that several federal court judges in the Southern District of Ohio do not believe defendants have the requisite opportunity to make ineffective assistance claims on direct appeal. Part III.C explores the split among district courts in Tennessee. Part III.D examines the holding of the Eighth Circuit in the wake of *Trevino*, in which it found that Arkansas does not offer defendants a meaningful opportunity to raise ineffective assistance of counsel claims on direct appeal.[287]

A. Illinois

Because Illinois allows defendants to pursue ineffective assistance claims on direct appeal, Illinois federal courts originally held that *Martinez* did not apply to state defendants.[288] But since the *Trevino* decision expanded the *Martinez* rule, district courts in Illinois have had to consider whether state procedure provides the necessary meaningful opportunity to raise

285. *Trevino*, 133 S. Ct. at 1921. In addition to showing the claim of ineffective assistance is substantial, a defendant must also show that he had no counsel or only ineffective counsel during the state collateral review proceeding and that the state collateral review proceeding was the initial review for the ineffective assistance claim. *Id.*

286. *Id.* at 1923 (Roberts, C.J., dissenting).

287. The Eighth Circuit was the first circuit court to weigh in on the *Trevino* rule. *See* Sasser v. Hobbs, 735 F.3d 833, 853 (8th Cir. 2013).

288. *See* Murphy v. Atchison, No. 12 C 3106, 2013 WL 4495652, at *22 (N.D. Ill. Aug. 19, 2013); *see also* Turner v. Harrington, No. 11-cv-07771, 2013 WL 2296189, at *14 (N.D. Ill. May 24, 2013); Weekly v. Hardy, No. 11 C 9231, 2012 WL 3916269, at *5 (N.D. Ill. Sept. 6, 2012); Butler v. Hardy, No. 11 C 4840, 2012 WL 3643924, at *3 (N.D. Ill. Aug. 22, 2012); Gill v. Atchison, No. 11 C 7868, 2012 WL 2597873, at *6 (N.D. Ill. July 2, 2012); Blair v. Rednour, No. 11 C 4108, 2012 WL 1280831, at *4 (N.D. Ill. Apr. 11, 2012).

ineffective assistance claims on direct appeal. Because state court precedent allows defendants to raise ineffective assistance claims pro se and sometimes receive new counsel before direct appeal, one judge in the Northern District of Illinois recently held that defendants do have a meaningful opportunity to bring ineffective assistance claims on direct appeal.[289]

1. New Counsel and Expansion of the Record

Regardless of whether a defendant raises an ineffective assistance claim on appeal, Illinois does not automatically grant new counsel.[290] However, state procedures occasionally allow for a defendant to get a new attorney if he or she can show some merit to an ineffective assistance claim. To receive new counsel, a defendant must file a pro se ineffective assistance of trial counsel claim and ask the court to appoint a different attorney.[291] When that occurs, the court conducts a "preliminary investigation."[292] If the claim is frivolous, no new counsel is appointed, but if the claim has merit, the court will appoint new counsel to argue the allegations of ineffective assistance of trial counsel.[293] This procedure aims to maximize efficiency in balancing frivolous, abusive claims while protecting potentially meritorious petitions.[294]

Often, a defendant's pro se petition for new counsel will be interpreted as a motion for new trial.[295] Illinois is one of eleven states that allow defendants to bring a motion for a new trial.[296] Such a motion is the only way to supplement a trial record before appellate review.[297]

State procedure dictates that this motion must be brought within thirty days of a guilty verdict or the entry of a finding.[298] However, claims

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289. *See Murphy*, 2013 WL 4495652, at *24.

290. *See* People v. Moore, 797 N.E.2d 631, 637 (Ill. 2003).

291. *See, e.g.*, People v. McKinney, 962 N.E.2d 1084, 1092 (Ill. App. Ct. 2011).

292. *See, e.g.*, 14B PAUL M. COLTOFF ET AL., ILLINOIS LAW AND PRACTICE § 578 (2013); *see also* People v. Tucker, 889 N.E.2d 733, 737 (Ill. App. Ct. 2008) ("[T]he court must inquire . . . .").

293. *See Moore*, 797 N.E.2d at 637; *see also* People v. Krankel, 464 N.E.2d 1045 (Ill. 1984). In *Krankel*, the defendant maintained his trial counsel did not investigate his alibi, leading to his burglary conviction. *Krankel*, 464 N.E.2d at 1046. He raised the claim pro se when his trial counsel failed to include it in the motion for a new trial. *Id.* The Illinois Supreme Court remanded the case so that the trial court could hold a hearing on his attorney's competence, while simultaneously expanding the record for appeal. *Id.* at 1049. At the court's instruction, the defendant was provided a new attorney. *Id.*

294. *See* People v. Patrick, 960 N.E.2d 1114, 1123 (Ill. 2011). These so-called *Krankel* hearings are "intended to promote consideration of pro se ineffective assistance claims in the trial court and to limit issues on appeal." *Id.*

295. *See Krankel*, 464 N.E.2d at 1049.

296. Brief for Utah and 24 Other States As Amici Curiae Supporting Respondent, *supra* note 241, at 8.

297. *See* Primus, *supra* note 79, at 2618.

298. 725 ILL. COMP. STAT. ANN. 5/116-1 (West 2008) provides in pertinent part: "(a) Following a verdict or finding of guilty the court may grant the defendant a new trial. (b) A written motion for a new trial shall be filed by the defendant within 30 days following

alleging ineffective assistance are given special latitude. Unless the state objects, a defendant may make an oral motion for a new trial, alleging ineffective assistance.[299] The courts will also consider such claims outside the mandatory thirty-day deadline.[300]

2. Recommendation by Illinois Courts

However, if a defendant does not make a motion for a new trial alleging ineffective assistance of trial counsel, Illinois state courts have refused to address ineffective assistance claims beyond the record on direct appeal, finding it is "more appropriate that the defendant's contentions be addressed in a proceeding for postconviction relief."[301] In that instance, "[t]he appellate court may properly decline to adjudicate the defendant's claim in his direct appeal from his criminal conviction."[302] Many courts have followed this directive and recommended that ineffective assistance claims be relegated to postconviction proceedings.[303]

3. *Murphy v. Atchison*

In *Murphy v. Atchison*,[304] Judge Gottschall in the Northern District of Illinois found that state procedures do provide a meaningful opportunity to pursue ineffective assistance claims on direct appeal.[305] In subsequent decisions, other federal district judges in Illinois have adopted the same position.[306]

In *Murphy*, the defendant, Lee Murphy, was convicted of shooting and stabbing Choni Dade and her two children, five-year-old Dashay Barlow and two-year-old Jailan Carter, on March 17, 2003, in their home on the south side of Chicago.[307] Dade died soon after she reached the hospital, but Dashay and Jailan survived after extensive medical treatment.[308] Murphy, Dade's former boyfriend, was found guilty of Dade's murder and the

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the entry of a finding or the return of a verdict. Reasonable notice of the motion shall be served upon the State. (c) The motion for a new trial shall specify the grounds therefor."

299. *See* COLTOFF ET AL., *supra* note 292, § 800.

300. *Id.*; *see, e.g.*, People v. Patrick, 960 N.E.2d 1114, 1123 (Ill. 2011) (waiving the thirty-day statutory deadline for filing a motion for new trial when the defendant alleged ineffective assistance of counsel, because the court's evaluation of the attorney's competence should not be constrained by the statutory deadline).

301. People v. Parker, 801 N.E.2d 162, 169 (Ill. App. Ct. 2003) (quoting People v. Burns, 709 N.E.2d 672, 680 (Ill. App. Ct. 1999)).

302. *Parker*, 801 N.E.2d at 169.

303. *See In re* Ch. W., 927 N.E.2d 872, 876–77 (Ill. App. Ct. 2010); People v. Phillips, 890 N.E.2d 1058, 1079 (Ill. App. Ct. 2008); People v. Millsap, 873 N.E.2d 396, 402–03 (Ill. App. Ct. 2007); People v. Ligon, 847 N.E.2d 763, 775–76 (Ill. App. Ct. 2006).

304. No. 12 C 3106, 2013 WL 4495652, at *22 (N.D. Ill. Aug. 19, 2013).

305. *Id.*

306. *See* Diaz v. Pfister, No. 12 C 286, 2013 WL 4782065, at *10 (N.D. Ill. Sept. 4, 2013) (holding that neither *Martinez* nor *Trevino* constitute cause that excuses the procedural default of the defendant's ineffective assistance of trial counsel claims); *see also* Kirkpatrick v. Lambert, No. 12 C 50400, 2013 WL 5477567, at *6 (N.D. Ill. Oct. 2, 2013) (same).

307. *Murphy*, 2013 WL 4495652, at *1.

308. *Id.*

attempted murders of her children after a jury trial in Cook County.[309] He was sentenced to 115 years in prison.[310]

After his direct appeal, Murphy moved pro se for a writ of habeas corpus, alleging, among other things, that his trial counsel was ineffective.[311] He claimed that his counsel should have objected to Dashay's identification of him in a police lineup because the lineup was overly suggestive.[312] He claimed that he had an alibi for the time of the murder but his counsel refused to pursue an alibi defense.[313] He claimed his counsel should have called five witnesses that could have corroborated his alibi, but his attorney failed to investigate or contact them.[314]

However, these claims, which were never presented in one full round of state court proceedings, were barred by the doctrine of procedural default.[315] The Northern District of Illinois first determined that Murphy did not have cause to excuse his default under the traditional *Coleman* doctrine.[316] However, because Murphy had proceeded pro se in his initial collateral motion, the district court looked to see whether his position was bolstered by the decisions in *Martinez* and *Trevino*.[317] The court found that the *Martinez* exception did not apply to Murphy, because Illinois state procedures allow for the expansion of the record before direct appeal.[318] The court specifically cited the availability of *Krankel* hearings, which can also provide defendants with new counsel.[319] Judge Gottschall wrote that Illinois law was critically different from the provisions of Texas law that the Supreme Court found problematic.[320] She found that these differences provided "Murphy . . . a meaningful chance to raise an ineffective assistance of trial counsel claim in his direct proceedings, had he chosen to do so."[321]

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309. *Id.*
310. *Id.*
311. *Id.* at *1, *9.
312. *Id.* at *9.
313. *Id.* at *10.
314. *Id.* at *9.
315. *Id.* at *10. A petitioner must present his claims to all levels of the Illinois courts to avoid procedural default. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 844–45 (1999). In other words, Murphy had to present the claims in his federal habeas petition to the state trial court, the Illinois Appellate Court, and the Illinois Supreme Court.
316. *Murphy*, 2013 WL 4495652, at *20–21.
317. *Id.* at *21.
318. *Id.* at *22. ("[U]nder Illinois law a petitioner can adequately develop the factual record supporting his ineffective assistance of counsel claim prior to his direct appeal . . . ." (quoting Butler v. Hardy, No. 11 C 4840, 2012 WL 3643924, at *3 (N.D. Ill. Aug. 22, 2012))).
319. *Id.*; *see supra* notes 293–94 (discussing People v. Krankel, 464 N.E.2d 1045 (Ill. 1984)).
320. *Id.*
321. *Id.*

B. Ohio

Like Illinois, Ohio federal courts originally clung to a narrow interpretation of *Martinez*, finding that it did not apply because Ohio allowed ineffective assistance claims to be raised on direct appeal.[322] Since *Trevino*, defendants have petitioned lower courts to reconsider. Now, unlike Illinois, some federal courts in the Southern District of Ohio have found that defendants do not have a meaningful opportunity to raise ineffective assistance claims on direct appeal in Ohio state courts and thus, the *Martinez* exception applies.[323]

1. New Counsel and Expansion of the Record

Ohio defendants are not automatically provided a different attorney on direct appeal.[324] Ohio law does allow defendants to move for a new trial, in an effort to expand the record before direct appeal, on the grounds of ineffective assistance of trial counsel.[325] A motion for a new trial on the grounds of ineffective assistance of counsel must be filed within fourteen days after the verdict, unless it appears, by clear and convincing proof, that the defendant was unavoidably prevented from filing his motion for new trial.[326] It seems that courts infrequently grant a motion for a new trial based on ineffective assistance, with one court calling it "rare."[327] In dismissing such petitions, state courts have held that "a petition for post-conviction relief may provide a more effective and appropriate vehicle for the assertion of an ineffective-assistance-of-counsel claim."[328]

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322. Moore v. Mitchell, 708 F.3d 760, 785 (6th Cir. 2013) ("We respect *Martinez*'s emphasis that its conclusion was a narrow one and join our sister circuits in refusing to expand it."); McGuire v. Warden, Mansfield Corr. Inst., No. 3:99-CV-140, 2013 WL 1131423, at *5 (S.D. Ohio Mar. 18, 2013) ("[T]he state of Ohio does not require claims of ineffective assistance of trial counsel to be brought in such a [initial-review collateral] proceeding, and it regularly considers these claims on direct appeal." (quoting *In re* Hartman, No. 12-4255, slip op. at *3 (6th Cir. Nov. 8, 2012)) (alterations in original)).

323. *See* Raglin v. Mitchell, No. 1:00CV767, 2013 WL 5468227, at *7 (S.D. Ohio Sept. 29, 2013); Landrum v. Anderson, No. 1:96-CV-641, 2013 WL 5423815, at *10 (S.D. Ohio Sept. 26, 2013); Henness v. Bagley, No. 2:01-CV-043, 2013 WL 4017643, at *3 (S.D. Ohio Aug. 6, 2013); McGuire, 2013 WL 1131423, at *6.

324. *See* United States v. Anderson, 409 F. Supp. 2d 925, 926 (S.D. Ohio 2005) ("Trial counsel in criminal cases, whether retained or appointed by the district court, is responsible for the continued representation of the client on appeal until specifically relieved by this Court."); *see also* OHIO R. CRIM. P. 44(a) (requiring courts to assign indigent defendants counsel "at every stage of the proceedings from his initial appearance before a court through appeal as of right").

325. Ohio rules of criminal procedure specify six causes under which a defendant may move for a new trial. Ineffective assistance can be raised under Ohio Rule of Criminal Procedure 33(A)(1), which provides for a new trial if there was "[i]rregularity in the proceedings . . . because of which the defendant was prevented from having a fair trial." OHIO R. CRIM. P. 33(A)(1).

326. *Id.* R. 33(B).

327. *See, e.g.*, State v. Urban, No. 01AP–239, 2002 WL 464980, at *14 (Ohio Ct. App. Mar. 28, 2002) ("On direct appeal of a criminal conviction, it is rare that we have in the record a motion for new trial based on ineffective assistance of counsel and rare that the trial court has held an evidentiary hearing and oral argument on the issue.").

328. State v. Lordi, 748 N.E.2d 566, 572 (Ohio Ct. App. 2000).

2. Res Judicata

The decision of whether to raise an ineffectiveness claim on direct appeal has important consequences because of Ohio's strict res judicata rule. If a defendant chooses to bring an ineffective assistance of counsel claim on direct appeal, res judicata may preclude the defendant from re-raising the claim in postconviction proceedings.[329] However, if a defendant forgoes the claim in his direct appeal, the courts can find it is barred because it *should have* been raised.[330] The Sixth Circuit recognized that this puts defendants in "somewhat of a procedural quandary":

> [E]ither [a defendant] must raise his ineffective assistance of counsel claim immediately on direct appeal and risk a potentially premature dispositive denial, or he must forego his claim on direct appeal and simply hope that he can thereafter develop sufficient outside-the-record evidence to overcome res judicata on collateral review.[331]

However, the Ohio Supreme Court has also recognized that a claim of ineffective assistance of counsel cannot be barred by the doctrine of res judicata where the claim is raised, for the first time, in a postconviction proceeding and the petitioner was represented by the same counsel both at trial and on appeal.[332] The rationale for this proposition is that counsel cannot be expected to assert his own ineffectiveness.[333]

3. Recommendation by Ohio Courts

The forum that Ohio courts favor for ineffective assistance claims depends on whether the claim is supported by the record.[334] If evidentiary support can be found in the record, Ohio courts not only allow—but require—that the claims be brought on direct appeal, through the application of res judicata, "despite the comparative evidentiary limitations concomitant on direct appeal."[335] However, Ohio state courts have found that when ineffective assistance claims are not based on the record, they are better suited for postconviction proceedings.[336]

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329. *See generally* State v. Cole, 443 N.E.2d 169 (Ohio 1982); State v. Perry, 226 N.E.2d 104 (Ohio 1967).
330. Hanna v. Ishee, 694 F.3d 596, 614 (6th Cir. 2012).
331. *Id.* (emphasis omitted).
332. State v. Lentz, 639 N.E.2d 784, 786 (Ohio 1994).
333. *Id.* at 785 ("[C]ounsel cannot realistically be expected to argue his own incompetence . . . ." (quoting *Cole*, 443 N.E.2d at 171 n.1)).
334. *See Hanna*, 694 F.3d at 614.
335. *Id.*
336. Hartman v. Bagley, 492 F.3d 347, 357 (6th Cir. 2007); State v. Harrington, 876 N.E.2d 626, 629 (Ohio App. Ct. 2007); State v. Singerman, 685 N.E.2d 279, 280 (Ohio App. Ct. 1996).

4. *Landrum v. Anderson*

In *Landrum v. Anderson*,[337] a magistrate judge in the Southern District of Ohio recommended that the *Martinez* exception apply to Ohio defendants because Ohio did not provide a defendant with a meaningful opportunity to raise ineffective assistance claims on direct appeal.[338] In subsequent cases, three other federal judges in the Southern District of Ohio have agreed with this recommendation.[339]

The defendant, Lawrence Landrum, was convicted of burglary and first-degree murder.[340] In a prior habeas petition, Landrum claimed that his attorney was ineffective for failing to call a witness that would have implicated his co-defendant instead of him.[341] But the Sixth Circuit refused to reach the merits, finding that Landrum procedurally defaulted his claim "because he failed to raise this claim on direct appeal and in his post-conviction petition."[342] Landrum, the Sixth Circuit continued, was unable to excuse this default because he failed to file a timely request to reopen his appeal and because ineffective assistance of postconviction counsel cannot constitute cause.[343]

In 2012, Landrum moved to reopen the judgment after the Supreme Court's decision in *Martinez*.[344] After a judge in the Southern District of Ohio granted his request, the magistrate judge found that *Martinez* should apply to Ohio defendants.[345] The exception, the magistrate judge found, is applicable in Ohio because defendants saddled with the same lawyer at trial and on appeal must pursue ineffective assistance claims in postconviction proceedings.[346] The magistrate found that the Court's ruling in *Trevino* only strengthened the application to Ohio.[347]

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337. No. 1:96 CV 641, 2013 WL 5423815 (S.D. Ohio Sept. 26, 2013).

338. *Id.* at *10.

339. Raglin v. Mitchell, No. 1:00CV767, 2013 WL 5468227, at *7 (S.D. Ohio Sept. 29, 2013) ("This Court has found that the *Martinez* exception applies to a case where, because of the way Ohio post-conviction review law is structured, the ineffective assistance of trial counsel claim had to be brought in post-conviction." (quoting Henness v. Bagley, No. 2:01-CV-043, 2013 WL 4017643, at *3 (S.D. Ohio Aug. 6, 2013))); *see also Henness*, 2013 WL 4017643, at *3 ("Henness' *Martinez*-based claim is cognizable in this Court."); McGuire v. Warden, Mansfield Corr. Inst., No. 3:99-CV-140, 2013 WL 1131423, at *6 (S.D. Ohio Mar. 18, 2013) ("An argument can be made that the *Martinez* exception should apply in Ohio in those narrow circumstances.").

340. Landrum v. Mitchell, 625 F.3d 905, 912 (6th Cir. 2010).

341. *Id.* at 913 (second amended habeas petition). For more information on Landrum's claims, see *supra* intro.

342. *Mitchell*, 625 F.3d at 919.

343. *Id.*

344. Landrum v. Anderson, No. 1:96 CV 641, 2013 WL 5423815, at *2 (S.D. Ohio Sept. 26, 2013).

345. *Id.* at *10.

346. *Id.* at *2 ("Ohio does require that [ineffective assistance] claims be brought in [postconviction proceedings] when they depend on evidence outside the record . . . [or] when a defendant has been represented on appeal by the same attorney who represented him at trial.").

347. *Id.* The magistrate judge also found that Landrum had a *substantial* claim for ineffective assistance of counsel, writing, "It is plain from the record that trial counsels'

However, the magistrate acknowledged that based on Sixth Circuit holdings issued before *Trevino*, the district court lacked authority to apply its newfound understanding of *Martinez*.[348] Instead, the judge recommended that the Sixth Circuit reconsider the issue on appeal.[349] Other federal district judges in the Southern District of Ohio have recommended a similar approach.[350]

C. Tennessee

Federal district courts in Tennessee initially held that state defendants could not depend on the *Martinez* exception to establish cause, because the state allows ineffective assistance claims to proceed by direct appeal as well as in postconviction proceedings.[351] Since the Supreme Court's expansion of the exception in *Trevino*, the question has reemerged. However, an analysis of the appellate framework in Tennessee has led federal judges in the Western and Middle Districts of Tennessee to opposite conclusions on whether defendants have the requisite meaningful opportunity to raise ineffective assistance claims on direct appeal.[352]

1. New Counsel and Expansion of the Record

In Tennessee, counsel appointed to represent a defendant during trial must continue to represent that defendant through an appeal when the trial resulted in a prison sentence.[353] Appointed counsel cannot withdraw unless permitted by a court.[354]

Tennessee allows defendants to expand the record by introducing evidence in a motion for a new trial.[355] However, in Tennessee, a "motion for a new trial is not just an optional pleading."[356] It acts to stay the running of the deadline for appeal *and* it is a necessary predicate to appellate review of most alleged errors in the trial court.[357] Tennessee state

deficient performance stemmed from ignorance of the law rather than from any strategic choice" and postconviction counsel failed "to include a claim in a pleading even though the facts in support of the claim were in counsel's hands." *Id.* at *5–6.

348. *Id.* at *10.

349. *Id.*

350. *See supra* note 339 and accompanying text.

351. *See, e.g.*, Leberry v. Howerton, No. 3:10-00624, 2012 WL 2999775, at *1–2 (M.D. Tenn. July 23, 2012) (holding, pre-*Trevino*, that the exception does not apply).

352. *See* Moore v. Steward, No. 2:09-CV-02698(JPM)(CGC), 2013 WL 4434371, at *3 (W.D. Tenn. Aug. 14, 2013) (dictum) (noting that defendants do not have a meaningful opportunity to raise ineffective assistance claims on direct appeal); Means v. Lester, No. 11-2646(JPM)(TMP), 2013 WL 3992506, at *14 (W.D. Tenn. Aug. 5, 2013) (dictum) (same). *But see* Rahman v. Carpenter, No. 3:96-0380, 2013 WL 3865071, at *5–6 (M.D. Tenn. July 25, 2013) (finding defendants do have a meaningful opportunity to raise ineffective assistance claims on direct appeal).

353. TENN. CODE ANN. § 40-14-203 (West 2012).

354. TENN. R. CRIM. P. 37(e).

355. 11 DAVID LOUIS RAYBIN, TENNESSEE CRIMINAL PRACTICE AND PROCEDURE § 33:23 (2013).

356. *Id.* § 33:18.

357. *Id.*

courts will not consider issues on appeal that were not presented in a motion for new trial.[358] As noted by the Tennessee Supreme Court:

> When the rules governing appellate procedure were revised, the motion for a new trial was retained as an important step of post-trial and appellate procedure in jury cases. This was done so that the trial judge might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict, such as alleged misconduct of jurors, parties, or counsel which either occurred after the trial or could not reasonably have been discovered until after the verdict.[359]

Tennessee courts have a strict thirty-day deadline in which to file a motion for a new trial.[360] However, courts will liberally grant motions to amend the initial filing.[361] Courts will allow testimony in open court, as well as sworn affidavits on relevant issues.[362]

2. Recommendation by Tennessee Courts

State courts ordinarily address ineffective assistance claims in postconviction proceedings because such claims typically rely on facts outside the record.[363] Courts in Tennessee have said that raising such claims on direct appeal is "strongly disfavored,"[364] calling the choice to do so "fraught with peril"[365] and "ill-advised."[366] These claims, instead, are litigated in collateral proceedings,[367] because once an ineffective assistance claim has been raised on direct appeal, that claim is barred in collateral proceedings even if different allegations of ineffectiveness are raised.[368] As the defendant in *Smith v. Colson* argued:

> Texas (at least as a matter of theory) allows defendants to advance ineffective-assistance claims in state habeas proceedings even if those claims were rejected on direct appeal, so long as there was not an adequate record to resolve those claims on direct appeal; in Tennessee, in contrast, once an ineffective-assistance claim is rejected on direct appeal,

358. *Id.*
359. McCormic v. Smith, 659 S.W.2d 804, 806 (Tenn. 1983).
360. *See* 11 RAYBIN, *supra* note 355, § 33:21.
361. *Id.*
362. *Id.* § 33:23.
363. Moore v. Steward, No. 2:09-CV-02698(JPM), 2013 WL 4434371, at *3 (W.D. Tenn. Aug. 14, 2013).
364. *See* State v. Day, No. E2010-01108-CCA-R3-C, 2012 WL 2926155, at *8 (Tenn. Crim. App. July 18, 2012).
365. Thompson v. State, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997) (quoting State v. Sluder, No. 1236, 1990 WL 26552, at *7 (Tenn. Crim. App. Mar. 14, 1990)).
366. *Sluder*, 1990 WL 26552, at *7.
367. *Moore*, 2013 WL 4434371, at *3.
368. *See, e.g.*, Troglin v. State, No. E2010-01838-CCA-R3-PC, 2011 WL 4790943, at *16 (Tenn. Crim. App. Oct. 11, 2011) ("[T]he petitioner's claim of ineffective assistance of trial counsel was previously determined by this court on direct appeal and cannot be relitigated in a post-conviction proceeding, even though the petitioner may not have made the same allegations on direct appeal that he now makes in his post-conviction petition.").

> no future ineffective-assistance claims are permitted, even if a later claim involves new evidence or separate allegations of ineffectiveness.[369]

However, despite these dangers, some defendants have successfully raised ineffective assistance claims on direct appeal.[370]

3. *Moore v. Steward* and *Rahman v. Carpenter*

Two recent federal district court decisions showcase the disagreement over the existence of a meaningful opportunity on direct appeal in Tennessee: *Moore v. Steward*[371] and *Rahman v. Carpenter*.[372]

In *Moore*, defendant Ronald Donnell Moore was convicted of first-degree murder and sentenced to life imprisonment after shooting and killing an acquaintance outside a grocery store.[373] The state court affirmed his conviction on direct appeal and denied his application for postconviction relief and his subsequent appeal of that denial.[374] The Western District of Tennessee denied his initial habeas petition because ineffective assistance of postconviction counsel could not excuse a procedural default.[375] Moore asked for reconsideration under *Trevino*.[376]

In *Rahman*, the defendant, Abu-Ali Abdur Rahman, also asked the district court to reconsider under *Trevino* his procedurally defaulted claims denied in a prior habeas petition.[377] Rahman was convicted of first-degree murder for gagging, blindfolding, and stabbing a small-time marijuana dealer in the dealer's home.[378]

Faced with similar requests, both courts denied the defendants' petitions for reconsideration, but reached different conclusions as to *Trevino*'s applicability in Tennessee.[379] Judge McCalla of the Western District of Tennessee noted that Tennessee defendants did not have a meaningful opportunity to raise ineffective assistance claims on direct appeal because in Tennessee, "issues of ineffective assistance of trial counsel ordinarily are

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369. Reply Brief for the Petitioner at 4, Smith v. Colson, 133 S. Ct. 2763 (2013) (No. 12-390), 2012 WL 5361531, at *4.

370. Rahman v. Carpenter, No. 3:96-0380, 2013 WL 3865071, at *5 (M.D. Tenn. July 25, 2013) ("Indeed, the defendants in *State v. Honeycutt*, 54 S.W.3d 762 (Tenn. 2001) and *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999) were successful in overturning their convictions on direct appeal by raising ineffective assistance of counsel claims in a motion for new trial and developing proof at evidentiary hearings held on the motions.").

371. 2013 WL 4434371.

372. 2013 WL 3865071, at *5.

373. Moore v. State, No. W2008-00034-CCA-R3-PC, 2009 WL 1424186, at *1 (Tenn. Crim. App. May 20, 2009) (denying postconviction relief).

374. *Id.* at *1, *6, *10.

375. *See Moore*, 2013 WL 4434371, at *2.

376. *Id.*

377. *See Rahman*, 2013 WL 3865071, at *4.

378. Rahman v. Bell, No. 3:96-0380, 2009 WL 211133, at *1–2 (M.D. Tenn. Jan. 26, 2009), *aff'd sub nom.* Abdur'Rahman v. Colson, 649 F.3d 468 (6th Cir. 2011).

379. *Moore*, 2013 WL 4434371, at *3 ("The decision in *Trevino* would appear to be applicable to habeas petitioners in Tennessee . . . ."); *Rahman*, 2013 WL 3865071, at *6 (finding that "procedural rules allow Tennessee defendants such a meaningful opportunity" and, thus, *Trevino* is not applicable to Tennessee defendants).

addressed in post-conviction proceedings."[380] Another judge in the Western District adopted the same rationale in a different criminal case, finding that a meaningful opportunity on direct appeal does not exist for Tennessee defendants.[381]

However, Judge Campbell of the Middle District, in *Rahman*, explicitly rejected that line of reasoning, finding that raising an ineffective assistance claim on direct appeal is not "virtually impossible" as it is in Texas.[382] He acknowledged that it is more common for defendants to raise ineffective assistance claims in postconviction proceedings, but found that Tennessee's motion for a new trial allows the extrarecord development needed for ineffective assistance claims.[383] Further, he added that ineffectiveness claims are evaluated under the same standard on direct appeals and in collateral proceedings.[384]

D. Arkansas

Although the Eighth Circuit originally declined to apply the *Martinez* exception, it was the first circuit court to parse *Trevino*'s "meaningful opportunity" standard when it examined Arkansas's appellate framework.[385] The Eighth Circuit found that without automatically providing new counsel, Arkansas could not meet the bar the Court set in *Trevino*.[386]

1. New Counsel and Expansion of the Record

Arkansas does not provide defendants with new counsel on direct appeal, as a matter of course.[387] State law provides a mechanism for defendants to request a new trial under the auspices of ineffective assistance of trial counsel, among other claims.[388] The motion must be filed within thirty days and should be accompanied by affidavits supporting the claim if possible.[389] The court is instructed to designate a hearing date, if warranted, within ten days of filing.[390] State courts may grant such relief "in limited circumstances" including in "the interest of judicial economy."[391] However, the Supreme Court of Arkansas has found that

380. *Moore*, 2013 WL 4434371, at *3.

381. Means v. Lester, No. 11-2646(JPM)(TMP), 2013 WL 3992506, at *14 (W.D. Tenn. Aug. 5, 2013).

382. *Rahman*, 2013 WL 3865071, at *6.

383. *Id.* at *5.

384. *Id.*

385. Sasser v. Hobbs, 735 F.3d 833, 853 (8th Cir. 2013).

386. *Id.*

387. *See* ARK. R. APP. P.-CRIM. 16(a)(i).

388. *See* 3A TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 101:3 (2013–2014 ed. 2013). *See generally* Rounsaville v. State, 288 S.W.3d 213 (Ark. 2008); Chavis v. State, 942 S.W.2d 853 (Ark. 1997); Burns v. State, 913 S.W.2d 789 (Ark. 1996).

389. *See* 3A TRIAL HANDBOOK FOR ARKANSAS LAWYERS, *supra* note 388, §§ 101:4–:5.

390. ARK. R. CRIM. P. 33.3(a).

391. *Rounsaville*, 288 S.W.3d at 217 (quoting Missildine v. State, 863 S.W.2d 813, 818 (Ark. 1993)).

when a defendant could not develop his ineffective assistance claim on the record at trial and presents more than "bare allegations" in his motion for new trial, "a hearing was essential for the trial judge to examine in detail the sufficiency of the representation."[392]

2. Recommendation by Arkansas Courts

The few reported cases in which an Arkansas defendant successfully obtained an ineffective assistance hearing on direct appeal involved defendants who raised the claims pro se or who had the means to hire new counsel.[393] In most reported cases, the Arkansas Supreme Court simply refused to consider ineffectiveness claims on direct appeal.[394]

3. *Sasser v. Hobbs*

The Eighth Circuit concluded recently that "Arkansas did not as a systematic matter afford . . . meaningful review of a claim of ineffective assistance of trial counsel on direct appeal."[395] In *Sasser v. Hobbs*, defendant Andrew Sasser was sentenced to death after a conviction for capital felony murder for raping and murdering a convenience store clerk.[396] After the Western District of Arkansas denied Sasser's defaulted claims of ineffective assistance of counsel in his habeas petition, the Eighth Circuit reconsidered the case under the Court's recent holding in *Trevino*.[397] The court found that because Arkansas did not provide new counsel on appeal, Sasser could not make a meaningful claim of ineffective assistance.[398] The court noted:

> Although new appellate counsel is not, by itself, sufficient to guarantee capital defendants a meaningful opportunity to challenge their trial counsel's effectiveness on direct appeal, it is a necessary part of such a guarantee. Otherwise, appointed trial counsel must question his own effectiveness—a conceptually difficult task for several reasons, including trial counsel typically must be a witness in any ineffectiveness hearing.[399]

In the wake of *Trevino*, the Eighth Circuit acknowledged that asking a lawyer to assert his own ineffectiveness would "violate the lawyer's duty of zealous representation to his client and . . . his duty of candor to the

392. *Id.* at 219.

393. *See id.* at 219–20; *Missildine*, 863 S.W.2d at 819 (Brown, J., concurring) (questioning "the wisdom of considering the issue of ineffective counsel on direct appeal," because it would incentivize "defendants to shuck trial counsel after trial and either proceed pro se or retain new counsel to pursue an ineffectiveness claim as part of post trial relief prior to direct appeal").

394. *See, e.g.*, Maxwell v. State, 197 S.W.3d 442, 445 (Ark. 2004); Ratchford v. State, 159 S.W.3d 304, 309 (Ark. 2004).

395. Sasser v. Hobbs, 735 F.3d 833, 853 (8th Cir. 2013) (quoting Trevino v. Thaler, 133 S. Ct 1911, 1919 (2013)).

396. *Id.* at 835–36.

397. *Id.* at 837–38, 851.

398. *Id.* at 851.

399. *Id.* at 852.

court."[400] The court noted that had Sasser raised such a claim pro se, the court likely would have appointed new counsel, "[b]ut a procedure to assure adequate representation cannot depend on a defendant's acting *without* representation."[401] Because of these factors, the state framework falls short of the meaningful opportunity the Court requires in *Trevino*.[402]

IV. New Counsel Guarantees Meaningful Opportunity

In promulgating the *Martinez* exception, the Supreme Court acted to ensure that repeat representation by incompetent counsel would not strip a defendant of the opportunity to make a claim of ineffective assistance of trial counsel.[403] The Court narrowly aimed this holding at states which mandate that ineffective assistance claims be brought in collateral proceedings,[404] where the Constitution does not guarantee counsel, much less *effective* counsel.[405] But in *Trevino*, the Court broadened the exception, applying it to states that permit such claims on direct appeal where defendants have the right to effective assistance of counsel.[406] The test whether to apply *Martinez* now turns on whether states have a procedural framework that "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."[407] Although this flexible standard seems to be an attempt to fit the varied rules of state criminal procedure, it gives lower federal courts little guidance in deciding what rules constitute a meaningful opportunity in the states where they sit.[408]

The lack of guidance poses several problems. First, when it comes to rules of criminal procedure, one size does not fit all. Each state can choose the methods and practices by which it adjudicates crimes so long as these practices meet the floor required by the Constitution. Consequently, criminal procedure is far from uniform throughout the states, depending on, among other things, the state's size, resources, public opinion, and the political response to public opinion. This is apparent in even a cursory examination of state appellate procedure: Illinois permits defendants to file an optional motion for new trial,[409] while Tennessee requires such a motion as a predicate for all issues raised on appeal.[410] Both motions can allow for expansion of the record, but they promote different policy considerations within the states.

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400. *Id.* at 853.
401. *Id.* at 852.
402. *Id*. at 853.
403. *See supra* Part II.A.
404. *See supra* note 233.
405. *See supra* note 175 and accompanying text.
406. *See supra* note 272 and accompanying text.
407. *See supra* note 280 and accompanying text.
408. *See supra* Part III.
409. *See supra* note 298.
410. *See supra* note 355 and accompanying text.

Second, lower courts must discern how these rules actually play out in day-to-day appellate practice. In *Trevino*, the Court found that while Texas did offer defendants a chance to expand the record by filing a motion for a new trial, in practice, it was nearly impossible to use this mechanism successfully because of the strictly enforced deadlines and the requirement that a trial transcript be attached long before it was prepared.[411] Put differently, a framework that is meaningful in one state may not be so meaningful in another—thus, there is no simple checklist for lower courts to follow.

Third, courts must examine a defendant's claims in light of the state's appellate framework as a whole. The *Trevino* standard asks federal courts to determine whether the state procedures make it "highly unlikely in a typical case" that a defendant will have a meaningful opportunity on appeal.[412] In *Trevino*, while the Court looked to what procedural hurdles the defendant faced in raising his ineffective assistance claim, the Court examined the Texas framework as a whole.[413] This means that courts must not only look to the proper outcome of a case, but also make broader judgments of that case's typicality within the system as a whole.

Because of these difficulties, the best method to fairly apply a single standard while accounting for the differences among the states must take into account a variety of factors that affect ineffective assistance of counsel claims on direct appeal. The most important of these is the provision of new counsel on appeal. Without unconflicted appellate counsel that can examine trial counsel's actions, defendants cannot have a meaningful opportunity to raise ineffective assistance claims on direct appeal. However, while this Note posits that new counsel is necessary for a meaningful opportunity on direct appeal, it is by no means sufficient. There are additional factors courts must take into consideration, such as mechanisms to expand the record.

This Part proposes a set of factors that lower courts should examine in determining whether a state offers a meaningful opportunity under *Trevino*. Part IV.A explains which elements courts should use in their analysis. Part IV.B critiques the conclusions of the courts who have already performed a *Trevino* analysis.

A. The Elements of Meaningful Opportunity

The very nature of most ineffective assistance claims means that they are not well suited for direct appeal.[414] These claims are not based on the record, which is the sole consideration for deciding a direct appeal.[415] That means that if a state has a mechanism for expanding the record, an individual must become familiar with the transcript and strategy at trial and

411. *See supra* note 260 and accompanying text.
412. *See supra* note 280 and accompanying text.
413. *See supra* Part II.B.
414. *See supra* Part I.D.1.
415. *See supra* note 160.

attempt to uncover what the trial attorney failed to see—all within deadlines of a week to a month.[416]

Faced with these shortfalls, it is hard to see how any defendant could have a meaningful opportunity to raise an ineffective assistance claim on direct appeal. However, if states make certain mechanisms available to defendants, significant ineffective assistance claims can be raised. The Supreme Court articulated some of these factors in its *Trevino* holding, particularly an opportunity to expand the record prior to a direct appeal.[417] The Court also pointed out that in Texas, state courts usually *strongly* recommended claims be brought in postconviction proceedings.[418] Thus, the recommended forum of the state itself should also be factored into the analysis. However, the first and most significant determination must be whether a state provides new, unconflicted counsel on direct appeal.

1. New Counsel

As the Eighth Circuit recognized in *Sasser*, the starting point for the meaningful opportunity analysis must be whether the state provides new counsel on direct appeal.[419] Without new counsel, a defendant is left to conceive, investigate, and litigate his claims pro se—an option the *Martinez* Court said poses difficulties because a pro se appellant is unlikely to possess the necessary understanding of trial strategy or be capable of performing the required investigative work.[420] Asking trial attorneys to claim their own ineffectiveness could expose them to malpractice suits.[421] Such a request is not within the bounds of zealous representation required of all attorneys.

Some states, like Illinois, allow a defendant to petition for a new counsel on appeal.[422] This is problematic because a defendant must first recognize the grounds for ineffective assistance—a complicated claim by any standard—and successfully notify the court of his or her desire for new counsel. Putting this burden on the defendant will likely lead to many significant and worthy claims being unaddressed.

The Supreme Court did not address the provision of new counsel in *Trevino* because Texas has a practice of providing new appellate representation.[423] However, Texas, even with this safeguard, did not offer defendants a meaningful opportunity.[424] This demonstrates that, as the Eighth Circuit noted in *Sasser*, new counsel is not sufficient but is necessary.[425]

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416. *See supra* notes 151–55.
417. *See supra* note 260 and accompanying text.
418. *See supra* note 269 and accompanying text.
419. *See supra* note 398 and accompanying text.
420. *See supra* note 153.
421. *See supra* note 157 and accompanying text.
422. *See supra* note 291 and accompanying text.
423. *See* Burnett v. State, 959 S.W.2d 652, 655–56 (Tex. Ct. App. 1997).
424. *See supra* note 256 and accompanying text.
425. *See supra* note 399.

2. *Trevino* Factors: Expansion of the Record and Recommended Forum

If a state does provide new counsel, as Texas does, courts should next look to the two additional factors analyzed in *Trevino*: whether a state provides the opportunity for expansion of the record and the state courts' own recommendation to defendants pursuing ineffective assistance claims.[426] Texas's motion for a new trial, which could expand the record, was deemed "inadequate" because of its short deadline and required attachment of the (often unavailable) transcript.[427]

To achieve meaningfulness, it is crucial for a state to offer some kind of mechanism to expand the record, because ineffective assistance claims typically cannot be raised based only on the record.[428]

A motion for a new trial, offered by eleven states,[429] is one way to expand the record in advance of a direct appeal.[430] Five other states have provisions that allow courts to remand a case during direct appeal to reopen the record.[431] Illinois's *Krankel* hearings are another example.[432]

However, not all states' motions for a new trial are created equal. In Tennessee, a motion for a new trial—which is a required predicate for appellate issues—serves to expand the record on appeal simply by its filing.[433] Other states, like Texas, rarely grant such motions.[434]

The Supreme Court, in *Trevino*, also took note of the forum Texas state courts recommended to defendants.[435] A state court's recommendation is not dispositive—the Supreme Court itself has offered the same recommendation.[436] However, it is a telling look at how the state court judges view ineffective assistance claims, and if judges believe such claims should routinely be pursued in postconviction proceedings, they are less likely to give them proper consideration on direct appeal.

3. Other Factors

Courts should also consider factors unique to a state's procedural framework. Federal courts in Ohio must account for the state's res judicata rule.[437] Courts in Tennessee must note the consequences of requiring motions for new trial as a predicate for issues raised on direct appeal.[438] The variation in the state criminal justice system will mean courts must

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426. *See supra* note 257 and accompanying text.
427. *See supra* notes 260, 265 and accompanying text.
428. *See supra* note 150.
429. *See supra* note 296 and accompanying text.
430. *See supra* note 297 and accompanying text.
431. *See supra* note 241.
432. *See supra* note 295.
433. *See supra* note 355 and accompanying text.
434. *See supra* note 266 and accompanying text.
435. *See supra* note 269 and accompanying text.
436. *See supra* note 162.
437. *See supra* Part III.B.2.
438. *See supra* note 357 and accompanying text.

always exercise some discretion as to how defendants are impacted on appeal.

The other distinct inquiry at the state level should also be whether defendants have historically shown any success on direct appeals claiming ineffective assistance of trial counsel.[439] If courts regularly find that success on direct appeal is limited, this tips the scales in favor of finding no meaningful opportunity and applying the *Martinez* exception.

B. Meaningful Opportunity in Arkansas, Illinois, Ohio, and Tennessee

With these factors in mind—provision of new counsel, expansion of the record, recommendation by state courts, and likelihood of success—lower courts can more fairly evaluate a defendant's chances of raising a genuine ineffective assistance claim on appeal and apply the standard for a meaningful opportunity. Judges will still have to exercise discretion in determining how frequently defendants are permitted to use such motions and how often such claims in that forum are successful. For instance, in *Trevino*, the Court found that Texas's appellate practices that allowed for expansion of the record were infrequently used and rarely successful.[440] Lower court judges should examine any appellate mechanism in their state in a similar fashion.

Of the four states examined above, courts found that neither Arkansas's nor Ohio's state frameworks gave defendants the requisite meaningful opportunity to bring ineffective assistance claims on direct appeal.[441] At the district level, Tennessee federal courts are currently divided,[442] and an Illinois federal court found that defendants are given a meaningful opportunity in direct appeals.[443] Applying the above factors to each court's determination, all the states fail to meet the meaningfulness benchmark. The determination turns on whether defendants are provided new appellate counsel who can, without a conflict of interest, delve into the record and make a meaningful claim, as the Eighth Circuit recognized in *Sasser*.[444]

1. Arkansas

By focusing on the lack of new, unconflicted counsel on direct appeal, the Eighth Circuit in *Sasser* identified the key to having a meaningful opportunity to raise ineffective assistance claims.[445] Thus, the Eighth Circuit correctly analyzed Arkansas's appellate framework. To argue ineffective assistance on direct appeal, Arkansas defendants either must proceed pro se or ask their attorneys to argue their own ineffectiveness.

439. *See, e.g.*, *supra* note 327 (noting that an Ohio court found that granting such motions was rare).
440. *See supra* notes 266–67 and accompanying text.
441. *See supra* notes 322–50 (Ohio); *supra* notes 385–402 (Arkansas).
442. *See supra* notes 351–84 and accompanying text.
443. *See supra* notes 288–321 and accompanying text.
444. *See supra* note 386 and accompanying text.
445. *See supra* note 386 and accompanying text.

Without new counsel, there is little chance a direct appeal on ineffective assistance grounds would ever truly be meaningful.

Other facets of Arkansas law support this determination—state courts routinely direct that claims be raised in postconviction proceedings and refuse to address them on direct appeal.[446]

2. Illinois

Although Illinois has procedures in place to help defendants claim ineffective assistance of trial counsel on direct appeal,[447] there can be no meaningful opportunity without provision of new counsel.

The contradictory finding in the Northern District of Illinois[448]—based on the availability of *Krankel* hearings[449]—misses the mark. For one, defendants are not instructed about the possibility of filing a motion for new trial or the need to inform the court of their dissatisfaction with their attorney. Thus, the danger remains that a defendant will not recognize the basis for the claim, which requires some understanding of legal tactics, until after the thirty-day window has passed.[450] Courts cannot predicate a defendant's meaningful opportunity on the chance he or she will recognize a basis for a claim and successfully proceed pro se. Further, raising the claim is no guarantee that the court will agree to hear it in a direct appeal.[451] In fact, if the claim is outside the record, the court can instead instruct the defendant to file it in a postconviction motion.[452] Tellingly, Illinois courts still recommend that defendants opt to pursue ineffective assistance claims in postconviction proceedings, despite the availability of such hearings.[453]

3. Ohio

Federal district courts in Ohio rightly recognized the hurdles faced by defendants claiming ineffective assistance of trial counsel on direct appeal, finding they lack a meaningful opportunity.[454]

State defendants are not provided new, unconflicted attorneys on appeal.[455] Ohio does allow for expansion of the record, but the motion must be filed within fourteen days and it is rarely granted.[456] Most problematic, however, is Ohio's strict application of res judicata.[457] The doctrine bars claims that were or should have been raised on direct

446. *See supra* note 394.
447. *See supra* note 295.
448. *See supra* note 289 and accompanying text.
449. *See supra* note 295.
450. *See supra* note 298 and accompanying text.
451. *See supra* notes 301–03 and accompanying text.
452. *See supra* note 301 and accompanying text.
453. *See supra* note 301 and accompanying text.
454. *See supra* note 323 and accompanying text.
455. *See supra* note 324 and accompanying text.
456. *See supra* notes 326–27 and accompanying text.
457. *See supra* note 329 and accompanying text.

appeal.[458] This rule is slightly relaxed when postconviction counsel and appellate counsel are the same but strictly enforced when they are not.[459]

4. Tennessee

Tennessee fails to provide defendants with new counsel on appeal.[460] But for that fatal fact, Tennessee comes the closest to providing a meaningful opportunity.

Tennessee allows defendants to motion for a new trial.[461] However, in Tennessee, a motion for a new trial is not an optional pleading.[462] In Tennessee, the mere act of filing the motion can expand the record for a later direct appeal.[463] Because the motion is required in order to preserve issues on appeal, it is much more widely known and expected, and thus less likely to take defendants by surprise.[464] Moreover, while the thirty-day deadline is strictly enforced for filing, defendants can liberally amend petitions to add new claims as they are realized.[465]

However, without providing an unconflicted attorney on appeal, defendants have no meaningful opportunity to make ineffective assistance claims in Tennessee. Thus, the Western District of Tennessee's holding that defendants lack a meaningful opportunity on direct appeal was correct, but premised on the wrong factors. Two courts in the Western District held that because defendants in Tennessee, like defendants in Texas, most often raise ineffective assistance of trial counsel claims in postconviction proceedings, Tennessee federal courts should apply the *Martinez* exception.[466] Because of the nature of ineffective assistance claims, it is a foregone conclusion that most defendants will raise claims in postconviction motions, as opposed to on direct appeal.[467] However, other flaws in the Tennessee system support the determination that defendants lack a meaningful opportunity.

CONCLUSION

The Court's purpose in *Martinez* and *Trevino* was clear: all defendants should have a real opportunity to claim their trial counsel was ineffective if they choose. The right to fair trial is so fundamental that courts, despite the procedural bar, should rule on the merits at least once.

Ineffective assistance claims cut to the very heart of why the justice system allows federal habeas review in the first place. It preserves a uniform federal standard for a competent defense, "forcing trial and

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458. *See supra* note 329 and accompanying text.
459. *See supra* note 332 and accompanying text.
460. *See supra* note 353 and accompanying text.
461. *See supra* note 355 and accompanying text.
462. *See supra* note 357 and accompanying text.
463. *See supra* note 355 and accompanying text.
464. *See supra* note 357 and accompanying text.
465. *See supra* note 361 and accompanying text.
466. *See supra* note 380 and accompanying text.
467. *See supra* Part I.D.

appellate courts . . . to toe the constitutional mark."[468] Further, the existence of habeas review is "predicated, at least in part, on the principle that every defendant should have the opportunity to litigate his federal questions in a federal forum."[469]

Because of these concerns, lower courts should undertake a searching examination of their states' appellate procedures in regard to ineffective assistance claims. If states do not provide new counsel on direct appeal, their remaining procedures cannot offer the requisite meaningful opportunity. If a state does provide new counsel, courts must continue the analysis, looking to procedures that allow for the expansion of the record, the recommendations of state counsel, the overall success of such claims on direct appeal, and other state-specific procedural quirks.

That is not to say that states must provide new counsel on direct appeal—that is beyond the scope of this Note. This Note argues that if a state does not provide new counsel on direct appeal, then federal courts within its jurisdiction must adopt the *Martinez* exception and allow the actions of postconviction counsel to serve as cause to excuse a procedurally defaulted ineffective assistance claim.

There are still safeguards in place to prevent the filing of frivolous claims that seek to delay or confuse already overburdened courts. Showing cause-and-prejudice to excuse a procedural default is a difficult task, even including the actions of postconviction counsel in the analysis. Furthermore, the Court in *Martinez* also required that the underlying claim of ineffective assistance of trial counsel be substantial, allowing federal courts to dismiss insubstantial claims at the outset.

This approach protects cherished individual rights with only the slightest deviation from the principles of federalism and finality. It gives deserving defendants a pathway—though still a treacherous, difficult one—by which to vindicate substantial, meaningful claims of ineffective assistance.

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468. Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., concurring).

469. *See* Voigts, *supra* note 67, at 1107 (citing Curtis R. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 464 (1960)).