

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X

3 LUIS MARIANO MARTINEZ, :

4 Petitioner :

5 v. : No. 10-1001

6 CHARLES L. RYAN, DIRECTOR, ARIZONA:

7 DEPARTMENT OF CORRECTIONS. :

8 - - - - - X

9 Washington, D.C.

10 Tuesday, October 4, 2011

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:05 a.m.

15 APPEARANCES:

16 ROBERT D. BARTELS, ESQ., Tempe, Arizona; for
17 Petitioner.

18 KENT E. CATTANI, ESQ., Chief Counsel, Criminal Appeals,
19 Phoenix, Arizona; for Respondent.

20 JEFFREY B. WALL, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; for
22 the United States, as amicus curiae, supporting
23 Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear case
4 next in Case 10-1001, Martinez v. Ryan.

5 Mr. Bartels.

6 ORAL ARGUMENT OF ROBERT D. BARTELS

7 ON BEHALF OF THE PETITIONER

8 MR. BARTELS: Mr. Chief Justice, and may it
9 please the Court:

10 In Arizona, almost all State and Federal
11 claims for relief from a criminal conviction are
12 raisable in the Arizona Court of Appeals on direct
13 appeal.

14 However, a claim that trial counsel was
15 ineffective must be presented first to a trial court in
16 what Arizona labels a postconviction relief proceeding.

17 Petitioner agrees entirely with Arizona's
18 requirement that ineffective assistance of trial counsel
19 claims go initially to a trial court, and he does not
20 object to the label "postconviction relief" as such.

21 The issue in the case has to do with
22 Arizona's insistence that Petitioner had no right to
23 counsel with respect to the postconviction first-tier
24 review, portion of first-tier review, even though he did
25 have a right to counsel in the appeal portion of direct

1 review.

2 And our position is that that distinction
3 between what are two portions of the first opportunity
4 for review of a conviction, broken up sensibly but by
5 the dictate of the State into two parts, that that
6 distinction cannot stand, especially in a case in which
7 the first postconviction proceeding started and ended
8 before anything of substance --

9 JUSTICE GINSBURG: But if you --

10 MR. BARTELS: -- happened in the direct
11 appeal.

12 JUSTICE GINSBURG: If your main position is
13 right, then wouldn't the same go for 2255 proceedings?
14 I mean, this Court has said it makes sense to have the
15 claims of ineffective assistance of counsel looked at by
16 a trial judge first, not an appellate judge. And yet in
17 2255 proceedings, if you're urging ineffective
18 assistance of counsel, you don't get an automatic right
19 to counsel. In 2255 proceedings, counsel will be
20 appointed only if the court determines that the
21 interests of justice so require. So, the proposition
22 you're urging would have ramifications in the Federal
23 system as well, wouldn't it?

24 MR. BARTELS: That's correct, Your Honor.

25 JUSTICE GINSBURG: And so, 2255 would no

1 longer be the interests of justice so require because if
2 it's your first opportunity to raise the point, the
3 court must appoint counsel for you. That's your view?

4 MR. BARTELS: In a situation -- the Federal
5 system is a little more complicated than Arizona, though
6 not much, because of Massaro.

7 JUSTICE GINSBURG: Because of the what?

8 MR. BARTELS: Our position would be, in the
9 Federal system, if -- if a Federal defendant wished to
10 file a 2255, that he would be entitled to appointed
11 counsel but, as far as this case is concerned, only with
12 respect to any claim of ineffective assistance of trial
13 counsel.

14 JUSTICE ALITO: Do you want us to hold that
15 there is a right to counsel whenever a petitioner
16 asserts a claim that could not have been asserted at an
17 earlier point in the proceedings?

18 MR. BARTELS: Yes, Your Honor, with the
19 caveat: If the State allows that kind of proceeding.
20 One of the things I have a hard time keeping track of in
21 this context is, unlike the right to counsel at trial,
22 the Sixth Amendment right, where I think they have to
23 give him a trial, we're dealing in a context where this
24 Court made clear well over 100 years ago that there
25 doesn't have to be any review at all. The State --

1 JUSTICE ALITO: That's a very far-reaching
2 proposition that extends well beyond claims of
3 ineffective assistance of counsel at trial, wouldn't it?

4 MR. BARTELS: Yes.

5 JUSTICE ALITO: If many years after someone
6 is convicted an allegation is made that the prosecution
7 failed to turn over exculpatory evidence and that the
8 information supporting the claim has just recently come
9 to light and could not have been previously discovered,
10 there would be a right to counsel there.

11 MR. BARTELS: If the State --

12 JUSTICE ALITO: That would be the case?

13 MR. BARTELS: If the State provided that
14 proceeding, that -- and the State would not have to.
15 The State could have statutes of limitation or rules
16 against successive petitions that could be extremely
17 strict if they're concerned about that.

18 JUSTICE GINSBURG: Why would it be
19 successive if it could not have been raised earlier?

20 MR. BARTELS: Your Honor, as I understand
21 the situation, we've got newly discovered evidence of
22 perhaps a Brady violation. In that situation, if the
23 State provides a proceeding for review of that, and it
24 is the first opportunity for review, I think the
25 implication of Douglas and Halbert is there would be a

1 right to counsel.

2 JUSTICE SCALIA: What if the State doesn't,
3 but the Federal government does? I mean, what if you
4 say, you know, there's no State habeas available; you go
5 straight to Federal habeas?

6 MR. BARTELS: I think that's correct, Your
7 Honor. In the Federal system --

8 JUSTICE SCALIA: So you haven't really given
9 us a solution for the States. They can't -- they can't
10 stop this thing. Right?

11 MR. BARTELS: Well, but the Federal system
12 itself has a statute of limitation, though I believe
13 that the statute would probably begin to run, in Justice
14 Alito's hypothetical, with the discovery of a Brady
15 violation. And so, the Federal courts have set up the
16 statute of limitation to accommodate that claim. And
17 the States would be free to do that, too, if they
18 wished.

19 JUSTICE GINSBURG: If -- if you are
20 permitted this counsel to raise a claim that could not
21 have been raised on the direct appeal, is the counsel
22 limited to that point, or can the counsel representing
23 the client bring up other things?

24 MR. BARTELS: No, Your Honor. The right to
25 counsel would apply only to the first-tier review issue.

1 And so, for example, if counsel finds other issues and
2 wants to pursue them, the State could say: We're not
3 going to pay you for those.

4 JUSTICE GINSBURG: But could it be that the
5 counsel could also bring up a Brady claim, newly
6 discovered evidence? So wouldn't be limited to
7 ineffective assistance of counsel.

8 MR. BARTELS: The holding in this case will
9 be so limited, but I would agree that Douglas and
10 Halbert would imply that Brady would -- at least many
11 Brady claims would be such that the 2255 or the State
12 postconviction would be the first opportunity --

13 JUSTICE ALITO: What if the --

14 MR. BARTELS: -- to present.

15 JUSTICE ALITO: I'm sorry. What if the
16 ineffective assistance of counsel claim is closely
17 related to other claims that petitioner wants to raise
18 in an initial postconviction relief proceeding? Counsel
19 at trial was ineffective for failing to do A, B, C, and
20 D, and all of those are bases for relief. And now I
21 want to argue with new counsel in the first
22 postconviction proceeding not only that counsel was
23 ineffective at trial but also that all of these other
24 claims are meritorious.

25 Are you saying that the counsel that -- to

1 whom the Petitioner has a right is limited to making
2 only the ineffective assistance of counsel claim and
3 cannot go on and represent the petitioner on these other
4 claims?

5 MR. BARTELS: I'm saying, Your Honor, that
6 the State does not have any duty to pay the lawyer in
7 those circumstances.

8 Now, the kind of situation you're talking
9 about I think is most likely to come up where --

10 JUSTICE GINSBURG: It's not a question of
11 pay. I think Justice Alito was asking, counsel says:
12 I've got a duty to represent my client zealously. So, I
13 want to bring up not only ineffective assistance of
14 counsel but these other matters.

15 MR. BARTELS: Your Honor, I think the
16 appointment could be limited to the first-tier review
17 issues.

18 CHIEF JUSTICE ROBERTS: I'm sorry. I don't
19 -- I don't understand how that works. The claim is,
20 say, for example, you were ineffective because you
21 didn't raise a Batson claim. Surely, he gets to pursue
22 the Batson claim once he establishes ineffectiveness --

23 MR. BARTELS: Yes, Your Honor, and, in fact,
24 in that example, pursuing the ineffective assistance
25 claim requires pursuing the Batson claim.

1 CHIEF JUSTICE ROBERTS: So -- so, the
2 lawyer -- the State would be required to provide counsel
3 not simply to raise the threshold ineffectiveness
4 argument, but to go ahead and raise the arguments as to
5 which he was ineffective.

6 MR. BARTELS: Well, Your Honor, in the
7 situation in which the ineffectiveness of counsel is
8 based on the failure to make a Batson claim, the failure
9 to make an objection at trial, I would agree with you,
10 absolutely.

11 JUSTICE SCALIA: But what --

12 MR. BARTELS: In my experience --

13 JUSTICE SCALIA: What about other claims
14 that -- that don't follow on? I mean, other -- other
15 claimed errors in the trial. You say the State doesn't
16 have to pay for that representation. Does counsel keep
17 time sheets on --

18 MR. BARTELS: Yes, Your Honor.

19 JUSTICE SCALIA: -- on the various issues,
20 12-minute intervals?

21 MR. BARTELS: Yes, Your Honor.

22 JUSTICE SCALIA: And the State pays for some
23 issues and not for other issues?

24 MR. BARTELS: Absolutely, Your Honor. That
25 happens routinely in the State system. The appointed

1 counsel have to submit detailed billing statements --

2 JUSTICE SOTOMAYOR: How does this work now,
3 counsel? How are you proposing this work? Right now,
4 in the Federal system, a pro se litigant comes in and
5 says, I have an ineffective assistance of counsel claim.
6 Most district courts say, ask the attorney to submit an
7 affidavit, and then decides whether on the face of the
8 claims there is reason to appoint counsel and hold a
9 hearing. Under your theory, every State would be
10 obligated to appoint counsel ab initio to check out
11 whether there is the potential for an IAC claim?

12 MR. BARTELS: Well, I think the States could
13 run this in different ways. The way in which Arizona
14 does it makes sense to me, which is that the -- there is
15 a form, Form 24(b). It's a very simple form. It
16 doesn't require stating any substantive grounds. It
17 really just says, I would like to challenge my
18 conviction through postconviction relief, in the very
19 same way that notices of appeal.

20 JUSTICE SOTOMAYOR: So, what you are
21 essentially saying, every State is obligated to appoint
22 an attorney on the first leg?

23 MR. BARTELS: Every State is obligated to
24 treat these, what are really parts of the appeal, the
25 initial appeal, in the same way they do the rest of

1 the appeal.

2 JUSTICE SOTOMAYOR: Counsel, there is a huge
3 reliance interest that has developed since Finley and
4 its progeny, and States don't routinely appoint
5 postconviction counsel.

6 MR. BARTELS: Your Honor --

7 JUSTICE SOTOMAYOR: What are we going to do
8 about that reliance interest and the burdens on States?

9 MR. BARTELS: Well, Your Honor, I -- I guess
10 I would say two things about that. One, there are a
11 fair number of States that do appoint counsel routinely
12 upon request.

13 JUSTICE SOTOMAYOR: Well, I know --

14 MR. BARTELS: Arizona is one.

15 JUSTICE SOTOMAYOR: I know for a fact that
16 most do in capital cases. But I don't know if that's
17 the same figure for non-capital cases.

18 MR. BARTELS: I don't know the percentage,
19 Your Honor, but I know there are several States. And --

20 JUSTICE BREYER: I don't understand. Could
21 you answer the original question that Justice Sotomayor
22 asked? She said: What happens in Arizona? You said a
23 prisoner, or defendant, he has been convicted, gone
24 through his first round of appeal. He is given a form,
25 which you said is a simple form: Do you want to proceed

1 in collateral review? And he answers yes. Then does
2 Arizona appoint a lawyer or not?

3 MR. BARTELS: Yes.

4 JUSTICE BREYER: All right. Then what are
5 we arguing about? He had his lawyer.

6 MR. BARTELS: He didn't have an effective
7 lawyer.

8 JUSTICE BREYER: Ah. So, now you're talking
9 about the second round. You're talking about does he
10 have a right to a lawyer when he wants to claim that the
11 first lawyer that they gave him on collateral review was
12 ineffective?

13 MR. BARTELS: No, Your Honor, that is not
14 the issue in this case.

15 JUSTICE BREYER: What is the issue?

16 MR. BARTELS: The issue in this case is
17 whether the ineffectiveness of the first postconviction
18 counsel --

19 JUSTICE BREYER: Yes.

20 MR. BARTELS: -- constitutes cause to
21 excuse --

22 JUSTICE BREYER: All right. So, why --
23 that's what I thought, actually. And I don't understand
24 what all the briefs are about, and I must be missing
25 something, about whether they're all going to have to

1 appoint lawyers or not in these different States. It
2 seems to me that has nothing to do with this case.

3 This case comes out of a State that does
4 appoint lawyers, and the question is whether you, your
5 client, should have from your point of view at least one
6 full, effective chance to say: Every lawyer I have been
7 appointed, I've gotten 100, and they are all terrible.
8 And -- or whether the State can block that from being
9 heard in habeas, by saying, oh, no, we gave him 19, and
10 the claim that all 19 were ineffective he can't even
11 raise. That's the issue; is that it?

12 MR. BARTELS: Well, Your Honor, we're
13 actually, once we take it past two, I -- I'm not on
14 board with the hypothetical.

15 JUSTICE BREYER: No, no, no. But I'm not --
16 I'm not ridiculing as it sounded your claim. I'm saying
17 maybe that's right. Maybe he's not going to win the
18 claim, probably. But the question is, if his claim is
19 in Federal habeas, I have gotten 102 lawyers in 102
20 proceedings and every one of them was absolutely
21 ineffective, perhaps that habeas judge has to look at it
22 and say, oh, I see, he's claiming he's never had one
23 full effective chance to claim that his trial lawyer was
24 ineffective because the other 19 were just as bad. I
25 have to look at it if I'm a trial judge.

1 Now, that's not a silly argument in my
2 opinion; that could be a winning argument. I just want
3 to know is that basically your argument?

4 MR. BARTELS: No, Your Honor.

5 JUSTICE BREYER: Okay.

6 MR. BARTELS: That's not my argument.

7 JUSTICE BREYER: Now let's start at ground
8 zero. Sorry. Everyone else --

9 (Laughter.)

10 JUSTICE ALITO: Why isn't that where your
11 argument leads, to the proposition that you can never
12 procedurally default irrevocably an ineffective
13 assistance of counsel claim?

14 MR. BARTELS: Well, Your Honor, on a
15 theoretical level, I don't think this Court's decisions
16 in Douglas and Ross and Halbert give us a clear answer
17 about whether there's a right to effective assistance of
18 second postconviction counsel.

19 JUSTICE KENNEDY: But we want to know what
20 rule you're advocating in this case.

21 MR. BARTELS: I --

22 JUSTICE KENNEDY: We want to know why you're
23 not advocating for what Justice Breyer and Justice Alito
24 indicate is an endless right to claim that all previous
25 counsel were ineffective. You say, oh, no, you're not

1 arguing that. What is the rule that you are arguing
2 for? What limiting principle do you have so that we do
3 not have an endless right of counsel?

4 MR. BARTELS: Well, Your Honor, the -- the
5 theory that you get counsel for first-tier review limits
6 it to that first tier, because when you go after the
7 effectiveness of this -- of the first postconviction
8 counsel, that is necessarily going to involve review of
9 the effectiveness of trial counsel --

10 JUSTICE KENNEDY: But -- I understand that.
11 But what is it that prevents the Petitioner from saying
12 that the first counsel in the collateral proceeding was
13 ineffective and that so was the second?

14 MR. BARTELS: Your Honor, I don't think
15 there's a right to a counsel and therefore not a right
16 to effective counsel in the second --

17 JUSTICE BREYER: But you can -- you can have
18 a -- you don't have to give him a counsel. Look, the
19 State did give him a counsel on first collateral review;
20 that counsel was supposed to, according to him, raise
21 the claim my trial counsel was no good.

22 Now we go to the next round. The State
23 says: I'm sorry, you are on your own here; we're not
24 giving you a lawyer anymore. Okay. That may count. He
25 now has to know he has to make the argument himself.

1 And, therefore, he goes and makes the argument himself,
2 and now he's in habeas and he can argue they got it all
3 wrong. He's not blocked.

4 MR. BARTELS: That's correct.

5 JUSTICE BREYER: All right. So, what --
6 there isn't an issue in this case about giving people
7 counsel, on that view. There is an issue about if you
8 do give them counsel, then they have to be able to have
9 an argument later that you did it ineffectively. That's
10 a different matter; that's a question of whether you're
11 blocked in habeas and can't even make the claim.

12 All right, forget it. I will ask the
13 other --

14 MR. BARTELS: Well, Your Honor, I think I'm
15 on the same page with that example.

16 JUSTICE BREYER: Yes, okay.

17 JUSTICE ALITO: But there can't be a
18 claim --

19 JUSTICE KENNEDY: But can I -- can I leave
20 this argument with the -- with the judgment that you've
21 offered me no limiting principle on how many proceedings
22 there must be --

23 MR. BARTELS: Well --

24 JUSTICE KENNEDY: -- before there's an end
25 to the argument that previous counsel were inadequate?

1 I understand, this is the -- in this case,
2 it was the first counsel in -- in the first collateral
3 proceeding that we're talking about. But why couldn't
4 it be the second? You don't give us a limiting
5 principle.

6 MR. BARTELS: Well, Your Honor --

7 JUSTICE KENNEDY: And if you want to say
8 there shouldn't be, then that's fine.

9 MR. BARTELS: No, Your Honor, there should
10 be. And the merits -- the Petitioner's merits brief
11 devoted quite a few pages to both the theoretical
12 problems with the infinite continuum of litigation and
13 the practical limitations.

14 And let me -- let me turn to the practical
15 ones.

16 JUSTICE KAGAN: But, Mr. Bartels, before you
17 do that, I mean, I understood you to be saying that you
18 would draw a line after the first postconviction
19 proceeding.

20 MR. BARTELS: Yes.

21 JUSTICE KAGAN: Is that correct?

22 MR. BARTELS: That's correct.

23 JUSTICE KAGAN: And the briefs go back and
24 forth as to whether that line -- you know, what lies
25 behind that line. But you would draw the line there?

1 MR. BARTELS: Yes, Your Honor,
2 theoretically. And the State has the wherewithal, given
3 McKane, to draw the line anywhere it pleases. It could
4 just say you get one postconviction.

5 JUSTICE ALITO: What I understand you to be
6 saying is exactly that. A line has to be drawn
7 somewhere. Enough is enough; it can't go on forever.

8 MR. BARTELS: Yes.

9 JUSTICE ALITO: And the sensible place to
10 draw the line, in your view, is after the first-tier
11 review. That's your argument, right?

12 MR. BARTELS: Yes, Your Honor, because I --

13 JUSTICE ALITO: But the problem with that is
14 that you can answer that by saying, yes, we have to draw
15 a line someplace; and the Court has already done it, and
16 it did it in Douglas, and it said it was after the first
17 tier of review on direct appeal. It's exactly the same
18 argument, except where the law stands now the line is
19 drawn at a different place on the same principle.

20 MR. BARTELS: Well, Your Honor --

21 JUSTICE ALITO: It has to be drawn
22 someplace.

23 MR. BARTELS: That principle doesn't work
24 very well in a system like Arizona's where you can't
25 bring this one claim on the direct appeal, and you can

1 -- and Mr. Martinez, well, couldn't -- you can file your
2 first postconviction and litigate it while the appeal is
3 pending before it's final.

4 CHIEF JUSTICE ROBERTS: So, you would be
5 happy with a system that said, no, you don't have to
6 raise it on collateral review; you have to raise it on
7 direct appeal.

8 MR. BARTELS: As long as --

9 CHIEF JUSTICE ROBERTS: Which is very
10 unworkable, because if you're arguing ineffective
11 assistance of counsel in a direct proceeding, presumably
12 it's usually the same counsel; he's not likely to bring
13 the claim. That would be worse for criminal
14 defendants --

15 MR. BARTELS: Well --

16 CHIEF JUSTICE ROBERTS: -- than the
17 system that's there now.

18 MR. BARTELS: No, Your Honor. I -- the --
19 if direct appeal is now going to encompass possible
20 claims of ineffective assistance, you're not going to be
21 able to have the same counsel on appeal.

22 CHIEF JUSTICE ROBERTS: Well, but the
23 person --

24 MR. BARTELS: And --

25 CHIEF JUSTICE ROBERTS: The person who

1 decides what arguments you're going to make on appeal is
2 usually the person who handled the trial in these types
3 of cases.

4 MR. BARTELS: Well, Your Honor, that's not
5 true in Arizona.

6 CHIEF JUSTICE ROBERTS: In Arizona, the
7 usual case in criminal cases is that somebody else
8 handles the appeal on direct proceedings?

9 MR. BARTELS: It may be from the same
10 office. But -- but I agree that that would have to
11 change if ineffective assistance of counsel were part of
12 the direct appeal.

13 And the other thing that would have to be
14 done -- and this is done in some States -- is that you
15 have to raise it in direct appeal, but most -- as this
16 Court recognized in Massaro -- most ineffective
17 assistance claims can't be dealt with on direct appeal
18 because of a lack of evidence. They need more evidence.
19 So --

20 JUSTICE SCALIA: Well, ineffective
21 assistance of appellate counsel certainly can't be dealt
22 with on direct appeal, right?

23 MR. BARTELS: No, that's correct.

24 JUSTICE SCALIA: So, even if you get a
25 different counsel to -- to take the appeal --

1 MR. BARTELS: Well, Your Honor --

2 JUSTICE SCALIA: -- you could always claim
3 that that counsel was ineffective in habeas, right?

4 MR. BARTELS: Your Honor, I -- two things
5 about that: First of all, the State does not have to
6 provide the review of the effectiveness of appellate
7 counsel. If it does so, I would still say that that's
8 going to end up having to be second-opportunity review
9 of the claims that appellate counsel failed to raise.
10 That's got to be the basis for --

11 JUSTICE ALITO: If there's a right to
12 counsel whenever someone asserts a claim that couldn't
13 have been raised earlier, why does the State not have
14 the obligation to provide counsel to contest the
15 constitutionality of the representation that was
16 provided on appeal?

17 MR. BARTELS: Well, Your Honor, the -- the
18 reason is that -- in terms of this first-tier,
19 second-tier analysis from Douglas and Halbert, you're
20 not going to be able to look at the effectiveness of
21 appellate counsel without looking at the issue of
22 prejudice. And that's going to require what is
23 second-opportunity review of the merits of the claim
24 that the appellate lawyer didn't raise. But that's the
25 second opportunity for that review, because the direct

1 appeal was the first opportunity.

2 I think in the end, though, just a Mathews
3 v. Eldridge procedural due process analysis works
4 better. And the critical factor is what's the risk of
5 an error in the absence of counsel?

6 Well, the first time around, the risk of
7 error involves what's the probability that the trial
8 judge made a mistake that's prejudicial? By the time we
9 get to the postconviction challenging appellate
10 counsel's effectiveness, now it's the probability that
11 the trial judge was wrong and that the appellate lawyer
12 was wrong. And so, it's exponentially lower and at
13 least provides a basis for --

14 JUSTICE ALITO: Well, the trial judge
15 doesn't have to be wrong for there to be an ineffective
16 assistance of counsel claim at trial?

17 MR. BARTELS: No. No, I'm sticking with the
18 example of ineffective assistance of appellate counsel.

19 JUSTICE KAGAN: But I --

20 MR. BARTELS: Trial counsel -- I'm sorry.

21 JUSTICE KAGAN: I wonder what you would say
22 -- some of these statistics suggest that these claims
23 succeed very, very rarely. So, by the analysis that you
24 just used, this kind of balancing analysis, why we
25 should even go so far as you would have us go?

1 MR. BARTELS: Well, Your Honor, the -- it
2 would be because Douglas and Halbert have done that
3 balancing and said in this situation, the first-tier
4 review, the probability of an incorrect result without
5 counsel is sufficiently high that there should be
6 counsel. And that's really the disagreement between
7 Justice Douglas and Justice Harlan in Douglas. Justice
8 Harlan didn't think the lawyers mattered that much.

9 JUSTICE GINSBURG: So the -- postconviction
10 application would go to the trial judge, right? And on
11 the --

12 MR. BARTELS: Yes, Your Honor.

13 JUSTICE GINSBURG: All right. So, go to the
14 trial judge with this Anders type brief that doesn't
15 raise ineffective assistance of counsel, but it's such
16 an obvious claim to make that when the -- when the judge
17 reviews that Anders brief, if the trial judge thought
18 that this defendant was abysmally represented, wouldn't
19 the -- wouldn't the court say: Sorry, I'm not going to
20 accept this Anders brief. It seems to me that you --
21 there was a flagrant ineffective assistance of counsel,
22 and you should have raised that. That's a -- that's a
23 viable issue. So, I'm not going to accept your brief.

24 I mean --

25 MR. BARTELS: I think there -- I think there

1 would be something like that with the right to counsel
2 for these ineffective assistance of trial counsel
3 claims. Your Honor --

4 JUSTICE GINSBURG: So, if the judge reviews
5 the Anders brief, really thought there was an
6 ineffective assistance of counsel claim, a valid one,
7 the judge would have spotted the issue, and it would
8 have been -- and it would have been argued on that
9 first --

10 MR. BARTELS: Are we talking about the
11 Martinez case itself, Your Honor?

12 JUSTICE GINSBURG: Yes. In the Martinez
13 case, there was an Anders brief, right?

14 MR. BARTELS: There was, Your Honor, but
15 it's nothing but a summary of the trial transcript and
16 provides no basis for the trial court -- the problem
17 with ineffective trial --

18 JUSTICE GINSBURG: Doesn't the trial
19 court -- I mean, the excuse -- the excuse of counsel is
20 not automatic; the trial judge has to look at it and
21 say, yes, there's -- there's no issue for you to pursue;
22 so, I'm going to excuse you.

23 MR. BARTELS: Well, under the current
24 system, the trial judge has no duty to make any Anders
25 determination because the Arizona courts have held

1 there's no right to effective appointed counsel.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. BARTELS: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Cattani.

5 ORAL ARGUMENT OF KENT E. CATTANI

6 ON BEHALF OF THE RESPONDENT

7 MR. CATTANI: Mr. Chief Justice, and may it
8 please the Court:

9 I would like to focus on three points.

10 First, Petitioner is advocating a significant change to
11 this Court's jurisprudence that does implicate the
12 State's reliance interest on Finley and Giarratano.

13 It's not a modest change --

14 JUSTICE KAGAN: Mr. Cattani, could I ask
15 about your interests here? Because your State is one
16 that does appoint counsel; so, you already have the cost
17 there. I'm just wondering -- in your brief, you talk a
18 lot about the excessive costs that this would impose on
19 you. And I'm just wondering where those costs come from
20 if you appoint counsel already. And I know some other
21 States are in a different situation, but as to you,
22 where do the costs come from?

23 MR. CATTANI: I think they come primarily
24 from the logical extension of the rule that would
25 require a second postconviction proceeding to litigate

1 claims of ineffective assistance of first postconviction
2 counsel. Right now, those claims are routinely rejected
3 under Finley and Giarrratano because there's no --
4 there's no constitutional right to counsel. Under --
5 under the theory and -- I don't think there's really
6 been advanced a principled basis for limiting the rule
7 that's been advanced. And, certainly, under --

8 JUSTICE KAGAN: Well, if we just said there
9 is -- you know, we can only draw a line in this context,
10 and we're going to draw the line here, and this is where
11 it sticks. What are the additional costs to you?

12 MR. CATTANI: Well, the additional costs
13 would -- would be implicated with a second
14 postconviction proceeding.

15 JUSTICE SOTOMAYOR: Well, that -- it's only
16 a cost if that second counsel, however it's secured, can
17 actually make a credible or sustainable claim that
18 appellate counsel, the first-tier counsel, was
19 ineffective.

20 MR. CATTANI: Well, I think it's the nature
21 of ineffective assistance claims. They are easy to
22 raise and difficult to litigate. It's -- it's not
23 difficult to raise -- to assert ineffective assistance.
24 It's -- it's very obvious in the context of capital
25 cases where -- where an assertion is my attorney was

1 ineffective at sentencing for failing to raise
2 additional things --

3 JUSTICE SOTOMAYOR: Federal courts --

4 MR. CATTANI: -- in mitigation.

5 JUSTICE SOTOMAYOR: -- handle them
6 routinely.

7 MR. CATTANI: Pardon me.

8 JUSTICE SOTOMAYOR: Federal courts handle
9 them routinely on papers, and most of them are denied.
10 Is the State system different? Where first-level
11 counsel, appellate counsel, postconviction counsel
12 raises ineffective assistance of trial counsel. How
13 many of those cases end up in hearings?

14 MR. CATTANI: I don't -- I don't have the
15 statistics. They do not generally result in -- in
16 evidentiary hearings.

17 JUSTICE SOTOMAYOR: Exactly. Very few.

18 MR. CATTANI: In noncapital cases.
19 Certainly, in capital cases, I think the majority do.

20 JUSTICE SOTOMAYOR: Could I go back to just
21 clarify the record for a second?

22 MR. CATTANI: Yes.

23 JUSTICE SOTOMAYOR: What authorized Levitt
24 to file the postconviction relief motion? Wasn't he
25 appointed simply to prosecute the direct appeal?

1 MR. CATTANI: Harriette Levitt was appointed
2 to prosecute the direct appeal.

3 JUSTICE SOTOMAYOR: What gave him the
4 authority to file the 32 motion? Obviously, he didn't
5 seek his client's approval, because the client when he
6 received the motion said: I don't understand what
7 you're saying; I only speak Spanish.

8 So, what gave Levitt the authority to do
9 what he did?

10 MR. CATTANI: Well, she -- she was
11 representing Mr. Martinez, and the rules allow the
12 filing of a postconviction petition.

13 JUSTICE SOTOMAYOR: By an attorney appointed
14 just on the direct review?

15 MR. CATTANI: Well, I don't think there was
16 anything that would prevent her from representing him in
17 -- in a number of different ways. If she saw something
18 that she thought needed to be raised in a post --

19 JUSTICE SOTOMAYOR: So, what would have
20 been -- what was the tactical advantage of doing what
21 she did? What conceivable reason was there for her to
22 file the Rule 32 motion before direct review finished?

23 MR. CATTANI: Well, I don't know that there
24 was necessarily a tactical reason. The reason would be
25 in some cases that if an attorney views the case as

1 having a potentially meritorious issue on
2 postconviction, you get relief earlier.

3 JUSTICE SOTOMAYOR: Well, you know that she
4 didn't. So, answer my question. What reason did Levitt
5 have, strategic or otherwise, to file the Rule 32
6 motion?

7 MR. CATTANI: I don't know that she had one.
8 There was some indication in the record that there was
9 some evidence that she wanted to raise an issue that the
10 victim's diary would have contained some exculpatory
11 information. And that would have been something that
12 would have had to have been developed in a
13 postconviction --

14 JUSTICE SOTOMAYOR: But she files
15 essentially an Anders brief that says, I don't see
16 anything.

17 What was the -- what was the strategic
18 reason for doing that? What conceivable strategic
19 reason?

20 MR. CATTANI: Well, if she thought that
21 there would be a claim but, after looking at it further,
22 decided that the claims were not colorable, is, I think,
23 what happened in this instance.

24 CHIEF JUSTICE ROBERTS: Is it routine, or
25 does it happen often, for lawyers who perceive a trial

1 issue that can only be raised on collateral review to
2 think that it makes sense to raise that right away so
3 that the appeal -- and then the appeal is delayed until
4 that's resolved?

5 MR. CATTANI: It is what happened in Arizona
6 frequently, prior to the Spreitz decision. And,
7 historically, counsel was allowed -- counsel were
8 allowed to raise claims of ineffective assistance and
9 stay the appeal. And that was the practice previously.
10 So, it's not necessarily unusual that an attorney
11 reviewing the record might decide that there's some
12 issue that could be raised in postconviction.

13 JUSTICE BREYER: All right. This is -- I'll
14 not -- we'll say this is my argument. I don't want to
15 make this your friend's argument.

16 In Arizona, there was a trial, and defendant
17 thinks trial counsel was inadequate. Then there was a
18 collateral review, and Arizona appoints a lawyer for
19 that. And after that, the Arizona courts thought, no,
20 he was adequate at trial. This particular defendant
21 wants to say that that lawyer was inadequate, too. In
22 fact, it was the same one. Hardly surprising. All
23 right? That's his view.

24 Now, when he makes that argument in Federal
25 court, I guess he's going to be met with the claim,

1 since Arizona didn't have to appoint the lawyer for
2 collateral review, it doesn't matter what that lawyer
3 does. Is that right?

4 MR. CATTANI: Well, I -- I think it's better
5 viewed through the lens of procedural due process. If
6 -- we're looking at what are the procedures that are
7 available to a defendant to raise a claim of ineffective
8 assistance of trial counsel. One of the ways that you
9 can do that, that certainly goes a long way to
10 satisfying procedural due process, is to appoint
11 counsel. It could be accomplished without appointing
12 counsel --

13 JUSTICE BREYER: Yes.

14 MR. CATTANI: -- certainly, having some --

15 JUSTICE BREYER: No, but don't -- don't
16 guess where I'm going here because maybe nobody wants to
17 go there.

18 (Laughter.)

19 JUSTICE BREYER: Just follow the questions.
20 The question is, if he tries to make the claim he does,
21 want to say that my first lawyer was no good at trial,
22 and my second lawyer, who by coincidence was the same in
23 the collateral proceeding, was no good either, then the
24 State comes in and says: You can't make that -- you
25 can't make that argument now because we had a proceeding

1 called the collateral review proceeding. We didn't have
2 to give you a lawyer there. But even if that lawyer was
3 inadequate, you lose because we didn't have to give you
4 one.

5 Am I right about that?

6 MR. CATTANI: Well --

7 JUSTICE BREYER: That's all I want to know.

8 MR. CATTANI: Well, I think you're -- you're
9 not right from the standpoint that we do have to provide
10 procedural due process.

11 JUSTICE BREYER: Yes.

12 MR. CATTANI: And so, the question is
13 whether that was enough.

14 JUSTICE BREYER: All right -- no, no. You
15 say -- I'll answer it. It is enough to give him a
16 lawyer. Okay? It is enough. But you have to give him
17 an adequate lawyer if you give him one. If you give him
18 one. You don't have to give him one. But if you give
19 him one, it has to be adequate. Now, what about that?

20 MR. CATTANI: Well, I think that goes well
21 beyond this Court's previous jurisprudence.

22 JUSTICE BREYER: All right, but would that
23 -- it does. That's what I think we're at. Now, why not
24 say this, that every defendant has to have one fair shot
25 at claiming -- they can make the claim that his trial

1 lawyer was inadequate? And the State doesn't have to
2 give him a lawyer at collateral review, but if it does,
3 then that lawyer, he can say, couldn't make that claim
4 because he was inadequate. So, you say, fine, they can
5 make that argument in habeas. I bet they never win it.
6 But somebody might. He can make it.

7 So, what would happen would be that the
8 habeas judge in Federal habeas would read the piece of
9 paper. He'd say, what's the ground for thinking this?
10 And then he'd make his normal kinds of judgments.

11 Now, what is -- is there anything wrong with
12 that view? Is it absolutely blocked by precedent? It
13 seems to me it would relieve the concerns of the States
14 about worrying about having to appoint a lot of lawyers,
15 and it gives him a fair shot to make his argument.

16 MR. CATTANI: Well, I think it is blocked by
17 precedent, certainly by Finley and Giarratano.

18 JUSTICE BREYER: Because?

19 MR. CATTANI: The problem with just shifting
20 -- because this Court has said that there is no right to
21 counsel and thus no right to the effective assistance of
22 counsel in both --

23 JUSTICE BREYER: Well, that's -- that's
24 where you'd have to make the exception. You'd say, if
25 you give him a counsel, he does have the right to an

1 effective assistance of counsel insofar as the
2 ineffectiveness would prevent him from raising a claim
3 that, to be fair, the trial itself has to be -- has to
4 -- he has to have that about the trial itself. That
5 exception. There would be that exception. Now, is
6 there something in those cases that blocks that
7 exception?

8 MR. CATTANI: Well, I think it does create
9 an infinite continuum.

10 JUSTICE BREYER: Well, in a sense it does,
11 but he's never going to win the infinite continuum.

12 MR. CATTANI: Well, but the other problem
13 with it is --

14 JUSTICE BREYER: You never have to give him
15 a lawyer at all.

16 MR. CATTANI: That's correct, but if you
17 don't, then the problem is you shift over to Federal
18 court, and on Federal habeas you're then -- you're then
19 in the position of litigating claims that are untethered
20 to any State court decision. And when we talk about
21 whether it's blocked by current precedent, certainly
22 under *Edwards v. Carpenter* to allege ineffective
23 assistance as cause to overcome a procedural default,
24 there's a requirement that you litigate that claim in
25 State court.

1 JUSTICE ALITO: The question is whether
2 there's cause external to the petitioner to overcome the
3 procedural default. So, if you went down that road,
4 would the petitioner representing himself or herself,
5 not have to show that, I would have raised a claim of
6 ineffective assistance of trial counsel, and I would
7 have won on that, were it not for the fact that the
8 State appointed counsel for me and led me astray and
9 prevented me from raising this meritorious argument --
10 isn't that where that would have to go?

11 MR. CATTANI: Well, I think it would, but
12 it's even more problematic here in that the procedure is
13 that the attorney files a notice, gives notice to the
14 defendant that she's been unable to find any colorable
15 claims and gives the defendant an opportunity to file
16 his own pleading. So, it's -- it's somewhat illogical
17 to think that if we just grant a second postconviction
18 proceeding that the defendant is going to be in any
19 better position than he's in, in this type of situation
20 where he's advised that the attorney says, as is
21 routinely the case, I'm unable to find colorable claims,
22 and then the defendant is given an opportunity to file
23 his own petition.

24 JUSTICE GINSBURG: And how much time.

25 JUSTICE KAGAN: Mr. Cattani, have you --

1 JUSTICE GINSBURG: How much time -- in the
2 procedure you described, appointed counsel does inform
3 Martinez: I'm not bringing up any -- any claims for
4 you. So, if you want to pursue relief, you have to do
5 so on your own.

6 How much time would the defendant have? How
7 much time remained?

8 MR. CATTANI: I don't recall the specific
9 time. I believe it is in the brief. I'm sorry. I
10 don't recall the number of days that were remaining.
11 But, certainly, a defendant can request additional time
12 if the period of time is very short at that point.
13 Extensions are routinely granted in those circumstances.

14 JUSTICE KAGAN: Mr. Cattani, if you handled
15 this through the regular appeals process, the person
16 would receive the benefit of counsel. Is that correct?
17 Rather than shuttle this over to the postconviction
18 review process?

19 MR. CATTANI: Well, the person -- here he
20 receives the benefit of counsel because it's appointed
21 in Arizona. He receives the benefit of counsel. If
22 your question is, would he be entitled to the effective
23 assistance of the attorney developing that record --

24 JUSTICE KAGAN: Yes, exactly right.

25 MR. CATTANI: And I don't think so

1 necessarily. I think that's a different -- I think the
2 attack on the effectiveness of collateral review -- of
3 trial counsel is itself a collateral attack. And I
4 think under Finley and Giarrratano -- and I think the
5 distinction this Court has drawn between direct review
6 and collateral attacks is one that should be maintained.
7 And in theory --

8 JUSTICE KENNEDY: But those -- those were --

9 JUSTICE KAGAN: Try it this way. Try --

10 JUSTICE KENNEDY: -- cases in which you
11 could not raise -- pardon me -- in which you could raise
12 the particular issue at hand. But that's not this case.

13 MR. CATTANI: Well, I don't think it's
14 ever --

15 JUSTICE KENNEDY: The question is whether or
16 not the rationale of those cases, which you state
17 correctly, is applicable to a different set of
18 circumstances.

19 MR. CATTANI: Well, I'm -- I'm not sure I'm
20 following, because I think the procedure that Arizona is
21 following is -- is something that was -- that was in
22 play at the time of Finley and Giarrratano. What -- what
23 Arizona does is not extraordinary; it really follows
24 what has been recommended in Massaro, that -- that
25 claims relating to --

1 JUSTICE KENNEDY: But -- but those were,
2 correct me if I'm wrong, cases -- those were not cases
3 in which the issue could only be raised on collateral.

4 MR. CATTANI: Well, I think in Massaro this
5 Court noted that it would be rare for any -- for a
6 defendant to be entitled to relief on a claim that could
7 be raised on direct appeal. And --

8 JUSTICE KAGAN: Well, Massaro, indeed, said
9 that there are good reasons for withdrawing this issue
10 and putting it in a different kind of process. So,
11 suppose the State does this, and some States do it:
12 They say, on -- in the direct appeal process, we're
13 going to remand this issue back to the trial court
14 because the trial court is good with the facts and can
15 make an evaluation. But it is part of the direct appeal
16 process, this -- this remand. Would the person then be
17 entitled to effective assistance of counsel?

18 MR. CATTANI: That's -- it's a difficult
19 question. I -- I don't think they would, because I
20 think it's still a collateral proceeding to address the
21 -- the effectiveness of trial counsel.

22 JUSTICE KAGAN: Even though now it's part of
23 the regular appeals process? It's just the way the --
24 because of the issues that we recognized in Massaro, the
25 State has decided to structure things in this way?

1 MR. CATTANI: Well, I think more important
2 than the -- than the label that's been put on it is the
3 nature of the -- of the argument that's being advanced,
4 and it's a collateral attack, whether it -- whether a
5 State chooses to call it part of the appeal. What
6 happened -- what happened in Arizona previously was
7 that it would be --

8 JUSTICE KAGAN: So, now you're creating a
9 different rule. You're saying anything which somebody
10 determines is appropriately raised as a collateral
11 attack, even if there's been no first review of that
12 question, there's no entitlement to counsel?

13 MR. CATTANI: Well, I think that's the
14 logical extension of what this Court announced in *Finley*
15 *v. -- Finley and Giartratano*, that we've drawn this
16 distinction between --

17 JUSTICE KAGAN: Well, I don't think, as
18 Justice Kennedy said, that we ever really considered
19 that question in *Finley and Giartratano* because we were
20 assuming there that all the things had been through the
21 appeals process.

22 MR. CATTANI: But I guess I'm not certain
23 that the timing would make a difference of when -- of
24 whether you had a direct appeal first or whether the
25 collateral proceeding occurs first. In either case, the

1 collateral proceeding is a non-record-based attack on
2 the conviction, as opposed to the direct review, which
3 is a record-based review of the conviction. So, the
4 timing I don't think is as important as the nature of
5 what's happening; it's a non-record based attack on the
6 conviction.

7 JUSTICE KENNEDY: Well, Justice Kagan's
8 question indicates that there are States, as you know,
9 where on direct appeal they can allow for an evidentiary
10 hearing on IAC. And as I understand your answer, is if
11 that happens, the proceedings that precede the
12 resolution of the issue on direct appeal, being probably
13 conducted by the same counsel who is taking the direct
14 appeal, can be conducted and he can be -- and the
15 counsel, he or she, can be inadequate in the conduct of
16 those further inquiries. That seems to me very strange.

17 MR. CATTANI: Well, I don't think we're
18 suggesting that would be the desired outcome. And it's
19 simply that drawing the distinction between
20 collateral --

21 JUSTICE KENNEDY: You're suggesting that
22 there's no constitutional right to effective assistance
23 of counsel on direct, when he conducts some
24 supplementary proceedings. That's very strange.

25 MR. CATTANI: Well, I guess the suggestion

1 is that it's a collateral -- that's a collateral
2 proceeding. If they -- if you stay the proceeding and
3 go back and address ineffective assistance, that that
4 would essentially be a collateral proceeding.

5 JUSTICE SOTOMAYOR: You mean -- it makes no
6 sense to me. That happens quite frequently on direct
7 appeal where a variety of issues are raised, and the
8 court -- the circuit courts or the appellate courts send
9 it back to trial counsel to develop the record further.
10 Your position is every time there's a sending back, that
11 stops the need for effective counsel?

12 MR. CATTANI: If they've sent something back
13 for a new hearing, I think that's something different.
14 I think you --

15 JUSTICE SCALIA: Is that involved in this
16 case?

17 MR. CATTANI: -- at that point.

18 JUSTICE SCALIA: Do we have to decide this
19 for this case?

20 MR. CATTANI: I don't think we need to. I
21 think it's clear that --

22 JUSTICE SCALIA: It's another case. It's --

23 JUSTICE KAGAN: Well, the reason I think
24 it's relevant is that if you were to say that there
25 needed to be effective assistance of counsel there, then

1 I would have asked you, what is the difference between
2 this case and that case? So, that's the reason it's
3 relevant to this case, because the difference is really
4 just one of just labels.

5 MR. CATTANI: Well, and that's why I think
6 it's more important to -- to assess the inquiry that's
7 being done, whether it's a collateral inquiry, as
8 opposed to whether we're labeling it part of the -- the
9 direct appeal or not. And if it is a collateral
10 inquiry, then it makes more sense, I think, to -- to
11 couch it in terms of this is collateral review. But,
12 certainly, I think --

13 JUSTICE SCALIA: There seems to be a
14 rational line between collateral attack and attack in
15 the same proceeding. I don't see anything irrational
16 about that. Right?

17 MR. CATTANI: No --

18 JUSTICE SCALIA: Yes!

19 MR. CATTANI: Yes, I agree. Yes.

20 (Laughter.)

21 JUSTICE GINSBURG: Would you explain to me,
22 why don't we consider this adverse to your proceeding,
23 because this postconviction proceeding -- it began and
24 it began at the same time as the direct appeal, but it
25 ended before this case became final.

1 So, it was the first -- it was the first
2 tier because it was decided before the direct appeal.

3 MR. CATTANI: Well, it is a first-tier
4 collateral attack. I would agree that it's a first
5 tier. That's the first time that this issue is raised
6 in a collateral attack. But I don't -- I don't think
7 that's determinative of the issue here.

8 This Court has never -- has never said that
9 every claim that can only be raised for the first time
10 entitles someone to -- to counsel. And that exception,
11 that would -- that would swallow the rule. In Arizona,
12 in most States where the types of claims that can be
13 raised in postconviction proceedings are generally
14 limited to claims that could not have been raised
15 earlier.

16 So, the rule that Petitioner is seeking
17 really would swallow -- the exception would swallow the
18 rule that was announced in -- in Finley -- and
19 Giarratano.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 No, you've got to listen to the Government.

22 Mr. Wall.

23 ORAL ARGUMENT OF JEFFREY B. WALL

24 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING THE RESPONDENT

1 MR. WALL: Mr. Chief Justice, and may it
2 please the Court:

3 Justices Sotomayor and Kagan, I want to go
4 to your questions about the costs, because there are
5 some very real costs here. We live in a world that is
6 settled and working. Although this Court has drawn the
7 line at the first direct appeal, 47 States, D.C., and
8 the Federal Government provide counsel in a first
9 postconviction proceeding, either as of right or in the
10 discretion of the trial court or the public defender.

11 JUSTICE SOTOMAYOR: Forty-seven do and the
12 Federal Government does?

13 MR. WALL: That's right. So, there are 18
14 States that provide it as of right; 29 States and D.C.
15 provide it in the discretion of the trial court or the
16 public defender, and then the Federal Government,
17 obviously, in the discretion of the district courts.

18 And so, what Petitioner is doing, by
19 constitutionalizing that area, is shifting resources to
20 a subset of ineffectiveness claims.

21 CHIEF JUSTICE ROBERTS: Well, it's pretty --
22 it's small comfort to the lawyer -- the client who
23 doesn't get one that everybody else does.

24 MR. WALL: Mr. Chief Justice, I understand,
25 but I think this is an area where States are permitted

1 to draw different lines. And what Petitioner is saying
2 -- take the Federal system, for example. Petitioner's
3 rule would say a Federal prisoner can walk in under
4 2255, and by making an allegation of ineffectiveness of
5 either trial or appellate counsel, he's entitled to
6 appointed counsel without even, I take it, a showing of
7 colorableness.

8 JUSTICE KENNEDY: Well, not if you adopt the
9 -- the one-proceeding rule that I think counsel for the
10 Petitioner was suggesting. He suggested Arizona is one
11 of those few States where you could only raise this
12 issue on collateral, and, therefore, you are entitled to
13 effective assistance of counsel on that collateral.
14 Then he would stop there, for statistical and for --
15 reasons, probability reasons, rather.

16 MR. WALL: I think that's exactly where he
17 would stop. I think it's very difficult to explain why
18 his rule doesn't require him to go further, because by
19 saying the first tier is not a stage of a case, as this
20 Court has always meant it, but it applies claim by
21 claim, and lawyers are going to represent you only on
22 some claims, and you're -- pro se you'll file others, he
23 ends up with two problems.

24 One, he has to concede, as he does in his
25 reply brief and as he did in response to Justice Alito,

1 that he's going to say the same thing with regard to a
2 lot of other claims that are typically raised in habeas;
3 and, second, he can't find a limiting principle.
4 Because when you come in on your second or your third or
5 your fourth postconviction proceeding, and you say all
6 my previous counsel has been ineffective, that's also
7 the first time that you've been able to say it, and
8 you'll be making the same claim: I'm entitled to have
9 one constitutionally competent lawyer argue that my
10 trial counsel was ineffective.

11 JUSTICE BREYER: What about not going that
12 far? What about saying: In this case -- in this case,
13 Arizona did give him a lawyer. In this case, it was the
14 same lawyer. In this case, the proceeding was filed
15 prior to the completion of the appeal and ended before
16 the completion of the appeal. So, for this case, this
17 counts as the one round of proceedings, and, therefore,
18 his client can in fact assert that that single
19 individual who was his lawyer was incompetent in those
20 proceedings that ended -- didn't end prior to the
21 termination of the appeal, ended first.

22 MR. WALL: Here's -- here's the primary
23 problem with that, Justice Breyer: This Court said in
24 Coleman, and before that in Murray v. Carrier and in
25 Wainwright v. Torna, that if you don't have a Federal

1 constitutional right to counsel and the States or
2 Congress go beyond what they're constitutionally
3 required to do when they give you a lawyer, that
4 lawyer's performance does not thereby give rise to a due
5 process claim.

6 JUSTICE BREYER: No, but it didn't face the
7 issue of what about a claim that you have a
8 constitutional right to bring up at least once? And
9 this is the first time he was able to bring it up. So
10 in other words, Coleman didn't face this problem. It's
11 as if you couldn't bring up the claim that the judge was
12 sleeping until you got to collateral proceedings. A
13 State could have such a rule. I don't know why they
14 would, but they could. But if they did, it would be
15 your first chance ever to attack that trial process, and
16 so isn't Coleman, in its effort to bar relitigation,
17 actually rather beside the point?

18 MR. WALL: Justice Breyer, I think we just
19 see the case in fundamentally different ways. His first
20 opportunity to raise his trial ineffectiveness claim was
21 in his first postconviction proceeding, and he had the
22 opportunity to raise it, and his lawyer didn't. And
23 what he's coming in and saying now is not I was deprived
24 of an opportunity to raise it, as in your --

25 JUSTICE BREYER: No.

1 MR. WALL: -- hypothetical, but I had the
2 opportunity and I didn't, and we should excuse that --

3 JUSTICE BREYER: No, no, we're saying it the
4 same way, just as if his lawyer, when he could raise the
5 fact that the judge was sleeping, didn't raise it
6 because he was staring at the ceiling and had been
7 drinking too much. Just as he could raise that point in
8 habeas, because it's his first chance to do it, so he
9 could raise the point that the lawyer, the first time
10 that he had the chance to raise the ineffectiveness of
11 trial counsel, was incompetent, et cetera.

12 MR. WALL: Justice Breyer, I think this case
13 presents a much narrower question, which is, when he
14 comes in, in his second postconviction proceeding, and
15 says although I didn't raise it last time around, I have
16 cause to excuse that default because my lawyer was
17 ineffective, this Court's been clear in three different
18 cases that that's only cause if he had a constitutional
19 right to counsel in the proceeding that he's pointed to
20 and that he complains about. So, the question --

21 JUSTICE SOTOMAYOR: What you haven't told me
22 is a reason why he shouldn't have had effective counsel
23 in the first postconviction proceeding? I mean, our
24 entire line of cases under Douglas were premised on the
25 fact that defendants would not be or couldn't be charged

1 with the ability to prosecute their claims through
2 direct appeal. Discretionary appeal, we said the
3 likelihood is they could do it on discretionary appeal
4 because they would have a record from below; they would
5 have competent counsel below who would make the best
6 arguments possible. They could then pursue their
7 discretionary appeals because they had something to work
8 with.

9 But if your first chance as to present
10 ineffective assistance of counsel claim is a
11 postconviction proceeding, you have no record to work
12 with.

13 MR. WALL: That's right. Justice Sotomayor,
14 I think this is a very different case from Douglas and
15 Halbert, which were grounded in a fairly fundamental
16 equal protection concern, that indigent defendants would
17 be denied a first look, maybe an only look, at their
18 convictions and sentences.

19 Here, we're facing something very different.
20 States like Arizona are giving direct appeals;
21 defendants are getting looks at their convictions and
22 sentences, as Petitioner did. They're providing
23 postconviction review.

24 JUSTICE KAGAN: Well, but it is the first
25 look --

1 MR. WALL: They're even providing lawyers in
2 postconviction review.

3 JUSTICE KAGAN: -- only look at the
4 effective assistance claims. So, what would you say,
5 Mr. Wall, if a State did the following: If it said
6 we're going to take out all Fourth Amendment exclusion
7 claims, and we're going to put that in a postconviction
8 review system, and, you know what, there you're not
9 entitled to an effective lawyer -- would that be all
10 right?

11 MR. WALL: Justice Kagan, I think there are
12 any number of claims that if a State tried to pull them
13 out of direct appeal and locate them in collateral
14 review, we might be able to say it's end-running its
15 obligation under Douglas, because those are the types of
16 claims based on a trial record that ought to be -- and
17 always have belonged to direct appeal. The question is,
18 does a State act arbitrarily when it takes an
19 ineffectiveness claim, which is the only type of claim
20 that a State has tried to relocate into collateral
21 review --

22 JUSTICE KAGAN: Well, I'm sure the State
23 would not say it was acting arbitrarily in my example.
24 The State would say there's a good reason for it:
25 Fourth Amendment exclusion claims are disfavored; they

1 have nothing to do with innocence; they involve a kind
2 of fact-intensive inquiry that is better done in a
3 different proceeding.

4 So, I think that the State would have many
5 good reasons, but, you know, it's also true that there
6 you don't get a lawyer.

7 MR. WALL: Justice Kagan, I just -- I think
8 that the Court's case law would -- I mean, I think it
9 would be a difficult question, the Court having said
10 that under Stone, at least in the Federal system, the
11 Fourth Amendment -- Fourth Amendment claims can't be
12 raised on habeas. I think it would be difficult for a
13 State to come in and say they have to be raised in
14 habeas.

15 Here, the Court said in Massaro these claims
16 are best suited to resolution in habeas, and they're
17 claims that are traditionally brought in habeas. And at
18 least for that type of claim, which is the -- I mean,
19 the State's not trying to hide the ball here. All the
20 State has done is take a claim that this Court has said
21 belongs at habeas and say we're putting it in habeas,
22 not as in the Federal system where, although people can
23 raise it as a practical matter, they're all decided on
24 collateral review, or virtually all of them. It says
25 we're just going to save people the trouble of briefing

1 and raising it, and we'll locate it to collateral
2 review, not for an invidious or arbitrary reason, but
3 for all the reasons that this Court gave in Massaro.

4 So, at least for that type of claim, I think
5 it's permissible under the Fourteenth Amendment, leaving
6 for another day whether it could do it with other types
7 of claims that I do think probably belong to a direct
8 appeal. And that would present very different
9 constitutional problems if a State started trying to
10 channel them to collateral review. But I -- all Arizona
11 has done is pick up on Massaro and say, absolutely
12 right, these claims belong in habeas, and that's where
13 we're going to put them.

14 And collateral review --

15 JUSTICE SOTOMAYOR: You've now told me that
16 the vast majority of States -- 47, I think, is the
17 number you gave -- put this into postconviction -- give
18 counsel at postconviction review.

19 MR. WALL: At least discretionarily.

20 JUSTICE SOTOMAYOR: Isn't it an empty
21 promise if what you're giving is incompetent counsel?

22 MR. WALL: Well --

23 JUSTICE SOTOMAYOR: I mean, it's a --
24 Strickland is a very high standard.

25 MR. WALL: Justice Sotomayor, a number of

1 States have found under their own constitutions or
2 statutes a right to effective assistance of counsel.
3 But it's a very different matter to say that when States
4 go beyond what the Constitution requires in providing
5 counsel, that counsel's performance thereby gives rise
6 to a due process claim. And, again, the Court's
7 rejected that in at least three cases, and I think
8 saying that it's cause to excuse a procedural default
9 here without saying that there's some underlying right
10 to counsel would require overruling those cases.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Bartels, you have 2 minutes remaining.

13 REBUTTAL ARGUMENT BY ROBERT D. BARTELS

14 ON BEHALF OF THE PETITIONER

15 MR. BARTELS: Mr. Chief Justice, let me
16 straighten out one thing about -- it's not only about
17 the record -- about the facts. This is not in the
18 record, and I'm really doing this for my friend's
19 benefit. Harriette Levitt was initially appointed to
20 represent Mr. Martinez on appeal. She then moved to
21 have herself appointed for purposes of the
22 postconviction review, and it was at a later date, not
23 too much later, that she filed the notice. So that at
24 the time the notice was filed, she was officially
25 appointed counsel for purposes of postconviction

1 proceedings, and the Arizona Court of Appeals stayed
2 their proceedings, which were ongoing. There was a
3 notice of appeal to allow this to continue.

4 The other point that I wanted to get to was
5 the questions about other States where this -- these
6 claims are handled on direct appeal illustrate a couple
7 of things about our argument: One is it would be --
8 seem very peculiar to say you have a right to appointed
9 and effective counsel in Wisconsin or Utah on these
10 issues, but not in Arizona, where the label -- the
11 difference is purely label.

12 All these claims, almost all of them,
13 require additional evidence, and that fact makes counsel
14 even more important. Respondents want to say you have a
15 right to counsel on review for almost all claims, but
16 not the one where you need it the most.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 12:06 p.m., the case in the
21 above-entitled matter was submitted.)
22
23
24
25

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