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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEFFERY RUSSELL FINLAYSON,

Petitioner - Appellant,

v.

STATE OF UTAH,

Respondent - Appellee.

No. 19-4151

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:15-CV-00818-DAK)

Andrew Parnes, the Law Office of Andrew Parnes, Ketchum, Idaho, for Petitioner-Appellant Jeffery Russell Finlayson.

Erin Riley, Assistant Solicitor General, Salt Lake City, Utah, (Sean D. Reyes, Attorney General, Salt Lake City, Utah, with her on the brief) for Respondent-Appellee State of Utah.

Before **HOLMES**, **BACHARACH**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

A Utah state court dismissed Petitioner Jeffery Russell Finlayson's habeas corpus proceeding for failure to prosecute. After appealing that decision, Petitioner brought a petition in federal court under 28 U.S.C. § 2254. But the district court

found the state court's dismissal procedurally barred federal relief. So the district court dismissed the petition and granted judgment for Respondent the State of Utah, denying a certificate of appealability. Petitioner appealed, and a judge of this Court issued a certificate of appealability on two issues. We exercise jurisdiction under 28 U.S.C. §§ 1291 and 2253(a) and affirm the district court on both issues.

I.

In 2005, Petitioner filed a pro se petition for a writ of habeas corpus in a Utah state court, related to his 1995 conviction for sex crimes (the state court petition). The state court appointed counsel in 2006, and that counsel started working on the case in early 2007. Six years later, in January 2013, the state court dismissed the petition for failure to prosecute. The Utah Court of Appeals affirmed the dismissal, Finlayson v. State, 345 P.3d 1266 (Utah Ct. App. 2015), and the Utah Supreme Court denied certiorari, Finlayson v. State, 362 P.3d 1256 (Utah 2015).

After exhausting the state-court appeals process, Petitioner filed a pro se petition for writ of habeas corpus, under 28 U.S.C. § 2254, in the United States District Court for the District of Utah (the federal petition). Petitioner became represented by counsel, who filed an amended petition on his behalf. After the parties fully briefed the amended petition, Petitioner sought an evidentiary hearing, but the district court did not hold one.

The district court disposed of the federal petition and entered judgment for Utah. Relevant to this appeal, the district court determined that Utah Rule of Civil Procedure 41(b) (involuntary dismissal for failure to prosecute) served as an

independent and adequate state procedural ground for the dismissal of the state court petition, barring federal review of the issues raised in that petition. The district court also concluded that Petitioner could not establish cause to excuse the procedural bar under Martinez v. Ryan, 566 U.S. 1 (2012), and its progeny. For these and other reasons, the district court dismissed the federal petition with prejudice for failure to state a claim and denied a certificate of appealability.

Petitioner appealed. Upon review of Petitioner's briefing, we granted a certificate of appealability on the two issues described above.[1]

II.

The certificate of appealability constrains our review to two issues. First, whether dismissal for want of prosecution under Utah Rule of Civil Procedure 41(b) is an independent and adequate state ground for denial of habeas relief. We review that question de novo. Anderson v. Attorney Gen. of Kan., 342 F.3d 1140, 1143 (10th Cir. 2003). And second, whether Martinez, supra, and its progeny offer habeas corpus petitioners in Utah an excuse for procedural default. We review that question de novo as well. See Cuesta-Rodriguez v. Carpenter, 916 F.3d 885, 903–05 (10th Cir. 2019).

III.

A state prisoner's default of his federal claims in state court under an independent and adequate state procedural rule bars federal habeas review of those

[1] Plaintiff's briefing requests that we issue a COA on several other issues, but our resolution of these two issues would resolve the case in any event. Thus, we DENY a COA on Plaintiff's remaining issues, and we do not reach them.

claims. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Petitioner "defaulted" his federal claims when he violated Utah's rule requiring that he actively prosecute his case, thus prompting the state court to dismiss those claims.[2] See Utah R. Civ. P. 41(b). If Utah Rule 41(b) is independent and adequate, the federal courts may not review Petitioner's claims. Coleman, 501 U.S. at 750. We apply the default rule to prevent end runs around the state-remedy exhaustion requirement. Id. at 731–32. But it also grants the same respect for state procedural rules that we grant our own and promotes comity between the federal and state courts. Id. at 746–51. And it ensures finality in state criminal proceedings according to those states' own rules. Id.

A state procedural rule is "independent" "if it relies on state law, rather than federal law, as the basis for the decision." Simpson v. Carpenter, 912 F.3d 542, 571 (10th Cir. 2018) (quoting Banks v. Workman, 692 F.3d 1133, 1145 (10th Cir. 2012)). And it is "adequate" if it is "strictly or regularly followed and applied evenhandedly to all similar claims." Id. (quoting Thacker v. Workman, 678 F.3d 820, 835 (10th Cir. 2012)). We have not yet decided whether Utah Rule 41(b) is independent and adequate, but our precedents lead us to conclude that it is.

A.

For a state procedural rule to be independent it must not require application of any federal law or depend on the answer to a question of federal law. Ake v.

[2] The version of Utah Rule of Civil Procedure 41(b) in effect at the relevant time provided, in part, that "[f]or failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action or of any claim against him."

Oklahoma, 470 U.S. 68, 75 (1985) (a rule is not independent where "the [s]tate has made application of the procedural bar depend on an antecedent ruling on federal law, [such as] the determination of whether federal constitutional error has been committed"). In Ake, the Supreme Court found that, as applied to a constitutional question, the state's waiver doctrine required the state court to "*rule*, either explicitly or implicitly, on the merits of the constitutional question." Id. (emphasis added). The waiver doctrine was therefore not independent of federal law when applied to a constitutional question. Id.

Petitioner raises three arguments that the Utah state law question of whether to dismiss a habeas corpus petition for failure to prosecute is intertwined with federal law and thus it is not independent. First, he points to a statute-of-limitations case, which he says supports his position, Julian v. State, 966 P.2d 249 (Utah 1998). Second, he points to an out-of-circuit case he says is persuasive, Park v. California, 202 F.3d 1146 (9th Cir. 2000). Finally, Petitioner points out that courts in Utah look to several factors when deciding whether to dismiss, including, "most important[ly], whether injustice may result from the dismissal." Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975). See also Gillmor v. Blue Ledge Corp., 217 P.3d 723, 732 (Utah Ct. App. 2009). We reject all three arguments.

Petitioner cherry-picks a sentence from Julian—"the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights." 966 P.2d at 254. He says this shows that Utah courts would look to the

nature and merit of his claim to determine whether he "has been deprived of fundamental rights." So, he argues, whether to dismiss is intertwined with the merits question. But the statute-of-limitations context differs from the failure-to-prosecute context. We will not assume, without more, that the Utah courts would use a rule articulated for one in ruling on the other.[3] Moreover, when a statute of limitations applies, the passage of time alone bars the petitioner's claims. Here, on the other hand, Petitioner instituted an action to vindicate his rights but then abandoned that action, allowing it to lie fallow for six years. Early in that proceeding, Utah moved for summary relief. And soon after, Petitioner's appointed counsel appeared in the case, only to never be heard from again. That dereliction of the obligation to prosecute a case once instituted, particularly the failure to respond to a motion for summary judgment, differs from the mere passage of time.[4]

In his reply brief, Petitioner's compares this case to Park, arguing it, too, shows that Utah's Rule 41(b) is intertwined with the merits question. But Petitioner omits the keystone fact of that case. The Ninth Circuit explained that "the California Supreme Court necessarily made an antecedent ruling on federal law . . . by

[3] Although the Utah Court of Appeals cited Petitioner's chosen sentence in its opinion affirming the trial court's dismissal of the state court petition, it did not do so to apply the proposition stated, and we do not think it did so intending to graft this statute of limitations principle onto the failure to prosecute context. See Finlayson, 345 P.3d at 1270.

[4] Petitioner's arguments based on the statutory "interests of justice" exception to Utah's post-conviction-review statute of limitation are equally unpersuasive. Even if that exception relies on the merits to such an extent as to rely on federal law, Petitioner has not shown that it ever applies in the failure-to-prosecute context.

concluding that no fundamental federal constitutional error had occurred." Park, 202 F.3d at 1153. That antecedent ruling made the procedural default dependent on federal law. See Ake, 470 U.S. at 75. Here, the Utah trial court made no comparable antecedent ruling on federal law, so the basic ground for Park's ruling is absent and that case does not apply.

Finally, Petitioner says that Utah courts must ask whether injustice would result from a dismissal for failure to prosecute. He argues the "injustice" factor requires an evaluation of the merits which, in turn, rest on federal law, so the inquiry cannot be independent of federal law. We disagree for three reasons. First, whether to dismiss does not solely depend on injustice, on the meritoriousness of the claim, or on the outcome of the merits question. Utah courts have explained that "even where a trial court finds facts indicating that injustice could result from the dismissal of [a] case, it can dismiss when a plaintiff has had more than ample opportunity to prove his [or her] asserted interest and simply failed to do so." Rohan v. Boseman, 46 P.3d 753, 758–59 (Utah Ct. App. 2002) (quoting Country Meadows Convalescent Ctr. v. Utah Dep't of Health, 851 P.2d 1212, 1216 (Utah Ct. App. 1993) (internal quotation marks omitted)). Given this rule, the outcome of a Utah court's decision on a Rule 41(b) dismissal for failure to prosecute is not so dependent on the meritoriousness of a federal claim as to make it dependent on federal law.

Second, we will not review the propriety of the state court's decision to dismiss the case for failure to prosecute, that is, the application of its own procedural rule. See Estelle v. McGuire, 502 U.S. 62, 67–68 (1991). A federal court may grant

a state prisoner habeas relief if "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). So a violation of state law, such as the misapplication of a state procedural rule, cannot justify habeas relief. See Estelle, 502 U.S. at 67–68. In reemphasizing this rule, we follow our sister circuits and at least one unpublished decision of this court.[5, 6] As a result, we will not second guess such Rule 41(b) concerns as whether Petitioner gave "a reasonable excuse for [his] lack of diligence," whether Petitioner "had more than ample opportunity to prove his" case, or whether the state court correctly weighed "the priority of afford[ing] disputants an opportunity to be heard." Rohan, 46 P.3d at 758–59.

Third, although the Utah court's injustice inquiry brushes against the merits, that is not enough to make that inquiry dependent on federal law or on the answer to a federal question. At least one circuit agrees that the kind of "glance at the merits" that may happen in Utah's injustice determination does not make the state court's procedural default ruling dependent on federal law, at least where that "glance" stops

[5] Whitley v. Ercole, 642 F.3d 278, 286 (2d Cir. 2011); Sharpe v. Bell, 593 F.3d 372, 377 (4th Cir. 2010); Gonzales v. Thaler, 643 F.3d 425, 428 n.3 (5th Cir. 2011); Oaks v. Pfister, 863 F.3d 723, 727 (7th Cir. 2018); Sweet v. Delo, 125 F.3d 1144, 1151 (8th Cir. 1997); Poland v. Stewart, 169 F.3d 573, 584 (9th Cir. 1999); Agan v. Vaughn, 119 F.3d 1538, 1549 (11th Cir. 1997); see also Suny v. Pennsylvania, 687 F. App'x 170, 175 (3d Cir. 2017); Bickham v. Winn, 888 F.3d 248, 253 (6th Cir. 2018) (Thapar, J., concurring) (arguing that the Sixth Circuit should explicitly adopt this rule).

[6] Fuller v. Pacheco, 531 F. App'x 864, 868 (10th Cir. 2013) ("A federal habeas court does not have license to question a state court's finding of procedural default or to question whether the state court properly applied its own law." (internal citation and quotation marks omitted)).

short of a full-blown consideration of the federal questions. See Neal v. Gramley, 99 F.3d 841, 844 (7th Cir. 1996). The Neal court looked to a state court's determination—purely under state law—that a defendant's post-conviction counsel was not prejudicially ineffective.[7] Id. at 843–44. The state court's state-law prejudice determination, though it "brushed" against the question of federal law, did not so depend on federal law as to bring the merits question back within the realm of federal habeas review. Id. at 844.

Similarly, we and other circuits have said that where a state court conducts a plain error review and "recognizes or assumes" an error of federal law but still denies relief on some other element of the state's plain error standard, that will serve as an independent state rule.[8] Cargle v. Mullin, 317 F.3d 1196, 1206 (10th Cir. 2003); see also Hinkle v. Randle, 271 F.3d 239, 244 (6th Cir. 2001); Daniels v. Lee, 316 F.3d 477, 487 (4th Cir. 2003).

Under Utah's rule, the state court can look to the meritoriousness of the federal claim to gauge the injustice that might result from dismissal. But the ultimate decision does not rest on the application of federal law or the answer to a question of

[7] That evaluation rested only on state law because, while there is no federal constitutional right to counsel in a post-conviction proceeding, the state in that case offered a safety valve to prevent a procedural bar from masking a plain error. Neal, 99 F.3d at 843–44.

[8] To the contrary, when the state court denies relief under the plain error standard because it finds no error of federal law, that determination *does* depend on federal law. Cargle, 317 F.3d at 1206.

federal law. For these reasons, we conclude that a dismissal for failure to prosecute under Utah Rule 41(b) is independent.

B.

We turn next to adequacy. An adequate state procedural ground is one that the state courts "strictly or regularly" follow and apply "evenhandedly to all similar claims." Thacker, 678 F.3d at 835 (internal citation and quotation marks omitted). But "all" means, more realistically, the "vast majority." Id. at 835–36. We have explained that a state court may overlook an otherwise applicable procedural rule and reach the merits of a claim from time to time without fear that we will find its procedural rule inadequate. Id. This principle finds root in the fact that many procedural default rules are discretionary, and so they need not be applied mechanically, just evenhandedly. Id. at 836. Thus, when a state's highest criminal court disregarded a discretionary default rule in four death-penalty cases, but otherwise applied that rule in most cases, and did so evenhandedly, that rule remained adequate. Id. at 835-36.

Petitioner raises two arguments that Utah Rule of Civil Procedure 41(b) is inadequate. First, that he was not on notice that the state court might apply Rule 41(b) to his habeas corpus proceeding. And second, that Rule 41(b) cannot meet the "vast majority" and evenhandedness requirements. As discussed above, "[o]ur task is not to determine whether [the state] ruling was correct, but to determine its adequacy to preclude federal habeas review." Whitely, 642 F.3d at 286. And here we conclude it is adequate.

Petitioner's first argument lacks merit. Rule 41(b) remained substantively unchanged throughout the relevant time. And Utah's Post-Conviction Remedies Act ("PCRA"), which provides "the sole remedy for any person who challenges a conviction or sentence," makes clear that "[p]roceedings under this [Act] are civil and are governed by the rules of civil procedure." Utah Code § 78B-9-102(1)(a). Petitioner cannot deny having notice that Rule 41(b) applied to his proceeding. But he argues that the Utah Court of Appeals articulated a new standard for dismissing a habeas corpus proceeding when it affirmed the trial court's dismissal of his case. We disagree. In that state-court appeal, Petitioner relied on Utah's statutory "interests-of-justice" exception to the PCRA's statute of limitation, and the Utah Supreme Court's interpretation of it.[9] Finlayson, 345 P.3d at 1269. But the Utah Court of Appeals did not create a new standard, or even clarify the existing one—it simply rejected Petitioner's argument and reiterated that the Westinghouse factors, noted above, constitute the standard. Id. at 1269–70.

Second, Petitioner argues that Utah courts have not consistently applied Rule 41(b). But he offers only one Utah case to support that claim—Cheek v. Clay Bulloch Constr., Inc., 269 P.3d 964 (Utah Ct. App. 2011). In that contract dispute, the trial court dismissed for failure to prosecute, but the Utah Court of Appeals reversed, explaining that "taking the five Westinghouse factors together, the trial court exceeded its discretion in dismissing the case." Id. at 967. In Petitioner's case,

[9] Petitioner relied, in part, on this provision in his argument that Rule 41(b) is not independent. Supra, at note 2.

on the other hand, that same court applied those same factors and came to a different conclusion. Finlayson, 345 P.3d at 1270–72. Two foundational principles undermine Petitioner's reliance on Cheek. First, we will not second guess a state court's ruling of state law. Estelle, 502 U.S. at 67–68. Thus, we presume the Utah Court of Appeals decided both cases correctly. Second, a showing that a different result obtained in a single case will not establish that Rule 41(b) is not evenhandedly applied in Utah. This is especially so because the rule incorporates an element of discretion and Utah courts have firmly established the standard governing the exercise of that discretion. Thacker, 678 F.3d at 835–36; Fields v. Calderon, 125 F.3d 757, 762 (9th Cir. 1997).

Petitioner suggests we should only look to post-conviction-review cases to see if Utah courts apply Rule 41(b) consistently. A curious argument, given his reliance on Cheek—an ordinary civil case. In any event, Petitioner's attempt to distinguish one such post-conviction case is unavailing. In Heerman v. State, No. 20030205-CA, 2004 WL 2821650 (Utah Ct. App. Dec. 9, 2004), the Utah Court of Appeals, applying Westinghouse, affirmed the trial court's dismissal of a post-conviction case for failure to prosecute. Petitioner claims that case is distinguishable and suggests it lacks weight because it is unpublished. First, any factual distinction is immaterial, as we will not second guess whether the Utah courts properly applied the Westinghouse factors to either case. Estelle, 502 U.S. at 67–68. Second, that the case is unpublished is also immaterial—as the Ninth Circuit has said, "unpublished decisions

are a particularly useful means of determining actual practice." Powell v. Lambert, 357 F.3d 871, 879 (9th Cir. 2004).

So Heerman aids Respondent in that it shows Utah courts have and will dismiss post-conviction cases under Rule 41(b). And that those courts consistently apply the same standard.[10] Our research has identified no other post-conviction-review cases in which the Utah Court of Appeals or the Utah Supreme Court either affirmed or reversed a dismissal for failure to prosecute. And Petitioner points to no other cases, orders, or other evidence to show a lack of evenhandedness.[11] So we conclude that dismissal for failure to prosecute under Utah Rule 41(b) is an adequate state procedural default.

IV.

Having determined that Utah Rule 41(b) is independent and adequate and that default under that rule will ordinarily bar federal review, one question remains—whether Petitioner "can demonstrate cause for the default." Coleman, 501 U.S. at 50. One avenue to make that showing comes via Martinez v. Ryan, 566 U.S. 1 (2012). There, the Supreme Court established an exception to Coleman's default rule—

[10] Heerman also belies Petitioner's argument that the Utah Court of Appeals changed the standard to dismiss a post-conviction case for failure to prosecute in his case. As that court said in Petitioner's case, Westinghouse has always been the standard, and Heerman, decided eleven years earlier, shows that to be true.

[11] Nor will we reach out to look for evidence such as trial court orders on Petitioner's behalf, as we are under no "obligation to perform that work for [him]," or "search[] out theories and authorities [he] has not presented for [him]self." Caplinger v. Medtronic, Inc., 784 F.3d 1335, 1342 (10th Cir. 2015).

> *Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding*, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 17 (emphasis added). Petitioner concedes this rule does not apply in Utah—Utah allows claims of ineffective assistance of trial counsel on direct appeal. In fact, Petitioner pursued such claims in his own direct appeal. State v. Finlayson, 956 P.2d 283, 293–95 (Utah Ct. App. 1998).

But in Trevino v. Thaler, 569 U.S. 413, 429 (2013), the Supreme Court expanded Martinez's rule to include instances in which 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."

So Petitioner may establish excuse for his default if he can show that Utah's procedural framework makes highly unlikely a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal. Id. As above, precedent leads us to decide against Petitioner.[12] Utah provides a meaningful opportunity to present ineffective assistance of trial counsel claims on direct appeal and thus Trevino lends no relief to Utah prisoners who procedurally default in their state-court collateral proceedings. We begin with a discussion of the precedents and then turn to Utah.

[12] We have decided that Trevino does not apply in Oklahoma, Fairchild v. Trammell, 784 F.3d 702, 721 (10th Cir. 2015), and we look to that case for guidance.

A.

The Trevino court confronted a scenario that fell outside the language of Martinez's rule, but within the spirit of that rule. Texas procedure, by the admission of that state's highest criminal court (the Texas Court of Criminal Appeals, or "TCCA"), "makes it 'virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim' on direct review." Trevino, 569 U.S. at 423 (alteration in original) (quoting Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)). The timing of Texas's new trial, notice of appeal, transcription, and briefing process mandate that state collateral review "is essential to gathering the facts necessary to . . . evaluate . . . [ineffective-assistance-of-trial-counsel] claims." Id. (alteration in original) (quoting Ex parte Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997)).

Of greatest importance to the Supreme Court, Texas lacked, for all practical purposes, any mechanism to develop a record to support a claim of ineffectiveness arising outside the existing trial record or to supplement the record on appeal with such information or evidence. Id. at 424–27. Although a Texas defendant could file a motion for a new trial and hope for the trial court to grant additional time to develop the record, that vehicle often proved "inadequate because of time constraints and because the trial record ha[d] generally not been transcribed" by the time the law required that trial court rule on the motion for new trial. Id. at 424 (quoting Torres, 943 S.W.2d at 475). The Supreme Court also noted that the TCCA had all but directed that defendants should not bring ineffective assistance claims on direct

appeal.[13] Id. at 425–26. So the Court concluded that Texas, "as a systemic matter," did not give meaningful direct review of ineffective assistance of trial counsel claims. Id.

But we have held that Trevino does not apply in Oklahoma. Fairchild v. Trammell, 784 F.3d 702, 719–23 (10th Cir. 2015). Oklahoma's system differs from Texas's in that it "provides a reasonable time to investigate a claim of ineffective assistance before raising it on direct appeal." Id. at 721. Oklahoma does not require that the transcript be filed in the trial court until six months after sentencing (a deadline that the trial court may extend). Id. at 722. But a defendant does not have to file an opening appellate brief, in which he should raise the claim, until 120 days after the Oklahoma Court of Criminal Appeals ("OCCA") (Oklahoma's highest criminal court) receives the record and transcripts. Id. at 721. And a mechanism exists for a judge of that court to extend the briefing deadline, and for the whole court to extend it again. Id. at 722.

Of even greater import to the Trevino analysis, when a party raises ineffective assistance of trial counsel in its opening brief, Oklahoma permits the party to move to

[13] The Supreme Court listed several points to show the TCCA's position that defendant should not bring those claims on direct appeal. First, the TCCA has noted the practical impossibility of doing so successfully. Id. at 426. Second, it has held that failure to do so does not bar those claims on collateral review. Id. Third, it has held that bringing those claims on direct review will not bar their re-litigation on collateral review. Id. Fourth, it has held that failure to bring such claims on direct appeal does not constitute ineffective assistance of appellate counsel. Id. And finally, it has stated that "'as a general rule' the defendant 'should *not* raise [such a claim] on direct appeal,' but rather in collateral review proceedings." Id. (quoting Mata v. State, 226 S.W.3d 425, 430 n.14 (Tex. Crim. App. 2007)).

supplement the record " . . . [w]hen an allegation of the ineffective assistance of trial counsel is predicated upon an allegation of failure of trial counsel to properly utilize available evidence or adequately investigate to identify evidence which could have been made available during the course of the trial . . . ." Id. at 721 (quoting Okla. Ct. Crim. App. R. 3.11(B)). That motion may request that the appellate court remand the case for an evidentiary hearing to develop the evidence and record. Id. Trevino emphasized Texas's practical lack of such a mechanism.

In Fairchild, the trial court appointed the defendant's appellate counsel the day of sentencing. Id. Ten months later, counsel received the transcript. Id. Six months after that, his opening brief was due in the OCCA, along with his motion to supplement the record, which could have asked for remand and an evidentiary hearing. Id.; Okla. Ct. Crim. App. R. 3.11(B). Oklahoma's framework, which the facts of that case exemplified, did not, by its "design and operation," preclude an Oklahoma defendant's meaningful opportunity to present his ineffective assistance claim on direct appeal. Id. at 723. Unlike in Trevino, an Oklahoma defendant's opportunity is more than just "theoretical" and is not "all but impossible" to use successfully.[14] We turn now to Utah.

B.

Texas and Oklahoma provide convenient points of comparison at either end of the spectrum. We conclude that Utah falls far closer to Oklahoma's end. At the

[14] We reaffirmed Fairchild in Cuesta-Rodriguez v. Carpenter, 916 F.3d 885, 903–05 (10th Cir. 2019), and in Pavatt v. Carpenter, 928 F.3d 906, 933–35 (10th Cir. 2019).

heart of this discussion lies Utah Rule of Appellate Procedure 23B, titled "Motion to Remand for Findings Necessary to Determination of Ineffective Assistance of Counsel Claim," which mirrors Oklahoma's mechanism for remand and evidentiary hearing.

That rule provides a criminal appellant with an avenue to "remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." Utah R. App. P. 23B(a). The appellant must support the motion with affidavits alleging facts "not fully appearing in the record," and may make the motion "before or at the time of the filing of [his] brief" or, for good cause, after that time. Id. If the appellant files the motion *before* his brief, operation of law stays briefing in the appellate case—otherwise, the court can stay briefing by order. Id. at 23B(d). The appellate court may, upon the appearance of a conflict of interest, direct that the appellant's counsel withdraw and that new counsel be appointed or retained. Id. at 23B(c)(4). If the appellate court grants the motion, the trial court will have 90 days to complete the supplemental proceedings, unless the trial court finds good cause for more time. Id. at 23B(e). On remand, the trial court must hold hearings and take evidence as necessary to facilitate its entry of written findings of fact, which must be established by a preponderance of the evidence. Id. After the trial court proceedings end, the trial court clerk will prepare and transmit the record of those proceedings with, or as a supplement to, the record of the original proceedings. Id. at 23B(f).

Rule 23B, therefore, provides a comprehensive mechanism for the investigation, development, preservation, and presentation of claims of ineffective assistance of trial counsel, including a safeguard against conflicts of interest. But Petitioner argues that Utah's process differs meaningfully from Oklahoma's process. We disagree.

First, we reject Petitioner's unsupported argument that Oklahoma and Utah have disparate requirements for appellate counsel's investigation into matters outside the trial record for potential ineffective assistance issues. That is simply not the case. Oklahoma's Rule 3.11(b) permits appellate counsel to raise ineffective assistance of trial counsel claims that arise from within, *or outside*, the record. Utah's Rule 23B requires the appellant to base any motion for remand on matters *outside* the record. So both states anticipate, permit, and facilitate claims arising outside the record. Moreover, an appellate counsel's federal constitutional duty to offer effective assistance on appeal (including to investigate and present claims of ineffective assistance of trial counsel) does not vary from state to state.[15]

Second, Utah's articulation of Rule 23B's purpose does not change our mind. Utah courts have said that the rule is "for appellate counsel to put on evidence he or she now has, not to amass evidence that might help prove an ineffectiveness of counsel claim." State v. Bryant, 290 P.3d 33, 38 (Utah Ct. App. 2012) (quoting State

[15] Utah has recently reaffirmed that it, too, applies that same federal standard, as established in Strickland v. Washington, 466 U.S. 668 (1984), to evaluate the effectiveness of appellate counsel. See generally McCloud v. State, No. 20190300, __ P.3d __, 2021 WL 2007041, at *8-*9 (Utah 2021).

v. Johnston, 13 P.3d 175, 178 (Utah Ct. App. 2000) (per curiam)). The rule reflects as much, in that remand is "available only upon a nonspeculative allegation of facts." Utah R. App. P. 23B(a). But this does not change the fact that, upon such an allegation and remand, the appellant will have both additional time to investigate and evidentiary proceedings to develop the claim of ineffective assistance. Of course, it does mean that the appellant must be aware of the basis for the claim when he makes the Rule 23B motion. Thus we must examine Utah's judgment-to-briefing timeline to determine whether it renders successful use of Rule 23B and presentation of those claims "highly unlikely in the typical case." See Trevino, 569 U.S. at 429.

If appellate counsel lacks sufficient time to identify the basis for a claim of ineffective assistance of trial counsel, it may be "practically impossible" to present that basis in a Rule 23B motion or at all on appeal. But that is not the case in Utah. Ordinarily, a defendant must file a notice of appeal "within 30 days after the date of the entry of the judgment . . . appealed from." Utah R. App. P. 4(a). But when the defendant files a motion for new trial, the 30 days run from disposition of that motion, whenever that may occur. Id. at 4(b)(1). For good cause (and in some cases for excusable neglect), or if the defendant "was deprived of the right to appeal," the trial court may extend the deadline. Id. at 4(e), (f). The notice of appeal need not identify the errors, issues, or arguments the defendant will raise. Utah R. App. P. 3(d). So counsel will have time to investigate or ponder grounds for an ineffective assistance claim preceding the notice of appeal, but need not identify them yet.

Transcripts are part of the record on appeal. Utah R. App. P. 11(a), (b). Within 10 days of filing a notice of appeal, the defendant-appellant must order the transcript. Id. at 11(e). The clerk of the appellate court will assign preparation of the transcript to an appropriate person, whom the defendant-appellant will arrange to pay. Utah R. App. P. 12(a). The transcript must be filed within 30 days after the appellant arranges payment, but the clerk of the appellate court may, in some cases, enlarge that time. Id.

Within 20 days after the appellate court requests an index of the completed record including any transcripts, the trial court will transmit the index to the appellate court. Id. at 12(b)(1). Upon receipt of the index, the clerk of the appellate court will notify the defendant-appellant that his brief is due within 40 days of the date of the notice. Utah R. App. P. 13, 26(a). The parties may, by stipulation, extend that deadline by no more than 30 days. Utah R. App. P. 26(a). Or the defendant-appellant can move for enlargement of time upon showing of good cause, which may include the complexity of the litigation. Utah R. App. P. 22(b). Even if the appellate court requests the index immediately after the transcript is filed, then, the defendant-appellant has at least 60 days from the filing of the transcript to identify the basis for any ineffective assistance claims and file an appropriate document, and he has two avenues to extend that time. An opening brief may argue those claims that arise within the record. Or a Rule 23B motion may identify for further development those claims that arise outside the record, simultaneously staying the briefing process. Or the defendant-appellant may file both.

Although this timeline is perhaps not as generous as Oklahoma's, the timing of Utah's system does not make investigation and presentation of an ineffective assistance of trial counsel claim "practically impossible." Utah gives an adequate time with the transcript to identify, investigate, and raise those claims. And we read Trevino as being particularly concerned with Texas's practical lack of any mechanism to supplement the record with facts supporting an ineffective assistance claim which arises outside the record. As discussed above, Rule 23B shows Utah has no such lack. Put simply, Petitioner has not shown that Trevino applies in Utah.[16]

AFFIRMED.

[16] And we doubt he could, given how often Utah criminal defendants, on direct appeal, attack the performance of trial counsel, sometimes successfully. See Finlayson v. Utah, No. 2:15-cv-818, 2019 WL 4752204, at *9, 11 (D. Utah Sept. 30, 2019) (collecting cases).