No. 16-6219

In The Supreme Court of the United States

ERICK DANIEL DAVILA,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether the rule established in *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012) and *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013) – ineffective assistance of counsel in an initial-review collateral proceeding can provide cause to overcome the procedural default of a substantial claim of ineffective assistance of trial counsel – also applies to the procedural default of a substantial claim of ineffective assistance of appellate counsel.

PARTIES TO THE PROCEEDINGS

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OPINIONS AND ORDERS BELOW

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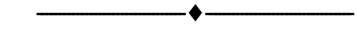
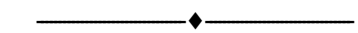
The opinion of the Texas Court of Criminal Appeals in petitioner's state habeas proceeding is unreported but available at 2013 WL 1655549. The opinion of the trial court (Pet. App. C) is unreported.

The opinion of the Texas Court of Criminal Appeals in petitioner's direct appeal (Pet. App. D) is unreported but available at 2011 WL 303265.



STATEMENT OF JURISDICTION

The order of the court of appeals denying rehearing *en banc* was entered on June 28, 2016. The petition for a writ of certiorari was filed on September 22, 2016, and was granted on January 13, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States of America provides:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2254 of Title 28 of the United States Code provides, in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits on State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 19.03 of the Texas Penal Code, as in effect in 2008, provides, in part:

(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

* * *

(7) the person murders more than one person:

(A) during the same criminal transaction; or

* * *

(b) An offense under this section is a capital felony.

STATEMENT OF THE CASE

A. Davila's Trial and Conviction

In February 2009, Erick Daniel Davila stood trial for capital murder for the deaths of Annette Stevenson and her granddaughter, who were killed while attending a birthday party hosted by Ms. Stevenson. Davila's trial counsel offered two defenses: (1) mistaken identity; and (2) lack of intent to commit capital murder. 14 RR 14-17.

The identity defense was the weaker of Davila's defenses: multiple witnesses identified Davila as the shooter, and Davila admitted his responsibility for the shooting in three separate statements to police.

Davila's stronger defense concerned his lack of intent to kill more than one person. The State charged

Davila with capital murder for intentionally or knowingly "causing the death of more than one person during the same criminal transaction." R.574 (Indictment); Tex. Penal Code § 19.03(a)(7)(A) (2008). To be guilty of this offense, a defendant must have the specific intent to commit two murders. Although intent can be transferred (i.e., the defendant can be convicted for murdering two people who were not the defendant's intended two victims), it is not enough to impose the death penalty that a defendant intended to murder a single person and accidently killed two. *See Roberts* v. *State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008). Davila's trial counsel argued that even if Davila had the intent to murder one person, he did not have the intent to murder two people and was therefore not guilty of capital murder.

Substantial evidence supported this argument: the State has never argued that Davila had any animus towards, much less intent to kill, Ms. Stevenson or her granddaughter. The only motive offered by the State was Davila's dispute with Jerry Stevenson, the only adult male at the house. R.5943. Jerry Stevenson, who lived at Annette Stevenson's house, associated with members of the "Polywood Crips" gang and acknowledged that the house where the shooting occurred was probably identified as a "Crip" house. R.5972. Davila was a member of the rival "Truman Street Bloods" gang. R.6228.

A witness testified that the red beam from the laser sight on Davila's rifle shined on Jerry Stevenson but not on the women or children outside. R.5638.

Davila also presented evidence of his poor vision, further supporting the conclusion that Annette Stevenson and her granddaughter were accidental victims of an attempt to murder a single individual: Jerry Stevenson. R.7163.

Such a defense would not lead to an acquittal on charges of murder or manslaughter. But if the jury believed that Davila intended to murder only Jerry Stevenson, then Davila could not be convicted of the capital murder as charged by the State.[1]

From the outset of trial, Davila's trial counsel emphasized that the most important issue would be intent; during his opening statement, defense counsel argued: "And what we're asking you to do is listen to all the evidence, because they have to prove that Erick had the specific intent to kill these two folks, intentionally or knowingly. You're going to be presented with that evidence through photographs and the medical examiner. That doesn't end the inquiry. So we ask you to look at this carefully, make your evaluation based on the body of evidence as to the critical question of specific intent."

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[1] A defendant may be convicted of capital murder based on two separate instances of conduct that involved separate intents to kill the same person. *See Ex parte Norris*, 390 S.W.3d 338, 341 (Tex. Crim. App. 2012) (requiring that a defendant "engaged in two discrete instances of conduct that carried separate intents"). "It is certainly possible to intend more than once to kill a particular person." *Ibid.* Because there were no separate instances of conduct, this principle is not implicated in this case. And even if it were, it is not reflected in the jury charge.

This theme continued through closing, when counsel once again argued that Davila was attempting to kill only Jerry Stevenson. R.7255 ("[T]he only specific intent to kill required for capital murder was directed at Jerry Stevenson.").

The trial court initially instructed the jury that to convict Davila of capital murder, it needed to find, beyond a reasonable doubt, that Davila "did intentionally and knowingly cause the death" of both Annette Stevenson and her granddaughter. R.7238. The jury was not instructed on transferred intent.

The jury correctly recognized Davila's intent as the key issue. After deliberating for four hours, the jury sent out a note, which essentially asked whether Davila's theory of defense was legally viable:

> In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others.

R.2619.

Over the objection of Davila's trial counsel, R.7285, the judge responded with a misleading instruction, which permitted the jury to convict Davila based only on the intent to kill Jerry Stevenson:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he

> desired, contemplated or risked is that: a different person was injured, armed, or otherwise affected.

R.1932-1933; Tex. Penal Code Ann. § 6.04. Without further clarification, this instruction permitted the jury to hold Davila criminally responsible for causing both the death of Annette Stevenson and the death of her granddaughter if he intended to kill only Jerry Stevenson. Davila could be criminally responsible for the death of Annette Stevenson because the difference between what occurred (her death) and what he desired (Jerry Stevenson's death) was that a different person was injured. Davila could also be criminally responsible for the death of Annette Stevenson's granddaughter because the difference between what occurred (her death) and what he desired (Jerry Stevenson's death) was that a different person was injured.

Unsurprisingly, after receiving the instruction that vitiated Davila's intent defense, the jury almost immediately returned a verdict convicting Davila of capital murder. R.7287 (Appendix E).

B. Direct Appellate and State Habeas Proceedings

On direct appeal, Davila received new appointed counsel, who correctly identified Davila's intent as the key issue in the appeal. Inexplicably, Davila's appellate counsel did not challenge the erroneous jury instructions but instead challenged only the sufficiency of the evidence. *See* R.10816 ("[T]he only scenario that passes

the common sense test, was that Appellant, a Truman Street Blood, had a grudge against Jerry Stevenson, a member of the Polywood Crips."). The Texas Court of Criminal Appeals found that sufficient evidence existed for the jury to infer that Davila intended to kill multiple individuals and affirmed his conviction. Pet. App. D. The State has never suggested that appellate counsel had a strategic reason for not challenging the jury instructions.

At the same time as Davila was appointed a new lawyer for his direct appeal, Davila was also appointed a separate lawyer for the state collateral review proceeding. That lawyer initially missed the filing deadline but was granted an extension by the Texas Court of Criminal Appeals. R.11242-11243. When his petition was finally filed, state habeas counsel argued that Davila received ineffective assistance from his trial counsel (for failing to develop mitigating evidence under *Wiggins* v. *Smith*, 539 U.S. 510 (2003)) but did not raise any complaint about the performance of his appellate counsel. R.11026. This omission is particularly salient since the habeas petition was filed in late August 2011, and the Court of Criminal Appeals' opinion had issued months before, in January 2011.

Davila's state habeas counsel hired a mitigation investigator, who raised several concerns about the performance of Davila's habeas counsel. In an affidavit, the mitigation investigator states that at the hearing on the *Wiggins* claim, Davila's habeas counsel was "generally unfamiliar with the contents of [her mitigation] report" and "made no effort to bring any of the

people identified in the report as potential witnesses." R.312-314. She believed that Davila's habeas counsel "had been in a car accident and had suffered a stroke or several strokes" and that his "impairment affected his ability to prepare for the hearing." *Ibid.* Davila received no relief in his state collateral review proceeding.

C. Federal Habeas Proceeding

Two new attorneys were appointed to represent Davila in his federal habeas proceeding and raised as a discreet claim that Davila was provided ineffective assistance of appellate counsel. Had his appellate counsel raised the jury charge issue on direct appeal it would have led to a new trial. Although this claim was not raised in the state habeas proceeding, Davila argued that the ineffective assistance he received from his state habeas counsel should excuse the procedural default of his claim of ineffective assistance of counsel on direct appeal. R.223-227; R.475-481.

Federal courts generally may not grant habeas relief based on "contentions of federal law which were not resolved on the merits in the state proceeding due to [the defendant's] failure to raise them there as required by state procedure." *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman* v. *Thompson*, 501 U.S. 722, 732

(1991). Nonetheless, a prisoner may receive federal habeas review by showing "cause" and "prejudice" for a state procedural waiver. *Wainwright*, 433 U.S. at 87.

Later decisions clarified the meaning of "cause." In *Coleman* v. *Thompson*, a prisoner filed an untimely notice of appeal of the denial of his state petition of writ of habeas corpus. 501 U.S. at 727. The Virginia Supreme Court dismissed the appeal as untimely. *Id.* at 727-728. Coleman thus defaulted his federal claims pursuant to an independent and adequate state procedural rule. *Id.* at 750.

In his federal habeas proceeding, Coleman argued that his attorney's error was "cause" that should excuse the procedural default. *Id.* at 752. The Court rejected this argument, concluding that because a prisoner has no constitutional right to the effective assistance of counsel in state habeas proceedings, "the petitioner bears the risk * * * for all attorney errors made in the course of the representation." *Id.* at 754.

Martinez narrowed *Coleman*, in part, holding that where claims of ineffective assistance of counsel must be raised for the first time in a state habeas proceeding, "ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." *Martinez* v. *Ryan*, 566 U.S. 1, 9 (2012). In *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013), the Court held that the rule of *Martinez* applied in the

Texas system, in which raising claims of ineffective assistance of counsel on direct appeal is theoretically possible but practically impossible. *Id.* at 1918.

Davila thus argued that under *Martinez* and *Trevino*, the ineffective assistance of his state habeas counsel provided cause to excuse the procedural default of his claim of ineffective assistance of appellate counsel.

The district court rejected this argument, and the Fifth Circuit denied a certificate of appealability. Pet. App. B. The panel followed "controlling precedent" from the Fifth Circuit, which held that *Martinez* and *Trevino* do not extend to ineffective assistance of appellate counsel. *See* Pet. App. B (*citing Reed* v. *Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014)). The panel thus concluded that "reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was procedurally defaulted because Davila failed to exhaust it in state court proceedings." *Id*.

SUMMARY OF THE ARGUMENT

Martinez and *Trevino* should apply to excuse the procedural default of substantial claims of ineffective assistance of counsel on direct appeal. This conclusion follows syllogistically from the reasoning of *Martinez*. Like claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel claims must

be raised in the first instance during initial-review collateral proceedings. Unless *Martinez* also applies to these claims, their forfeiture at the hands of ineffective state habeas counsel will mean that even the most substantial ineffective appellate counsel claim will not ever be reviewed by any court.

For these purposes, there is no principled distinction between ineffective assistance of trial and appellate counsel. Nor has any court of appeals identified any reason that *Martinez* would not apply to ineffective assistance of appellate counsel. Instead, reading *Martinez* narrowly, most circuits have considered themselves bound to follow *Coleman* v. *Thompson*, 501 U.S. 722 (1991), without engaging with *Martinez*'s logic.

Nor will applying *Martinez* to ineffective assistance of appellate counsel overburden the federal courts. Because ineffective assistance of appellate counsel claims turn largely on analysis of the strength of legal arguments, relatively few resources will be expended in evaluating them.

Ineffective assistance of counsel in an initial-review collateral proceeding should provide cause to overcome the procedural default of a substantial claim of ineffective assistance of counsel, whether at trial or on appeal.

ARGUMENT

I. This Court's Reasoning in *Martinez* Applies Equally to Ineffective Assistance of Appellate Counsel.

In *Martinez v. Ryan*, this Court held, "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. 1, 9 (2012). *Martinez* creates an exception to *Coleman* v. *Thompson*, which held that ineffective assistance of counsel in state habeas proceedings "cannot constitute cause to excuse the default in federal habeas." 501 U.S. 722, 757 (1991).

The equitable exception established in *Martinez* rests on the Court's recognition that an "initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim" of ineffective assistance of trial counsel. 566 U.S. at 14.

This rule should excuse the procedural default claims of all substantial claims of ineffective assistance – both claims alleging ineffective assistance of trial counsel and claims alleging ineffective assistance of counsel on direct appeal.

The reasoning of *Martinez* – and much of its language – apply equally to claims of ineffective assistance of appellate counsel.

Claims of ineffective assistance of appellate counsel are inherently incapable of being presented on direct appeal. If the claim is not raised in the state habeas proceeding (and if this procedural default cannot be excused), it will never receive review: "[I]f counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.* at 10.

The district court in this case acknowledged that ineffective assistance of appellate counsel claims "are logically raised, as Davila asserts, in state habeas proceedings." ROA.540. Unless the procedural default can be excused, ineffective assistance of state habeas counsel will cause even the most substantial ineffective-assistance-of-appellate-counsel claims to be forever barred from review by any court.

Thus, as the first opportunity to assert the error, a "collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance [of appellate counsel] claim." *Id.* at 11. The state habeas court "'looks to the merits of the clai[m]' of ineffective assistance, no other court has addressed the claim, and 'defendants pursuing first-tier review . . . are generally ill equipped to represent themselves[.]'" *Ibid.* (*quoting Halbert* v. *Michigan*, 545 U.S. 605, 617 (2005) (omission and first alteration in original)).

Indeed, the need for the help of an adequate attorney to vindicate a substantial ineffective-assistance-of-appellate-counsel claim is even greater than the need

to vindicate an ineffective-assistance-of-trial-counsel claim. By definition, the effectiveness of appellate counsel will not have been raised on direct review, so a prisoner "cannot rely on a court opinion or the prior work of an attorney addressing th[e] claim." *Id.* at 11. And where pressing a claim of ineffective assistance of trial counsel may require "investigative work and an understanding of trial strategy," *id.* at 11, pressing a claim of ineffective assistance of appellate counsel would require an understanding of appellate strategy, procedure, and law.

In this case, for Davila to raise a claim of ineffective assistance of appellate counsel, it would have been necessary to identify the error in the jury instructions (based on the Texas law of jury charges and the Texas law of transferred intent), determine that the error was properly preserved in the trial court (or that no preservation was necessary), recognize the rule of "harm" applied to allegations of charge error in Texas, appreciate the relief that would have been granted if the issue had been raised on direct appeal, and conclude that appellate counsel could not have made a strategic decision not to raise the issue.

Prisoners understand appellate lawyers and the appellate process even less than they understand trial lawyers and trials. A prisoner is physically present for trial and, particularly in death penalty matters, works closely with trial counsel for an extended period of time, literally sitting at counsel's elbow through the trial. By contrast, a prisoner has much less interaction with his appellate lawyer and virtually no interaction

with the appellate process. prisoners necessarily rely on the assistance of effective habeas counsel to vindicate claims of ineffective assistance of appellate counsel.

And like the effective assistance of trial counsel, the effective assistance of appellate counsel is "a bedrock principle in our justice system." *Id.* at 12. The right to effective assistance of counsel on appeal arises from both the Fourteenth Amendment and the Sixth Amendment. The Fourteenth Amendment "guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal "adequate and effective." *Evitts* v. *Lucey*, 469 U.S. 387, 392 (1985) (*citing Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956)). These safeguards include the right to counsel. *Ibid.* (*citing Douglas* v. *California*, 372 U.S. 353 (1963)). This Court's Sixth Amendment jurisprudence confirms that a right to counsel "comprehends the right to effective assistance of counsel." *Ibid.* (*citing Cuyler v*. *Sullivan*, 446 U.S. 335, 344 (1980)). Thus, an appeal "is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id.* at 396.

One responsibility of effective trial counsel is "preserv[ing] claims to be considered on appeal." *Martinez*, 566 U.S. at 12. But without the effective assistance of counsel on direct appeal, the preservation of arguments by trial counsel is meaningless. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.3 (6th ed. Supp. 2013) (noting the Court's description of the "right to counsel

* * * at critical stages of the proceedings before and at trial and on appeal, including * * * the right to effective assistance of counsel" as "'so basic to a fair trial that their infraction can never be treated as harmless error'" (*quoting Chapman* v. *California*, 386 U.S. 18, 23 (1967))).

In this case, Davila's trial counsel acted properly by objecting to the erroneous jury instructions and preserving the argument to be considered on appeal. But this preservation of error was rendered nugatory when Davila's new counsel abandoned the argument on his direct appeal.

Ultimately, *Martinez* recognized a principle that applies equally to substantial claims of ineffective assistance of trial and appellate counsel: "[A]s an equitable matter, [an] initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 14. From this principle, "it follows" that ineffective assistance of counsel in the initial-review collateral proceeding can excuse procedural default of a substantial claim of ineffective assistance of appellate counsel. *Ibid.*

Secondary sources have recognized that application of *Martinez* in these circumstances follows naturally from its reasoning. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.3[b] (6th ed. Supp. 2013) ("Although *Martinez* concerned a claim of ineffective assistance of trial

counsel, * * * the Court's reasoning logically extends to other types of claims that, as a matter of state law or of factual or procedural circumstances, could not be raised before the postconviction stage.").

Under the reasoning of *Martinez*, the Court should hold that ineffective assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance on direct appeal.

II. In This Context, No Principled Distinction Exists Between Ineffective Assistance of Trial and Appellate Counsel.

There is no reason that the rule of *Martinez* and *Trevino* would apply to claims of ineffective assistance of trial counsel but not ineffective assistance of appellate counsel.

As Justice Scalia noted in his *Martinez* dissent: "[t]here is not a dime's worth of difference in principle between those cases [of ineffective assistance of trial counsel] and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised[,]" including "claims asserting ineffective assistance of appellate counsel." *Martinez*, 566 U.S. at 19 (Scalia, J., dissenting).

A. *Trevino* held that *Martinez* applies when a claim must, practically, be asserted on collateral review.

Only one distinction might be drawn between ineffective assistance of trial and appellate counsel: The very nature of ineffective-assistance-of-appellate-counsel claims requires them to be raised on collateral review. But some States "deliberately choos[e] to move trial-ineffectiveness claims outside of the direct-appeal process[.]" *Martinez*, 566 U.S. at 13. It was "within the context" of such a "procedural framework that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." *Ibid.* This Court confirmed that this distinction is of no moment in *Trevino* v. *Thaler*, 133 S. Ct. 1911, 1914 (2013).

The Texas procedural regime discussed in *Trevino* "permit[ted] (but [did] not require) the defendant initially to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 1915. But as this Court and the Texas Court of Criminal Appeals recognized, "'the inherent nature of most ineffective assistance' of trial counsel" claims required the claims to be asserted in collateral review proceedings. *Id.* at 1918 (*quoting Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (*en banc*)).

Because the Texas system required, in practice albeit not formally, a claim of ineffective assistance of trial counsel to be raised on collateral review, the Court

held that the *Martinez* exception applied to the Texas procedural regime. *Trevino*, 133 S. Ct. at 1921.

Trevino's analysis confirms that the Court has focused on the practical opportunity to assert a claim. Even more so than the ineffective-assistance-of-trial-counsel claims discussed in *Trevino*, a defendant has no opportunity to assert a claim of ineffective assistance of appellate counsel before the initial collateral review proceeding.

The State may suggest that *Trevino* still turned on the State's choice of system for raising claims of ineffective assistance of trial counsel. *See Trevino*, 133 S. Ct. at 1918 (noting that "Texas procedure makes it" virtually impossible for these claims to be presented on direct review).

But the analysis in *Trevino* concerned both the State's system and " 'the inherent nature of most ineffective assistance' of trial counsel 'claims.' " *Ibid.* (*quoting Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (*en banc*)). The State's procedural rules – such as a hypothetical motion for a new trial to develop the record on appeal – did not overcome those aspects of an ineffective assistance of trial counsel claim that require a collateral proceeding, such as the need to develop new evidence. *Ibid.* The inherent nature of all claims of ineffective counsel – both trial and appellate – requires the claim to be raised on collateral review. Indeed, an ineffective assistance of appellate counsel claim, because of its very nature, must be raised for the

first time in collateral proceedings, much like the ineffective assistance of counsel claim in *Martinez*.

More significantly, the purpose of the *Martinez* rule is not to punish states for requiring claims to be raised in collateral proceedings but to avoid injustice to the prisoner. In adopting the rule, the Court repeatedly emphasized that it was not criticizing the State. *See Martinez*, 566 U.S. at 13 ("This is not to imply the State acted with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding."); *Trevino*, 133 S. Ct. at 1921 ("[W]e do not * * * seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for the States to decide.").

The concern was that without effective assistance of counsel in a state initial-review collateral proceeding, "proper consideration" may not have been given to a substantial claim of ineffective assistance. *Martinez*, 566 U.S. at 14; *see also id.* at 11 (explaining that if an attorney errs in an initial-review collateral proceeding, "no court will review the prisoner's claims"). If a claim must be raised in a collateral proceeding, the consequences to the prisoner are the same whether it must be raised in the collateral proceeding as a matter of a state requirement, as in *Martinez*; a matter of the claim's inherent nature and the practical realities of the state system, as in *Trevino*; or primarily as a matter of the claim's inherent nature, as in this case. *See* Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071,

2167-2168 (2014) (explaining that the "proceduralist promise" of *Martinez* "is that every prisoner shall have a meaningful opportunity to litigate the federal constitutional challenges to his conviction": "When ineffective assistance of postconviction counsel deprived a prisoner of the opportunity for such a review, the Court overturned prior precedent and carved out an exception to a longstanding rule.").

The Court exercises discretion in establishing the rules for when a prisoner may establish cause to excuse a procedural default. *Martinez*, 566 U.S. at 13. The same consideration that led the Court to exercise that discretion to hold that ineffective assistance of counsel in an initial-review collateral proceeding can excuse the procedural default of a claim of ineffective assistance of counsel at trial – to ensure that at least "the claim will have been addressed by one court," *id.* at 10 – should likewise lead the Court to apply this rule to claims of ineffective assistance of counsel on direct appeal.

B. No court of appeals has identified any principled distinction.

None of the circuits – including the Fifth Circuit – that have refused to apply *Martinez* to ineffective appellate counsel claims have identified any principled distinction. Rather than considering *Martinez*'s reasoning, each of these circuits has read *Martinez* narrowly, considering itself still bound to follow this Court's decision in *Coleman* v. *Thompson*, 501 U.S. 722,

750 (1991).[2] The Court in *Martinez* instructed that "[t]he rule of *Coleman* governs in all but the limited circumstances recognized here." 566 U.S. at 16; *see also Trevino*, 133 S. Ct. at 1932 (Roberts, C.J., dissenting) (describing *Martinez* as using "aggressively limiting language").

With this narrow understanding of *Martinez*'s holding, the lower courts were not free to consider *Martinez*'s reasoning. *See Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Because these circuits believed that *Coleman* controlled, there was no opportunity to consider whether the distinction between trial and appellate counsel was a rational one.

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[2] *See Hodges* v. *Colson*, 727 F.3d 517, 531 (6th Cir. 2013) ("The Court in *Martinez* purported to craft a narrow exception to *Coleman*."); *Reed* v. *Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014) (*citing Hodges*); *Banks* v. *Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012) (concluding that *Coleman* governs claims of ineffective assistance of appellate counsel); *Dansby* v. *Norris*, 682 F.3d 711, 729 (8th Cir. 2012), *vacated on other grounds sub nom. Dansby* v. *Hobbs*, 133 S. Ct. 2767 (2013) ("[T]he narrow exception of *Martinez* is limited to claims of ineffective assistance of trial counsel and does not extend to alleged ineffectiveness of appellate counsel. The rule of *Coleman* governs these claims[.]"); *Long* v. *Butler*, 809 F.3d 299, 314-315 (7th Cir. 2015), *judgment vacated on other grounds*, 2016 WL 1621711 (7th Cir. Apr. 20, 2016) (agreeing with "[t]he majority of other circuits" and "refus[ing] to expand this narrow exception to the general prohibition against excusing procedural default via post-conviction ineffective assistance claims").

See Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2156 (2014) ("The result in cases like *Hodges*, while defensible based on the plain text of the decision, is arguably at odds with the spirit of *Martinez*[.]").

The only circuit that considered whether *Martinez*'s reasoning should apply to claims of ineffective assistance of appellate counsel – the Ninth Circuit – correctly concluded that *Martinez* should apply both to ineffective assistance of trial and appellate counsel. "The fundamental principle of *Martinez* is that a criminal defendant deserves a chance to assert a Sixth Amendment claim of ineffective-assistance of counsel." *Ha Van Nguyen* v. *Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013). "[*Martinez*] is not limited to Sixth Amendment claims of trial-counsel IAC. It also extends to Sixth Amendment claims of appellate-counsel IAC." *Ibid.*

Even among courts that refused to apply *Martinez* to claims of ineffective assistance of appellate counsel, no court has identified any reason for distinguishing between these claims.

C. Distinguishing between ineffective trial and appellate counsel would cause some prisoners to be worse off because of their trial counsel's effective assistance.

Failure to apply the *Martinez* exception to ineffective appellate counsel would lead to the perverse consequence that defendants with effective trial counsel

are worse off than defendants with ineffective trial counsel.

In this case, Davila's trial counsel provided effective assistance by objecting to the judge's response to the jury's question. *Cf. Martinez*, 566 U.S. at 12 ("Effective trial counsel preserves claims to be considered on appeal[.]"). The trial court erred by overruling the objection and giving the erroneous response to the jury, and Davila's appellate counsel on direct appeal erred by not raising this issue on direct appeal.

If Davila's trial counsel had committed the error – and provided ineffective assistance either by not objecting[3] or by inviting the incorrect instruction – then *Martinez* would undisputedly permit the ineffective assistance of Davila's state habeas counsel to excuse the procedural default and permit Davila to assert ineffective assistance of trial counsel in his federal habeas petition.

But if the Court were to affirm the decision below and hold that *Martinez* does not apply to ineffective assistance of appellate counsel, then Davila will have no remedy at all. He will be in a worse position than if his trial counsel had provided ineffective assistance.

Such a bizarre consequence only further confirms that no distinction should be drawn between claims of

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[3] Some Texas authority indicates that no objection was necessary to preserve this issue regarding the jury charge. *See Almanza* v. *State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (holding that a defendant may receive relief for charge error when no objection was made if the error was "fundamental").

ineffective trial and appellate counsel. Trial counsel should be encouraged to make contemporaneous objections. *See Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977) (requiring federal habeas courts to require compliance with contemporaneous-objection rules). A defendant should not be worse off because appellate counsel – rather than trial counsel – rendered the ineffective assistance.

III. The Practical Consequences of Applying *Martinez* Will Be Modest.

The practical consequences of the rule urged by petitioner do not suggest any prudential reason for its rejection. Adopting the petitioner's rule will be a modest and narrow application of *Martinez* and *Trevino*, which follows directly from the logic of those decisions.

The rule of *Martinez* and *Trevino* is cabined by two important limits: (1) the underlying claim must be substantial; and (2) ineffective assistance of counsel in an initial-review collateral proceeding would prevent any court from hearing the claim on the merits.

A. *Martinez* applies only to substantial claims of ineffective assistance of appellate counsel.

The impact of applying *Martinez* to ineffective assistance of appellate counsel will be limited by the requirement that these claims be substantial.

This Court has found ineffective assistance of appellate counsel when a defendant received no counsel at all. *See Penson* v. *Ohio*, 488 U.S. 75, 88 (1988) ("[A]t the time the Court of Appeals first considered the merits of petitioner's appeal, appellate counsel had already been granted leave to withdraw; petitioner was thus entirely without the assistance of counsel on appeal."). And the Court has remanded for a court of appeals to consider whether appellate counsel was ineffective for failing to file a merits brief at all. *See Smith* v. *Robbins*, 528 U.S. 259, 287-288 (2000).

But when an attorney has represented a defendant on appeal and presented argument, stating a substantial claim of ineffective assistance of appellate counsel will be difficult. Appellate counsel must "present the client's case in accord with counsel's professional evaluation." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). Arguments made to the trial court will inevitably be abandoned because elementary appellate strategy requires "focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-752. "Vigorous and effective advocacy" requires an appellate lawyer to exercise professional judgment in selecting issues for appeal. *Id.* at 753;[4] *see also Smith*, 528 U.S. at 288 ("[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.").

[4] Indeed, *Jones* confirms that the responsibility for selecting issues to be raised on appeal belongs to the attorney and not to the client. *Id.* at 753 & n.6.

"Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith*, 528 U.S. at 288 (*quoting Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

Davila can satisfy this standard – the challenge to his jury instructions was a decisive argument at the time of his appeal, and no strategic reason justifies raising the much weaker sufficiency argument instead of appealing the instructions – but not every prisoner will be able to assert a substantial claim of ineffective assistance of appellate counsel. Cf. Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 Yale L.J. 2428, 2436 (2013) (noting that judges applying *Martinez* have found claims of ineffective assistance of trial counsel to be insubstantial because "*Strickland* * * * is a very high bar, and *Martinez* did not lower it one notch").

And federal judges can evaluate the substantiality of a claim of ineffective assistance of appellate counsel is "substantial" far more easily than they can evaluate the substantiality of a claim of ineffective assistance of trial counsel. The adequacy of the performance of appellate counsel will often turn on the reasonableness of not raising a particular issue on appeal, and prejudice will turn on whether the issue would have succeeded on appeal. When a judge determines that an omitted issue would not have succeeded on appeal or was not clearly stronger than those presented, no substantial claim of appellate counsel has been stated.

Unlike claims of ineffective assistance of trial counsel, these initial evaluations of the substantiality of a claim of ineffective assistance of appellate counsel can be made based on the record on appeal. Thus, an exhaustive outside-the-record search is not required, and there will often be no need for hearings or discovery to establish that there is no substantial claim of underlying ineffectiveness.[5] The practical effects of applying *Martinez* to substantial claims of ineffective appellate counsel claims will be minimal.

B. *Martinez* applies only to circumstances in which no state court at any level would hear the prisoner's claim.

Applying *Martinez* to claims of ineffective assistance of appellate counsel would not create a general exception to *Coleman*. As in *Martinez*, the error in Davila's state habeas proceeding occurred in the initial-review collateral proceeding, not in the appeal from the initial-review collateral proceeding. *See Martinez*, 566 U.S. at 10 (explaining that *Coleman* did not "determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default"). And like a claim of ineffective assistance of trial counsel, a claim of ineffective assistance

[5] After a prisoner asserts a substantial claim of ineffective assistance of appellate counsel, in which it appears that a meritorious issue was unreasonably omitted from the appeal, it may be necessary to depose or introduce an affidavit from appellate counsel to evaluate whether there was a strategic reason for this omission.

of counsel on direct appeal must be raised in a collateral proceeding.

As the Court noted in *Martinez*, the combination of these two factors means that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." 566 U.S. at 10. Unless cause excuses the procedural default and permits the claim to be considered in a federal habeas proceeding, "no court will review the prisoner's claims." *Id.* at 11.

This is a principled line to which this Court can adhere in future cases. There is a critical difference between circumstances in which at least one court has considered a claim on the merits (even if, as in *Coleman*, the claim is subsequently forfeited later in the state process) and circumstances in which the absence of effective assistance of counsel prevents any court from hearing the claim.

Even if there is no additional review, a prisoner whose claim has been considered on the merits by at least one court – even without the prospect of further review – is in a far better position that a prisoner whose claim has never been considered at all.

Nor do the state courts mechanically apply their own procedural rules. *E.g., Mullaney* v. *Wilbur*, 421 U.S. 684, 688 n.7 (1975) ("Respondent did not object to the relevant instructions at trial. The Maine Supreme Judicial Court nevertheless found the issue cognizable on appeal because it had 'constitutional implications.'"). When an issue has already been decided by a

state court on the merits – either on direct appeal or in an initial-review collateral proceeding – a reviewing state court may exercise its discretion to excuse what would otherwise be an adequate and independent procedural bar.

And in extreme circumstances, federal courts will excuse a procedural default "where review of a state prisoner's claim is necessary to correct 'a fundamental miscarriage of justice.'" *Coleman*, 501 U.S. at 748 (*quoting Engle* v. *Isaac*, 456 U.S. 107, 135 (1982)). Analysis of a claim on the merits by a state court aids a federal court in applying this standard, either by revealing or confirming the non-existence of a fundamental miscarriage of justice.

Petitioner thus does not ask the Court to abandon the general rule that a prisoner "must 'bear the risk of attorney error that results in a procedural default.'" *Coleman*, 501 U.S. at 752-753. *Coleman* and *Martinez* are properly harmonized by extending the logic of *Martinez* to ineffective assistance claims involving appellate counsel on the same terms as trial counsel and preserving *Coleman*'s procedural bar whenever at least one court has had the opportunity to address the merits of the claim.

CONCLUSION

The Court should reverse the judgment below, hold that ineffective assistance of counsel in an initial-review collateral proceeding may excuse procedural

default of a substantial claim of ineffective counsel on direct appeal, and remand for application of this rule.

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