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

REPLY BRIEF FOR PETITIONER

WILLIAM R. PETERSON
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana St., Suite 4000
Houston, TX 77002
(713) 890-5188 (direct)
(713) 890-5001 (fax)

SETH KRETZER
LAW OFFICE OF SETH KRETZER
Counsel of Record
440 Louisiana St., Suite 1440
Houston, TX 77002
(713) 775-3050 (direct)
(713) 929-2019 (fax)
seth@kretzerfirm.com

JONATHAN LANDERS
917 Franklin, Suite 300
Houston, TX 77002
(713) 685-5000

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF FOR PETITIONER

In this context, there is no principled distinction between ineffective assistance of trial and appellate counsel claims. The reasoning of *Martinez* applies directly to the issue before the Court.

The State argues that the right to effective assistance of counsel is a secondary, conditional right; that *Martinez* should not apply to appellate counsel claims because they, by their very nature, must be raised in collateral proceedings; and that the trial court has already ruled on the claims.

The State is incorrect. The right to counsel on a direct appeal is firmly established, and, like the right to effective assistance of counsel at trial, applies to the States from the intersection of the Sixth and Fourteenth Amendments. Both rights are necessary to protect vital interest of the accused.

As this Court recognized in *Trevino*, the essence of the *Martinez* rule is that the underlying ineffectiveness claim must be raised during initial-review collateral proceedings to avoid procedural default. It is irrelevant whether, as in *Martinez*, the State "channeled" ineffective assistance claims into collateral proceedings or whether, as in *Trevino*, the State fails to overcome "the inherent nature of most ineffective assistance" claims that require them to be raised on collateral review. *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (1997) (en banc).

The State misreads *Martinez* by treating the claim as the underlying trial error, not the ineffective assistance. If a claim of ineffective assistance of appellate counsel is procedurally defaulted in an initial-review collateral proceeding, no court will address that claim on the merits.

The rule sought by Davila will not lead to the consequences predicted by the State. Davila asks only that *Martinez* apply to ineffective assistance of counsel claims and only to default of such claims because of ineffective assistance in the initial-review collateral proceeding. Such a ruling will be unlikely to increase the number of federal habeas petitions filed, and insubstantial claims of ineffective appellate counsel can be efficiently dealt with by federal courts.

Finally, the State's merits analysis is flawed. Under Texas criminal law, charge error can never be forfeited. The instructions did not capture Texas' prohibition on double-transferred intent. Davila properly objected, so his case would have been reversed if the instruction caused any harm, in any degree. But even if Davila had not objected, Davila would still have been entitled to a new trial under the "egregious harm" standard because the erroneous jury instruction vitally affected his defense theory and relieved the State of its burden to prove an element of the offense.

I. The State Has Not Identified a Principled Distinction Between Ineffective Assistance of Trial and Appellate Counsel.

As Davila explained in his opening brief (at 18-26), for these purposes, there is no principled distinction between ineffective assistance of trial counsel and appellate counsel.

A. Assistance of counsel on direct appeal is no less important than assistance of counsel at trial.

The State is incorrect that assistance of appellate counsel is a second-class right, less important than the right to effective assistance of counsel at trial. State Brief at 21-27.

Both the right to counsel at trial and the right to counsel on appeal apply to the States through the Due Process Clause of the Fourteenth Amendment. *Gideon* rests on the recognition that a "fair system of justice" requires the appointment of counsel: "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963).

When a State, as Texas has done, makes appellate review "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956), defendants have the right to the effective assistance of counsel on direct appeal.

Although, as the State notes (at 26-27), *Ross* v. *Moffitt*, 417 U.S. 600 (1974), identified some differences between the trial and appellate stages of a criminal proceeding (at least the discretionary appellate stages), the later decision in *Evitts* v. *Lucey*, 469 U.S. 387 (1985), firmly grounded the right to effective assistance of counsel on appeal in the same due process concerns as *Gideon*: "[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Id.* at 392. Without assistance of an attorney, the right to a direct appeal is no more than a "meaningless ritual." *Id.* at 394 (quoting *Douglas* v. *California*, 372 U.S. 353, 358 (1963)).[1]

In *Evitts*, this Court also recognized that effective counsel was necessary at both trial and during direct appeal in order "to protect the vital interests at stake." 469 U.S. at 396. Further, the failure to comply with Due Process during the direct appellate process renders "the subsequent judgments against the petitioners unconstitutional." *Id.* at 397.

And while it is true that the Court has previously stated that due process of law does not require direct appeals in criminal proceedings, *McKane v. Durston*, 153 U.S. 684, 687 (1894), all States currently provide for direct appeals. *E.g.*, Harlon Leigh Dalton, *Taking*

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[1] In *Moffitt*, this Court declined to extend the right to counsel to discretionary appeals beyond a first appeal of right partly because the petitioner's claim "had 'once been presented by a lawyer and passed upon by an appellate court.' " *Moffitt*, 417 U.S. at 614.

the Right To Appeal (More or Less) Seriously, 95 YALE L.J. 62, 62 & n.2 (1985).

Difficult constitutional questions would certainly arise if a State were to abolish direct appeals in capital cases. In all three of the 1976 cases upholding capital punishment schemes, the plurality noted with approval the provisions for direct appellate review as critical to the validity of each State's new capital punishment framework. *See Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality op.) (noting that "meaningful appellate review" was a "further safeguard" against arbitrary death sentences); *Proffitt* v. *Florida*, 428 U.S. 242, 258-59 (1976) (plurality op.) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."); *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (plurality op.) (noting Texas' "prompt judicial review of the jury's decision in a court with statewide jurisdiction").

In the years since *Gregg*, *Profitt*, and *Jurek*, this Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker* v. *Dugger*, 498 U.S. 308, 321-23 (1991). It is doubtful that the Eighth Amendment would permit the imposition of capital sentences with no direct appellate review.

But the question is moot because all States provide for direct appeals. Trials continue to be the "main event" (where a defendant's guilt or innocence is

determined), but the States recognize that to accurately adjudicate guilt, trials must follow the rules. Regardless whether direct appeals are required, the Court has recognized that where a State provides for appeals, the right to appellant counsel is important "to assure that only those who are validly convicted have their freedom drastically curtailed." *Evitts*, 469 U.S. at 399.

Indeed, this Court has recognized that "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Griffin*, 351 U.S. at 18. The *Griffin* Court also noted that every state provided "some method of appeal from criminal convictions" and that "[s]tatistics show that a substantial proportion of criminal convictions are reversed by state appellate courts." *Id.* at 18-19. The appellate process was therefore a necessary tool to ensure that defendants did not "lose their life, liberty or property because of unjust convictions which appellate courts would set aside." *Id.*

As noted by the *amici* supporting the Petitioner, the direct appellate process is just as important a tool in correcting invalid convictions today as it was 60 years ago. Amicus Br. of NACDL and ACLU at 8.

For a trial to serve its proper role in adjudicating guilt and innocence, rules of procedure and evidence

must be followed, and juries must be properly instructed. Appellate lawyers are vital to protecting these rights, and the right to effective assistance of appellate counsel is no less important than the right to effective assistance of trial counsel.

Teague v. *Lane*, 489 U.S. 288 (1989), involves a fundamentally different context. *Teague*'s "watershed rule" exception is "extremely narrow," *Whorton* v. *Bockting*, 549 U.S. 406, 417 (2007), because overcoming the bar on retroactivity means that a court must reconsider a criminal conviction that had no constitutional error at the time it became final. *See Teague*, 489 U.S. at 311. By contrast, Davila seeks to challenge his conviction based on a constitutional error that was established as an error at the time of the conviction.

The same equitable considerations that led the Court in *Martinez* to permit ineffective assistance in an initial-review collateral proceeding to excuse the procedural default of a substantial claim of ineffective assistance of trial counsel should lead to the same result for substantial claims of ineffective assistance of appellate counsel.

B. Claims of ineffective assistance of both trial and appellate counsel must, by their nature, be raised in collateral proceedings.

As Davila anticipated, the State emphasizes (at 28-32) that it has not "channeled" ineffective assistance of appellate counsel claims into collateral review

proceedings. Instead, such claims must inherently be raised on collateral review.

But as this Court recognized in *Trevino*, "'the inherent nature of most ineffective assistance' of trial counsel 'claims'" requires them to be raised on direct appeal. *See Trevino*, 133 S. Ct. at 1918 (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc)). Texas has not "deliberately" and formally precluded defendants from raising ineffective assistance of trial counsel on direct appeal. But nonetheless, Texas's procedures, and the nature of ineffective-assistance claims, inherently required that the claims be raised in a collateral proceeding.

What is important in both *Martinez* and *Trevino* is that the initial-review collateral proceeding was the first place where an important constitutional claim could be raised. In this context, the initial-review collateral proceeding is tantamount to a direct appeal: this is the first opportunity to raise the claim, the petitioner will not have a prior brief or judicial decision addressing the claim, and it will be nearly impossible for a petitioner to present the claim without competent counsel.

This Court has historically relied upon its equitable power to ensure that important federal constitutional claims are reviewed by the federal courts. *See Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (recognizing the "importance of the Great Writ" and that "a strong equitable claim would ordinarily keep [federal courthouse doors] open."); *Maples* v. *Thomas*, 565 U.S.

266, 292 (2012) (Alito, J., concurring) (agreeing that petitioner had established cause and prejudice although the cause was not "a predictable consequence of the [state's] system.").

The reasoning in *Trevino* is consistent with the equitable nature of the exception drawn by the Court. Prisoners whose claims of ineffective assistance of trial or appellate counsel are forfeited at initial-review collateral proceedings are in the same position, regardless of why those claims must be raised in the initial-review collateral proceeding. If, as *Martinez* held, the failure to receive effective assistance of counsel in an initial-review collateral proceeding can excuse the procedural default of ineffective trial counsel claims, there is no reason it should not excuse the procedural default of ineffective appellate counsel claims.

C. Under the State's rule, meritorious claims of ineffective assistance of appellate counsel would never be reviewed by any court.

And like a claim of ineffective assistance of trial counsel, if a claim of ineffective assistance of appellate counsel is forfeited at an initial-review collateral proceeding, then no court will ever address the claim on the merits.

In *Martinez*, this Court explained 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. That is, no state court

at any level will hear the claim of ineffective assistance of counsel, not a claim of some underlying trial error. *Id.* Similarly, both *Trevino*'s majority and dissenting opinions focused on the ineffective assistance claims: "*Martinez* argued that his lawyer should have raised, but did not raise, his claim of ineffective assistance of trial counsel during state collateral review proceedings." 133 S.Ct. 1911, 1917 (2013); *see also id.* at 1922 (Roberts, C.J., dissenting) (explaining that in *Martinez*, defendants "could *only* raise such claims [of ineffective assistance] in state collateral proceedings" (emphasis in original)).

The State argues that Davila's argument about the jury instructions was already heard by the trial court.[2]

But errors of state law at trial do not provide grounds for relief in a federal habeas proceeding. Davila could not assert the error in his jury instructions as a claim in this federal habeas proceeding. Instead, Davila's federal claim is that he received ineffective assistance of counsel in his direct appeal, in violation of Due Process and Equal Protection. *Evitts*, 469 U.S. at 399.

Absent the application of *Martinez*, this claim was forfeited when it was not raised in his initial-review

[2] The State simultaneously argues that Davila's argument was unpreserved and not heard by the trial court. State Br. at 43.

collateral proceeding. And unless the ineffective assistance of counsel excuses the procedural default, no court will hear the claim on the merits.[3]

For these purposes, there is no meaningful difference between these claims. The same reasoning underlying the Court's holding in *Martinez*, that claims of ineffective assistance in an initial-review collateral proceeding can excuse the procedural default of a substantial claim of ineffective assistance of trial counsel, should lead the Court to apply the *Martinez* rule to ineffective assistance of appellate counsel claims.

II. Practical Concerns Do Not Justify Distinguishing Between Ineffective Assistance of Trial and Appellate Counsel.

The State overstates the practical consequences of a holding in favor of *Davila*, which will not impose the costs the State hypothesizes. *Martinez* has already considered the costs to the State of finality, delay, and expense, and it found those costs outweighed by the equitable considerations discussed above. Since those equitable considerations apply with equal force here, the balance comes out the same. And any costs are inherently limited by the fact that *Martinez* applies only

[3] In this case, the district court made an alternative merits finding. JA.366-68. The judgment of the Fifth Circuit cannot be affirmed on this basis because it rests entirely on the procedural default. JA.400; 413. And there is no reason to believe that in the ordinary case, district courts would address the merits of procedurally defaulted claims.

to substantial claims and only to attorney error in initial-review collateral proceedings. In other words, Davila's urged application will not increase the number of federal habeas corpus petitions, but only potentially increase the number of claims within those petitions. The subsequent writ bar will continue to prevent subsequent petitions and will prevent prisoners from asserting defaulted ineffective assistance of appellate counsel claims outside of their first federal petition. *See* 28 U.S.C. § 2244. And even if there were an increase in the number of ineffective appellate counsel claims presented, the federal courts will be able to easily and efficiently weed out insubstantial claims.

Finally, the State is incorrect that extending *Martinez* will encourage sandbagging. Not only do attorneys have an ethical duty to zealously represent their clients at all stages, but there is no benefit to omitting a winning claim from state habeas review. To do so would only make obtaining relief more difficult. Instead, the modest extension sought by Davila will enable federal courts to remedy unlawful convictions which remain only because the prisoner had ineffective appellate and habeas counsel.

A. Applying *Martinez* in these circumstances will not, necessarily, require *Martinez* to apply to other claims.

The State suggests that treating ineffective assistance of trial and appellate counsel the same will, necessarily, lead to the application of *Martinez* to other claims as well. *See* State Br. at 39-40. This is incorrect.

Martinez rested, in part, on the particular necessity for the assistance of counsel in vindicating claims of ineffective assistance of counsel. *See Martinez* v. *Ryan*, 566 U.S. 1, 12 (2012) ("Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim.").

As Davila explained (at 14-16), this rationale applies to ineffective assistance of appellate counsel at least as much – and perhaps even more – than to ineffective assistance of trial counsel. But it would not, necessarily, apply to other claims listed by the State. The issue is not before the Court now, but the balance struck by this Court in *Martinez* concerns only claims of ineffective assistance. In a future case, this Court could draw a principled distinction, for purposes of *Martinez*, between ineffective assistance of counsel and other claims, if it were to conclude that the vindication of other claims does not require the assistance of counsel to the same degree.

Nor would the limited extension of *Martinez* to ineffective assistance of appellate counsel claims permit

petitioners to prove cause and prejudice based on attorney errors occurring outside of initial-review collateral proceedings. *Martinez* specifically limited its holding to errors in such proceedings because initial-review collateral proceedings are the equivalent of a direct appeal for ineffectiveness claims. Davila does not ask this Court to change the distinction between attorney error in initial-review collateral proceedings and any other subsequent proceedings.

B. The State overstates the practical consequences of applying *Martinez* to ineffective assistance of appellate counsel.

The State predicts that applying *Martinez* to claims of ineffective assistance of appellate counsel will overwhelm the federal courts, but it offers only speculation in support.

As an initial matter, applying *Martinez* to claims of ineffective assistance of appellate counsel is unlikely to increase the number of federal habeas petitions. At most, it would lead to the assertion of an additional claim of ineffective assistance of appellate counsel within a petition. Nor will the extension of *Martinez* affect the subsequent writ bar. 28 U.S.C. § 2244(b).

Ineffective appellate counsel claims submitted in successive habeas petitions which had already been presented will continue to be dismissed, claims submitted when the default at issue did not occur in the initial-review collateral proceeding will continue to be dismissed, and claims not previously presented will

continue to be dismissed because Davila does not request a "new rule of constitutional law." 28 U.S.C. § 2244(b).

Statistics show that ineffective assistance of appellate counsel claims are rarely asserted in habeas proceedings. One study indicates that although 81% of habeas petitions in capital cases raised at least one claim of ineffective assistance of counsel, only 31% alleged ineffective assistance of appellate counsel. In non-capital habeas petitions, only 20% of the petitioners alleged ineffective assistance of appellate counsel. N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 45-49 (2007).

And insubstantial claims of ineffective assistance of counsel can be readily identified by the district courts. Unlike ineffective assistance of trial counsel, ineffective assistance of appellate counsel will, usually, be based entirely on legal arguments and the record. District courts are well equipped to evaluate the strength of arguments and can readily recognize insubstantial claims. If a petitioner argues, like Davila, that counsel on direct appeal filed a brief but omitted an issue, then district court could determine that a claim was insubstantial by concluding either that (1) the issue omitted was not meritorious or (2) not "clearly stronger" than those issues raised in the brief.

Only if the omitted claim survived both of these hurdles might it be necessary, as the State argues, to "hold evidentiary hearings to determine what

prompted counsel's failure to raise the claim in question." State Br. at 38-39.

The State's arguments could also have been raised against *Martinez* itself, where this Court recognized that the holding "ought not to put a significant strain on state resources." 566 U.S. at 15. The Court's reasoning applies straightforwardly to this case.

Finally, the State's theory that counsel in state habeas proceedings will – intentionally – provide ineffective assistance in order to reserve ineffective assistance of appellate counsel claims for federal habeas is difficult to understand. As an initial matter, the same argument could be made about *Martinez* itself. And putting aside the ethical obligations of attorneys (and the personal consequences to an attorney of a court finding that the attorney provided ineffective assistance), there is no strategic benefit to this approach. On federal habeas, merely overcoming the procedural default of an ineffective assistance claim requires demonstrating both the substantiality of that claim and that counsel in the initial-review collateral proceeding was ineffective for not raising it. A prisoner whose attorney properly asserts the claim in an initial-review collateral proceeding does not need to surmount these additional hurdles. The *Martinez* rule is an act of grace – an equitable exception to permit prisoners to have claims heard on the merits when they would otherwise be forfeited because of their attorneys' mistakes – not some type of tactical ploy.

C. AEDPA supports Davila.

The State argues that AEDPA supports the state by embracing traditional concerns of finality and comity. State Br. at 41.

But, as this Court recognized in *Holland* v. *Florida*, AEDPA supports this Court's exercise of equitable discretion to excuse procedural default. "The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion." *Martinez*, 566 U.S. at 13. These rules are rooted in this Court's equitable powers, which have historically guided habeas corpus jurisprudence. *Ibid.* This Court has "traditionally 'governed' the substantive law of habeas corpus," and does "not construe a statute to displace courts' traditional equitable authority absent the 'clearest command.'" *Holland* v. *Florida*, 560 U.S. at 646. This Court's equitable authority to determine the cause and prejudice standard was "further reinforced by the fact that Congress enacted AEDPA after this Court" had held that it would apply equitable principles to the substantive law of habeas corpus. *Ibid.*

D. While the costs associated with applying *Martinez* are modest, the benefits are not.

The State argues that the costs associated with the application of *Martinez* outweigh what he believes are "only scant alleged benefits." State Br. at 32. Davila has shown that the costs associated with the extension

are modest, but the benefits will be existential to petitioners who will otherwise be executed, despite meritorious claims that would have resulted in a new trial had they been presented on direct appeal.

The *Carpenter* case cited by the State (at 34-35) confirms the need for application of *Martinez* to claims of ineffective assistance of appellate counsel. In *Carpenter* both the district court and the Sixth Circuit believed Carpenter had been convicted and sentenced based upon constitutionally insufficient evidence. *Edwards* v. *Carpenter*, 529 U.S. 446, 449-50 (2000). The issue was overlooked by his direct appellate counsel, and Carpenter failed to raise the issue in his *pro se* request for postconviction relief. *Ibid.* Carpenter attempted to raise the claim in a failed bid to reopen his direct appeal, but the state court refused to address the issue. *Ibid.*

Recognizing that "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim," this Court held that ineffective assistance of appellate counsel could not be used to establish cause unless the ineffective assistance claim had been properly raised before the state court. *Id.* at 452-53.

In *Carpenter*, the prisoner did not argue to this Court that the procedural default of his claim of ineffective assistance of appellate counsel should be excused. *See id.* at 453 ("[W]e should note that

respondent has not argued that he can [show cause-and-prejudice to excuse the default], preferring instead to argue that he does not have to[.]").

The result was that a man, apparently convicted on insufficient evidence, lost his ability to challenge his illegal conviction and sentence because he was provided ineffective assistance of appellate counsel and was not provided counsel during his initial-review collateral proceeding. *Carpenter* confirms the importance of the equitable holding urged by Davila. The State may consider this a "modest" benefit, but to defendants like Carpenter and Davila, facing lengthy prison sentences and execution based on convictions at trials that were infected with error, the benefits are far from modest.

III. The State's Arguments Regarding the Merits of Davila's Claim Are Incorrect and Only Confirm the Ineffectiveness of Davila's Direct Appellate Counsel.

Finally, the State addresses the merits of Davila's claim of ineffective assistance of appellate counsel and the underlying error in the jury instructions.

There is no reason to address the issues, which turn on state law. The proper disposition is the same as in *Martinez*: adoption of the rule urged by Davila and remand to the court of appeals to determine "whether [Davila's] attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of [appellate] counsel is substantial."

Martinez, 566 U.S. at 18; *see also McLane Co.* v. *EEOC*, No. 15-1248, slip op. at 11 (Feb. 21, 2017) ("[W]e are a court of review, not of first view[.]" (quoting *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n.7 (2005)).

Nonetheless, on the merits, the State's analysis of preservation is incorrect under state law, and fails to consider the jury instructions under the proper standard of harm, relying instead on a sufficiency analysis.

If anything, the State's arguments about the "overwhelming" evidence in support of the verdict only confirm the ineffectiveness of Davila's counsel on direct appeal. As the State argues, challenging the sufficiency of the evidence was hopeless – yet a challenge to sufficiency was the centerpoint of Davila's direct appeal. Counsel providing effective assistance could not have chosen this argument over the challenge to the jury instructions.

A. Under Texas law, the challenge to the jury instructions could have been raised on direct appeal.

The State is incorrect to suggest that Davila's challenge to his jury instructions was unpreserved by trial counsel and forfeited.

Under Texas criminal law, objections to jury instructions cannot be forfeited: "[C]harge error is never forfeitable by a defendant's failure to object at trial." *Cosio* v. *State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011).

When a Texas defendant raises a charge issue on appeal, an "appellate court's first duty . . . is to determine whether error exists." *Middleton* v. *State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). "[I]f error is found, the appellate court should analyze that error for harm." *Ibid.*

The standard for harm depends on whether the defendant objected at trial. Where, as here, the defendant objected to the instruction, reversal is required if there was "some harm." *Barrios* v. *State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). But even when there is no objection at trial, a court of appeals will reverse the conviction when the erroneous instruction has caused "egregious harm," when the error either "go[es] to the very basis of the case" or "vitally affect[s] [the] defensive theory." *Almanza* v. *State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1984) (quoting *Bellah* v. *State*, 415 S.W.2d 418 (Tex. Crim. App. 1967) and *Franco* v. *State*, 147 S.W.2d 1089 (Tex. Crim. App. 1941)).

As a positive legal matter, the complaint about Davila's jury instructions could not have been forfeited. And regardless of the harm standard, the issue should have been raised on direct appeal as a normative matter.

Davila would have been entitled to the "some harm" standard. In Texas criminal procedure, preservation "is not an inflexible concept." *Thomas* v. *State*, 408 S.W.3d 877, 884 (Tex. Crim. App. 2013). "[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants,

why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Ibid.* A defendant must "enable the trial judge to know in what respect the defendant regards the charge as defective and to afford him an opportunity to correct it before reading the charge to the jury." *Pennington* v. *State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985).

In this case, Davila's trial counsel let the trial judge know that he did not want the trial judge to submit the erroneous instruction as an answer to the jury's question, and he did so at a time before the trial judge provided the answer. R.10377 ("we'd object to the submission of the second charge"). Nothing more was required.

B. Under Texas law, the jury instructions were erroneous and harmful.

Although the State endeavors to defend the jury instructions, the crucial point is incontestable: Nothing in the instructions captured the Texas rule barring double-transferred intent.

Admittedly, as the State notes, this doctrine arises from caselaw rather than the text of the transferred intent statute. And perhaps, after Davila's appeal is reinstated, the State may wish to argue that the Court of Criminal Appeals should abandon the doctrine. But until the Court of Criminal Appeals has done so, the

prohibition on transferring the same intent twice remains Texas law, and the trial court erred by instructing the jury that it could convict Davila of two intentional murders based on a single intent to kill.

Although the supplemental instruction correctly quoted Texas' transferred intent statute, it incorrectly permitted the jury to transfer Davila's intent from a single intended victim to the two actual victims.

The State argues that even if the jury instructions were erroneous, raising the issue on appeal was unwarranted because Davila could not show harm. But the State fails to analyze harm under the correct standard.

In determining whether a defendant has suffered harm, Texas courts consider "the entire charge; the state of the evidence, including contested issues and the weight of probative evidence; the arguments of counsel; and any other relevant information the record, as a whole, reveals." *Heins* v. *State*, 157 S.W.3d 457, 461 (Tex. App. – Houston [14th Dist.] 2004, no pet.). Neither the State nor the defendant bears a burden in the harm analysis. *Reeves* v. *State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

Because Davila's trial counsel objected to the instruction, any harm – of any degree – from the error requires reversal. "'Some harm' under the *Almanza* analysis means any harm." *Murphy* v. *State*, 44 S.W.3d 656, 666 (Tex. App. – Austin 2001, no pet.) (citing *Hutch* v. *State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)). "Presence of any harm, regardless of degree,

which results from preserved charging error, is sufficient to require reversal of a defendant's conviction." *Ibid.*

But even under the "egregious harm" standard, Davila is entitled to relief. The erroneous instruction eliminated the only viable defensive theory: that Davila only intended to kill Jerry Stevenson. Because the error vitally affected the defensive theory and went to the entire basis of the defendant's case, the error constituted egregious harm.

Instead of considering harm under these standards, the State merely recites in the evidence in the light most favorable to the verdict, analyzing the sufficiency of the evidence supporting the verdict rather than the harm from the erroneous charge.

In effect, the erroneous instruction eliminated an element of the offense by relieving the State of its burden to prove two separate intents to kill. Under Texas law, such an error in the charge renders a conviction "fatally defective":

> [W]hen a trial court omits from the application paragraph of the charge required elements of an offense, this also will render a conviction fatally defective. To rule otherwise, we believe, would permit and allow our trial courts to state in a jury charge abstract definitions of legal terms and principles of law, without the necessity of applying those principles and terms to the very facts of the case. We further believe that to uphold such a rule

> of law could lead to the destruction of our jury system.

Doyle v. *State*, 631 S.W.2d 732, 735 (Tex. Crim. App. 1980). The evidence marshalled by the State cannot overcome this fatal defect in the conviction.[4]

Davila could also satisfy the egregious harm test because the error went "to the very basis of the case" and "vitally affect[ed] [the] defensive theory." *Almanza*, 686 S.W.2d at 172. The error in the instruction went to the basis of Davila's case and vitally affected Davila's intent defense. The instruction invalidated Davila's strongest defense. *See Heins*, 157 S.W.3d at 457 (finding egregious harm where erroneous instruction prevented the only defense offered at trial.).

The jury could have rationally concluded that Davila had the intent to kill only Jerry Stevenson based on evidence that Davila had an altercation with Jerry Stevenson (who was associated with a rival gang) shortly before the murder. R.10026-10027; R.10031; R.10176-10177; R.10336-10340. The jury could also have credited the testimony that the red beam shined only on Jerry Stevenson. R.9950 ("Q: And was the beam anywhere else that you saw? A: Not really."); R.9951 ("Q: Did you see the beam on the women and children? A: No. Q: You never saw the beam on the women and children? A: Nuh-uh.").

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[4] Whether Davila suffered prejudice from the ineffective assistance of his direct appellate counsel turns on whether, under state law, Davila would have received relief if his direct appeal had been handled properly.

And the jury was entitled to interpret Davila as confessing intent to kill only Jerry Stevenson, given that there were no other "guys on the porch." R.10019. ("Q: No other adult males? A: No, ma'am. I was the only male."). The State's argument that "guys on the porch" referred to the women and children may be a permissible inference, but it is by no means compelled. Davila's defense that he intended to kill only Jerry Stevenson may not have succeeded if the jury had been permitted to consider it, but it was the only real defense he had.

Indeed, the jury's note provides the strongest possible evidence of harm, indicating that at least some jurors believed that Davila "intend[ed] to murder a person and in the process took the lives of two others." JA.60.

The jury instructions were erroneous and harmed Davila. If the issue had been raised on direct appeal, Davila's conviction would have been reversed.

C. The State's sufficiency arguments confirm the ineffectiveness of Davila's direct appellate counsel.

But instead of challenging the jury instructions, Davila's counsel on direct appeal challenged the sufficiency of the evidence that Davila intended to kill multiple individuals.

The State's brief confirms the hopelessness of these arguments. *See* State Br. at 46-48 (analyzing the

sufficiency of the evidence). As the Court of Criminal Appeals held on direct appeal, sufficient evidence certainly supported the conclusion that Davila intended to kill multiple individuals. In light of the evidence discussed by the State, no lawyer providing effective assistance of counsel would have raised this issue on appeal and chosen to abandon the far-stronger issue regarding the erroneous jury instructions. This is particularly true when the jury's note confirmed that the jury (or at least some members of the jury) believed Davila harbored only a single intent to kill.

The State's brief thus confirms the ineffectiveness of Davila's counsel on direct appeal. Davila has raised a substantial claim of ineffective assistance of appellate counsel, and the ineffective assistance of counsel in his initial-review collateral proceeding should excuse the procedural default of this 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 assistance of counsel on direct appeal, and remand for application of this rule.

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Respectfully submitted,

SETH KRETZER
LAW OFFICE OF SETH KRETZER
Counsel of Record
440 Louisiana Street, Suite 1440
Houston, TX 77002
(713) 775-3050 (direct)
(713) 929-2019 (fax)
seth@kretzerfirm.com

JONATHAN LANDERS
917 Franklin, Suite 300
Houston, TX 77002
(713) 685-5000

WILLIAM R. PETERSON
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana St.,
Suite 4000
Houston, TX 77002
(713) 890-5188 (direct)
(713) 890-5001 (fax)