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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Coleman v. Thompson, 501 U.S. 722, 752-54 (1991), held that inadvertence or error by counsel in a proceeding where a State has no responsibility to ensure that a prisoner is represented by competent counsel is not cause to excuse the procedural default of a challenge to the conviction. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), "qualifie[d] *Coleman* by recognizing a narrow exception: 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." *Martinez* rested on a combination of (1) the desire to have at least one court evaluate the merits of a claim of trial error, (2) the bedrock nature of the Sixth Amendment right to effective trial counsel, and (3) the "deliberat[e]" choice by the State "to move trial-ineffectiveness claims outside of the direct-appeal process." *Id.* at 11-13. For all other claims, *Martinez* foreclosed this excuse for procedural default. *Id.* at 16 ("The rule of *Coleman* governs in all but the limited circumstances recognized here.").

The question presented is whether the Court should create an additional exception to *Coleman* for substantial claims of ineffective assistance of *appellate* counsel—even though (1) such a claim will turn on an underlying question of law that at least one court has already reviewed on the merits; (2) the right to appellate counsel is not equivalent to the right to trial counsel, which this Court has repeatedly singled out for unique treatment; and (3) States do not "move" claims of ineffective assistance of appellate counsel outside of a process where counsel to help develop the claim is guaranteed.

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STATEMENT

A. Factual Background

In 2008, Nahtica Stevenson was turning nine years old. R.5588.[1] On a Sunday afternoon after church, Nahtica's family threw her a birthday party at the home of her grandmother, Annette Stevenson. J.A. 7-8. Celebrating with Nahtica were more than fifteen family members—including Nahtica's grandmother, Annette; her uncle, Jerry Stevenson; Jerry's five-year-old daughter, Queshawn; three of Nahtica's adult aunts; and several children. J.A. 7-10, 22. Annette Stevenson's home was decorated with a birthday banner and the children wore birthday hats. R.5749, 5783.

Petitioner, a member of the Bloods street gang, drove by Nahtica's party. J.A. 37. Believing that members of a rival gang (the Crips) were present among the people attending the birthday party, petitioner decided—in his words—to "shoot 'em up." J.A. 37 (petitioner's confession). Petitioner's accomplice dropped him off a block away. J.A. 38. Armed with a semi-automatic rifle with a bayonet, laser sight, and large magazine of hollow-point bullets, petitioner crept in between houses towards the party. J.A. 38, 40-43; R.6919.

The children were finishing their cake and ice cream on the front lawn and porch when petitioner opened fire towards the party, pulling the trigger at least ten times. J.A. 8-9, 23-24, 30, 38. As petitioner described in his confession:

> I had a scope on my gun, so I had range. I stood in the field across the street. The fat dude [Jerry Stevenson] was in the middle of the street. The other three were on the porch. I wasn't going to

[1] R.*p* refers to the record on appeal in the Fifth Circuit.

> give them a chance to get a gun. . . . I only let off 10 rounds, and I had 21 in the clip. I was trying to get the guys on the porch, and I was trying to get the fat dude.

J.A. 38. The three men that petitioner thought he saw on the porch were actually two women: Sheila Moblin and Annette Stevenson. J.A. 30, 391.

Petitioner missed Jerry Stevenson, who ran into the house. J.A. 17. Frustrated, petitioner opened fire again. J.A. 17. While Annette Stevenson was moving the children to safety inside her house, a bullet struck her in the back and went through her spleen, liver, and heart. J.A. 16, 25, 43, 44-45. The bullet's trajectory suggests that the grandmother was hunched over, shielding the children, when she was hit. *See* R.7048-49. She stumbled inside and fell to the ground in her bedroom, where she died. J.A. 27-28.

During the attack, Jerry Stevenson lost sight of his daughter, Queshawn. J.A. 24-25. He ran outside and found her on the ground, badly wounded by two bullets that had struck her and caused "massive" internal injuries. J.A. 16, 26, 46-48; *see also* J.A. 26 (Jerry Stevenson's testimony that Queshawn's "guts was hanging out"). Queshawn was airlifted to a children's hospital, but the doctors there could not save her. J.A. 28-29.

Petitioner's gunfire also wounded three other children and one adult. J.A. 28. Two shots struck Nahtica's sister, Cashmonae, in the hand, and another grazed the head of Nahtica's cousin, Brianna, slicing a braid of hair from her head. J.A. 13, 28.

When he finished firing, petitioner got in the car driven by his accomplice and fled. J.A. 17, 39. Days later, petitioner was arrested after a high-speed chase and was identified as the shooter. *See* J.A. 32-35.

Petitioner confessed to the murders of Annette and Queshawn Stevenson. J.A. 36-39. Petitioner stated that he did not intend to shoot any women or children, but rather was trying to shoot multiple men—Jerry Stevenson and other men that petitioner thought he saw on Annette Stevenson's porch. J.A. 38 ("I was trying to get the guys on the porch, and I was trying to get the fat dude [Jerry Stevenson].").

B. Judicial Proceedings

1. a. The State charged petitioner with capital murder, which is defined in relevant part as the "murder[] [of] more than one person . . . during the same criminal transaction." Tex. Penal Code § 19.03(a)(7). "Murder," in turn, is defined in relevant part as "intentionally or knowingly caus[ing] the death of an individual." *Id.* § 19.02(b)(1). Applying those statutory provisions, the trial judge instructed the jury as follows:

> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

J.A. 57. *Compare* Pet. Br. 6 (misquoting jury instruction as requiring that multiple deaths be caused "intentionally and knowingly"), *with* J.A. 57 (quoting jury instruction at R.7238: "intentionally or knowingly").

The judge further instructed the jury on the crime's mental-state element as follows: (1) "[a] person acts 'intentionally,' or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result"; and (2) "[a] person acts 'knowingly,' or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result." J.A. 56; *see* Tex. Penal Code § 6.03(a)-(b).

Various types of evidence were presented to the jury, such as eyewitness testimony describing the shooting and identifying petitioner as the shooter. *See, e.g.*, R.5631-35. The jury also heard evidence of petitioner's confession to intending to shoot multiple people at the party, which trial counsel unsuccessfully attempted to exclude. J.A. 36-39; R.795-96, 6682.

During its deliberations, the jury sent a note seeking "clarification of the capital murder charge": "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 [the two] others"? J.A. 60. In response, the judge proposed resubmitting the instructions quoted above, J.A. 61, and a supplemental mental-state instruction describing the doctrine of transferred intent:

> 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, harmed, or otherwise affected.

J.A. 62. This instruction came verbatim from the relevant statute. *See* Tex. Penal Code § 6.04(b) ("A person is nevertheless criminally responsible for causing a re-

sult if the only difference between what actually occurred and what he desired, contemplated, or risked is that: . . . a different person . . . was injured, harmed, or otherwise affected.").

Contrary to implications in petitioner's brief, *see* Pet. Br. 6, 17, 25, his trial counsel did not raise an objection to the substance of the transferred-intent instruction. To preserve an objection to a jury instruction, "the accused is required to distinctly specify each ground of objection." *Pennington v. State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985). Petitioner's trial counsel argued that the transferred-intent instruction "should not have been sent to the jury until more deliberation had occurred." J.A. 399 (Fifth Circuit opinion). He did not object to the instruction's substance, only to its timing:

> Mr. Ford: [W]hat we request the Court do is to send the original response the Court had regarding intentionally and knowingly.
>
> The Court: Which refers to the law and defines it.
>
> Mr. Ford: That's right.
>
> The Court: Right.
>
> Mr. Ford: And *wait. And – until the jury indicates they can't reach – reach a resolution. And then at that point, submit the other special charge*, if it's called for, Judge. We'd object to submission of both charges—well, we'd object to the submission of the second charge.

J.A. 51-52 (emphasis added). As that colloquy shows, petitioner's trial counsel in fact endorsed the substance of the transferred-intent instruction—agreeing that the court should, after further jury deliberation resulting in impasse, "then at that point, submit the other special

charge." J.A. 52. Petitioner thus preserved only an objection to the timing of the transferred-intent instruction, not to its substance. And contrary to an implication in petitioner's brief, trial counsel did not request any other "clarif[ying]" instruction. Pet. Br. 7; *see* J.A. 51-52.

The trial court overruled the timing objection and submitted the transferred-intent instruction along with its original instructions on the elements of the crime. J.A. 52. The jury returned a guilty verdict on capital murder. *See* R.11400.

b. During the penalty phase of petitioner's trial, the jury heard significant evidence of petitioner's violent propensities. For instance, the jury heard evidence implicating petitioner in a separate murder. Among this evidence was petitioner's confession to that murder, which petitioner's counsel unsuccessfully sought to exclude. J.A. 63-67; R.795-96, 7356-63. The jury further heard an eyewitness testify that petitioner shot the victim in that murder while the victim was running away and that, after the victim had fallen to the ground, petitioner "walked over to" the victim "and shot him four more times in his back." J.A. 67-69.

The jury also heard evidence of petitioner's participation in an armed robbery of two men. J.A 52-54. And the jury heard several witnesses describe petitioner's attempted escape from the Tarrant County jail while awaiting trial for the murders of Annette and Queshawn Stevenson. J.A. 70-84. During the escape attempt, petitioner and his accomplices stabbed and severely beat two guards. J.A. 70-84.

The jury deliberated and returned answers to the penalty-phase questions. R.11400-01. In accordance with those answers, the trial court sentenced petitioner to death. R.11401.

2. Petitioner's appeal was submitted directly to the Texas Court of Criminal Appeals because he received the death penalty. *See* Tex. Code Crim. Proc. art. 37.071(h). The State appointed petitioner new counsel for his appeal. *See* J.A. 85; Tex. Code Crim. Proc. art. 26.052(j).[2] Petitioner's appellate counsel filed a 94-page brief raising fourteen points of error, all of which were properly preserved by trial counsel. J.A. 86-90; R.10749-873. Most of petitioner's challenges to his conviction were aimed at the trial court's refusal to suppress his confessions. *See* J.A. 86-89.

On appeal, petitioner did not raise an unpreserved challenge to the transferred-intent jury instruction. He did argue that the evidence was insufficient to satisfy that instruction. *See* J.A. 86, 91-102. In making this argument, petitioner relied on the same case that he relies on here (Pet. Br. 4)—*Roberts v. State*, 273 S.W.3d 322 (Tex. Crim. App. 2008)—to argue "that the doctrine of transferred intent could not be utilized to . . . sustain [petitioner's] capital murder conviction" because the evidence purportedly showed that petitioner had the specific intent to kill only one person, Jerry Stevenson. J.A. 97-101. Citing *Roberts*, petitioner argued that because his specific intent to kill was purportedly aimed at only one person, it could not support a conviction for murdering two people. J.A. 97-101.

The Court of Criminal Appeals affirmed petitioner's conviction and sentence. *See* J.A. 104. The court rejected petitioner's challenge to the sufficiency of the evidence concerning mental state. It first noted "ample ev-

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[2] Petitioner's appellate counsel is, and was at the time of the appeal, board-certified in Texas criminal law. *See* Tex. Bd. of Legal Specialization, Profile of Mary Brabson Thornton, https://perma.cc/JYA7-8C97.

idence in the record to support a verdict that appellant intended to cause more than one death":

> The evidence shows that appellant intended to kill possible members of the Crips gang, but he mistakenly killed a grandmother and small child instead. As appellant himself explained, he went to "a shoot em up" in which he intended to kill "the fat dude in the middle of the street" and the three "guys on the porch." That is, he intended to shoot four males, not two females. But, under Texas law, the intent to kill four males will transfer to the unintentional killing of two females.

J.A. 113. The court also observed that, as an alternative culpable mental state, the jury could find that petitioner "knew that he was reasonably certain to[] cause two deaths when he repeatedly shot his SKS semi-automatic rifle at the birthday party group on Ms. Stevenson's front porch." J.A. 115; *see* Tex. Penal Code § 19.02(b)(1).

3. Petitioner initiated state-court habeas review of his judgment of conviction. J.A. 133. Pursuant to state law, the State provided petitioner new counsel for that proceeding. J.A. 133; *see* Tex. Code Crim. Proc. art. 11.071 § 2.[3] Petitioner asserted three grounds for relief. Two of his three claims challenged Texas's death-penalty procedures. J.A. 134. His third claim asserted ineffective assistance of counsel at trial, arguing that his trial counsel failed to conduct a sufficient mitigation investigation. J.A. 134-39; *see Wiggins v. Smith*, 539 U.S. 510 (2003). Petitioner did not contend that his ap-

[3] Petitioner's state-habeas counsel is, and was at the time of state habeas proceedings, board-certified in Texas criminal law. *See* Tex. Bd. of Legal Specialization, Profile of David L. Richards, https://perma.cc/4XHF-8ZYY.

pellate counsel was ineffective, nor did he bring a claim challenging the transferred-intent jury instruction.

After an evidentiary hearing, the state trial court recommended that relief be denied. *Ex Parte Davila*, No. WR-75356-01, 2013 WL 1655549, at *1 (Tex. Crim. App. Apr. 17, 2013) (per curiam). The Court of Criminal Appeals accepted the trial court's recommendation and denied relief. *Id.*

4. a. Petitioner then sought habeas relief in federal court. New counsel was again appointed for these federal habeas proceedings. J.A. 140-41; *see* 18 U.S.C. § 3599. Petitioner's eleven claims largely tracked the claims raised by his state appellate and habeas counsel. *Compare* J.A. 174-76, *with* J.A. 86-90, 134. Petitioner also raised an ineffective-assistance-of-appellate-counsel (appellate-IAC) claim for the first time, arguing that his direct-appeal counsel was ineffective for failing to challenge the trial court's transferred-intent instruction. J.A. 175, 223-31. Petitioner did not raise an ineffective-assistance-of-trial-counsel (trial-IAC) claim regarding the transferred-intent instruction.

The reasoning underlying petitioner's appellate-IAC claim is as follows: According to petitioner, the jury's note "clearly suggested that the jury believed [petitioner] had intended to kill" only "one person." J.A. 225. Petitioner then reasons that the trial court's transferred-intent jury instruction was "incorrect" because it "did not clarify that [petitioner] must intend to kill two distinct people before he could be convicted of a capital murder." J.A. 225. Perhaps recognizing that his trial counsel did not preserve an objection to the substance of the transferred-intent instruction, petitioner insists that "even if the objection lodged by the defense counsel was not sufficient to specifically cover the charging error, relief would still have been granted had the issue

been raised on appeal" because the trial court's alleged error was supposedly "egregious." J.A. 228-29. And petitioner asserts that appellate counsel was constitutionally inadequate for failing to raise this unpreserved issue because it was purportedly "the strongest appellate point of error in [his] case," notwithstanding that the remaining points of error were all preserved for appellate review. J.A. 146.

Petitioner acknowledges that his appellate-IAC claim is procedurally defaulted because he failed to present it to the state habeas court. J.A. 146. But petitioner argues that the supposed ineffectiveness of his state-habeas counsel "constitute[s] cause and prejudice to excuse any default." J.A. 146; *see* J.A. 240-41.

The federal district court denied petitioner relief. J.A. 316-87. The court held that petitioner's appellate-IAC claim is procedurally defaulted, and the court cited binding Fifth Circuit precedent holding that allegations of ineffective assistance of state-habeas counsel cannot excuse the default of an appellate-IAC claim. J.A. 360-61; *see also* R.504-06. The district court went on to conclude that, in any event, petitioner's appellate counsel was not constitutionally inadequate because (1) the trial court's transferred-intent jury instruction was correct, and (2) any supposed confusion in that instruction could not have harmed petitioner because he confessed to "intend[ing] to kill more people than he actually did." J.A. 361-68; *accord* J.A. 328 ("the record establish[es] that [petitioner] had the intent to kill multiple individuals").

b. The Fifth Circuit denied petitioner a certificate of appealability (COA). J.A. 389-412. Like the Court of Criminal Appeals and the federal district court, the Fifth Circuit noted that petitioner's confession "reveals an intent to kill at least four persons." J.A. 398. Relying on binding precedent, the Fifth Circuit also noted that

the alleged ineffectiveness of petitioner's state-habeas counsel could not excuse the default of his appellate-IAC claim. J.A. 399-400 (citing *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014)).

SUMMARY OF ARGUMENT

I. In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court gave three reasons for exempting certain trial-IAC claims from *Coleman*'s rule that the alleged ineffectiveness of a prisoner's state-habeas counsel is not cause to excuse the bar on habeas claims procedurally defaulted in state court. None of the three reasons given in *Martinez* warrants treating appellate-IAC claims the same as trial-IAC claims. And additional equitable reasons also counsel against expanding *Martinez*.

A. First, the "key" to *Martinez* was the Court's concern "that no state court at any level will hear the prisoner's" asserted "trial error." *Id.* at 10-12. This interest is almost uniformly absent in substantial appellate-IAC claims because they almost always involve questions of law or fact reviewed by the trial court and thus preserved for appeal. This is a critical difference between trial-IAC and appellate-IAC claims. *Cf.* Pet. Br. 30. Extending *Martinez* to appellate-IAC claims would entail significant costs yet would not produce the foremost benefit identified in *Martinez*—that is, avoiding a situation where no court could adjudicate an underlying claim of trial error.

Petitioner tries to manufacture similarity between the two types of claims by focusing on the risk that the appellate-IAC claim itself will go unreviewed. Pet. Br. 14. But *Martinez* did not turn on the need to review any type of claim that a prisoner might belatedly raise on federal habeas review. Instead, it sought to ensure that

there was at least one adjudication "on the merits" of the alleged "*trial* error" underlying a conviction. 566 U.S. at 11-12 (emphasis added). *Martinez* expressly rejected the proposition that its reasoning extended to "attorney errors *in other kinds of proceedings*." *Id.* at 16 (emphasis added). The "criminal trial," after all, "is the 'main event' at which a defendant's rights are to be determined." *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

The nature of petitioner's own appellate-IAC claim confirms that an extension of *Martinez* is not necessary to ensure that at least one court can review an asserted trial error. Petitioner challenges the substance of a jury instruction. If his trial counsel had objected to it, the claimed error would have been reviewed in the trial court. And because trial counsel did not object, a trial-IAC claim would be the direct, logical vehicle for petitioner's newfound dispute with the failure to challenge that instruction. A new exception to *Coleman* is thus unnecessary to ensure that at least one court will have adjudicated an underlying claim of trial error.

B. Second, *Martinez* recognized that the right to trial counsel has unique significance as "the foundation for our adversary system"—necessary to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Martinez*, 566 U.S. at 12.

Martinez thus singled out trial-IAC claims for special treatment. Likewise, this Court has repeatedly distinguished the right to trial counsel from all other rights, including the right to appellate counsel. *Martinez* is one of several decisions relying on the unique nature of the right to trial counsel to justify exceptions to otherwise blanket rules. *See, e.g.*, *Whor-*

ton v. Bockting, 549 U.S. 406, 419 (2007); *Daniels v. United States*, 532 U.S. 374, 382 (2001); *Custis v. United States*, 511 U.S. 485, 493-96 (1994); *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938).

Petitioner tries to equate the right to trial counsel with the right to appellate counsel, but this Court has said many times that the two rights are quite different. Their differences begin with their sources: the right to trial counsel is expressly guaranteed in the Sixth Amendment, while the right to appellate counsel has been recognized based on more general provisions in the Fourteenth Amendment. *See Halbert v. Michigan*, 545 U.S. 605, 610-11 (2005). The proceedings to which the rights respectively attach are also meaningfully different. *See Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974). As already noted, the "criminal trial is the 'main event.'" *McFarland*, 512 U.S. at 859. An appeal, on the other hand, is not "central to an accurate determination of innocence or guilt." *Goeke v. Branch*, 514 U.S. 115, 120 (1995) (quotation marks omitted). In fact, "it is well settled" that there is not even a "constitutional right to an appeal" in criminal cases. *Abney v. United States*, 431 U.S. 651, 656 (1977). The right to appellate counsel, while surely important, is not foundational and cannot justify the same treatment as the right to trial counsel.

C. Third, unlike the situation in *Martinez*, Texas did not "choos[e] to move" appellate-IAC claims into a proceeding where effective counsel is not guaranteed. 566 U.S. at 13. The constitutional right to effective counsel extends only through one level of direct appellate review. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). It is natural that appellate-IAC claims will be available only in a proceeding itself lacking a constitutional right to counsel. No State bears responsibility for this state of affairs, and that point undermines any ar-

gument for burdening States with the cost of defending defaulted appellate-IAC claims.

D. Additional equitable considerations also counsel against expanding *Martinez* to appellate-IAC claims. First and foremost, doing so will "put a significant strain on state" and federal resources. *Martinez*, 566 U.S. at 15. Unlike the exception for trial-IAC claims, which is limited to States that channel such claims to collateral review, an exception for appellate-IAC claims would extend to all jurisdictions. And because appellate-IAC claims are a gateway to federal review of underlying complaints about trial, the incentive to bring defaulted appellate-IAC claims is strong. If petitioner prevails, *Coleman*'s bar on consideration of appellate-IAC claims not presented in state court will no longer provide a necessary brake on these claims.

The cost of this flood of previously precluded claims would be borne by States and the federal Judiciary, which share no responsibility for a procedural default. And expanding *Martinez* will harm important interests in comity and finality. In order to avoid "undermin[ing] the usual principles of finality of litigation," "degrad[ing] the prominence of the trial itself," and "impos[ing] special costs on our federal system," *Engle v. Isaac*, 456 U.S. 107, 126-28 (1982), petitioner's request to expand *Martinez* should be rejected.

II. Even if the Court were inclined to create an exception to *Coleman*'s bar on defaulted appellate-IAC claims, the denial of petitioner's request for a COA should still be affirmed. The district court rejected petitioner's appellate-IAC claim for the alternative reason that it lacked merit, and petitioner has made no "substantial showing" of the merit of his claim. 28 U.S.C. § 2253(c)(2) (COA standard). It is beyond reasonable debate that the performance of petitioner's

appellate counsel was not deficient for the same reason that petitioner cannot show prejudice: the substance of the transferred-intent instruction was not objected to in trial court, was drawn verbatim from the governing statute, and could present no substantial harm even on petitioner's view given the overwhelming evidence of petitioner's guilt—including his spraying a group of people with gunfire and his confessed intent to kill multiple people.

ARGUMENT

I. *Martinez* Should Not Be Extended to Appellate-IAC Claims.

Martinez unambiguously held that its exception was cabined to trial-IAC claims only: "*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause [to excuse procedural default], and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial." *Martinez*, 566 U.S. at 15.[4]

[4] All but one court of appeals to consider the issue has concluded that "[u]nder *Martinez*'s unambiguous holding," "ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013); *accord Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014); *Reed*, 739 F.3d at 778 n.16 (5th Cir.); *Gore v. Crews*, 720 F.3d 811, 817 (11th Cir. 2013) (per curiam); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012) (Gorsuch, J.); *see also Hunton v. Sinclair*, 732 F.3d 1124, 1126 (9th Cir. 2013) (applying *Martinez*'s limiting language to reject a *Coleman* exception for *Brady* claims); *but see Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1293-94 (9th Cir. 2013). Petitioner contends that this body of authority has not "identified any principled distinction" of *Martinez*. Pet. Br. 22. That would not be unusual, given that lower courts have no discretion to override this Court's holdings, but petitioner is wrong in any event. *See Dansby*, 766 F.3d at 833.

Petitioner now asks the Court to withdraw its reaffirmation of *Coleman* outside of the narrow *Martinez* exception. He provides no persuasive reason to do so. Petitioner relies on the three reasons animating *Martinez*, *see* Pet. Br. 13, which he asserts apply equally to his appellate-IAC claim. But none of those reasons support extending *Martinez* to appellate-IAC claims.

First, and most importantly, in cases raising substantial appellate-IAC claims, the trial court will have already addressed the underlying assertion of trial error. For an appellate-IAC claim to be substantial, the underlying issue must have been preserved at trial. In contrast, the Court in *Martinez* was principally concerned with the risk "that no state court at any level will hear the prisoner's claim" of a trial error. *Martinez*, 566 U.S. at 10. That chief concern behind *Martinez* is absent here, so it cannot justify a further exception for appellate-IAC claims.

Second, *Martinez* recognized that the right to counsel at trial is fundamental because the trial "is the 'main event,'" *McFarland*, 512 U.S. at 859, where claims must originate and where guilt or innocence is adjudicated. The right to appellate counsel is different. The Court has repeatedly rejected any suggestion of equivalence between trials and appeals, including expressly distinguishing the two for purposes of retroactivity and structural error. *Martinez* was just the latest in a long line of decisions according special treatment to the right to trial counsel.

Third, unlike the trial-IAC claim in *Martinez*, States do not "move" or deliberately "channel" appellate-IAC claims from a proceeding in which counsel is constitutionally guaranteed to one without such a guarantee. Whereas *Martinez* reasoned that this channeling justified treating state-habeas counsel like the counsel that

a prisoner would be guaranteed on direct appeal (whose inadequate assistance can be cause to excuse a default), there is no constitutional guarantee of counsel to develop an appellate-IAC claim. This too reflects the different treatment of appellate counsel and the fact that the right to counsel necessarily ends at some point.

Finally, additional equitable considerations counsel against extending *Martinez* to appellate-IAC claims. It would impose significant burdens on state and federal resources and encourage sandbagging. Moreover, federal review of state convictions is inherently costly in terms of finality and comity, and those costs rise significantly when prisoners fail to present their claims first in state court. It is not equitable to impose these costs given the absence of a compelling reason to do so.

A. At least one court will have already reviewed allegations of trial error underlying a substantial appellate-IAC claim.

By its nature, a substantial appellate-IAC claim will involve an underlying assertion of trial error that the trial court has already adjudicated. That is a crucial distinction from the trial-IAC claims at issue in *Martinez*.

1. The foundation of *Martinez* is its concern for avoiding a system in which "it is likely that no state court at any level will hear" the prisoner's "claim of trial error." *Martinez*, 566 U.S. at 10, 12. That concern arose with trial-IAC claims defaulted on state habeas because of the nature of those claims. The typical trial-IAC claim will involve one of three allegations: trial counsel failed to raise an error at trial, failed to properly prepare for trial, or provided poor advice to a defendant. *See* 2 Brian R. Means, *Postconviction Remedies* § 35:4 at 486-88 (2016 ed.). In the first scenario, the purported trial error would have gone unreviewed by the trial

court, likely unreviewed by the appellate court (barring plain-error-type review), and unreviewed by the habeas court (assuming the trial-IAC claim was defaulted there). In the latter two scenarios, which involve counsel's preparation or advice, and thus "often turn[] on evidence outside the trial record," the claims would go unreviewed in a system like Arizona's in *Martinez*, again assuming the claim was defaulted on state habeas. 566 U.S. at 12. So, for all three scenarios, the allegation of trial error underlying a defaulted trial-IAC claim would have gone unreviewed by any court.

In stark contrast, the allegation of trial error underlying a substantial appellate-IAC claim will have been reviewed by the trial court. Preservation of an issue in trial court is essential to showing that a failure to raise that issue on appeal was deficient performance by appellate counsel.[5] So for most appellate-IAC claims raised in practice—and for basically all such claims that are "substantial," Pet. Br. i, 11, 13, and thus within the exception that petitioner seeks—the assertion of trial error that was not raised on appeal *will* have been raised and adjudicated in trial court.

Thus, the central pillar of *Martinez*'s exception for trial-IAC claims is not present for substantial appellate-IAC claims. Indeed, *Martinez* distinguished the facts of *Coleman* on a similar basis, 566 U.S. at 10, recognizing

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[5] 2 Means, *supra*, § 35:19 at 627 ("the failure to raise issues not preserved for review by timely objection in the trial court does not constitute ineffective assistance of appellate counsel"); *accord, e.g.*, *Aparicio v. Artuz*, 269 F.3d 78, 96 (2d Cir. 2001) (holding that appellate counsel cannot be deficient in failing to raise unpreserved claim of error); *Chateloin v. Singletary*, 89 F.3d 749, 755 (11th Cir. 1996) (same); *Tisius v. State*, 183 S.W.3d 207, 213 (Mo. 2006) (same); *Randolph v. State*, 853 So. 2d 1051, 1066 (Fla. 2003) (per curiam) (same).

that *Coleman* barred consideration of a defaulted claim after noting that Coleman had been able to "present a challenge to his conviction" and "one state court"—a trial court—had addressed Coleman's claim. 501 U.S. at 755.[6]

2. Moreover, even outside the mine-run of appellate-IAC claims, *Martinez*'s rationale still does not support the extension that petitioner seeks. Even in the unusual case of an attack on appellate counsel for failing to raise an issue unpreserved in trial court, that very failure to preserve the issue in trial court would almost invariably allow a parallel trial-IAC claim already covered by the existing *Martinez* exception.

In fact, such a trial-IAC claim would be stronger than the parallel appellate-IAC claim because appellate review of unpreserved claims (and thus appellate strategy regarding those claims) is constrained by demanding standards of review. For example, Texas's standard for appellate review of issues not preserved in trial court—akin to the federal plain-error standard—is so demanding that trial counsel's failure to object to an error that would satisfy this appellate standard of review "would almost always amount to ineffective assistance of [trial] counsel." *Posey v. State*, 966 S.W.2d 57, 71 (Tex. Crim. App. 1998) (Womack, J., concurring). So, as to any appellate-IAC claim based on a legal objection not preserved in trial court, it would be the rare and

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[6] There is no merit to petitioner's suggestion that prisoners whose trial counsel properly objected at trial are "worse off" than those whose trial counsel failed to object. Pet. Br. 24-26. When trial counsel raises an argument, the trial court has the opportunity to address and rule on the issue. So the underlying claim of trial error "will have been addressed by one court" in that scenario, which is the baseline that *Martinez* seeks to ensure. *Martinez*, 566 U.S. at 11.

perhaps illusory circumstance in which *Martinez*'s exception for trial-IAC claims is not already a complete remedy.

Such a circumstance may never materialize in practice. At the least, it does not arise here. Petitioner could have challenged trial counsel's performance for failing to raise the same instructional objection that appellate counsel is now challenged for not raising on appeal. *See supra* pp. 5-6. And if petitioner had brought a trial-IAC claim, he could have sought to use the existing *Martinez* exception to excuse the default of that claim on state habeas.

In short, even prisoners bringing unusual appellate-IAC claims like petitioner's (based on issues not preserved in trial court) virtually always have an avenue under existing case law to ensure that the underlying allegation of trial error is reviewed by at least one court.[7] Even for these appellate-IAC claims based on

[7] Hypothetically, there could be cases in which an appellate-IAC claim presents concerns like those in *Martinez* yet is not covered by *Martinez* and the availability of a parallel trial-IAC claim: where a fundamental change of law on a preserved legal issue occurs after trial but is not raised by either appellate or state-habeas counsel, and the change in law is so momentous that failure to heed it rises above mere "ignorance or inadvertence." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In that narrow, hypothetical situation, it would be true that no court will have considered the legal issue under the controlling legal framework yet a trial-IAC claim would not be available as an equal or better alternative to an appellate-IAC claim. It is doubtful whether such a momentous legal change would ever go unnoticed in practice by both appellate and habeas counsel. Respondent has not located a single case where this has occurred, and petitioner does not identify one either. In any event, even if that hypothetical possibility concerns the Court, that limited scenario could not justify a ruling in this case recognizing a broad extension of *Martinez* for all appellate-IAC claims.

arguments not preserved at trial, the availability of a parallel trial-IAC claim counsels against an unnecessary extension of *Martinez*. *See Dretke v. Haley*, 541 U.S. 386, 394 (2004); *McCleskey v. Zant*, 499 U.S. 467, 481 (1991). And this alternative remedy under *Martinez* is already in addition to the backstop provided by the separate "miscarriage of justice" exception to various procedural barriers. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-32 (2013).

Of course, petitioner chose to bring an appellate-IAC claim while foregoing a trial-IAC claim regarding the transferred-intent jury instruction. Whatever the reason for this decision, petitioner's strategic choice in this case is no reason to extend *Martinez* unnecessarily to all appellate-IAC claims.

B. The right to trial counsel is uniquely important and different from the right to appellate counsel.

Martinez also relied on the specific nature of a unique type of trial error: denial of the "bedrock" right to effective assistance of counsel at *trial*. 566 U.S. at 12. In doing so, *Martinez* continued in a long tradition of treating the right to trial counsel as special, "reflect[ing] the unique importance of the assistance of competent counsel before final judgment is imposed by the trial court, perhaps the most important of all of the trial-related rights protected by the Sixth Amendment." 7 Wayne R. LaFave et al., *Criminal Procedure* § 28.4(d) at 258 (4th ed. 2015); *accord, e.g.*, Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 Yale L.J. 2428, 2455 (2013) (cited at Pet. Br. 28) ("*Gideon*'s promise is that every person accused of a crime will have competent representation when he needs it the most—before he is convicted.").

Petitioner and the amici supporting him try to evade this limiting principle by urging the Court to treat the rights to trial and appellate counsel as equivalent. Pet. Br. 16-17; Br. for the Nat'l Assoc. of Criminal Defense Lawyers and the Am. Civil Liberties Union as Amici Curiae (NACDL Br.) at 6-13. But the Court has repeatedly made clear that the right to trial counsel is different—in a category all its own. And the Court has specifically recognized that the right to counsel on appeal is different from, and not as vital as, the right to counsel at trial. The right to appellate counsel is not expressly guaranteed in the Constitution. It is not central to the determination of guilt or innocence. And the failure of appellate counsel to make any argument on behalf of a defendant is not structural error. *Martinez*'s departure from principles of finality and federalism in order to promote the right to trial counsel does not similarly justify a departure from settled claim-processing principles for the quite different right to appellate counsel.

1. The right to trial counsel, which "is the right to effective assistance" of trial counsel, *Missouri v. Frye*, 566 U.S. 133, 138 (2012), is of "unique" importance in the criminal justice system, *Custis*, 511 U.S. at 494. In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the Court unanimously described the right to appointed trial counsel as necessary to the great and "noble ideal" of fair trials.[8] "[S]ince then, American rhetoric has hailed *Gideon*'s promise of equal justice as one of the most im-

[8] "Attorney General Robert Kennedy[] stated a few months after the 1963 ruling" that it changed "'the whole course of American legal history.'" Eric H. Holder, Jr. & Dick Thornburgh, Gideon—*A Watershed Moment*, Champion (June 2012), http://www.nacdl.org/Champion.aspx?id=24999 (quoting Robert Kennedy).

portant in the criminal justice system." J. Harvie Wilkinson III, *The Dual Lives of Rights*, 98 Cal. L. Rev. 277, 285-86 (2010) (quotation marks omitted).

The right to trial counsel has been deemed a necessary precursor to all other procedural rights: the "master key to all the rules and procedures" of the criminal trial. Yale Kamisar, Panel Discussion, Gideon *at 40: Facing the Crisis, Fulfilling the Promise*, 41 Am. Crim. L. Rev. 135, 150-51 (2004); *accord United States v. Cronic*, 466 U.S. 648, 654-56 (1984); Brandon L. Garrett, *Validating the Right to Counsel*, 70 Wash. & Lee L. Rev. 927, 929 (2013) ("[T]he Sixth Amendment right to counsel [is] . . . a central . . . means for regulating the entire criminal process."). The Court has even suggested that the guarantee of effective trial counsel, and its aid in truth-finding, is itself a powerful justification for limits on collateral review. *See Boumediene v. Bush*, 553 U.S. 723, 790-91 (2008). *Martinez* thus described the right to effective trial counsel as "a bedrock principle"—"the foundation for our adversary system"—necessary to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." 566 U.S. at 12.

This Court's other decisions concur, and *Martinez* is not alone in treating the right to trial counsel as unique. For example, in applying the retroactivity bar established in *Teague v. Lane*, 489 U.S. 288 (1989), the Court has repeatedly refused to characterize new rules of procedure as "watershed" because each fails to measure up to the right to trial counsel. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 420 (2004); *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997); *Saffle v. Parks*, 494 U.S. 484, 495 (1990). The Court has described *Gideon* as "the only case that [it has] identified as qualifying under" *Teague*. *Whorton*

v. Bockting, 549 U.S. 406, 419 (2007); *see also id.* ("The *Crawford* [*v. Washington*, 541 U.S. 36 (2004),] rule is in no way comparable to the *Gideon* rule."). In contrast, the Court has expressly held that the right to appeal—and thus *a fortiori* the right to appellate counsel—does not match the right to trial counsel because it is not "central to an accurate determination of innocence or guilt." *Goeke*, 514 U.S. at 120 (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993)).

Like *Martinez*, other decisions of this Court have also reasoned that only the right to trial counsel justified "an end run around . . . procedural barriers that would preclude the movant from attacking [his] prior conviction." *Daniels*, 532 U.S. at 383. In *Custis*, the Court recognized the availability of collateral review of convictions used for sentencing enhancement *only* on the basis of an alleged violation of the right to trial counsel, declaring that right "unique" and "declin[ing]" the invitation to extend the collateral-attack rule "beyond the right to have appointed counsel established in *Gideon*." 511 U.S. at 493-96. In *Daniels*, the Court allowed federal prisoners to use the rule of *Custis* while again recognizing the rule's sole exception for the "unique" right to trial counsel. 532 U.S. at 378.

And during the period when collateral attack on federal convictions was limited to jurisdictional infirmities, the Court uniquely deemed "the Sixth Amendment" right to trial counsel as "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Johnson*, 304 U.S. at 467.

2. Contrary to the suggestion of petitioner and his supporting amici, the rights to trial and appellate counsel differ in meaningful ways. The latter does not justify a costly exception to *Coleman*.

The differences between the two rights begin with their respective sources. Unlike the right to trial counsel, the right to appellate counsel is not expressly guaranteed in the Constitution. Petitioner and the Ninth Circuit misstate the source of the right to appellate counsel as the Sixth Amendment. Pet. Br. 16; *Nguyen*, 736 F.3d at 1296. But the Sixth Amendment guarantees only effective counsel at trial and trial-related proceedings. *See Frye*, 566 U.S. at 140; *Cronic*, 466 U.S. at 658 ("Absent some effect of challenged conduct on the reliability of the *trial process*, the Sixth Amendment guarantee is generally not implicated.") (emphasis added). As opposed to such an express right, "the precise rationale for the" right to appellate counsel "has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment and some from the Due Process Clause of that Amendment." *Smith v. Robbins*, 528 U.S. 259, 276 (2000) (quotation and alteration marks omitted). The right to appellate counsel is part of a class of procedural protections designed to aid indigent defendants on appeal. *See Halbert*, 545 U.S. at 610-11.; *Bearden v. Georgia*, 461 U.S. 660, 664-67 (1983).

In addition to arising from different sources, the two rights serve different purposes. The right to trial counsel is "a bedrock principle" forming "the foundation" of our adversarial criminal system. *Martinez*, 566 U.S. at 12. But "other rights to representation grounded in general concepts of due process, such as assistance during direct appeal . . . , lack this singular quality." 7 LaFave, *supra*, § 28.4(d) at 258-59. The "criminal trial is the 'main event' at which a defendant's rights are to be determined." *McFarland*, 512 U.S. at 859. As petitioner recognizes, unlike appeals, "[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." Pet. Br. 15.

In contrast, "it is well settled" that there is not even a "constitutional right to an appeal." *Abney*, 431 U.S. at 656; *accord Smith*, 528 U.S. at 270 n.5 ("The Constitution does not ... require States to create appellate review in the first place.").[9] As such, the right to appellate counsel is conditional—a far cry from the bedrock right to trial counsel. For similar reasons, even the total failure of appellate counsel to offer an argument on behalf of a defendant, unlike the absence of trial counsel, is not structural error. *Compare Cronic*, 466 U.S. at 658-59, *with Smith*, 528 U.S. at 288-89.

Ross further undermines any purported equivalence between the rights to trial and appellate counsel. 417 U.S. at 611. *Ross* confirms that the lesser status of the right to appellate counsel follows from its conditional nature. *Id. Ross* also details the "significant difference[]" between the respective purposes of the "trial and appellate stages of a criminal proceeding," which points out the different status of the two rights:

> The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant,

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[9] An appeal as of statutory right in federal death-penalty cases was established only in 1889, and "[a] general [statutory] right of appeal in [federal] criminal cases was not created until 1911." *Abney*, 431 U.S. at 656 n.3.

> argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."
>
> By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.

Id. at 610-11 (citation omitted; quoting *Gideon*, 372 U.S. at 344); *accord Goeke*, 514 U.S. at 120 (explaining that the right to appeal is not "central to an accurate determination of innocence or guilt").

The important differences between the bedrock right to the "shield" of trial counsel and the right to the "sword" of appellate counsel confirm that *Martinez* soundly limited its exception to trial-IAC claims. 566 U.S. at 16.

C. States do not deliberately channel appellate-IAC claims out of a proceeding where counsel is constitutionally guaranteed.

1. The third basis for *Martinez*'s holding was the State's "deliberate[] cho[ice] to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed," thereby "significantly diminish[ing] prisoners' ability to file such claims." *Id.* at 13. That dynamic is not present here. In contrast to trial-IAC claims, States do not and cannot move an appellate-IAC claim away from a proceeding in which counsel is constitutionally guaranteed to assist in filing the claim.

This Court has recognized that, if a State chooses a system that significantly diminishes a prisoner's ability to file a claim in state court, there is less encroachment on comity if a federal court hears that claim for the first time. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) (explaining that the "application of the cause-and-prejudice standard" must "appropriately accommodate concerns of finality, comity, judicial economy, and *channeling the resolution of claims into the most appropriate forum*") (emphasis added); *cf. O'Neal v. McAninch*, 513 U.S. 432, 443 (1995) ("[T]he State's interest in [finality] . . . is somewhat diminished" where "the State . . . bears responsibility for the error.").

Martinez thus reasoned that "when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding" where effective counsel is not guaranteed, as opposed to the direct appeal where all other trial errors are heard with the assistance of counsel, the State has "impeded or obstructed" the petitioner's "compl[iance] with the State's established procedures." 566 U.S. at 13-14. This "deci-

sion" by the State, *Martinez* explained, has "consequences for the State's ability to assert a procedural default in later proceedings." *Id.* at 13.

In contrast, appellate-IAC claims by their nature must be brought in proceedings where effective counsel is not constitutionally guaranteed. That is not due to any choice by a State to channel them away from another proceeding. It is because the constitutional "right to appointed counsel extends to the first appeal of right, and no further." *Finley*, 481 U.S. at 555. Because appellate-IAC claims will not accrue until after the "first appeal of right" has ended, *id.*, they are inherently incapable of being presented on direct appeal. It is inevitable that they will be raised in a subsequent proceeding in which counsel is not constitutionally guaranteed. Because Texas has not used "state procedural law," *Trevino v. Thaler*, 133 S. Ct. 1911, 1914 (2013), to erect an impediment or obstacle to the vindication of the right to appellate counsel, the State's interests in finality and respect for its procedural rules are not diminished.

2. Far from erecting impediments or obstacles, Texas has gone to great lengths to promote access to counsel in state habeas proceedings challenging a capital conviction. In 2009, Texas created a state agency called the Office of Capital and Forensic Writs (OCFW) for the express purpose of ensuring that capital-case prisoners receive access to counsel in their state postconviction proceedings, if they desire it. *See* Act of May 20, 2009, 81st Leg., R.S., ch. 781, 2009 Tex. Gen. Laws 1972. The OCFW's exclusive function is to represent indigent capital-case petitioners in state postconviction proceedings. Tex. Gov't Code § 78.054.

The OCFW is staffed by a number of accomplished lawyers and five post-conviction investigators.[10] Per state law, OCFW may decline an appointment as state postconviction counsel only for good cause, such as a conflict of interest. *See* Tex. Gov't Code § 78.054(a). Texas also maintains rigorous requirements for appointed counsel in the event that OCFW cannot represent an indigent petitioner in a capital case. *See* Tex. Code Crim. Proc. art. 11.071 § 2(f); Procedures Regarding Eligibility for Appointment of Attorneys as Counsel Under Article 11.071, Section 2(f), https://perma.cc/DNE7-VCFW; Tex. Office of Court Admin., Application for Appointment of Counsel Pursuant to Article 11.071, https://perma.cc/22VF-J288.

3. Petitioner and his supporting amici observe that both channeled-trial-IAC claims and appellate-IAC claims can first be raised only in state collateral proceedings. *See* Pet. Br. 19-22; NACDL Br. 17-18. But they ignore the essential role that "deliberate[]" state action played in *Martinez*'s analysis. 566 U.S. at 13. *Martinez* made clear that it was the State's "*decision*" to channel trial-IAC claims to collateral proceedings—not simply the nature of the claims—that had "consequences for the State's ability to assert a procedural default in later proceedings." *Id.* (emphasis added). And petitioner concedes that *Martinez* and *Trevino* apply only to States that "*choos[e]* to *move* trial-ineffectiveness claims outside of the direct-appeal process." Pet. Br. 19 (emphases added) (quoting *Martinez*, 566 U.S. at 13).

Deliberate action was crucial to the Court's reasoning because the cause-and-prejudice "rules reflect an

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[10] The OCFW staff directory can be found at http://www.ocfw.texas.gov/staff-directory.aspx.

equitable judgment that *only* where a prisoner *is impeded or obstructed* in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default." *Martinez*, 566 U.S. at 13 (emphases added). Where a State channels trial-IAC claims to collateral review, the Court concluded, it is "*the State* [that] significantly diminishes prisoners' ability to file such claims." *Id.* (emphasis added). That is not true with appellate-IAC claims, which, by their nature, have never been available in proceedings in which counsel to develop such a claim is guaranteed.

Trevino did not alter this reasoning. It is true that *Trevino* "rejected the argument that the *Martinez* exception hinges on the State's formal channeling of claims to collateral proceedings." NACDL Br. 17; *accord* Pet. Br. 19-20. But *Trevino* still relied on the State's *choice*, through the "design and operation" of its "procedural framework," to make "collateral review . . . the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel claim." *Trevino*, 133 S. Ct. at 1920-21. *Trevino* commented on "'the inherent nature of most ineffective assistance' of trial counsel 'claims,'" Pet. Br. 20 (quoting *Trevino*, 133 S. Ct. 1918), only in the context of explaining why the State's deliberate choices in the "structure, design, and operation" of its procedures "make[] it virtually impossible for appellate counsel to adequately present an ineffective assistance of trial counsel claim on direct review." *Trevino*, 133 S. Ct. at 1918, 1921 (quotation marks omitted).

Petitioner is correct that "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." Pet. Br. 21. But the "injustice to the

prisoner" that concerned the Court in *Martinez* was holding the prisoner solely responsible for a default that was, in part, a result of an impediment or obstacle erected by the State. *Martinez*, 566 U.S. at 13-14. Deliberate state channeling was vital to the creation of *Martinez*'s limited exception to *Coleman*. No such impediment or obstacle exists here. Accordingly, neither does any comparable justification exist for a further exception to *Coleman* for appellate-IAC claims.

D. Additional equitable considerations show that *Martinez* should not be extended to appellate-IAC claims.

The *Martinez* exception is equitable in nature. The Court concluded that the three considerations discussed above (in Part I.A-I.C) justified an equitable exception to *Coleman* for substantial trial-IAC claims in certain jurisdictions, notwithstanding the potential costs. *Cf. Wright v. West*, 505 U.S. 277, 293 (1992) ("[T]he[] costs, as well as the countervailing benefits, must be taken into consideration in defining the scope of the writ."). As demonstrated above, those three factors do not justify extending *Martinez*'s exception to include appellate-IAC claims.

Furthermore, competing equitable considerations in this context support adherence to *Coleman*'s rule. Expanding *Martinez* to include appellate-IAC claims will consume resources, create perverse incentives, and impinge on finality and comity. Those costs are not "modest," *cf.* Pet. Br. 26, and they will accrue despite a trial court having already adjudicated the alleged trial error underlying any substantial appellate-IAC claim. It is not equitable to create such substantial costs in the face of only scant alleged benefits from extending *Martinez* to appellate-IAC claims.

1. "*Davila* claims" will become a regular part of federal habeas review.

If *Martinez* is extended to appellate-IAC claims, a "*Davila* claim" can be expected frequently in federal habeas cases for several, reinforcing reasons.

a. First, unlike *Martinez* claims, a *Davila* claim will be available in every jurisdiction. *Martinez* and *Trevino* limited their remedy to States that channeled trial-IAC claims out of the first round of direct appeal, in which effective counsel is guaranteed. Thus, those decisions did not cover a number of States. *See, e.g.*, *Lee v. Corsini*, 777 F.3d 46, 59-60 (1st Cir. 2015) (*Martinez* and *Trevino* do not apply because Massachusetts does not channel trial-IAC claims to collateral review); *Fairchild v. Trammell*, 784 F.3d 702, 721 (10th Cir. 2015) (Oklahoma); *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015) (Wisconsin); *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014) (Ohio). But appellate-IAC claims, by their very nature, can never be brought in a proceeding in which effective counsel is guaranteed. *See supra* Part I.C. Accordingly, a *Davila* claim will be available to prisoners in every State.

b. Second, there will routinely be opportunity to allege *Davila* claims requiring party and judicial scrutiny. Any issue raised at trial that appellate counsel chooses not to pursue on appeal could be alleged by a prisoner as the basis for an appellate-IAC claim. And those issues will often be abundant because it is both expected and normal that appellate counsel abandon a number of issues raised by trial counsel: "appellate 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." *Smith*, 528 U.S. at 288; *see*

Martinez, 566 U.S. at 15 (presuming that "the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing norms").

c. Third, not only will opportunity routinely exist, but the incentives to allege appellate-IAC claims are powerful—as this case shows. The incentive is particularly strong in capital cases, where the overriding goal of petitioners is to, at the very least, delay their penalty. *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 5 (Aug. 23, 1989) ("The inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out.").[11] And it is easy to second-guess appellate decisions after the fact, as it is with any litigation. Thus, claims of ineffective assistance of counsel are "one of the most common forms of cause invoked." Aziz Huq, *Habeas and the Roberts Court*, 81 U. Chi. L. Rev. 519, 542 (2014) (quotation marks omitted).

Petitioner's proposed rule would further incentivize defaulted appellate-IAC claims because their new cognizability on federal habeas would also allow, in turn, assertion of appellate-IAC as *cause* to allow direct con-

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[11] *See also* Barry Latzer & James N.G. Cauthen, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study* 13 (Mar. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf ("The appeals process does not affect non-capital sentences in the same way as capital sentences. Whereas a death sentence may not be carried out while appeals are pending, a sentence of imprisonment ordinarily will run its course notwithstanding appellate review. Because appeals stay, even if temporarily, the implementation of death sentences, there is a strong incentive to file numerous and even frivolous postconviction petitions, further prolonging the appellate process.").

sideration of the underlying claim of trial error. Under current law, if a claim of trial error was not presented on appeal in state court, the prisoner cannot overcome that default due to the "cause" of ineffective appellate counsel unless that appellate-IAC assertion was itself properly presented in state court "as an independent claim." *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (quoting *Murray*, 477 U.S. at 489). *Edwards* held that, because "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim," *id.* at 451, the *Coleman* bar precludes federal-court consideration of any appellate-IAC assertion—as a claim or as cause—if it was not properly presented for state-court review. *Id.* at 451-52.

If the Court were to now create an exception to *Coleman* allowing federal habeas courts to consider defaulted appellate-IAC claims, the reasoning of *Edwards* means that a defaulted appellate-IAC claim could also be entertained as cause to overcome the appellate default of a trial-error claim. That would make appellate-IAC allegations an enticing tool for prisoners trying get federal review of trial claims—which come with the remedy of a new trial, not merely a new appeal.[12]

Currently, *Coleman* provides a much-needed brake on the incentive to assert appellate IAC as cause where

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[12] Adding to this incentive, when procedural default is excused, some courts review the defaulted claim de novo notwithstanding an earlier decision on the merits. *See, e.g.*, *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 462 (6th Cir. 2015) (per curiam), *cert. denied sub nom. Cook v. Barton*, 136 S. Ct. 1449 (2016); *Thomas v. Horn*, 570 F.3d 105, 117 (3d Cir. 2009); *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997); *Hilton v. Dir. of the Dep't of Corr.*, No. 2:16-cv-00135, 2016 WL 8285664, at *4 (E.D. Va. Dec. 7, 2016).

it was not raised on state collateral review. If petitioner succeeds, however, that benefit will be lost. Defaulted appellate-IAC claims will be accompanied by trial-error claims. This dynamic did not exist in *Martinez*, which concerned trial-IAC claims, because trial-IAC is itself sufficient for a prisoner to obtain a new trial. *See* 7 LaFave et al., *supra*, § 28.4(d) at 258 n.75.

d. Finally, recognizing a *Davila* claim will incentivize prisoners to sandbag on state habeas and save their appellate-IAC claims for federal habeas. Under the existing *Coleman* rule, there is no benefit to holding back an appellate-IAC claim on state habeas: the default of that claim cannot be excused in federal court based on state-habeas counsel's alleged inadvertence or error. Thus, prisoners are incentivized to bring appellate-IAC claims on state habeas—where they should—and the merits rejection of appellate-IAC claims in state court will receive AEDPA deference in subsequent federal habeas petitions. *See* 28 U.S.C. § 2254(d).

In contrast, under petitioner's rule allowing federal-court review of defaulted appellate-IAC claims, a prisoner would be better served by his state-habeas counsel failing to raise an appellate-IAC claim if the counsel believes that federal court would be a better forum. That is because procedural default would not bar the claim in federal court under petitioner's rule, yet the contrived absence of a merits adjudication of that claim by the state court would preclude AEDPA deference. *See, e.g.*, Jonathan D. Soglin, First District Appellate Project Training Seminar 14 (2008) ("Practice Tip: The best scenario for federal court review may be where the state court finds the federal claim procedurally defaulted under a state procedural bar that is . . . excused . . . . In that situation, the federal court will review the claim on the merits and decide it de novo, with no deference

to the state court decision."), https://perma.cc/JNU7-AXCR. Creating a *Davila* claim will thus incentivize prisoners to sandbag in state court and channel appellate-IAC questions to federal court. This is precisely the result that the cause-and-prejudice standard seeks to avoid. *See Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977).

e. In sum, under petitioner's rule, ample opportunity and incentive will cause *Davila* claims to proliferate in federal court. Experience in the Ninth Circuit bears out that concern. Respondent's research indicates that the Ninth Circuit's decision in late 2013 holding that *Martinez* extends to appellate-IAC claims, *Nguyen*, 736 F.3d 1287, has already been used by petitioners in dozens of appellate-IAC habeas cases.[13] And that is the consequence of just one outlier decision of a circuit-court panel. A decision of this Court would affect practice much more extensively. For example, after this

[13] *See, e.g.*, *Hawes v. Palmer*, No. 3:10-cv-00655, 2017 WL 663235, at *3 (D. Nev. Feb. 16, 2017); *Ramet v. Legrande*, No. 3:14-cv-00452, 2016 WL 4770030, at *4 (D. Nev. Sept. 12, 2016); *Husband v. Ryan*, No. 13-cv-01320, 2016 WL 5799039, at *5 (D. Ariz. June 21, 2016), *report and recommendation adopted*, 2016 WL 5682747 (D. Ariz. Sept. 30, 2016); *Miller v. Baldwin*, No. 3:96-cv-00114, 2016 WL 3951394, at *23 (D. Or. Apr. 7, 2016), *report and recommendation adopted*, 2016 WL 3951408 (D. Or. July 19, 2016); *Dixon v. Ryan*, No. 14-cv-00258, 2016 WL 1045355, at *41-44 (D. Ariz. Mar. 16, 2016); *Speight v. Warner*, 159 F. Supp. 3d 1218, 1220-29 (W.D. Wash. 2016); *Chavez v. LeGrand*, No. 3:13-cv-00548, 2015 WL 5567284, at *4 (D. Nev. Sept. 22, 2015); *Pinzon v. Ryan*, No. 14-cv-08244, 2015 WL 11071468, at *10 (D. Ariz. Sept. 22, 2015), *report and recommendation adopted*, 2016 WL 3387269 (D. Ariz. June 20, 2016); *Jaffe v. Brown*, No. 05-cv-04439, 2014 WL 2938275, at *7 (N.D. Cal. June 27, 2014); *see also Vanderschuit v. Ryan*, No. 15-cv-00915, 2016 WL 7383785, at *4 n.5 (D. Ariz. Dec. 21, 2016).

Court's *Martinez* decision, *Martinez* claims are now routine in federal habeas litigation. By respondent's count, *Martinez* has so far been cited in over 3,800 federal cases. If petitioner's position here is accepted, *Davila* claims would similarly flood federal courts.

2. The proliferation of *Davila* claims will impose significant costs and harm important interests in finality and comity.

Swamping federal courts with *Davila* claims would not advance any of the considerations animating *Martinez*, *see supra* Part I.A-I.C, and would only impose significant costs and impair state and federal interests in finality and comity.

a. Making *Davila* claims a regular part of habeas practice will put a significant strain on state resources. After all, "most of the price paid for federal review of state prisoner claims is paid by the State." *Coleman*, 501 U.S. at 738-39. This is true in capital cases in particular: "This delay undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system." Lewis F. Powell, Jr., *Capital Punishment*, 102 Harv. L. Rev. 1035, 1035 (1989).

This Court has recognized that evaluating alleged cause for procedural default based on purported attorney error is a particularly costly exercise:

> In order to determine whether there was cause for a procedural default, federal habeas courts would routinely be required to hold evidentiary hearings to determine what prompted counsel's failure to raise the claim in question. While the federal habeas courts would no doubt strive to minimize the burdens to all concerned through the use of affidavits or other simplifying procedures, [one cannot] assume that these costs

> would be negligible, particularly since, as [the Court] observed in *Strickland* . . . , "[i]ntensive scrutiny of counsel . . . could dampen the ardor and impair the independence of . . . counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."

Murray, 477 U.S. at 487-88.

Federal courts bear this burden as well. In 2015, habeas petitions under 28 U.S.C. § 2254 accounted for one out of every fifteen private civil cases filed in federal courts. Admin. Office of the U.S. Courts, 2015 Judicial Business of the United States Courts tbl. C-3 (2016), http://www.uscourts.gov/sites/default/files/data_tables/C03Sep15.pdf. In Texas, that statistic jumps to one in ten. *Id.* And, even a few years before *Martinez*, capital habeas petitions took "twice as long to complete in the federal courts" as they did at the time of AEDPA's enactment. Jon B. Gould, *Justice Delayed or Justice Denied?: A Contemporary Review of Capital Habeas Corpus*, 29 Justice Sys. J. 273, 273 (2008).

Courts must be sensitive to the "heavy burden" that "[f]ederal collateral litigation places . . . on scarce federal judicial resources, . . . threaten[ing] the capacity of the system to resolve primary disputes." *McCleskey*, 499 U.S. at 491. The strain on federal courts that will accompany a victory for petitioner counsels against expanding *Martinez*'s narrow exception to *Coleman*.

b. The increase in litigation if petitioner prevails will not be limited to *Davila* claims; a stream of litigation seeking further exceptions to *Coleman* can be expected. *Martinez* was not blind to the comparable danger there; hence, the Court used specific and clear limiting language. Retreating from that language here will

undermine any further effort to limit exceptions to *Coleman* and other procedural rules.

This is not idle speculation. *See, e.g.*, *Hunton*, 732 F.3d at 1127-31 (Fletcher, J., dissenting) (arguing that claims beyond ineffective assistance of counsel should be excepted from *Coleman*'s rule); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.3[b] at 1590-91 n.36 (7th ed. 2016) (arguing that the reasoning of *Martinez* should remove *Coleman*'s bar in all manner of new scenarios, such as defaulted *Brady* claims, defaulted trial-IAC claims in States that do not channel such claims to collateral proceedings, and where the purported "cause" of a default is ineffective assistance of counsel in proceedings subsequent to initial collateral review);[14] Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 Hofstra L. Rev. 591, 595-97 (2013) (arguing that *Martinez*'s reasoning undermines the bar on second-and-successive petitions and should allow new factual development in federal court).

The costs and delays from this avalanche of expected litigation only confirm the undesirability of cutting back on *Coleman* here.

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[14] Petitioner relies on the Hertz and Liebman treatise for various propositions. Pet. Br. 16-17. The authors of that treatise, however, take an unduly aggressive stance in favor of expanding federal review of state convictions compared to other secondary sources. *Cf., e.g.*, 2 Hertz & Liebman, *supra*, § 26.3[b] at 1584-85 (advocating for a constitutional right to effective state collateral counsel); James Liebman & Randy Hertz, Brecht v. Abrahamson*: Harmful Error in Habeas Corpus Law*, 84 J. Crim. L. & Criminology 1109, 1113 (1994) (bemoaning this Court's decision in *Brecht* as "an assault on the principle of direct appeal/habeas corpus parity").

c. Traditional concerns of finality and comity likewise counsel against any further exception to *Coleman*. "[T]he doctrine[] of procedural default" is "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time;" it also "seek[s] to vindicate the State's interest in the finality of its criminal judgments." *McCleskey*, 499 U.S. at 493.

These traditional interests are all the more powerful after Congress endorsed them in AEDPA. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (highlighting "AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review a claim, and to correct any constitutional violation in the first instance.") (quotation and alteration marks omitted); *Day v. McDonough*, 547 U.S. 198, 208 (2006) ("[C]onsiderations of comity, finality, and the expeditious handling of habeas proceedings . . . motivated AEDPA."); *Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("AEDPA's clear purpose [is] to encourage litigants to pursue claims in state court prior to seeking federal collateral review").

Recognizing an additional exception to *Coleman* in this case will "undermine[] the usual principles of finality of litigation," "degrade[] the prominence of the trial itself," and "impose[] special costs on our federal system." *Engle*, 456 U.S. at 126-28. These costs imposed on our federal system by the availability of the writ for state prisoners "are particularly high when a . . . default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts," thereby depriving state courts of the "chance to mend their own fences and avoid federal intrusion." *Id.* at 128-29; *accord Coleman*, 501 U.S. at 729-32.

In short, a victory for petitioner can be expected to flood the federal courts with claims that will undermine state procedural rules. This "significant harm," *Coleman*, 501 U.S. at 750, is not justified—especially when none of the three reasons animating *Martinez* apply to appellate-IAC claims, *see supra* Part I.A-I.C.

II. Alternatively, the Court Should Affirm the Fifth Circuit's Denial of Petitioner's Request for a COA Because Petitioner's Appellate-IAC Claim Is Undebatably Meritless.

Petitioner's appellate-IAC claim is based on his appellate counsel's decision not to raise an *unpreserved* challenge to a *correct* jury instruction where petitioner *confessed* to the facts constituting capital murder. No reasonable jurist would find any merit in petitioner's appellate-IAC claim. *See* Br. in Opp. 15-21. This alternative reason requires affirmance of the Fifth Cicuit's denial of petitioner's request for a COA, even if this Court were inclined to expand *Martinez*'s exception to cover appellate-IAC claims. And the Court may dispose of the case on the basis that the appellate-IAC claim is without merit, rather than address whether a procedural-default bar applies. *See Engle*, 456 U.S. at 119-21 & n.19 (where a claim is "without merit," "[i]t is unnecessary in such a situation to inquire whether the prisoner preserved his claim before the state courts").

To obtain a COA, it must be "debatable among jurists of reason" that petitioner's appellate-IAC claim would prevail on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 330 (2003). And, to succeed on an appellate-IAC claim, a prisoner must show that appellate counsel was deficient and that this deficiency prejudiced him.

Smith, 528 U.S. at 285-86. Both elements of an appellate-IAC claim are undebatably lacking here.

A. No reasonable jurist would find appellate counsel's performance here deficient, as the purported trial error was nonexistent and unpreserved.

It is beyond reasonable debate that petitioner's appellate counsel was not constitutionally deficient by failing to challenge the substance of the transferred-intent instruction. That argument was not preserved by trial counsel; the instruction was a correct, verbatim recitation of the relevant statute; and the instruction would not have erased the overwhelming evidence of petitioner's guilt.

"Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (quotation marks omitted). Always difficult to overcome, that presumption is particularly demanding when the claim is that counsel failed to raise a particular issue on appeal. *See* Pet. Br. 27. "[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." *Smith*, 528 U.S. at 288; *accord Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). It is "only when ignored issues are clearly stronger than those presented" that "the presumption of effective assistance of counsel [can] be overcome." *Smith*, 528 U.S. at 288 (quotation marks omitted).

Petitioner complains that his appellate counsel failed to argue that the transferred-intent instruction was

erroneous, insisting that this argument was the strongest available on appeal. Pet. Br. 28. But, as noted above, petitioner's trial counsel did not object to the substance of the instruction and thus failed to preserve that argument for appeal. *See supra* pp. 5-6; *see also Pennington*, 697 S.W.2d at 390 (explaining that to preserve an objection to a jury instruction, "the accused is required to distinctly specify each ground of objection"). So any challenge on appeal to the substance of that instruction would have been reviewed under a demanding standard: it must be "so egregious" that it denied petitioner "a fair and impartial trial." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (quotation marks omitted).

The arguments that were raised by petitioner on appeal—such as the challenges to the admission of his confession, which was the crux of the prosecution's case—did not face such an "exacting" burden. *Jones v. State*, 720 S.W.2d 535, 536 (Tex. Crim. App. 1986). That point belies any thought that an instructional challenge was "clearly stronger" than the arguments actually made on appeal. *Smith*, 528 U.S. at 288. In fact, many of the arguments raised on appeal were repeated in petitioner's current federal habeas petition. *See supra* p. 9. Petitioner's unpreserved jury-instruction argument would have been one of the weakest on appeal and certainly not the strongest.

In all events, because the transferred-intent instruction was proper, declining to challenge it could not have been deficient performance by trial or appellate counsel. Petitioner does not contend that the instruction failed to accurately recite the governing statute—as it quoted the relevant statute verbatim. *See supra* pp. 4-5. Instead, petitioner incorrectly contends that the instruction was infirm because it allegedly permitted

the jury to use petitioner's intent to kill one person to satisfy the mental-state element with respect to the two deaths that he caused. Pet. Br. 6-7.[15] But the instruction addressed culpability when the intent to harm one "person," in the singular, results in harm to a different "person," in the singular. J.A. 62. This single-victim-focused instruction did not permit "the double use of a single specific intent to elevate two homicidal results" into two murders. *Roberts*, 273 S.W.3d at 333 (Price, J., concurring).

Contrary to petitioner's statement, respondent has indeed argued "that appellate counsel had a strategic reason for not challenging the jury instructions." Pet. Br. 8. As respondent's brief in opposition to certiorari stated: "Understandably, defense trial counsel did not lodge an objection to the supplemental charge on the basis that it was an incorrect statement of the law. Appellate counsel cannot be ineffective for failing to raise a claim of error that was not preserved for appeal and was not erroneous." Br. in Opp. 19 (citation omitted); *see also* Br. in Opp. 14, 17.

Not only was the instruction both correct and far from the strongest issue on appeal, but the jury heard overwhelming evidence of petitioner's intent to murder multiple people and evidence supporting the alternative "knowing" mental-state for capital murder. Petitioner, who shot up a group of people with a semi-automatic

[15] Petitioner's insistence that the jury's note evinces its belief that petitioner intended to kill only one person despite his confession to intending to shoot at least four persons, Pet. Br. 6-7, is meritless. The only plausible interpretation of the note is that the jury was seeking clarification as to whether the specific identities of petitioner's victims mattered.

rifle, was clearly guilty of this alternative form of capital murder. *See infra* Part II.B.

B. No reasonable jurist would find prejudice because the unpreserved objection had no merit and no serious question of petitioner's guilt exists.

Nor is it reasonably debatable that petitioner could satisfy the prejudice prong of his appellate-IAC claim. To reverse the denial of a COA, this Court would need to find it at least reasonably debatable that a direct-appeal challenge to the trial court's transferred-intent instruction would have been successful. But petitioner could not have overcome the Court of Criminal Appeals' "egregious harm" standard for unpreserved arguments, even if there were something wrong with the trial court's supplemental instruction.

When overwhelming evidence supports a verdict, the Court of Criminal Appeals will not find egregious harm warranting reversal. *See, e.g.*, *Neal v. State*, 256 S.W.3d 264, 278-79 (Tex. Crim. App. 2008); *Bonfanti v. State*, 686 S.W.2d 149, 153 (Tex. Crim. App. 1985); *see also Sanchez v. State*, 376 S.W.3d 767, 776 (Tex. Crim. App. 2012) (concluding that instructional error was harmless because the evidence of defendant's guilt was overwhelming). In *Neal*, for example, the defendant complained that the trial court's instruction allowed the jury to convict him of murder even if it concluded that his alleged accomplice had acted alone. 256 S.W.3d at 278. The court explained, "[e]ven assuming arguendo that the jury instruction was erroneous . . . , any such error would not have risen to the level of egregious harm" because "the evidence of appellant's guilt was overwhelming." *Id.* at 278-79.

The same is true here even assuming arguendo that the jury instruction was erroneous. The jury convicted petitioner of capital murder based on his "shoot 'em up" of a child's birthday party attended by more than 15 people. J.A. 37. There is no question that petitioner killed multiple people. And petitioner *confessed* to intending to shoot more than two people:

> I had a scope on my gun, so I had range. I stood in the field across the street. The fat dude [Jerry Stevenson] was in the middle of the street. The other three were on the porch. I wasn't going to give them a chance to get a gun. . . . I only let off 10 rounds, and I had 21 in the clip. I was trying to get the guys on the porch, and I was trying to get the fat dude.

J.A. 38.

Even apart from petitioner's confession to intending to kill multiple people, petitioner's actions are overwhelming proof that he committed the knowing form of capital murder. It is beyond peradventure that spraying bullets at a crowd of more than 15 people with a rifle was reasonably certain to kill more than one person. *See, e.g.*, *Medina v. State*, 7 S.W.3d 633, 636-38 (Tex. Crim. App. 1999).

It is not debatable that the Court of Criminal Appeals would find overwhelming evidence that petitioner was guilty of capital murder.[16] That would

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[16] Petitioner's purported "[s]ubstantial evidence" to the contrary, Pet. Br. 4-5, is nothing of the sort. It does not address at all petitioner's confession to intending to shoot four people or the undisputed inference that, when petitioner opened fire on a group of more than 15 people, he was reasonably certain to kill two or more of them. Moreover, petitioner's description of the "evidence" is not accurate. The "motive offered" by the State, Pet. Br. 4, was not just that petitioner had a dispute with Jerry

foreclose any appellate relief on egregious-error review. Petitioner's appellate-IAC claim is thus meritless beyond any reasonable debate.

CONCLUSION

The order of the court of appeals denying a COA should be affirmed.

Respectfully submitted.

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Stevenson, but that, in petitioner's own words, he wanted to shoot members of a rival gang, J.A. 37. And although a witness did at one point "testif[y] that the red beam from the laser sight on Davila's rifle shined on Jerry Stevenson but not on the women or children outside," Pet. Br. 4 (incorrectly citing R.5638), that same witness later corrected himself and testified that he saw the "beam on the grandmother [Annette Stevenson]" and other "people in the front of the house[.]" R.5715-16; *cf.* R.5707 (earlier uncorrected testimony). Finally, petitioner's "poor vision," Pet. Br. 5, does not help him; when he took aim, he thought he was shooting at four men. J.A. 37-38. Thus, he had the mental state for capital murder. *See supra* pp. 4, 8, 10.