No. 16-6219

IN THE

Supreme Court of the United States

ERICK DANIEL DAVILA,

Petitioner,

vs.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Martinez v. *Ryan* held that its exception to the *Coleman* v. *Thompson* rule was limited to claims of ineffective assistance of *trial* counsel and that *Coleman* would govern in all other circumstances, which necessarily includes claims of ineffective assistance of *appellate* counsel.

Should *Martinez* be overruled to the extent of that limitation, thereby extending its exception to appellate counsel claims?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, Petitioner seeks to further erode the finality of capital cases by further widening an excep-

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

tion to the landmark case of *Coleman* v. *Thompson*. This erosion would cause further delay in cases that are already delayed too long, contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts of the crime are related in the opinion of the Texas Court of Criminal Appeals on direct appeal. See J. A. 104-110. On April 6, 2008, Annette Stevenson held a birthday party for her nine-year-old granddaughter at her home in Fort Worth, Texas. Fifteen children were on the porch eating ice cream and cake. Mrs. Stevenson's son, Jerry Stevenson, was the only adult male present. J. A. 104. A man fired multiple shots at the porch. Three girls and one woman were wounded. Mrs. Stevenson and her five-year-old granddaughter, Queshawn, were killed. J. A. 105. Crime scene investigators found "bullet holes . . . all along the porch walls and in the windows of the Stevenson home." J. A. 108.

After an investigation, police arrested petitioner Erick Davila, and he made four written statements. In the third one, he admitted committing the crime with a gun he referred to as an "AK," which had a scope. He stated that he did not know that the people on the porch other than Jerry were all women and children, but thought his targets were all men, whom he referred to as "the fat dude" and "the other 3." J. A. 109. He claims he has "clinically bad eyesight." Pet. for Cert. 8-9. Davila said he "*only* let off 10 rounds," and "I was trying to get the *guys* on the porch *and* I was trying to get the fat dude." J. A. 109-110 (emphasis added). By his own admission, then, he fired ten rounds from an AK-47 type gun at a porch full of people and was specifically targeting four people.

The variant of capital murder charged in this case requires that the defendant "knowingly or intentionally" killed more than one person, but it does not require that the people the defendant intended to kill or knew would be killed be the same people who were actually killed. See *infra*, at 18.

The jury sent a note asking for clarification on the required mental state. See J. A. 362 (Federal District Court opinion). The trial court responded with one additional instruction on mental state and one on transferred intent. See J. A. 363-364. The defendant's only objection was that the second instruction should be held and only given if needed later. Trial counsel did not object on the ground that the instructions were legally incorrect. See J. A. 51-53, 366. Counsel did not request an additional instruction pinpointing the issue of the number of people targeted by the defendant. See *ibid*.

On direct appeal, counsel raised 14 points of error, 9 of which related to the defendant's devastating statements. See J. A. 86-90. One claim challenged the sufficiency of the evidence on mental state, J. A. 92-102, arguing that the evidence showed the defendant intended to murder only one person. The CCA affirmed, finding ample evidence that the defendant intended to kill more than one person. J. A. 113-115.

On state habeas corpus, Petitioner made no claim of ineffective assistance of trial counsel. J. A. 134.

On federal habeas corpus, the District Court found that the claim of ineffective assistance of appellate counsel was procedurally defaulted because it was not made on state habeas corpus. J. A. 360-361. The District Court nonetheless went on to consider the claim on the merits. Appellate counsel was not ineffective because the instructions were not erroneous.

Further, "any alleged error did not result in harm under either *Almanza* standard," J. A. 366, referring to the State's standards for preserved and unpreserved errors. Further, the District Court denied a certificate of appealability (COA) because the Petitioner had "failed to make a substantial showing of the denial of a constitutional right." J. A. 386.

The Court of Appeals also denied a COA, holding that the claim was procedurally defaulted, and that *Martinez* v. *Ryan*, 566 U. S. 1 (2012), and *Trevino* v. *Thaler*, 569 U. S. __, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), did not create an exception for ineffective assistance of trial counsel claims. The Ninth Circuit held to the contrary in *Nguyen* v. *Curry*, 736 F. 3d 1287, 1293 (2013). This Court granted certiorari on February 27, 2017.

SUMMARY OF ARGUMENT

Fidelity to *stare decisis* demands that the limits that *Martinez* v. *Ryan* set for its rule be maintained. *Martinez* unambiguously limited its exception to *Coleman* v. *Thompson* to claims of ineffective assistance of *trial* counsel and held that *Coleman* would continue to apply in all other circumstances. Petitioner is therefore asking for a partial overruling of both *Martinez* and *Coleman*.

Stare decisis has particular force when Congress exercises primary authority in the area and remains free to alter what this Court has done. In enacting the habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress made a number of changes in the law of habeas corpus procedure, but it chose to leave the rule of *Coleman* intact. No justification has been shown for a departure from

precedent. The rule has not been undercut, and it has not proved unworkable.

Unlike most areas of procedure, the reliance interest is strong here. Because of the interrelation between state and federal habeas corpus, persons crafting rules for state habeas must take federal habeas rules into account so that the systems dovetail and federal courts do not consider unexhausted claims never presented to any state court. Making rules is not easy in such a contentious area of law, and constant change in federal rules frustrates efforts to make the systems mesh.

The "particular concern" of *Martinez* is not present with ineffective assistance of appellate counsel claims. The *Martinez* Court was particularly concerned that if trial counsel were ineffective then an error seriously affecting the fairness of the trial would neither be raised at trial nor cognizable on appeal, and state collateral review would be the first chance to raise it. On the other hand, if a grave error affecting the trial occurred and trial counsel *was* effective, then trial counsel raised the objection and got one ruling on it, from the trial judge. For a properly preserved objection, an ineffective appellate lawyer can only default a chance to receive a second ruling on the question, a much less compelling case for further eroding *Coleman*. If trial counsel was ineffective and failed to raise it, then *Martinez* applies directly without a need for an extension.

Martinez has seriously eroded finality already, compromising the objective of AEDPA. In a sample of post-*Martinez* federal capital habeas cases from Arizona, 70% had *Martinez* issues that had to be litigated and decided. None were determined to be meritorious. *Martinez* adds complexity and delay to a system that is already too complex and already takes too long. Fur-

ther widening the *Martinez* exception to *Coleman* would further erode the important value of finality.

ARGUMENT

I. Fidelity to *stare decisis* demands that the limits *Martinez* v. *Ryan* set for its rule be maintained.

The problem of constantly shifting rules in federal habeas corpus review of state decisions is not a new one. Justice Jackson famously noted long ago, "Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles." *Brown* v. *Allen*, 344 U. S. 443, 535 (1953) (concurring in the judgment).

To answer the question presented in this case, the Court need look no further than the words of *Martinez* v. *Ryan*, 566 U. S. 1 (2012). "This opinion qualifies *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*." *Id*., at 9 (emphasis added) "The rule of *Coleman* governs in *all* but the limited circumstances recognized *here*." *Id*., at 16 (emphasis added).

Does "all" mean "all" or does it mean "some"? Does "recognized here" mean "recognized here" or does it mean "recognized here plus an indeterminate number of future cases"? Does "at trial" mean "at trial" or does it mean "at trial or on appeal"? Do words mean what they have always meant? Does the law know fixed principles? If the *Martinez* Court meant what it said,

and if the dissent's accusation, see *id*., at 19 (opinion of Scalia, J.), was indeed overwrought, then the question presented has already been decided, and that is the end of this case.

The word "overruled" does not appear in Petitioner's brief, and the brief contains no discussion of *stare decisis*. Nonetheless, Petitioner is asking for nothing less than a partial overruling of both *Coleman* v. *Thompson*, 501 U. S. 722, 752-754 (1991) and *Martinez* v. *Ryan*. *Coleman* held that ineffective assistance of counsel in a proceeding where there is no constitutional right to counsel is not "cause" for the purpose of the procedural default rule. *Id*., at 754. *Martinez*, as noted above, held that its "narrow exception" to *Coleman* was limited to claims of ineffective assistance of *trial* counsel and that *Coleman* would continue to govern in *all* other circumstances, which includes the circumstance of this case.

The question then is whether *Coleman* and *Martinez* should be overruled in part so as to further erode the protection of finality of criminal judgments that *Coleman* provided. "Overruling precedent is never a small matter." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. __, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463, 471 (2015). The simplest reason to maintain *Coleman* with no further exceptions is that this landmark case was correctly decided and gave proper weight to the vitally important interest in finality of judgments. See 501 U. S., at 750. *Stare decisis* is an alternative answer to the argument that a precedent was incorrectly decided, see *Kimble*, 135 S. Ct., at 2409, 192 L. Ed. 2d, at 471-472, and its invocation makes it unnecessary to decide whether a prior case was correctly decided, "saving parties and courts the expense of endless relitigation." *Ibid*. "*[S]tare decisis* is a foundation stone of the rule of law," and any argument for departure " 'demands

special justification.' " *Michigan* v. *Bay Mills Indian Community*, 572 U. S. __, 134 S. Ct. 2024, 2036, 188 L. Ed. 2d 1071, 1089 (2014) ("*Bay Mills*") (quoting *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984)).

This Court has noted many times that "considerations of *stare decisis* have special force in the area of statutory interpretation." *CBOCS West, Inc*. v. *Humphries*, 553 U. S. 442, 452 (2008) (internal quotation marks omitted). This principle is not limited to decisions interpreting the words of statutes, however. It also applies to a precedent when "Congress exercises primary authority in [the] area and 'remains free to alter what [this Court has] done.' " *Bay Mills*, 134 S. Ct., at 2036, 188 L. Ed. 2d, at 1089. *Bay Mills* involved a precedent on tribal sovereign immunity, and the "special force" principle applied when Congress had repeatedly legislated in the area but declined to alter the precedent in question. Similarly, *Halliburton Co.* v. *Erica P. John Fund, Inc*., 573 U. S. __, 134 S. Ct. 2398, 2411, 189 L. Ed. 2d 339, 354 (2014) applied the "special force" principle to a precedent that had established a presumption as a "judicially created doctrine" "because it provides a way of satisfying the reliance element of the Rule 10b-5 cause of action."

The history of congressional involvement in habeas corpus procedure is similar. The exhaustion rule was originally case law, see *Ex parte Royall*, 117 U. S. 241, 253 (1886), but Congress eventually codified it. See 28 U. S. C. § 2254(b), (c).[2] Soon after codification, the procedural default rule was considered to be part and parcel of the exhaustion rule. The fact that the unexhausted remedy no longer existed due to the petitioner's default did *not* render the claim exhausted for

2. All section references are to 28 U. S. C. unless otherwise indicated.

the purpose of § 2254. *Brown* v. *Allen*, 344 U. S., at 487. While this holding of *Brown* has since been abandoned, see, *e.g.*, *Woodford* v. *Ngo*, 548 U. S. 81, 92-93 (2006), the statutory exhaustion rule and the mostly nonstatutory procedural default rule remain closely related. Protecting the integrity of the exhaustion rule is a large part of the rationale for the procedural default rule. See *ibid.*; *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999).

When Congress enacted comprehensive reform of habeas corpus in AEDPA, it made major changes to the successive petition rule, see § 2244(b), the timeliness requirement, see § 2244(d), and the effect of prior state rulings on questions of federal law. See § 2254(d). On the other hand, Congress was evidently satisfied with this Court's development of retroactivity law in *Teague* v. *Lane*, 489 U. S. 288 (1989), and its progeny and made no change to it. See *Greene* v. *Fisher*, 565 U. S. 34, 39 (2011) (*Teague* and AEDPA inquiries are distinct).

With regard to exhaustion and procedural default, Congress made some adjustments but did not change the bulk of the case law. For efficiency, Congress allowed the dismissal of meritless claims even when unexhausted, see § 2254(b)(2), and it prevented the inadvertent forfeiture of an exhaustion defense by the State. See § 2254(b)(3). For procedural default, Congress codified in part the prior case-law rule on failure to develop facts in state court, see *Williams* v. *Taylor*, 529 U. S. 420, 434 (2000), but tightened up the exceptions to default. See § 2254(e)(2)(A), (B). Except for these adjustments, the absence of changes indicates that Congress believed that the exhaustion and default rules as they existed in case law prior to 1996 fit into the picture that Congress envisioned for federal habeas corpus review of state convictions as a whole. "So rather than confronting . . . a legislative vacuum as to

the precise issue presented," this case must be decided "against the backdrop of a congressional choice: to retain" the procedural default rule and its exceptions with only the relatively minor adjustments made in AEDPA. Cf. *Bay Mills*, 134 S. Ct., at 2038-2039, 188 L. Ed. 2d, at 1091-1092.

The law of habeas corpus is not a collection of unrelated doctrines. The exhaustion rule, the procedural default rule, the statute of limitations, the retroactivity limitation, the successive petition rule, and the deference standard all relate to the delicate balance between "the importance of finality in state criminal litigation," *Coleman*, 501 U. S., at 747, and the need to maintain habeas corpus as a " 'guard against extreme malfunctions in the state criminal justice systems.' " *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)). Congress took a strong stand in AEDPA that reducing delay needed to be given a higher priority, and it altered the balance in that direction. See *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003).

The procedural default rule generally and *Coleman* in particular have "effectively become part of the statutory scheme." Cf. *Kimble*, 135 S. Ct., at 2409, 192 L. Ed. 2d, at 472. Changing the rules alters the balance from the one Congress chose, whether the change is to the interpretation of the statutes Congress enacted or to the case law that was woven into the canvas on which Congress painted.

This Court did, of course, change the rules in *Martinez* and *Trevino* v. *Thaler*, 569 U. S. __, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), but that alteration should not be regarded as *carte blanche* to disregard *stare decisis* from this point forward. Any proposal for

further change to the congressionally determined balance must clear the "special force" hurdle.

None of the usual justifications for making an exception to *stare decisis* applies to this case. *Coleman* is not a constitutional doctrine immune from legislative alteration, but rather a rule that Congress is " 'free to alter.' " *Bay Mills*, 134 S. Ct., at 2036, 188 L. Ed. 2d, at 1089 (quoting *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989)). Nor has experience with applying the *Coleman* rule revealed that it is unworkable. Cf. *Johnson* v. *United States*, 576 U. S. __, 135 S. Ct. 2551, 2562, 192 L. Ed. 2d 569, 584 (2015). The *Coleman* rule is quite simple to apply. A federal habeas corpus petitioner seeking to qualify for the "cause and prejudice" exception cannot cite ineffective assistance of state habeas counsel as his cause and must look elsewhere.

The *Coleman* rule has not been undercut by "either the growth of judicial doctrine or further action taken by Congress," which is the "primary reason" for overruling statutory precedent. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989); *Kimble*, 135 S. Ct., at 2410, 192 L. Ed. 2d, at 473. As noted above, the further action by Congress was a determination that the case law did not go far enough in protecting finality and reducing delay, just the opposite of a trend that would justify reconsidering *Coleman*. While *Martinez* did make an exception, it took pains to emphasize that the exception was narrow and to reaffirm the *Coleman* rule outside the scope of the exception. See 566 U. S., at 9, 16.

Finally, there is the matter of reliance. While it is sometimes said that the reliance interest is reduced in matters of procedure, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), that is not true when a change is not fully self-executing but requires adjustments by legisla-

tive or rule-making bodies, either to implement the decision or to avoid adverse impact to other important values. The problem is particularly acute for rules on collateral review of state criminal judgments because these cases pass through two different judicial systems, and each system's rules must take account of the other.

Federal habeas corpus has many rules that depend on the process in state court. The question of when a California state habeas corpus case is "pending" within the meaning of the tolling rule of § 2244(d)(2) raised problems sufficient to require consideration twice by this Court. See *Carey* v. *Saffold*, 536 U. S. 214 (2002); *Evans* v. *Chavis*, 546 U. S. 189, 199 (2006). Congress simply did not consider California's quirky practices when it crafted the tolling rule, and this Court went so far in *Evans*, *supra*, at 199, to suggest that the state change its rules to alleviate the problem.

State rules must also be written with federal law in mind if the state wishes to avoid circumvention of the exhaustion rule and the routine litigation in federal court of issues never decided on the merits in state court. The exhaustion doctrine is one of the oldest principles in habeas corpus law, and its importance was confirmed by Congress when it amended § 2254(b) in AEDPA. "[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts," *O'Sullivan*, 526 U. S., at 845, and state rule drafters must necessarily consider the exceptions to the federal procedural default rule in crafting their own default and successive petition rules.

Under *Coleman*, a state could declare defaulted any claim that had not been made in either the direct appeal or the initial collateral review petition in the trial court without any cause external to the defense. It could craft its rules on successive and untimely

petitions to make such exceptions as it deemed appropriate, knowing that the federal courts would consider the claims it chose to bar only if the exceptions to the default rule were met, with ineffective assistance of habeas counsel not being an exception. An exception to *Coleman* requires a state to choose between making a parallel exception in its own rules or allowing its prisoners to dance around the exhaustion rule and make claims in federal court that have never been properly presented to a state court.

Adjusting a state's rules is no small matter. Habeas corpus is closely linked with the highly contentious issue of capital punishment. See *Woodford* v. *Garceau*, 538 U. S., at 206 ("particularly in capital cases"). The rules are often statutory, and constitutions are intentionally crafted to make legislation difficult. See Scalia, How Democracy Swept the World, Wall Street Journal, Sept. 7, 1999, p. A24. In California, for example, after many years of legislative gridlock, supporters of habeas corpus reform finally succeeded in the difficult and expensive process of putting an initiative on the ballot, and the habeas corpus review provision is crafted to accommodate *Martinez*. See Cal. Penal Code § 1509.1(b). Further modification to accommodate further exceptions to the *Coleman* rule is extremely unlikely.

Because federal and state rules need to dovetail in order to provide a coherent and efficient system of review, there is a strong interest in stability of the rules. The standard brush-off for reliance in matters of procedure is inappropriate here.

Even if the creation of further exceptions to *Coleman* were a desirable rule supported by sound considerations of policy, the principles of *stare decisis* would counsel against it. But it is not. The primary reason for the creation of the *Martinez* exception does not

apply, and the reasons behind *Coleman* remain compelling.

II. The "particular concern" of *Martinez* does not apply to ineffective assistance of appellate counsel.

The *Martinez* Court believed that an exception to the *Coleman* rule was warranted in large part because of the special role of trial counsel in the system of criminal justice. "The right to the effective assistance of counsel *at trial* is a bedrock principle in our justice system." *Martinez* v. *Ryan*, 566 U. S. 1, 12 (2012) (emphasis added). Appellate attorneys play an important role in the system, to be sure, but it is a different role, and different considerations apply.

This Court has often referred to the trial as the "main event." See *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977); *Beard* v. *Kindler*, 558 U. S. 53, 62 (2009). The primacy of trial is reflected in the original Constitution and the Bill of Rights. The original Constitution guaranteed trial by jury and a venue at the place of the crime. See U. S. Const., Art. III, § 2. The Sixth Amendment reiterated these guarantees and added several other required safeguards, particularly "the assistance of counsel for his defence." In contrast, there is nary a word in the Constitution about appeals.

At the time the Constitution and the Bill of Rights were adopted, it was considered entirely consistent with due process of law to make a trial court judgment in a criminal case unreviewable by any judicial process, leaving executive clemency as the only remedy. This Court originally had no jurisdiction to hear appeals from convictions by circuit courts, see *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 201 (1830), and habeas corpus was not available then to review a final judgment of a court

of general jurisdiction. *Id*., at 209; see also Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-932 (1998) (discussing *Watkins).* *McKane* v. *Durston*, 153 U. S. 684, 687 (1894) confirmed that there is no constitutional right to appeal, and this holding is still good law. See, *e.g.*, *Halbert* v. *Michigan*, 545 U. S. 605, 610 (2005) (citing *McKane*).

Of course, all states do provide appeals of some kind today. See 7 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 27.1(a), p. 3 (4th ed. 2015). Even so, the purpose of appeals is secondary. A fair trial is the constitutionally required safeguard for the defendant; appeals exist only to safeguard the right to a fair trial. Ineffective assistance of trial counsel directly impairs the defendant's right to a fair trial, but ineffective assistance of appellate counsel has only an indirect effect on the core right.

The particular concern of *Martinez* was that an error affecting the defendant's core right to a fair trial might never be raised by any lawyer through the initial-review collateral proceedings and therefore never decided on the merits at all. See *Trevino* v. *Thaler*, 569 U. S. __, 133 S. Ct. 1911, 1918, 185 L. Ed. 2d 1044, 1053 (2013). For obvious reasons, trial courts rarely rule on ineffective assistance of trial counsel claims during the course of the original trial. See *ibid*. (noting inadequacy of motion for new trial to present issue). Thus if the error that made the defendant's trial unfair was ineffective assistance of his trial lawyer, his state collateral review lawyer typically provides his first chance to correct that error, and if a strict default rule applies, this will be his only chance.

Failure of the direct appeal lawyer to brief a strong claim, the error alleged here, stands on a different footing. Such an error cannot be committed unless

there was a serious error in the trial court. An appellate lawyer's decision not to brief a weak claim, "far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith* v. *Murray*, 477 U. S. 527, 536 (1986).[3] Only a serious error would reach the threshold of being one that every effective appellate lawyer *must* brief. Further, under standard appellate practice, only errors appearing in the trial record are cognizable on appeal, see *Trevino*, 133 S. Ct., at 1918, 185 L. Ed. 2d, at 1053-1054, and therefore only such errors can be the underlying errors for an ineffective assistance of appellate counsel claim. If an error in the trial record is so glaring and prejudicial that failure to brief it on appeal amounts to ineffective assistance of appellate counsel, then effective trial counsel would object to it and obtain a ruling from the trial court.

Generally speaking, then, if trial counsel was effective the underlying claim has been decided on the merits by at least one court, the trial court. If trial counsel was ineffective, *Martinez* applies directly and there is no need for an extension of it. The problem underlying the *Martinez* exception, that ineffective assistance of collateral counsel deprived the petitioner of his one and only chance to get review of a claim seriously affecting the fairness of his trial, will rarely, if ever, occur in these circumstances.

Underlying claims regarding jury instructions, as in the present case, illustrate the usual situation. If jury instructions are both legally erroneous and clearly adverse to the defendant, an effective trial attorney will object to them. If trial counsel does not object for strategic reasons, believing the error runs in the defendant's favor in the particular circumstances of the case,

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3. *Smith* was a capital case. See *id*., at 530. Death is not different in this regard.

the objection is properly regarded as waived, and appellate counsel may properly winnow out that issue. The parties disagree whether the underlying issue was properly preserved at trial in the present case. Compare Respondent's Brief in Opposition 14 with Petitioner's Brief 6; see J. A. 51-52 (objection); J. A. 366 (District Court: objection was to timing, not correctness). To the extent that trial counsel's half-baked objection presented the issue, the trial judge's overruling of it constituted a decision on the merits.

The *Martinez* Court was concerned about a scenario where "it is likely that no state court at any level will hear the prisoner's claim." 566 U. S., at 10. As to the underlying claim directly impacting the fairness of the trial, that is highly unlikely in the situation presented by this case, assuming effective trial counsel. The petitioner might not get any review of his second-level claim, which directly affects only the appeal, not the trial, but that is a very large step removed.

To say that there is no distinction between effective assistance of trial and appellate counsel is absurd. See Brief for the National Association of Criminal Defense Lawyers, *et al*., as *Amici Curiae* 19. There is a huge distinction. There is a reason why effective assistance of trial counsel was recognized as a constitutional right half a century before effective assistance of appellate counsel. See *Powell* v. *Alabama*, 287 U. S. 45, 71 (1932); *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985); see also *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting) ("fundamental" errors are those in the "classic" cases). There is a reason why assistance of trial counsel is guaranteed in black and white in the Sixth Amendment while assistance of appellate counsel had to be teased out of the Due Process Clause. *Evitts*, *supra*, at 396.

The reason is the vastly greater potential for an actual miscarriage of justice. "Without [the guiding hand of trial counsel], though [the defendant] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 U. S., at 69. In the case of a defendant who had an effective trial attorney, ineffective assistance of appellate counsel will result in a miscarriage of justice only *if* a reversible error occurred at trial despite trial counsel's efforts and *if* that error caused the conviction of an innocent person. That is not impossible, but it is far less likely than the scenario envisioned by *Powell*. An exception to *Coleman* would be needed only *if* this unlikely scenario occurred and *if* an ineffective habeas corpus lawyer failed to raise it and *if* the petitioner cannot qualify for the "actual innocence" gateway. See *House* v. *Bell*, 547 U. S. 518, 536-537 (2006). As the "ifs" pile up, the probabilities become vanishingly small.

In the present case, particularly, there is clearly no miscarriage of justice. The defendant's properly admitted confession clearly stated an intent to kill more than one person. See J. A. 109-110 (CCA opinion). On top of that, Petitioner's claim that Texas law necessarily requires specific intent to kill more than one person for capital murder, Brief for Petitioner 4, is not correct. Texas Penal Code section 19.02(b)(1) defines one type of murder as "intentionally or knowingly causes the death of another." Section 19.03(a)(7) raises this type of murder to capital murder if the defendant murders more than one person. Nowhere does the law required specific intent as opposed to knowledge. By his own admission, Davila fired ten bullets at a porch full of people. See J. A. 109-110. If that does not qualify as "knowing," it is hard to imagine what does.

The case for another exception to *Coleman* is far weaker in this case than it was in *Martinez*.

III. *Martinez* is already a serious impediment to finality and should not be expanded.

Petitioner promises that his proposed extension of *Martinez* would have only modest practical consequences. Brief for Petitioner 26. This is very much like Lucy promising to hold the football for Charlie Brown. The promise is always made and never kept. Every new exception to finality will be invoked in every capital case where an argument—even a frivolous one—can be made that it applies, and these claims will have to be litigated.

Petitioner notes, correctly, that under *Martinez*, "the underlying claim must be substantial." Brief for Petitioner 26. But that is the requirement to *succeed* under *Martinez*. That is not the requirement to *make* a claim under *Martinez*, require the state to oppose it, require both the District Court and the Court of Appeals to decide it (or at least decide whether to issue or expand a certificate of appealability), require this Court to consider a certiorari petition on it, and maintain a stay of execution while all this happens. *Martinez* is only one of many impediments to finality, to be sure. But it is a brick in the wall, and a brick wall can be a major obstruction even when no single brick is.

To get a rough assessment of how often *Martinez* comes up as an issue, *amicus* took as a sample the last ten opinions in cases from Arizona listed as "prisoner death penalty" cases on the opinion search page of the Ninth Circuit's website. Arizona was chosen because that is where *Martinez* has been in effect the longest. It has only applied to most states since *Trevino*. The

cases are listed and described in the Appendix to this brief.

Seven out of ten cases had *Martinez* issues that had to be litigated and decided, eight if we count the proposal to expand *Martinez* to new territory. In no case has a meritorious claim been found to date. The Ninth Circuit found no merit in five cases. One claim was found meritless in District Court on remand, although an appeal is pending. One claim will never be decided because the petitioner died before any court had decided the merits.

This is a small sample, to be sure, but seven out of ten is a very large portion, sufficient to demonstrate that the costs of *Martinez* are already high in terms of the expense and delay of litigating claims that previously could have been dismissed at the threshold under *Coleman*. Any further expansion of *Martinez* will only aggravate the problem.

Capital cases take far too long to resolve already. Congress was sufficiently concerned about this problem from the victims' and the public's perspective to enact AEDPA, and concerns have been raised about it from the defendant's perspective as well. "[T]his Court's Byzantine death penalty jurisprudence," *Knight* v. *Florida*, 528 U. S. 990, 991 (1999) (Thomas, J., concurring in denial of certiorari), is certainly a big part of the problem, but the erosion of the pillars of finality is also a big part. No further erosion is called for in the case of a man who undisputedly fired ten or more bullets at a porch full of people with murderous intent, killing a five-year-old child and her grandmother.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

March, 2017

Respectfully submitted,

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APPENDIX

A Sample of Capital Habeas Cases from Arizona

The following cases are the last ten opinions in cases from Arizona listed as "prisoner death penalty" cases on the opinion search page of the Ninth Circuit's website, http://www.ca9.uscourts.gov/opinions/index.php, as of March 9, 2017, skipping orders and opinions that were not in a procedural posture for a *Martinez* issue to be raised. For example, *Washington* v. *Ryan*, 833 F. 3d 1087 (CA9 2016), was skipped because the only point decided was to remand to the District Court for relief from a late notice of appeal, and none of the actual claims in the petition were discussed.

1. *Dickens* v. *Ryan*, 740 F. 3d 1302 (CA9 2014) (en banc): The majority held that Dickens's new ineffective assistance of counsel (IAC) claim must be remanded for a determination of whether he can qualify for the *Martinez* exception, *id*., at 1321-1322, over a strong dissent. See *id*., at 1324 (opinion of Callahan, J.). The case was mooted by Dickens's death four days later. See *Dickens* v. *Ryan*, 744 F. 3d 1147 (CA9 2014).

2. *Murray (Robert)* v. *Schriro*, 745 F. 3d 984 (CA9 2014): Petitioner raised a claim that required evaluation under *Martinez*. The court denied the claim on the ground that it was not a substantial claim of ineffective assistance, thus effectively deciding a defaulted claim on the merits. See *id*., at 1017-1018.

3. *Murray (Roger)* v. *Schriro*, 746 F. 3d 418 (CA9 2014): Petitioner is the brother and co-defendant of the petitioner in Case 2. Similarly, the court rejected his *Martinez* claim on the ground that the underlying IAC claim was not substantial, effectively adjudicating the defaulted claim on the merits.

4. *Hurles* v. *Ryan*, 752 F. 3d 768 (CA9 2014): Remanded for consideration of *Martinez* claim based on

allegedly ineffective assistance of appellate counsel. On remand, the court found neither prong of *Strickland* met, see *Hurles* v. *Ryan*, 188 F. Supp. 3d 907, 925 (DC Ariz. 2016), but granted a certificate of appealability. *Id*., at 927. Appeal is pending, No. 16-99007.

5. *McKinney* v. *Ryan*, 813 F. 3d 798 (CA9 2015) (en banc): No *Martinez* issue was before the en banc court. In the prior panel decision, the court rejected the petitioner's attempt to extend *Martinez* beyond IAC claims. See *McKinney* v. *Ryan*, 730 F. 3d 903, 913 (CA9 2013).

6. *Hedlund* v. *Ryan*, 815 F. 3d 1233 (CA9 2016): Codefendant of McKinney, Case 5, is granted relief based on that decision. No *Martinez* issue.

7. *Gallegos* v. *Ryan*, 820 F. 3d 1013 (CA9 2016): Petitioner sought a remand to reconsider in light of *Martinez*. The panel was divided but denied remand on this ground. See *id*., at 1040 (Callahan, J., dissenting in part).

8. *Smith* v. *Ryan*, 823 F. 3d 1270 (CA9 2016): *Martinez* argument is rejected on the ground that the underlying IAC claim is insubstantial, effectively adjudicating the defaulted claim on the merits. See *id*., at 1295-1296.

9. *Runningeagle* v. *Ryan*, 825 F. 3d 970 (CA9 2016): In 2012, the court had remanded for consideration under *Martinez*. On the second appeal, the court held that "petitioner fails to show that his PCR counsel performed deficiently and to his prejudice," thus reaching the same result it would have reached four years earlier but for *Martinez*.

10. *Mann* v. *Ryan*, 828 F. 3d 1143 (CA9 2016): No *Martinez* issue.