No. 17-887

In the Supreme Court of the United States

RICHARD BROWN, WARDEN,

Petitioner,

v.

DENTRELL BROWN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit correctly concluded that Indiana's procedures governing claims of ineffective assistance of trial counsel "do[] not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino* v. *Thaler*, 569 U.S. 413, 428 (2013).

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STATEMENT

A. Legal Background.

1. *Federal Habeas.* A federal court generally may not review on habeas a claim not addressed by a state court because of a procedural default by the petitioner. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (holding that 28 U.S.C. § 2254 precludes federal review of procedurally defaulted state claims). In *Coleman* v. *Thompson*, this Court held that a petitioner can overcome procedural default if he can show cause for the default and prejudice from a violation of federal law. 501 U.S. 722, 750 (1991).

Martinez v. *Ryan* applied *Coleman* in the context of ineffective assistance of counsel claims, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. 1, 9 (2012). The Court explained that if a State channels initial review of ineffectiveness claims into collateral proceedings, a lawyer's failure to raise such a claim during those collateral proceedings could deprive a defendant of any consideration of that claim on the merits. *Id*. at 10 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."). Because Arizona required claims of ineffective assistance of counsel at trial to be raised in a collateral proceeding, the Court held that inadequate assistance of counsel in that collateral proceeding provided the "cause" necessary to empower a federal habeas court to address the merits of the claim of ineffective assistance of counsel at trial. *Id.* at 4, 9.

The year after its ruling in *Martinez*, the Court in *Trevino* v. *Thaler* held that the *Martinez* rule applies not only to those jurisdictions that prohibit claims of ineffective assistance of trial counsel from being raised on direct review, but also to a jurisdiction that "in theory grants permission" to present on direct review ineffective assistance of counsel at trial but, "as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so." 569 U.S. 413, 429 (2013). The Court determined that the *Martinez* rule applies to ineffective assistance claims in Texas because the "structure and design of the Texas system in actual operation" made it "virtually impossible" for an ineffective assistance claim to be raised on direct appeal. *Id.* at 417.

Several courts of appeals have applied *Martinez* and *Trevino* to determine whether particular States' procedural systems qualify for the procedural default exception defined by *Martinez* and *Trevino*. This Court has not granted review of any of those state-specific inquiries. See, *e.g.*, *Runningeagle* v. *Ryan*, 825 F.3d 970 (9th Cir. 2016), cert. denied, 137 S. Ct. 1439 (2017) (holding that *Martinez-Trevino* applies to Arizona); *Fairchild* v. *Trammell*, 784 F.3d 702 (10th Cir. 2015), cert. denied, 136 S. Ct. 835 (2016) (holding that *Martinez-Trevino* does not apply to Oklahoma); *Fowler* v. *Joyner*, 753 F.3d 446 (4th Cir. 2014), cert. denied, 135 S. Ct. 1530 (2015) (holding that *Martinez-Trevino* applies in certain circumstances in North Carolina).

2. *Indiana's Procedures for Raising Ineffective Assistance of Counsel Claims.* Indiana permits defendants to raise claims of ineffective assistance of trial counsel on either direct or collateral review. The Indiana Supreme Court has stated that "a post-

conviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim." *Woods* v. *State*, 701 N.E.2d 1208, 1219 (Ind. 1998).

Ineffective assistance of trial counsel claims raised on direct appeal are subject to several significant procedural constraints. *First*, the defendant is limited to the trial record—he or she may not use a motion to correct error to supplement the record in support of an ineffectiveness claim. *Id.* at 1216-1217. *Second*, the defendant may not split ineffectiveness claims, raising record-based claims on direct appeal while reserving for collateral review those claims that require additional factual development. *Id.* at 1220 ("The specific contentions supporting the [ineffectiveness] claim, however, may not be divided between the two proceedings."). If the defendant raises any ineffective assistance of trial counsel claim on direct appeal, "the issue will be foreclosed from collateral review." *Ibid*.

Indiana law provides that post-conviction collateral challenges may be instituted in two ways: either (1) by initiating a collateral review proceeding after the direct appeal is concluded; or (2) by requesting that the Court of Appeals dismiss or suspend the direct appeal and remand the case to the trial court so that a collateral review proceeding may be instituted prior to disposition of the direct appeal, with the trial court's decision in the collateral review proceeding considered by the appellate court in tandem with the direct appeal. *Woods*, 701 N.E.2d at 1219. The Indiana Supreme Court has stated that the second option is "not to be used as a routine matter in adjudicating the issue of trial counsel's effectiveness." *Id*. at 1220.

This second option—labeled the "*Davis-Hatton*" procedure after the relevant Indiana Supreme Court

decisions—is initiated by filing a motion with the state court of appeals requesting that the defendant's direct appeal be suspended or dismissed and that the case be remanded to the trial court. *Slusher* v. *State*, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005) ("[T]he *Davis/Hatton* procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court.").

"The appellate court preliminarily screens the motions and remands to the trial court those cases in which an arguably meritorious motion is sought to be made." *Davis* v. *State*, 368 N.E.2d 1149, 1151 (Ind. 1977); see also *Thompson* v. *State*, 671 N.E.2d 1165, 1168 n.2 (Ind. 1996) ("Finding that the appellant had failed to make any showing that his claim of ineffective assistance of counsel has a substantial likelihood of success at trial, we denied his [*Davis-Hatton*] petition, and this appeal ensued.").

If the court of appeals grants the *Davis-Hatton* petition, the case is remanded to the trial court, where the defendant then files his or her petition for post-conviction relief. *Woods*, 701 N.E.2d at 1219. The defendant must raise all available grounds for post-conviction relief in this original post-conviction petition. Ind. Rules of Post-Conviction Remedies, § 8, perma.cc/X78R-H8HX.

If, after a full evidentiary hearing, the petition for post-conviction relief is denied, "an appeal from that post-conviction denial and the original direct appeal will be consolidated but evaluated under separate standards of review." Pet. App. 12a. In particular, a defendant wishing to appeal claims raised in the petition for post-conviction relief "faces the rigor-

ous burden of showing that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the court." *Peaver* v. *State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010) (quotation marks, brackets, and citation omitted).

The *Davis-Hatton* procedure is rarely used. A group of Indiana public defenders informed the court below that between 2008 and 2012, its attorneys filed approximately 2,000 appeals and only four *Davis-Hatton* petitions. Pet. App. 14a.

The Indiana Court of Appeal's 2016 report recites that the Court of Appeals disposed of 1,031 direct criminal appeals in 2016, only two of which it disposed of "by order." Court of Appeals of Ind., *2016 Annual Report* 2, perma.cc/7UVF-6FRD. Even if one assumes that these two cases were cases in which a *Davis-Hatton* petition had been filed, and the appeal was suspended or terminated, that means the *Davis-Hatton* procedure was successfully invoked in at most 0.2% of the direct criminal appeals disposed of by that court in 2016.

B. Factual Background

On March 5, 2009, fourteen-year-old Dentrell Brown was sentenced to 60 years in prison on his homicide conviction. *State* v. *Brown*, No. 20C01-0806-MR-00002, 2009 WL 2844532 (Ind. Cir. Ct. Mar. 5, 2009).

There was no forensic evidence tying Brown to the crime, a murder that occurred during an alleged drug sale. Pet. App. 3a. Instead, the State relied principally on the testimony of jail house informer Mario Morris. *Ibid.* Morris claimed that Brown and his co-defendant, Joshua Love, had both confessed to

the murder in separate conversations with Morris. *Ibid.*

Morris's testimony about these conversations was not consistent with the State's theory of the case. See Pet. 5 (characterizing Morris's testimony as "almost identical [], but with significant differences"). Morris's account of Love's confession included no mention of Brown or anyone else having been present at the shooting. Pet. App. 94a-95a. Morris's account of Brown's confession, moreover, included no mention of Love or anyone else having been present at the shooting. *Id*. at 95a.

After Morris testified, both Brown and Love moved for a mistrial based on *Bruton* v. *United States*, 391 U.S. 123 (1968). Pet. App. 4a. The trial judge denied their motions and both Love and Brown were convicted of murder (Brown on a theory of accomplice liability). *Ibid.*

C. Proceedings Below.

Brown raised three claims on direct appeal, including whether the trial court erred in denying the mistrial motion. Pet. App. 4a. The Indiana Court of Appeals denied relief on all counts. *Id*. at 103a.

Brown then filed a petition for post-conviction relief asserting that his trial counsel provided ineffective representation by failing to move to sever Love's trial from Brown's. Pet. App. 87a. The Indiana Court of Appeals affirmed the denial of relief on that claim. *Ibid.*

Brown next filed a habeas petition in federal district court raising three issues, including an ineffective assistance of counsel claim based on trial counsel's failure to request an instruction limiting the use of Love's statement, offered through Morris, to Love.

Pet. App. 75a, 77a. Brown argued that he should be given the opportunity to overcome procedural default under *Martinez* and *Trevino*. *Id.* at 77a-78a. The district court dismissed all of his claims without holding an evidentiary hearing. *Id.* at 69a-73a.

The court of appeals reversed and remanded, ordering the district court to conduct an evidentiary hearing on Brown's ineffective assistance of counsel claim. Pet. App. 6a. In doing so, the court held that "the rule established in *Martinez* and *Trevino* applies to § 2254 cases in Indiana so that [Brown] may try to overcome the procedural default of his claim for ineffective assistance of trial counsel." *Id.* at 7a

Applying the test prescribed by this Court in *Trevino*, the Seventh Circuit determined that "two characteristics of Indiana practice—the 'procedural design' and 'systemic operation'—convince us that the *Martinez-Trevino* doctrine applies in Indiana." Pet. App. 11a.

The court pointed to several factors that force almost all ineffective assistance of trial counsel claims in Indiana into collateral review. For example, "presenting a claim for ineffective assistance is an all-or-nothing proposition in Indiana" because a defendant cannot present one ground on direct review and another on collateral review. Pet. App. 11a-12a. And Indiana does not allow counsel on direct appeal to use a motion to correct errors to supplement the record. Pet. App. 14a. The court concluded that "Indiana rules work together to make it unlikely that an Indiana defendant will be able to raise adequately on direct appeal a claim for ineffective assistance of trial counsel." Pet. App. 14a.

The court also found it significant that Indiana courts "routinely direct defendants to bring claims for ineffective assistance of trial counsel on collateral review and warn against bringing them on direct review." Pet. App. 15a.

Turning to the *Davis-Hatton* procedure, the court of appeals observed that, because it is a means of advancing the timing of collateral review proceedings, it could not possibly supply "meaningful" direct review of an ineffective assistance of trial counsel claim. Pet. App. 14a.

The court of appeals further determined that Brown had sufficiently alleged cause for failing to raise the ineffective assistance claim on collateral review in state court, holding that "Brown has offered evidence that his post-conviction counsel's representation fell below an objective standard of reasonableness so that he is entitled to an evidentiary hearing on the issue." Pet. App. 18a. It also found that the underlying ineffective assistance of trial counsel claim was substantial. *Id.* at 23a-26a.

Judge Sykes dissented, stating that the *Davis-Hatton* procedure furnishes sufficient opportunity to develop the factual record necessary to support an ineffectiveness claim at the direct appeal stage. Pet. App. 32a. Judges Sykes, Flaum, and Easterbook dissented from the denial of rehearing en banc. *Id.* at 39a-40a.

REASONS FOR DENYING THE PETITION

The court of appeals' decision does not conflict with any decision of this Court or of another lower court. Every court of appeals to consider whether the *Martinez-Trevino* exception applies to ineffective assistance of trial counsel claims in a particular State

has utilized a totality-of-the-circumstances test based on an examination of the same factors.

The Seventh Circuit correctly applied that test to Indiana's procedural system. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004) (citation omitted). And the application of *Trevino* turns almost entirely on interpreting state law. Review by this Court is not warranted.

A. The Courts Of Appeals Apply The Same Test In Assessing States' Procedures Under *Martinez* And *Trevino*.

Every court of appeals to apply the *Martinez-Trevino* test to a State's procedural framework for asserting ineffective assistance of trial counsel claims has utilized the same test, based upon the factors that this Court canvassed in determining whether Texas's procedures made it "virtually impossible for appellate counsel to adequately present an ineffective assistance of trial counsel claim on direct review." *Trevino* v. *Thaler*, 569 U.S. 413, 423 (2013) (quotation marks, brackets, and citation omitted).

Courts assess (1) the extent to which state courts direct these claims to a particular procedure; (2) the frequency with which the procedures are actually used; (3) the time available to a defendant to invoke the procedures; and (4) the continuity of counsel from trial to the various post-trial procedures. No one factor is determinative: courts evaluate the totality of the circumstances in concluding whether it is "virtu-

ally impossible" to present the claim on direct review.

1. Judicial direction.

Trevino considered whether Texas's procedures "would create significant unfairness * * * because [the State's] courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than direct, review." *Id.* at 425-426. Courts of appeals therefore look to the opinions of state appellate courts to determine whether they have directed claims of ineffective assistance of counsel to collateral review proceedings.

For example, in *Runningeagle* v. *Ryan*, 825 F.3d 970 (9th Cir. 2016), the Ninth Circuit observed that the Arizona Supreme Court "strongly urged" defendants to bring ineffective assistance of counsel claims in collateral review proceedings. *Id.* at 980.[1] The Sixth Circuit did the same in *Sutton* v. *Carpenter*, where the court explained that "the message overwhelmingly communicated [to Tennessee defendants] is that the claims are best resolved, with least risk to the defendant, in post-conviction proceedings." 745 F.3d 787, 795 (6th Cir. 2014). That court reached the same conclusion regarding Kentucky procedures, explaining that "Kentucky courts have noted 'the danger in raising an ineffective assistance of counsel claim on direct appeal.'" *Woolbright* v. *Crews*, 791 F.3d 628, 635 (6th Cir. 2015) (quoting *Wilson* v. *Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998)). See also *Ramirez* v. *United States*, 799 F.3d

[1] As the court of appeals explained (see 825 F.3d at 980), the relevant events in *Runningeagle* occurred before the Arizona Supreme Court held that ineffective assistance of trial counsel claims must be asserted in collateral review proceedings.

845, 853 (7th Cir. 2015) (holding that *Martinez-Trevino* applies to the federal system, pointing out that "the [Supreme] Court criticized the practice of bringing these claims on direct appeal").

2. Actual use.

Courts also consider the frequency with which nominally available procedures are actually used. As this Court recognized in *Trevino*, the technical availability of an obscure and inaccessible procedure for asserting an ineffective assistance claim on direct appeal does not mean there is an opportunity for meaningful review on direct appeal. See *Trevino*, 569 U.S. at 427 ("[T]he procedural possibilities to which Texas now points seem special, limited in their application, and, as far as we can tell, rarely used.").

For example, in *Coleman* v. *Goodwin*, the Fifth Circuit found that *Trevino* applied in Louisiana, because as in *Trevino*, nominally available direct appeal procedures had been used in only a "handful of cases," best characterized as "outliers." 833 F.3d 537, 542-543 (5th Cir. 2016). Similarly, in *Woolbright*, the Sixth Circuit found it telling that Kentucky could not cite even one example of a nominally available direct-appeal procedure being used. 791 F.3d at 633.

3. Timing.

This Court in *Trevino* also looked at timing—whether a State's procedures provided defendants with sufficient time to create an adequate appellate record on the ineffective assistance issue. Several courts have found *Trevino* applicable after determining that state procedures simply do not give enough time to create an adequate record on an issue.

In *Woolbright*, for example, the Sixth Circuit relied heavily on the fact that Kentucky procedures re-

quired defendants to file a motion for a new trial within five days of the verdict and prohibited extensions of time, yet did not require trial transcripts to be available for at least 50 days. *Ibid.* The court in *Sutton* similarly observed that in Tennessee, motions for new trials must be filed within 30 days of sentencing—even though trial transcripts might not be available until much later. 745 F.3d at 792.

On the other hand, courts have found that some direct review procedures do provide adequate time to create a sufficient factual record. See *Fairchild* v. *Trammell*, 784 F.3d 702, 721-722 (10th Cir. 2015) (finding *Trevino* not to apply in Oklahoma, where "[t]he opening brief is not due until 120 days from the date the [court] receives the trial record and transcripts"); *Lee* v. *Corsini*, 777 F.3d 46, 60 (1st Cir. 2015) (noting that Massachusetts provides defendants ample time to amass a record).

4. Counsel.

Finally, courts frequently assess whether trial counsel's continuing representation of the defendant on direct appeal precludes ineffective assistance claims from being raised on direct review. After all, it is unlikely that trial counsel will be willing to argue his own ineffectiveness on appeal.

For this reason, in *Sutton*, the Sixth Circuit found that *Trevino* applied in Tennessee because its appointed trial counsel was obligated to continue representing the defendant through direct appeal, absent good cause. 745 F.3d at 792-793. Courts have reached the same conclusion about Kentucky and capital defendants in Arkansas. See *Woolbright*, 791 F.3d at 632; *Sasser* v. *Hobbs*, 735 F.3d 833, 851-852 (8th Cir. 2013).

* * *

Judicial direction, frequency of actual use, timing, and continuity of counsel are the factors that courts of appeals consistently evaluate when determining whether the *Martinez-Trevino* rule applies in a particular State. Not surprisingly, courts have found *Trevino* to apply in some States but not in others. But that is a result of differences in state procedures, not because the courts are applying different tests.

B. The Court Below Correctly Held That *Trevino* Applies To Indiana Ineffective Assistance Claims.

Indiana defendants have two options for raising claims of ineffective assistance of trial counsel: (1) in the opening brief on direct appeal; or (2) through a post-conviction collateral review proceeding. And they have two options for initiating collateral review proceedings: (1) waiting until direct review is concluded; or (2) invoking the *Davis-Hatton* procedure after the docketing of the direct appeal, and requesting the termination or suspension of that direct appeal, to enable the expedited initiation of a collateral review proceeding in the trial court.

An Indiana defendant's claim of ineffective assistance of trial counsel may be raised either on direct appeal or in a collateral proceeding—but not in both. Raising any claim of ineffective trial counsel on direct appeal bars the defendant from raising any such claim in a collateral proceeding, even if it rests on grounds different from those presented on direct appeal. *Woods* v. *State*, 701 N.E.2d 1208, 1220 (Ind. 1998) ("The defendant must decide the forum for adjudication of the issue—direct appeal or collateral

review. The specific contentions supporting the claim, however, may not be divided between the two proceedings.").

The State does not seriously argue that the direct appeal option is sufficiently viable to preclude the application of *Trevino*. Nor could it.

There is no mechanism for supplementing the trial record, and the defendant who chooses this route must raise all ineffectiveness claims on direct appeal. See pages 3-5, *supra*.

Drawing on long-established federal practice, the Indiana Supreme Court has explained that ineffectiveness claims raised in the opening brief on direct appeal "almost always fail" because "[w]hen the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight." *Woods*, 701 N.E.2d at 1216 (citing *United States* v. *Taglia*, 922 F.2d 413, 417-418 (7th Cir. 1991)).

Indeed, the Indiana Supreme Court has refused to address an ineffective assistance of counsel claim asserted on direct appeal, in *McIntire* v. *State*, 717 N.E.2d 96, 102 (Ind. 1999), later explaining that "because *Woods* expressed a strong preference for considering [ineffective assistance of trial counsel claims] in post-conviction proceedings, we declined to address the ineffective assistance of counsel claim in *McIntire* at all." *Landis* v. *State*, 749 N.E.2d 1130, 1132-1133 (Ind. 2001).[2]

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[2] The infrequency with which defendants assert ineffectiveness claims on direct appeal is confirmed by Indiana's petition for

Rather than pointing to direct appeal as the procedural route that Brown was obligated to pursue, the State invokes the *Davis-Hatton* procedure—asserting that it provides most defendants a meaningful opportunity for the review of ineffective assistance of trial counsel claims on direct appeal.

The Seventh Circuit correctly held that it does not. That holding, which is entirely consistent with *Trevino*, presents no conflict with the decisions of other circuits and does not warrant further review.

1. The Davis-Hatton *process is a mechanism for expedited collateral review, and is therefore irrelevant to the* Trevino *inquiry.*

Indiana's argument fails at the threshold because the *Davis-Hatton* procedure does not permit the presentation of ineffectiveness claims on direct review. Rather, it is a means of initiating a collateral review proceeding on an expedited basis. Because *Trevino* does not require a defendant to utilize a spe-

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certiorari, which identifies only five cases since 2001 in which defendants won on ineffectiveness claims raised on direct appeal. All involve narrow claims based on the trial record: *Perez* v. *State*, 748 N.E.2d 853, 855 (Ind. 2001) (for failure to object to a jury instruction misstating the law); *Brown* v. *State*, No. 32A05-1510-CR-1748, 2016 WL 3556267 (Ind. Ct. App. June 29, 2016) (for clear failure to move for a discharge after a speedy trial violation); *Williams* v. *State*, 983 N.E.2d 661 (Ind. Ct. App. 2013) (table) (for failure to object to the introduction of large amounts of prejudicial propensity evidence); *Pryor* v. *State*, 973 N.E.2d 629 (Ind. Ct. App. 2012) (for failure to file a timely demand for a jury trial because counsel inadvertently miscalculated the deadline date); *Lewis* v. *State*, 929 N.E.2d 261 (Ind. Ct. App. 2010) (for failure to file a necessary jury trial request when defendant had clearly stated on the record that he wanted a jury trial).

cific collateral review proceeding—particularly in the absence of a state law requiring that the defendant do so—the existence of the *Davis-Hatton* procedure is irrelevant to the *Trevino* analysis.

To begin with, Indiana decisions make clear that the *Davis-Hatton* procedure is a means of instituting collateral review, not a means of supplementing the defendant's direct appeal. It involves "a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court." *Slusher*, 823 N.E.2d at 1222; see also *Woods*, 701 N.E.2d at 1219 (explaining that a *Davis-Hatton* petition, if granted, "allows a defendant to suspend the direct appeal to pursue an immediate petition for postconviction relief"). It is to be used, in the Indiana Supreme Court's words, in the "exceptional case in which the defendant prefers to adjudicate a claim of ineffective assistance before direct appeal remedies have been exhausted." *Woods*, 701 N.E.2d at 1219-1220.

That a *Davis-Hatton* petition is nothing more than a mechanism for accelerating collateral review is confirmed by the step that follows the granting of the petition: the filing of a post-conviction petition in the trial court. This petition is treated the same as any other post-conviction petition and is governed by the same procedural rules under Indiana Post-Conviction Rule 1. See *Peaver* v. *State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010) (applying Rule 1 in context of collateral proceeding instituted through the *Davis-Hatton* procedure).

Once the *Davis-Hatton* procedure has been invoked, the trial court's determination is reviewed on appeal under the standard of review applicable to

collateral review proceedings. Thus, if the post-conviction petition that results from the granting of a *Davis-Hatton* petition is denied, "an appeal from that post-conviction denial and the original direct appeal will be consolidated but evaluated under separate standards of review." Pet. App. 12a. In particular, a defendant wishing to appeal the trial court's rulings in the collateral review proceeding "faces the rigorous burden of showing that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the court"—the standard that also applies to collateral review proceedings not initiated through the *Davis-Hatton* procedure. *Peaver*, 937 N.E.2d at 900 (quotation marks, brackets, and citation omitted).

The State relies on lower court decisions addressing Oklahoma and Massachusetts procedures. See *Fairchild* v. *Trammell*, 784 F.3d 702 (10th Cir. 2015); *Lee* v. *Corsini*, 777 F.3d 46 (1st Cir. 2015). But those procedures enabled defendants to create an expanded direct appeal record and made clear that the determinations would be subject to the standard governing direct appeals. *Fairchild*, 784 F.3d at 721; *Lee*, 777 F.3d at 61. That is totally different from the *Davis-Hatton* procedure, which results in the institution of a separate collateral review proceeding, subject to the rules governing such proceedings in the trial court and on appeal—which is merely heard by the appellate court in tandem with the separate direct appeal.

The Seventh Circuit therefore correctly held that the accelerated collateral review proceeding triggered by the filing of a *Davis-Hatton* petition "does not provide, in the *Trevino* Court's words, 'meaningful review' of an ineffective assistance counsel claim

on direct review: it simply is not direct review." Pet. App. 14a.

2. The structure and operation of the Davis-Hatton *procedure make it virtually impossible to raise ineffective assistance claims.*

Even if the *Davis-Hatton* procedure could somehow be relevant to the *Trevino* inquiry notwithstanding the fact that this procedure does not provide an opportunity to raise ineffective assistance claims on direct review—which is the relevant question under *Trevino*—that procedure does not provide a meaningful opportunity to raise ineffective assistance of trial counsel claims. Multiple features of the *Davis-Hatton* procedure mandate that conclusion.

First, a party seeking to invoke the *Davis-Hatton* process must demonstrate to the appellate court—based on the trial record alone—that there is a substantial likelihood of success on the merits of the ineffectiveness claim. *Davis* v. *State*, 368 N.E.2d 1149, 1151 (Ind. 1977). See also *Thompson* v. *State*, 671 N.E.2d 1165, 1168 n.2 (Ind. 1996) (denying *Davis-Hatton* petition because "the appellant had failed to make any showing that his claim of ineffective assistance of counsel has a substantial likelihood of success at trial"); *Slusher*, 823 N.E.2d at 1222 ("If the appellate court preliminarily determines that the motion has sufficient merit, the entire case is remanded for consideration of the petition for post-conviction relief.").

Making such a showing requires time and an investigation, neither of which is available in Indiana. The *Davis-Hatton* petition must be filed in the course of appellate briefing—and logically, with, if not be-

fore, the filing of the appellant's brief. That brief is due 30 days after the filing of the trial transcript. Ind. R. App. P. 45.

In addition, as the Indiana Supreme Court has explained, "expecting appellate lawyers to look outside the record for error is unreasonable in light of the realities of appellate practice. Direct appeal counsel should not be forced to become a second trial counsel. Appellate lawyers may have neither the skills nor the resources nor the time to investigate extra-record claims, much less to present them coherently and persuasively to the trial court." *Woods*, 701 N.E.2d at 1216

In the States whose procedures are relied on by Indiana—Massachusetts and Oklahoma—the appellate attorney has at least 120 days after the court of appeals receives the trial transcript before appellant's opening brief is due. See Mass. R. App. P. 19; Okla. Stat. tit. 21, § 701.13(D); Okla. R. Ct. Crim. App. 9.3(A). And that time can be used to invoke procedures permitting the addition of new facts to the record—a motion for a new trial (in the case of Massachusetts) or a request to supplement the record (in the case of Oklahoma).

Second, the Indiana Supreme Court has effectively directed defendants to reserve ineffective assistance of trial counsel claims for collateral review proceedings following a decision on direct appeal. In *Woods*, the Indiana Supreme Court explained that "a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim," 701 N.E.2d at 1219, and that the *Davis-Hatton* procedure is therefore "not to be used as a routine matter in adjudicating the issue of trial counsel's effectiveness," *id.* at 1220.

That is remarkably similar to the directive from the Texas Court of Criminal Appeals upon which this Court relied in *Trevino*: "Texas' highest criminal court has explicitly stated that '[a]s a general rule' the defendant 'should *not* raise an issue of ineffective assistance of counsel on direct appeal,' but rather in collateral review proceedings." 569 U.S. at 426 (quoting *Mata* v. *State*, 226 S.W.3d 425, 430 n.14 (Tex. Crim. App. 2007)).

Third, appellate counsel must convince the court of appeals that use of the *Davis-Hatton* procedure "has a substantial likelihood of rendering moot the issues raised on direct appeal and would effect a net savings of judicial time and effort," and "that the circumstances of the case are such that undue hardship would result to appellant were he required to await completion of his appeal to petition for post-conviction relief." *Davis*, 368 N.E.2d at 1151. These requirements add additional obstacles to the use of the *Davis-Hatton* procedure and confirm its status as an exceptional procedure.

Fourth, as the Seventh Circuit emphasized, "[a] defendant who uses the *Davis-Hatton* procedure will be barred from asserting any new claim for ineffective assistance on direct appeal, or in any of the consolidated proceedings or additional post-conviction proceedings that may follow." Pet. App. 13a; see also pages 3-5, *supra*.

When the Indiana Supreme Court in *Woods* articulated that rule barring splitting of ineffective assistance of counsel claims, it anticipated that the rule "will likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal." *Woods*, 701 N.E.2d at 1220. This rule, which makes the use of the *Davis-Hatton* pro-

cedure a deeply risky business, renders Indiana's procedures "even more restrictive than the Texas procedures in *Trevino*." Pet. App. 14a.

On this point, the contrast with Massachusetts's and Oklahoma's procedures is stark. In Oklahoma, raising an ineffective assistance of trial counsel claim on direct appeal is a prerequisite—not a bar—to raising such a claim on collateral review. Similarly, Massachusetts General Laws Chapter 278 states that while a defendant is free to file any number of motions for a new trial as he wants, he is not entitled to appellate review of a denial of such a motion if the issues it raises "could have been raised on direct appeal or in his first motion for a new trial." *Lee* v. *Corsini*, 777 F.3d 46, 57 (1st Cir. 2015). Both Massachusetts and Oklahoma thus effectively require defendants to raise ineffective assistance of trial counsel claims on direct appeal. The same is true of the Wisconsin procedure upheld in *Nash* v. *Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014) ("Wisconsin law expressly allows—indeed, in most cases requires—defendants to raise claims of ineffective assistance of trial counsel as part of a consolidated and counseled *direct* appeal."). The opposite is true in Indiana, where raising a claim of ineffectiveness on direct appeal actually bars a defendant from raising it on collateral review.

In light of the Indiana court's directives and the procedural obstacles to use of the *Davis-Hatton* procedure, it is no wonder that use of the *Davis-Hatton* procedure is exceptionally rare. The submission below by a group of Indiana public defenders confirms that between 2008 and 2012, its attorneys filed approximately 2,000 appeals and only four *Davis-Hatton* petitions. Pet. App. 14a.

The Seventh Circuit properly concluded that the *Davis-Hatton* procedure is "special, limited, . . . [and] rarely used." *Ibid.* (citing *Trevino*, 569 U.S. at 427). In so concluding, the Seventh Circuit reasoned in lockstep with this Court's statement in *Trevino* that "special, rarely used procedural possibilities" could not overcome "Texas courts' own well-supported determination that collateral review normally constitutes the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel claim." 569 U.S. at 427.

The conclusion of the court below is entirely consistent with the decisions of the First and Tenth Circuit holding, respectively, that Massachusetts and Oklahoma procedures make direct appeal a meaningful route for raising ineffective assistance claims.

In *Lee*, the First Circuit emphasized that defendants faced "no unrealistic time limits," were able to supplement the factual record, and did not risk waiving other ineffective assistance claims. 777 F.3d at 60. The court balanced this procedural design against a mild directive from the Massachusetts Supreme Court that "the preferred method for raising a claim of ineffective assistance of counsel is through a motion for a new trial." *Ibid.* (citing *Commonwealth* v. *Zinser*, 847 N.E.2d 1095, 1098 (Mass. 2006)).

Here, by contrast, the defendant cannot supplement the record on which the appellate court adjudicates his or her *Davis-Hatton* petition, and risks waiving all other claims. And the Indiana courts have much more clearly expressed their preference that these claims be raised in collateral proceedings following the resolution of the direct appeal.

The Tenth Circuit in *Fairchild* also focused on the time allowed for record development and cited numerous examples of successful ineffective assistance of trial counsel claims raised on direct appeal. 784 F.3d at 722-723. Unsurprisingly, given the number of successful claims, there were no directives from the Oklahoma courts advising defendants to raise their claims in collateral proceedings.

The different results in these cases therefore turn entirely on the different state procedures and different statements by state courts—as well as the fact that the *Davis-Hatton* procedure is not a route to direct review but rather a mechanism to speed up the initiation of a collateral review proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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