No. _____

IN THE

Supreme Court of the United States

ZANE DICKINSON,

Petitioner,

v.

DAVID SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS;
ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal habeas petitioner whose trial counsel performed deficiently by failing to preserve a meritorious issue for appeal satisfies the prejudice component of an ineffective-assistance-of-trial-counsel claim by showing a reasonable probability that, but for counsel's deficient performance in failing to preserve the issue, he would have prevailed in his direct appeal.

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INTRODUCTION

Petitioner Zane Dickinson was convicted of attempted second-degree murder under jury instructions that did not require the jury to find he intended to kill anyone. This error prevented the jury from finding every element of the offense and would have compelled reversal in his direct appeal—if only trial counsel had performed competently by preserving the issue.

In holding, with the decision below, that any prejudice owing to counsel's failure to preserve the meritorious instructional issue may be measured *only* by the effect of the error on the jury's verdict, and not by the impact of trial counsel's deficient performance on Petitioner's direct appeal, the Ninth Circuit splits with two—arguably three—other circuits, which have found prejudice where trial counsel's failure to preserve an issue undermined the outcome of the petitioner's direct appeal. It also disregards this Court's holistic view of the nature of an ineffective assistance claim, as exemplified by the Court's extension of *Strickland* v. *Washington*, 466 U.S. 668 (1984), to cases in which trial counsel's conduct prejudiced the petitioner in a manner subsequent and unrelated to the verdict or even "to matters affecting the determination of actual guilt." *Kimmelman* v. *Morrison*, 477 U.S. 365, 380 (1986). Given the frequency of ineffective-assistance-of-trial-counsel ("IATC") claims in federal habeas cases—including claims arising from counsel's failure to preserve a winning appellate issue, as here—and because this case presents an excellent vehicle for consideration of the question presented, the Court should resolve the conflict here.

OPINIONS BELOW

The order of the court of appeals affirming the denial of a writ of habeas corpus, App. 1a–39a, is reported at 2 F.4th 851. The court of appeals' order denying rehearing, App. 40a, is unreported. The order of the district court denying the petition for a writ of habeas corpus, App. 41a–62a, and the report and recommendation of the magistrate judge, App. 63a–78a, are also unreported. The opinion of the Arizona Court of Appeals on direct appeal, App. 79a–88a, is reported at 314 P.3d 1282. The decisions of the Arizona state courts on post-conviction review are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2021. A petition for rehearing was denied on August 5, 2021. On September 3, 2021, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 20, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

This case presents an ideal opportunity for the Court to clarify the scope of the prejudice component of an IATC claim where, but for counsel's failure to

preserve a winning appellate issue, the petitioner would have prevailed in his direct appeal.

1. In 2008, Petitioner was convicted in an Arizona court of, inter alia, attempted second-degree murder stemming from an incident in which he ran his friend, who was riding a bicycle, off the road with his truck, injuring the friend. Although Arizona law required the State to prove "that [Petitioner] intended or knew that his conduct would cause death" and established that "[t]here is no offense of attempted second-degree murder based on knowing merely that one's conduct will cause serious physical injury[,]" *State* v. *Ontiveros*, 81 P.3d 330, 333 (Ariz. Ct. App. 2003), the trial court erroneously instructed the jury that it could find him guilty if he "knew that his conduct would cause death *or serious physical injury*." App. 82a. Despite on-point precedent—*Ontiveros*—defense counsel did not object.

Because the issue was unpreserved, the Arizona Court of Appeals applied its heightened "fundamental error" standard to Petitioner's challenge to the erroneous instruction. App. 83a. This standard required the appellate court to view the evidence in the light most favorable to the prosecution, "resolv[ing] all reasonable inferences against" Petitioner, App. 80a n.1, and for Petitioner to show under that harsh rubric that "a reasonable, properly instructed jury could have reached a different result[,]" App. 85a (internal quotation marks and citation omitted). Although the court held, per *Ontiveros*, that the instruction constituted fundamental error, viewing the evidence in the prosecution's favor it concluded that Petitioner could not "affirmatively prove prejudice" resulting from the erroneous

instruction. App. 84a; see App. 88a. Had trial counsel preserved the issue, the State would have borne the burden to prove the error harmless, *State* v. *Henderson*, 115 P.3d 601, 607 (Ariz. 2005) (en banc), and Arizona law would have compelled reversal, see *State* v. *Amaya-Ruiz*, 800 P.2d 1260, 1281 (Ariz. 1990) (en banc).

Petitioner's post-conviction counsel failed to raise any claim concerning the jury instructions. Petitioner's subsequent, *pro se* claim for ineffective assistance of post-conviction counsel was denied on the ground that he was not entitled to post-conviction counsel's effective assistance.

2. Petitioner timely pursued federal habeas review *pro se*, alleging as Ground II that trial counsel was ineffective for failing to object to the flawed attempted second-degree murder instruction, thereby failing to preserve the issue for direct appeal. The magistrate judge appointed counsel, concluded that the procedural default of the claim was excused under *Martinez* v. *Ryan*, 566 U.S. 1 (2012), and recommended relief on the merits. App. 63a, 69a–77a.

The district court, on *de novo* review, disagreed on both counts and denied the petition. App. 41a, 46a–61a. Although it concurred in the magistrate judge's assessment that trial counsel performed deficiently, it held that Petitioner could not show prejudice because counsel's failure to object to the erroneous instruction did not prejudice the outcome of the trial. App. 49a–60a. It further held that post-conviction counsel was not ineffective for failing to raise the issue because the claim would have failed under the Arizona state courts' gloss on *Strickland* in other cases; thus, Petitioner could not show cause or prejudice to excuse his procedural default.

App. 56a–57a, 60a. The district court specifically rejected Petitioner's argument that prejudice could be (and was) established by the decisive impact of trial counsel's failure to preserve the issue on the outcome of Petitioner's direct appeal. App. 56a–57a. It issued a certificate of appealability. App. 61a–62a.

4. On June 22, 2021, the Ninth Circuit issued a published Opinion affirming the denial of habeas relief. App. 1a–39a. Like the district court, the Ninth Circuit concluded that Petitioner was not prejudiced, under either *Strickland* or *Martinez*, because he could not show that the outcome of his trial would have been different had the jury been instructed properly. App. 26a–39a. It found irrelevant that trial counsel's failure to preserve the meritorious instructional issue for direct appeal raised the standard of review on appeal, causing him to lose the appeal where he would have prevailed but for trial counsel's deficient performance. App. 17a–26a.

5. Petitioner sought panel or en banc rehearing, which were denied. App. 40a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens a Circuit Conflict.

The courts of appeals have reached differing conclusions over whether the prejudice prong of an IATC claim may be satisfied by showing that trial counsel's objectively unreasonable failure to preserve an issue for appeal undermines confidence in the outcome of the appeal. The Second and Fifth Circuits have held that it may, in sharp contrast with the decision below. The Eleventh Circuit has taken yet a third approach, albeit in a peculiar context, but its consideration of the

issue in a second case more closely aligned with this one suggests agreement with the Second and Fifth Circuits and rejection of the Ninth Circuit's view here.

1. The Second and Fifth Circuits have held that prejudice exists where there is a reasonable likelihood that trial counsel's deficient performance altered the outcome of the appeal.

In *Parker* v. *Ercole*, 666 F.3d 830 (2d Cir. 2012), the petitioner argued that trial counsel's failure to preserve a sufficiency challenge prejudiced him because the appellate court would have reversed but for the higher standard of review applicable to unpreserved issues. *Id.* at 834. The Second Circuit held that the prejudice inquiry required the petitioner to "show that, but for his counsel's failure to preserve his sufficiency claim, there is a reasonable probability that his claim would have been considered on appeal and, as a result, his conviction would have been reversed." *Id.* It denied the writ because it found the evidence sufficient, such that "there is no reasonable probability that, but for [counsel's] failure, the result of Parker's state-court proceedings would have been different." *Id.* at 835–36.

The Fifth Circuit reached a similar conclusion in *Rogers* v. *Quarterman*, 555 F.3d 483 (5th Cir. 2009). There, the petitioner argued that trial counsel's failure to object to the voluntariness of his confession prejudiced him on appeal because the lack of preservation defeated his intended argument that the higher courts should adopt a new rule that would render his confession inadmissible. *Id.* at 495. The Fifth Circuit declined to find prejudice because the petitioner could not show that the state courts would have adopted his proposed rule; thus, "there [was] no

reasonable likelihood that the Fourteenth Court of Appeals, the Texas Court of Criminal Appeals, or the United States Supreme Court would have found the confession to be involuntary or inadmissible had that issue been properly before it," and the petitioner in turn could not "show that there is any reasonable probability (or probability sufficient to undermine confidence in the outcome) that but for counsel's failure to preserve for appeal the claim that the confession was inadmissible, the case would have had a different result." *Id*. at 495–96.

The Ninth Circuit sought to minimize its departure from *Parker* and *Rogers* by asserting that those cases do not support the argument "that the loss of a more favorable standard of appellate review could satisfy *Strickland*'s prejudice requirement." App. 22a; see App. 23a (similar). But that is not the issue. Petitioner argued that he suffered prejudice because there was a reasonable probability that, but for trial counsel's failure, the state appellate court on direct appeal would have reversed his attempted second-degree murder conviction and granted him a new trial. Pet. C.A. Op. Br. 26.

2. The Eleventh Circuit has split the baby. In *Davis* v. *Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003) (per curiam), trial counsel objected, under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to the prosecution's discriminatory use of peremptory strikes, but he failed to renew his objection at the close of voir dire, as required to preserve the issue for appeal under a quirk of Florida law. *Davis*, 341 F.3d at 1315. As a result, the state appellate court, on

direct appeal, affirmed the conviction despite the meritorious *Batson* challenge because the issue was unpreserved. *Id.*

The Eleventh Circuit found guidance in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), where this Court held that a defendant establishes prejudice from trial counsel's deficient failure to timely file a notice of appeal by showing that he would have appealed had counsel consulted him on the issue. *Id.* at 484. *Flores-Ortega*, the Eleventh Circuit concluded, "establishes that the prejudice showing required by *Strickland* is not always fastened to the forum in which counsel performs deficiently: even when it is *trial* counsel who represents a client ineffectively in the *trial court*, the relevant focus in assessing prejudice may be the client's appeal." *Davis*, 341 F.3d at 1315. Distinguishing between trial counsel's obligation to alert the trial court to the error by objecting and "his separate and distinct role of preserving error for appeal[,]" the Eleventh Circuit held that, where counsel raises an issue but nonetheless fails to preserve it for appeal, "the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved." *Id.* at 1316.

In *French* v. *Warden, Wilcox State Prison*, 790 F.3d 1259 (11th Cir. 2015), however, the Eleventh Circuit took a position that hews more closely to that of the Second and Fifth Circuits. In that case, the focus of counsel's failure to raise at trial or proffer supporting evidence for an alternate defense theory, as was necessary to perfect the record for appeal, was on whether there was "a reasonable probability of a different result on appeal." *Id.* at 1269; see *id.* ("we must determine whether

French had a reasonable likelihood of securing a new trial" on appeal); *id.* at 1270 (finding no "reasonable probability that the result in the Georgia Court of Appeals on direct appeal would have been different"). The Eleventh Circuit so concluded even though the absence of a proffer or trial objection deprived the trial court of an opportunity to pass on the issue—the distinction it appeared to draw in *Davis*. See *id.* at 1268.

Relying on *Davis*, the Ninth Circuit below concluded that the outcome of the direct appeal was irrelevant because "it is entirely possible to analyze the prejudice of an objected-to jury instruction upon the outcome of the trial itself." App. 22a. But that conclusion cannot be reconciled with *French*, where it was similarly "possible" to assess whether the defense, if properly presented, could have affected the verdict.

3. Until this case, the Ninth Circuit, like its sister circuits, had suggested that a reasonable likelihood of success on appeal suffices to demonstrate prejudice in the IATC context. See, *e.g.*, *United States* v. *Span*, 75 F.3d 1383, 1389 (9th Cir. 1996) (finding IATC where "counsel failed to establish a foundation for an excessive force defense, which would at least have allowed the [defendants] to obtain reversal on appeal"); *Burdge* v. *Belleque*, 290 F. App'x 73, 79 (9th Cir. 2008) (unpublished) (finding IATC where, but for counsel's failure to object to a sentencing enhancement, "either the sentencing judge would have agreed with the objection, or the issue would have been preserved for appeal"). In the decision below, by contrast, the court of appeals construed *Strickland*'s requirement that the

defendant show "the result of the proceeding would have been different" as restricting an ineffective assistance claim to the forum where the ineffective assistance was rendered. See App. 18a (referring to an appeal as a "subsequent proceeding"). This rule stands exactly contrary to the Second and Fifth Circuits, the Eleventh Circuit's ruling in *French*, and even its conclusion in *Davis* that the prejudice component of an IATC claim may center on the appeal. *Davis*, 341 F.3d at 1315.

The division of authority necessitates this Court's intervention.

II. The Decision Below Conflicts with This Court's Precedents.

The Ninth Circuit's cramped interpretation of the prejudice component also clashes with this Court's precedent establishing that the *Strickland* analysis applies to the "whole course of a criminal proceeding[,]" *Lafler* v. *Cooper*, 566 U.S. 156, 165 (2012), and recognizing that an error by counsel at one stage of the case may manifest at a later stage.

1. The Court has counseled that prejudice means "a reasonable probability that the end result of the criminal process" would have been different. *Missouri* v. *Frye*, 566 U.S. 134, 147 (2012). Here, but for trial counsel's failure to preserve the meritorious instructional issue, "the end result of the criminal process" would indeed have been different: the error would have been deemed harmful, and Petitioner's conviction would have been reversed with the case remanded for a new trial. Of course, a new trial is the same outcome that would have resulted had "one juror … struck a different balance[,]" *Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003)—which is the analysis the court of appeals held to be the exclusive inquiry for this

type of error. See App. 17a ("[T]he IATC prejudice analysis focuses on the effect of an alleged error on the *verdict*—that is, on [the] outcome of the trial."). These alternative analyses are two sides of the same coin. Nothing in this Court's jurisprudence compels one mode of analysis to the exclusion of the other.

2. Nor can the court of appeals' view that the prejudice analysis is confined to the forum in which counsel performs deficiently, App. 18a, be squared with this Court's precedents. "We … have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*[.]" *Padilla* v. *Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Strickland*, 466 U.S. at 689). The consequence of trial counsel's failure to preserve the error in this case—defeat on appeal where Petitioner would otherwise have won—is far less tangential than the collateral immigration consequence (deportation) that this Court held sufficient to establish prejudice in *Padilla*. See *id.* at 364–66.

Indeed, in both *Flores-Ortega* and *Garza* v. *Idaho*, 139 S. Ct. 738 (2019), this Court assessed the prejudice resulting from *trial* counsel's deficient failure to file a timely notice of appeal by the impact of that conduct on the *appeal*. *Garza*, 139 S. Ct. at 747; *Flores-Ortega*, 528 U.S. at 484. Like the forfeiture of an appeal in those cases, counsel's failure here to preserve a meritorious issue caused Petitioner to *lose* his appeal. If anything, prejudice is greater in this context, where the underlying issue (a) is identified and (b) would have required reversal on appeal had trial counsel preserved it.

3. The court of appeals reasoned that *Garza* and *Flores-Ortega* are different because they involved the loss of an appeal entirely. App. 19a–22a. This is true, and, for that reason, this Court has held that, in that unique circumstance, prejudice is presumed, *Garza*, 139 S. Ct. at 749–50; *Flores-Ortega*, 528 U.S. at 484—a matter not at issue here. But those cases also make clear what is apparent from the Court's application of *Strickland* in a variety of circumstances: that prejudice may be found in a context apart from that in which counsel performed deficiently and that a more favorable "end result of the criminal process[,]" *Frye*, 566 U.S. at 147, may mean something other than a different jury verdict. See, *e.g.*, *Padilla*, 559 U.S. at 1486 (counsel's incorrect advice regarding the immigration consequences of a guilty plea is prejudicial where the defendant would have gone to trial); *Lafler*, 566 U.S. at 174 (counsel's failure to convey a plea offer is prejudicial where the defendant would have accepted that plea instead of a subsequent, less favorable offer); *Hill* v. *Lockhart*, 474 U.S. 52, 58–60 (1985) (counsel's erroneous advice regarding the consequences of the defendant's guilty plea is prejudicial where the defendant otherwise would not have pleaded guilty).

Unmoored from this Court's precedent and in conflict with other circuits, the decision below warrants review.

III. The Question Presented Is of Substantial and Recurring Importance, and This Case Is an Ideal Vehicle.

The scope of the prejudice inquiry mandated by *Strickland* and *Martinez* is critical in numerous federal habeas cases, and no vehicle problems are present here.

1. IATC claims in federal habeas cases are exceedingly common. And such claims often center on trial counsel's failure to raise a critical issue. The decision below, however, ignores this Court's admonition that "[e]ffective trial counsel preserves claims to be considered on appeal and in federal habeas proceedings[,]" *Martinez*, 566 U.S. at 12 (internal citations omitted), leaving Petitioner without a remedy for a violation of that independent Sixth Amendment guarantee. See *Davis*, 341 F.3d at 1315 (distinguishing counsel's obligation to object to error from his independent duty to preserve issues for appeal); *id.* ("[T]he prejudice showing required by *Strickland* is not always fastened to the forum in which counsel performs deficiently: even when it is *trial* counsel who represents a client ineffectively in the *trial court*, the relevant focus in assessing prejudice may be the client's appeal."). The recurring nature and importance of the issue in numerous federal habeas cases merit this Court's attention.

2. This case is an ideal vehicle for consideration of the question presented. That question is dispositive of Petitioner's entitlement to relief, and the underlying facts are undisputed. This case thus turns entirely on the resolution of the constitutional question.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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