No. ________

IN THE

Supreme Court of the United States

RICHARD BROWN,
Warden, Wabash Valley Correctional Facility,
Petitioner,

v.

DENTRELL BROWN,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

* *Counsel of Record*

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Chief Counsel
HENRY A. FLORES, JR.
LARA LANGENECKERT
JULIA C. PAYNE
LEE M. STOY, JR.
Deputy Attorneys General

Counsel for Petitioner

QUESTION PRESENTED

Under the *Martinez-Trevino* doctrine, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if a state denies a meaningful opportunity to raise the claim on direct appeal. Indiana allows trial-counsel *Strickland* claims on direct appeal in one of two ways. First, if they choose to make no further record in support of their claims, defendants may simply assert them in their brief on appeal. Second, if they wish to develop a record supporting their claims, defendants may suspend their direct appeals while they develop the factual record in trial court in what is called the *Davis/Hatton* procedure. Any appeal of that claim will be combined with the direct appeal of the conviction. The *Davis/Hatton* procedure is optional, however, and prisoners may choose instead to raise their trial-counsel *Strickland* claims in a traditional post-conviction review proceeding *after* direct appeal.

The question presented is whether the Indiana procedure satisfies *Martinez-Trevino*.

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PETITION FOR WRIT OF CERTIORARI

The State of Indiana, through Richard Brown, Warden of the Wabash Valley Correctional Facility, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a) and its order denying rehearing en banc and the dissenting opinion therefrom (App. 39a) are reported at *Brown v. Brown*, 847 F.3d 502, *reh'g en banc denied*, 869 F.3d 507 (7th Cir. 2017). The orders of the United States District Court for the Southern District of Indiana denying habeas corpus relief (App. 45a, 75a) are unreported. The decisions of the Court of Appeals of Indiana on state post-conviction review (App. 85a) and direct appeal (App. 92a) are unreported.

JURISDICTION

A panel of the Seventh Circuit Court of Appeals panel entered judgment on February 1, 2017. Petitioner filed a petition for rehearing *en banc*, which the Court of Appeals denied on July 19, 2017. On October 10, 2017, this Court extended the deadline to file a petition for writ of certiorari until December 16, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254 provides, in relevant part,

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

. . .

STATEMENT OF THE CASE

1. Early one bleak March morning in 2008, Gerald Wegner was found dead in the street with a single nine-millimeter bullet wound in his head. App. 3a, 93a. Elkhart, Indiana, Police found a nine-millimeter shell near his body, but also found a .45 caliber bullet casing nearby. *Id.*

Relying on information from police interviews with neighbors and others, the State of Indiana charged Dentrell Brown and Joshua Love with

Wegner's murder. App. 3a. Brown, then a juvenile, was waived into adult felony court, and both defendants were tried together. *Id.*

At trial, the prosecution introduced the testimony of fellow jail inmate, Mario Morris. *Id.* Morris testified that both Brown and Love separately confessed to their involvement in murder, neither implicating the other. *Id.* According to Morris, Love told him that on the night of the murder, he met with Wegner in an attempt to sell him a "gang pack," a substance that appears to be crack cocaine. *Id.* at 94a. When Wegner discovered that the gang pack was fake, the pair argued and Love shot Wegner in the head with a 9mm handgun. *Id.* at 94a–95a.

Morris also testified that Brown confessed to being present the night of the murder, telling him an almost identical story, but with significant differences. *Id.* at 3a. In Brown's version of the story, he was the one who had attempted to sell Wegner the gang pack. *Id.* at 95a. When the deal went bad, Brown hit Wegner in the head with a .45, which accidentally fired. *Id.* Brown's version of the story did not account for how Wegner was killed. Neither confession mentioned the presence of a third party; both defendants told the story as if they had met with Wegner alone. *Id.* at 4a.

After hearing Morris's testimony, both defendants moved for a mistrial based on *Bruton v. United States*, 391 U.S. 123 (1968), which held that admission of a co-defendant's confession implicating another defendant at a joint trial is a prejudicial error, even if a jury instruction is given to limit the use of the confession to the defendant who made it. *Id.* The trial court judge denied both motions because neither

confession implicated the co-defendant. *Id.* Prosecutors argued that Love was guilty of Wegner's murder and Brown was guilty of murder on a theory of accomplice liability. *Id.* The jury found both guilty.

Brown appealed his conviction, raising three issues: "1) whether the trial court abused its discretion when it denied [Brown]'s motion for a mistrial; 2) whether the trial court abused its discretion when it admitted evidence that [Brown] possessed a gun prior to the murder; and 3) whether [Brown]'s sentence is inappropriate in light of the nature of his offense and his character." *Id.* at 92a–93a. The Indiana Court of Appeals denied relief on all counts. *Id.* at 103a. Brown's petition to transfer to the Indiana Supreme Court was denied. *Brown v. State*, 929 N.E.2d 781 (2010).

2. Next, Brown filed a petition for post-conviction relief back in state trial court, raising a single issue for review: whether his trial counsel was ineffective "because he failed to file a motion to sever [Brown]'s trial from that of his codefendant." *Id.* at 87a. Both the post-conviction trial court and the Indiana Court of Appeals rejected this claim. *Id.* at 87a, 91a. Once again, Brown's petition to transfer to the Indiana Supreme Court was denied. *D.B. v. State*, 980 N.E.2d 323 (2012).

Brown then filed a habeas corpus petition in federal district court, raising three grounds for relief: (1) whether "the Indiana Court of Appeals erred in deciding a *Bruton* claim raised on direct appeal[;]" (2) whether trial counsel provided ineffective assistance by failing to request a limiting instruction that would have prevented the jury from using Love's

statement as evidence against Brown; and (3) whether there was "a *Giglio* [*v. United States*, 405 U.S. 150 (1972),] violation concerning his testifying co-defendant." *Id.* at 75a. The district court initially dismissed the ineffective assistance of trial counsel and *Giglio* claims as being procedurally defaulted as Brown had not raised them in state court, *id.* at 77a–83a, and ordered further briefing on the merits of the *Bruton* issue. *Id.* at 83a–84a. It later denied relief on Brown's *Bruton* claim, *id.* at 63a–69a, and reaffirmed its procedural default finding regarding Brown's ineffective assistance claim, *id.* at 69a–73a. However, the district court granted Brown a certificate of appealability on the *Bruton* claim. *Id.* at 73a–74a.

3. Brown appealed, and the Seventh Circuit expanded the certificate of appealability to include the ineffective assistance claim. Brown then dropped his *Bruton* claim and appealed only the ineffective assistance of counsel issue. App. 6a. The Seventh Circuit reversed, holding that the doctrine of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), "applies to Indiana procedures governing ineffective assistance of trial counsel claims," *id.* at 5a, and remanded to the district court for an evidentiary hearing on whether state post-conviction counsel performed deficiently, and if so, whether trial counsel rendered ineffective assistance by not having requested a limiting instruction regarding the use of Love's statement, *id.* at 26a–27a.

In its majority opinion, the Seventh Circuit held that the design and operation of Indiana's practice make the *Martinez-Trevino* doctrine applicable.

App. 11a. Although Indiana permits ineffective assistance of counsel claims to be brought on either direct appeal or state post-conviction review, "the Indiana Supreme Court has adopted rules and doctrines that strongly discourage" the direct appeal path and "force" defendants "to wait for collateral review." *Id.* Specifically, the Indiana Supreme Court has warned litigants of the dangers of raising an ineffective assistance of trial counsel claim without an adequate record and established a res judicata bar that prohibits raising such a claim on state collateral review if it was first raised on direct appeal. *Id.* at 11a–14a.

In contrast, Judge Sykes's dissent highlighted the characteristics of the *Davis/Hatton* procedure that afford a meaningful right to bring *Strickland* claims on direct review. App. 32a. Under the *Davis/Hatton* procedure, Indiana prisoners are provided two opportunities to address *Strickland* claims during a direct appeal. Indiana prisoners may present claims of ineffective assistance of counsel for the first time in their direct appeal opening brief. Or Indiana prisoners may request a stay of the direct appeal for the specific purpose of submitting an early petition for post-conviction relief to the trial court to obtain a more fully-developed record to support any claims that a defendant believes—for strategic reasons—would be made stronger. "Indiana does not by procedural rule make it virtually impossible to litigate a *Strickland* claim on direct appeal. To the contrary, Indiana *explicitly provides* a process for doing so: the so-called *Davis/Hatton* procedure[.]" App. 32a. Unlike Texas, "which specifically directed defendants *not* to raise these claims on direct

review … the Indiana Supreme Court explained that although collateral review is 'normally the preferred forum' for a claim of ineffectiveness assistance of trial counsel, direct review remains an appropriate and workable option in light of the *Davis/Hatton* procedure." App. 32a. Therefore, Judge Sykes concluded, "my colleagues' decision is not so much an application of *Trevino* as an unwarranted *expansion* of it." *Id.* at 36a (emphasis in original).

Indiana petitioned for rehearing en banc, which was denied. *Id.* at 39a–40a. Judges Sykes, Flaum, and Easterbrook dissented from the denial, restating the reasons given by Judge Sykes in her panel dissent. *Id.* at 40a. Judge Sykes also explained that this Court's recent decision in *Davila v. Davis*, 137 S. Ct. 2058 (2017), was "hard to reconcile" with "[t]he panel's expansion of *Martinez-Trevino*." App. 44a. Whereas *Davila* "suggests a strong reluctance to expand the exception beyond the limits of its rationale," the panel's decision does exactly that. *Id.* at 43a. "Indiana has *not* moved *Strickland* claims outside the direct-appeal process, so the reason for the exception does not exist here." *Id.* (emphasis in original).

REASONS TO GRANT THE PETITION

The *Martinez-Trevino* doctrine essentially provides that if a state wants federal habeas courts to honor state procedural rules for processing ineffective assistance claims, it must allow criminal defendants two shots at bringing a claim of ineffective assistance of trial counsel in state court: on direct appeal and through state post-conviction review. Where a state allows ineffective assistance claims to be brought on direct appeal, a defendant has one opportunity to

argue his claim on direct appeal and then also raise any other unexhausted ineffective assistance arguments on state collateral review as either a freestanding claim or via an ineffective assistance of appellate counsel claim. *Martinez v. Ryan*, 566 U.S. 1, 11–12 (2012). This way, state prisoners are afforded ample opportunities—one with the benefit of constitutional guaranteed counsel—to preserve the opportunity for federal court review of trial counsel's performance. But where a state bars such claims on direct appeal (or makes such claims virtually impossible), a criminal defendant has only one opportunity to argue an ineffective assistance claim on state post-conviction review, is not constitutionally assured counsel to assist in bringing that claim, and proceeds with the disadvantage of litigating the claim from prison. *Id.* at 12.

For this reason, *Martinez* carved out a narrow exception to the general rule announced in *Coleman v. Thompson*, 501 U.S. 722, 755 (1991), that attorney error during state post-conviction proceedings—where the Constitution does not guarantee the right to counsel—cannot supply cause to excuse a procedural default that occurs in those proceedings. "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding," *Martinez* provides that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 566 U.S. at 17.

Trevino v. Thaler, in turn, applied the *Martinez* exception to circumstances where a state's procedural requirements for bringing an ineffective assistance claim on direct appeal do not offer a "meaningful opportunity" to do so because it is "virtually impossible for appellate counsel to adequately present" such claims. 569 U.S. 413, 417, 429 (2013).

If, however, a state does provide a meaningful opportunity to bring an ineffective assistance claim on direct review, a criminal defendant who fails to bring a claim on either direct appeal or state post-conviction review has already had two shots. In that situation, the *Martinez-Trevino* doctrine is not applicable.

This case concerns what exactly constitutes a meaningful opportunity to bring an ineffective assistance of counsel claim on direct appeal. Indiana courts provide both an opportunity to assert ineffective assistance claims in a direct appeal opening brief *and* a specially designed procedure to halt direct appeal proceedings so that defendants can establish a more thorough record before presenting those claims combined with the direct appeal. Yet the Seventh Circuit held that these opportunities are insufficient to satisfy the standard of *Martinez-Trevino*. The Court should grant the petition and reverse to provide states with a model of how to provide criminal defendants with a meaningful opportunity to bring ineffective assistance of counsel claims on both direct appeal and state post-conviction review.

I. Indiana's Procedures are Materially Indistinguishable from Those of Three Other States Where Circuit Courts Have Found *Martinez-Trevino* Inapplicable

The procedures that Indiana employs to permit convicted defendants to bring claims of ineffective assistance of trial counsel are much more flexible and accessible than procedures in other states where the *Martinez-Trevino* exception has been held not to apply. And even circuit court decisions holding that other states' procedures are insufficient to satisfy *Martinez-Trevino* demonstrate just how much the Seventh Circuit has distorted the meaning of *Martinez-Trevino*, which was designed to be a highly limited, federalism-respecting, exception.

1. Both the First and Tenth Circuits have approved procedures under *Martinez-Trevino* that are materially identical to Indiana's *Davis/Hatton* procedure. In *Lee v. Corsini*, 777 F.3d 46 (1st Cir. 2015), the First Circuit held that *Martinez-Trevino* is satisfied by a Massachusetts procedure that permits defendants to develop an ineffective-assistance record through a motion for a new trial filed within 120 days of when the direct appeal is docketed. *Id.* at 61. As with the Indiana *Davis/Hatton* procedure, the direct appeal is stayed pending the motion for a new trial, and appeals from denials of motions for a new trial may be consolidated with the original direct appeal. *Id.* Moreover, an ineffective assistance claim is not waived if the defendant chooses not to bring it on direct appeal unless it is apparent from the trial court record itself. *See Commonwealth v. Zinser*, 847 N.E.2d 1095, 1099 (Mass. 2006).

In *Fairchild v. Trammell*, 784 F.3d 702 (10th Cir. 2015), the Tenth Circuit held that Oklahoma's procedures satisfy *Martinez-Trevino* because criminal defendants may file a request to supplement the record along with their brief on direct appeal. *Id.* at 721. Like the Indiana *Davis/Hatton* procedure, such a request affords a much longer time in which to investigate ineffective assistance of counsel claims. *Id.* at 722. In contrast to the Indiana procedure, however, if appellant fails to raise ineffective assistance on direct appeal, it is waived during state post-conviction review. *See id.* at 716. *See also Nash v. Hepp*, 740 F.3d 1075 (7th Cir. 2014) (majority opinion of Sykes, J.) (discussing the Wisconsin procedure that "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, and provides an opportunity to develop an expanded record.").

These cases identify the common characteristics of a state procedural system from which federal courts will honor procedural defaults under *Martinez-Trevino*. First, they permit (or require) ineffective assistance of trial counsel claims to be brought on direct appeal. Second, they offer easily accessible procedures during the pendency of a direct appeal for defendants to further develop the record in circumstances where it is necessary to establish a *Strickland* claim. *See generally Strickland v. Washington*, 466 U.S. 668 (1984). Indiana's approach is identical in these respects. App. 32a–34a, 41a. Yet the Seventh Circuit nevertheless applied *Martinez-*

Trevino to Indiana's system, and in so doing departed from the First and Tenth Circuits.

2. Other states' procedures have not been subject to such incompatible understandings of *Martinez-Trevino* by their respective circuit courts, which have applied the doctrine in much more straightforward ways. For example, other circuits have consistently found *Martinez* to apply where state procedure explicitly forces ineffective assistance claims into a state post-conviction proceeding. *See, e.g.*, *Fowler v. Joyner*, 753 F.3d 446, 463 (4th Cir. 2014) (holding that *Martinez-Trevino* applies to North Carolina because ineffective assistance claims were only considered "when the cold record reveal[ed] that no further investigation [was] required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing."); *Coleman v. Goodwin*, 833 F.3d 537, 542 (5th Cir. 2016) (applying *Martinez-Trevino* to Louisiana because state courts would not consider ineffective assistance of counsel claims if they were not apparent from the record and would direct such claims to be brought in a collateral proceeding); *Runningeagle v. Ryan*, 825 F.3d 970, 981 (9th Cir. 2016) (applying *Martinez* to Arizona again after *Trevino* despite that state's consolidated direct and collateral review appeal process because state courts "will not reverse a conviction" on direct appeal due to ineffective assistance of trial counsel until after an evidentiary hearing on post-conviction review).

In some cases, to be sure, the state nominally permitted the defendant to file a post-trial motion for purposes of making a further record, but (as in

Trevino), the timeline for making that record was so short that the opportunity was meaningless. *See Coleman*, 833 F.3d at 542 (explaining that Louisiana has similar timing constraints to Texas); *Sutton v. Carpenter*, 745 F.3d 787, 792–93 (6th Cir. 2014) (holding that, like Texas, Tennessee's deadlines to file a motion for a new trial in order to develop a factual record on the issue created a "timing obstacle"); *Woolbright v. Crews*, 791 F.3d 628, 633–34 (6th Cir. 2015) (explaining that Kentucky employs timing obstacles similar to Texas in *Trevino*).

In other cases, the opportunity to pause an appeal to make a *Strickland* record was compromised because trial counsel whose deficiency was at issue was required to participate. *See Sutton*, 745 F.3d at 794 (stating that Tennessee's "procedural law creates a presumption that indigent defendants will be represented by trial counsel on appeal, and trial counsel are unlikely to raise their own errors in a motion for new trial"); *Woolbright*, 791 F.3d at 632 (explaining that in Kentucky "public defenders represent defendants in the overwhelming majority of cases," and "it is unethical for counsel to assert his or her own ineffectiveness" (internal citations omitted)); *Sasser v. Hobbs*, 735 F.3d 833, 852–53 (8th Cir. 2013) (holding that the *Martinez-Trevino* exception applies to capital defendants in Arkansas because they retained the same counsel they had for trial on appeal).

These decisions carry out the letter of *Martinez-Trevino* where discernible rules and legal standards impede immediate *Strickland* claims. Indiana's procedures suffer from none of the shortcomings cited

by the Fourth, Fifth, Sixth, Eighth and Ninth Circuits. By contrast, the decision below expanded *Martinez-Trevino* to apply where there is no procedural barrier, but where the state judiciary has merely communicated a realistic understanding that *Strickland* claims on direct appeal are unlikely to be supported by the record.

* * *

This case is worthy of review not only because the decision below conflicts with decisions of the First and Tenth Circuits and because it expands *Martinez-Trevino* well beyond the guardrails recognized by several other circuits, but also because the issue appears to have percolated among the circuits as much as the Court might reasonably expect. States take many different approaches to collateral review, so it is unclear whether *any* other states have systems materially identical to Indiana's that could be tested in other circuits. Moreover, the reluctance of states to test new systems in uncertain doctrinal environments makes it unlikely any states would now develop something akin to *Davis/Hatton* absent review and approval by the Court.

Consideration of Indiana's model now could give the majority of other states the guidance necessary to make it worthwhile to craft procedures that may avoid unnecessary federal court interference at the habeas stage. Such a model could help states avoid the "endless . . . state-by-state litigation" that Chief Justice Roberts warned of in his *Trevino* dissent. *Trevino*, 133 S. Ct. at 1923 (Roberts, C.J., dissenting).

II. Indiana's Procedure Both Comports with *Martinez-Trevino* and Resolves the Challenges Attendant to Bringing Trial-Counsel *Strickland* Claims

Indiana does not frustrate early resolution of trial counsel ineffectiveness claims; it flexibly accommodates a variety of avenues for vindicating those claims and leaves to defendants and their counsel to decide which path is the better strategic choice.

1. Indiana begins by satisfying the fundamental requirement of *Martinez*: ineffective assistance of counsel claims may be brought on direct appeal. *Woods v. State*, 701 N.E.2d 1208, 1216 (Ind. 1998). What is more, Indiana defendants take advantage of this opportunity to raise ineffective trial counsel claims routinely—indeed, they even win. *See*, *e.g.*, *Brown v. State*, 59 N.E.3d 364, 2016 WL 3556267 (Ind. Ct. App. June 29, 2016); *Williams v. State*, 983 N.E.2d 661 (Ind. Ct. App. 2013); *Pryor v. State*, 973 N.E.2d 629 (Ind. Ct. App. 2012); *Lewis v. State*, 929 N.E.2d 261 (Ind. Ct. App. 2010); *Perez v. State*, 748 N.E.2d 853, 855 (Ind. 2001). So while all trial-counsel ineffectiveness claims must be raised at the same time, *Woods*, 701 N.E.2d at 1220, "Indiana offers defendants a true choice—direct appeal *or* collateral review—and *either* forum is a procedurally viable option for adjudicating a *Strickland* claim." App. 35a (emphasis in original).

Indiana even offers an early and expedited post-conviction procedure for those who want to use it—the aforementioned *Davis/Hatton* procedure. *Davis/Hatton* is a hybrid direct and collateral review

process whereby a convicted defendant may develop a record supporting a collateral claim, such that the claim may be presented alongside other appeal claims in a single appellate proceeding. *See Woods*, 701 N.E.2d at 1219–20 (citing *Davis v. State*, 368 N.E.2d 1149 (Ind. 1977), and *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993)). Yet it still leaves open the standard state post-conviction review when defendants choose neither of those earlier options.

2. Indiana's procedure is meaningful in every sense: its well-known and well-defined procedural rules assist litigants in choosing their strategy; its ample timeline allows counsel to identify claims and assess the need for further record development; and, ultimately, the system is commonly used. *Cf. Trevino*, 133 S. Ct. at 423–28.

By hitting those marks, Indiana would seem to have provided a model system for developing and presenting a *Strickland* claim on direct appeal, and thereby avoiding application of the *Martinez-Trevino* rule to prisoners who nonetheless default on those claims in state court. The *Martinez-Trevino* exception, after all, is "narrow," "limited," and "highly circumscribed." *Davila v. Davis*, 582 U.S. __, 137 S. Ct. 2058, 2062, 2065, 2066–67, 2068, 2069, 2070 (2017). And for good reason. A federal court decision eschewing a state procedural default comes at the expense of "comity, finality, and federalism"—the critical values that underlie limits on federal review of state court convictions. *Davila*, 137 S. Ct. at 2070.

Yet the decision below expanded *Martinez-Trevino* at the expense of the careful balance the Court struck in those decisions. App. 43a–44a. The panel majority

faulted Indiana courts for "routinely direct[ing] defendants to bring claims for ineffective assistance of trial counsel on collateral review and warn[ing] against bringing them on direct review" and observed that the criminal defense bar advises clients against bringing such claims. *Id.* at 15a–16a.

But the mere fact that Indiana courts warn defendants against raising ineffective assistance claims on direct appeal does not render the procedure suspect under *Martinez-Trevino*. Unsurprisingly, the Court has never held that an equitable exception to procedural default should apply merely because a state court recognizes that direct appeal record-based claims will often not succeed under the *Strickland* standard. It is the responsible approach for a state judiciary to ensure that criminal defendants are well-informed of the relative risks and benefits of their strategic options. "'Rules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time.'" *Massaro v. United States*, 538 U.S. 500, 504 (2003) (quoting *Guinan v. United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring)).

As the Court itself has recognized, "there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage[.]" *Martinez*, 566 U.S. at 13. In particular, "[w]hen an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Massaro*, 538 U.S. at 504-05. Without any

specific investigation of trial counsel's performance and the potential prejudicial effects of the representation, it is often impossible to satisfy the *Strickland* standard. *Id.* Just because a state could make ineffective assistance claims available on direct appeal does not mean that it will always be advantageous for appellants to bring such claims. Accordingly, Indiana's procedures should not be faltered for offering criminal defendants the option of deferring *Strickland* claims until after direct appeal.

In addition, the panel majority erred by claiming that the Indiana Supreme Court goes "so far as to decline addressing a defendant's claim for ineffectiveness of trial counsel actually presented on direct appeal, believing it 'preferable for the defendant to adjudicate his claim . . . in a post-conviction relief proceeding.'" App. 15a (citing *McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999), and *Landis v. State*, 749 N.E.2d 1130, 1132 (Ind. 2001)). In *McIntire,* the law changed during the pendency of the appeal in a way that might have adversely effected McIntire's rights, so the court did McIntire a favor and declined to consider the *Strickland* claim at that stage of the case, allowing McIntire to raise it later on post-conviction review. *McIntire*, 717 N.E.2d at 101–02. In *Landis*, the court reversed a lower court decision holding that failure to raise a *Strickland* claim on direct review defaulted the claim entirely (and addressed the claim on the merits). 749 N.E.2d at 1132–33. And other decisions cited by the Seventh Circuit as evidence of a systemic hostility to direct-appeal *Strickland* claims—seven non-precedential decisions over nearly twenty years (App. 15a–16a)—merely denied relief on the merits and imposed no

procedural barriers. *Trevino* obviously does not require state courts to create a lesser standard than *Strickland* to maintain federal court respect for state procedural defaults.

Martinez and *Trevino* also do not require states to *force* defendants to bring ineffective assistance claims on direct appeal. *Trevino*, 569 U.S. at 429. *But see Nash*, 740 F.3d at 1079 (holding the Wisconsin's procedure requiring that all trial-counsel *Strickland* claims be brought on direct appeal satisfies *Martinez-Trevino*). They require only that state courts provide a meaningful opportunity to do so if state procedural rules are to be respected on federal review. As Judge Sykes, the author of the majority opinion in *Nash*, observed in dissent below, "[i]n sharp contrast to Texas," *i.e.,* the state procedures reviewed in *Trevino*, "both options [direct appeal and post-conviction review] are fully open in Indiana, and the state provides a meaningful opportunity to litigate the issue at either stage. This takes Indiana outside the rule and rationale of *Trevino*." App. 35a.

Hence, the decision below constitutes an "unwarranted *expansion*" of *Trevino*. *Id.* at 36a, 46a. The Court should grant review to protect basic federalism principles from this "serious intrusion."

CONCLUSION

The petition should be granted.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
STEPHEN R. CREASON
Chief Counsel
HENRY A. FLORES, JR.
LARA LANGENECKERT
JULIA C. PAYNE
LEE M. STOY, JR.
Deputy Attorneys General

Counsel for Petitioner

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