No. 17-887

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

REPLY BRIEF OF PETITIONER

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE CASES [CONT'D]

RULES

REPLY BRIEF OF PETITIONER

Respondent underscores the confusion over the "narrow exception" to procedural default rules created by *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 428 (2013). The First, Seventh and Tenth Circuits all have approved systems that force defendants into one-size-fits-all unified appellate review of all challenges to their convictions. Yet here the Seventh Circuit needlessly frustrated Indiana's innovative system of multiple defendant-tailored appellate review options, including direct, collateral, and hybrid review of ineffective assistance claims. And while Judge Sykes warned of "unwarranted expansion" of *Martinez-Trevino*, App. 27a–38a, Respondent merely parrots the panel majority's flawed rationale for that expansion (and its misstatements of Indiana law). The Court should grant the petition and reverse.

ARGUMENT

I. Indiana Permits Ineffective-Assistance Claims on Direct Appeal

For *Martinez-Trevino* purposes, the defining feature of Indiana's criminal appeals procedures is that a defendant may, with benefit of counsel and no judicial impediment, raise ineffective-assistance of trial counsel claims on direct appeal. That system satisfies *Martinez*, which "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." 566 U.S. at 16.

It also satisfies *Trevino*. Since *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998), in at least 108 cases defendants have raised ineffectiveness claims on direct appeal that the appellate courts addressed on the merits. *See* Table A, below at 8. The "exception" is the interregnum case *McIntire v. State*, 717 N.E.2d 96 (Ind. 1999), where (again) the court merely allowed McIntire to benefit from the new *Woods* rule instead of unjustly enforcing the former procedural law. *McIntire*, 717 N.E.2d at 101–02. *McIntire* illustrates how Indiana courts value procedural fairness to criminal defendants.

To be sure, most defendants choose not to raise ineffective-assistance claims on direct appeal, but the relevant point for *Martinez-Trevino* is that Indiana defendants make their own meaningful and counseled strategic choices in that regard. Accordingly, procedural defaults should be respected by federal habeas courts under *Coleman v. Thompson*, 501 U.S. 722 (1991).

Even so, the Seventh Circuit and Respondent insist that only a unified direct-appeal procedure that negates all collateral review satisfies *Martinez-Trevino*. The Court should correct that misperception.

II. *Martinez-Trevino* Does Not Mandate Unified Appellate Review

Respondent's view of *Martinez-Trevino* leaves but one option if a State wishes for federal habeas courts to respect its procedural default rules: unified appellate review, where defendants must raise trial-counsel ineffective-assistance claims on direct appeal by delaying appellate briefing pending full evidentiary

hearings on all allegations. *See Fairchild v. Trammell*, 784 F.3d 702, 721–22 (10th Cir. 2015) (approving Oklahoma's mandatory direct appeal process); *Lee v. Corsini*, 777 F.3d 46, 61 (1st Cir. 2015) (approving Massachusetts's compulsory first-degree murder appellate process); *Nash v. Hepp*, 740 F.3d 1075 (7th Cir. 2014) (approving Wisconsin's process requiring a consolidated direct appeal following expansion of the record).

With narrow and rare exceptions, unitary-review States bar subsequent claims that could have been, but were not, raised prior to and during direct appeal. *Fairchild*, 784 F.3d at 716; *Commonwealth v. Zinser*, 847 N.E.2d 1095, 1099 (Mass. 2006); *State v. Evans*, 682 N.W.2d 784, 795–96 (Wis. 2004); *but see State v. Walker*, 716 N.W.2d 498, 504–05 (Wis. 2006). Hence, in those States, defendants face a potentially unjust choice between either sacrificing ineffective-assistance claims while seeking prompt adjudication of promising stand-alone claims *or* delaying those stand-alone claims while attorneys work up ineffective-assistance claims in the trial court. Surely a system that offers immediate review for stand-alone claims without sacrificing a later chance to develop ineffective-assistance claims—or permits both to be brought at the same time—should also be deserving of respect on habeas.

III. Indiana's *Davis*/*Hatton* Procedure Fulfills the Purposes of *Martinez-Trevino*

1. Indiana courts see the unfairness of needlessly rigid unified review. So, in *Woods,* the court settled on procedures that allow defendants to choose among three options for challenging their convictions. First,

defendants may bring any claim—including trial-counsel ineffective-assistance—on direct appeal. Second, defendants may pursue some claims on direct appeal and, without risk of default, reserve ineffective-assistance (or any other claim not optimal for direct appeal, such as newly discovered evidence) for post-conviction review. Third, defendants may invoke *Davis*/*Hatton* suspension of direct appeal pending post-conviction relief, which, if unsuccessful, may be consolidated into a single appeal.

Indiana defendants thus control strategy and are not thrust into all-or-nothing unified review. In Indiana, there are no tricks or pitfalls—no "risky business." Opp. 21. A court assigns appellate counsel at sentencing or notice of appeal, and counsel has a minimum thirty-day extendable deadline with trial transcripts before either filing an appellate brief or invoking *Davis*/*Hatton*. Ind. Appellate Rules 35, 45(b)(1). *See also Slusher v. State*, 823 N.E.2d 1219 (Ind. Ct. App. 2005) (allowing *Davis*/*Hatton* after filing of direct-appeal brief).

While leave of the appellate court is required for *Davis*/*Hatton*, the bar is low and defendants suffer no penalty if permission is denied. Defendants have filed appeals following a *Davis*/*Hatton* procedure at least forty times since *Woods*. *See* Table B, below at 16. That demonstrates substantial use of the procedure, and is conservative in that it excludes unappealed *Davis*/*Hatton* cases, such as those where the defendant prevailed.

Unfortunately, Indiana courts do not track use of *Davis*/*Hatton*, and the 2016 annual report of the Indiana Court of Appeals, cited by Respondent, sheds no

light on the matter. Opp. 5. The percentage of fully briefed appeals ultimately disposed of by order (rather than full opinion) has no connection to *Davis/Hatton*, which is originated by *pre*-briefing order, not *post*-briefing order.

2. Respondent mistakenly suggests that differing standards of review between direct appeal and post-conviction review disqualifies Indiana's system from *Coleman* respect under *Martinez-Trevino*. It is not entirely clear what Respondent means; the standard for reviewing a trial attorney's performance for ineffective assistance is not a matter of state law, but rather is governed by Sixth Amendment doctrine, as explained in *Strickland v. Washington*, 466 U.S. 668 (1984).

Under *Strickland*, although a reviewing court may defer to a lower court's "findings of fact made in the course of deciding an ineffectiveness claim," that is the same for direct and collateral review. *Id.* at 698. In state law terminology, Indiana courts review factual findings for "clear error"—*see* Ind. Rules of Trial Procedure Rule 52(A)—in both direct appeals and post-conviction review. *See Austin v. State*, 997 N.E.2d 1027, 1040 & n.10 (Ind. 2013) (citing *Pruitt v. State*, 834 N.E.2d 90, 104 (Ind. 2005) (explaining how all factual findings are subject to clear error review)).

Further, "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact," subject to de novo consideration on both direct and collateral review. *Strickland*, 466 U.S. at 698. Consequently, Indiana reviews all conclusions of law (necessarily including mixed questions implicit in ineffective-assistance claims) de novo. *See*

Ritchie v. State, 875 N.E.2d 706, 714 (Ind. 2007) (explaining both the general post-conviction standard and the specific ineffective-assistance standard).

Regardless, *Martinez* was not concerned with the standards of review that might be used—precisely because *Strickland* controls all ineffectiveness questions. Rather, it was concerned with whether ineffective-assistance claims can be brought on direct appeal. In Indiana they can, and they are.

* * *

Martinez-Trevino does not predicate federal respect for state procedural rules on the required use of lengthy, dilatory, and resource-hogging pre-appeal record-expansion procedures that disadvantage defendants in most circumstances. Rather, that respect turns only on whether a state affords defendants a meaningful, counseled choice as to the best timing for trial-counsel ineffective-assistance claims. *Martinez*, 566 U.S. at 13. Indiana provides that minimum guarantee and more, so this Court should extend comity to Indiana's reasonable procedural default rules.

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

Dated: March 6, 2018