CAPITAL CASE
EXECUTION SCHEDULED FOR APRIL 23, 2025, 6:00PM CST
No. ___

IN THE

Supreme Court of the United States

MOISES SANDOVAL MENDOZA,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED (CAPITAL CASE)

Whether a criminal defendant has a right to effective habeas counsel to assert a claim of ineffective assistance of trial counsel where, by operation of state law, the defendant's first meaningful opportunity to assert such a claim is in state habeas?

PARTIES TO THE PROCEEDINGS BELOW

This Petition stems from a habeas corpus proceeding in which petitioner, Moises Sandoval Mendoza, was the Applicant before the Texas Court of Criminal Appeals.

Mr. Mendoza asks that the Court issue a Writ of Certiorari to the Texas Court of Criminal Appeals.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

RELATED PROCEEDINGS

Mendoza v. Lumpkin, No. 23-1004 (U.S.)

Mendoza v. Lumpkin, No. 12-70035 (5th Cir.)

Mendoza v. Director, No. 5:09-cv-00086 (E.D. Tex.)

Ex Parte Moises Sandoval Mendoza, No. WR-70,211-01 (Tex. Crim. App.)

Ex Parte Moises Sandoval Mendoza, No. WR-70,211-02 (Tex. Crim. App.)

Ex Parte Moises Mendoza, No. W401-80728-04 (HC1) (Dist. Ct. Collin Cnty., Tex.)

Texas v. Mendoza, No. W401-80728-04 (Dist. Ct. Collin Cnty., Tex.)

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PETITION FOR A WRIT OF CERTIORARI

Moises Sandoval Mendoza respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINION BELOW

The order of the Texas Court of Criminal Appeals denying Mendoza's application for leave to file a subsequent application for a writ of habeas corpus (App. 1a-2a) is unpublished.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals had jurisdiction under Texas Code of Criminal Procedure article 11.071, § 5. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment provides in pertinent part: "No State shall . . . 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."

Texas Code of Criminal Procedure article 11.071, § 5(a) provides in pertinent part: "[A] court may not consider the merits of or grant relief based on [a] subsequent application unless the application contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously

considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application."

INTRODUCTION

This case presents the same question as *Martinez v. Ryan*, 566 U.S. 1 (2012)—*viz.*, whether a criminal defendant has a right to the effective assistance of habeas counsel where, by operation of state law, habeas proceedings represent the defendant's first meaningful opportunity to assert a claim of ineffective assistance of trial counsel ("IATC"). In *Martinez*, the Court avoided answering that question by holding that a state defendant could assert a defaulted IATC claim in federal habeas if he could also show that state habeas counsel was ineffective. That is not an option here. This case squarely presents the question *Martinez* left open. The only conceivable basis for the Texas Court of Criminal Appeals's denial of Mendoza's motion for leave to file a habeas petition asserting the ineffective assistance of appointed state habeas counsel is its longstanding rule that there is no right to effective counsel in those proceedings. *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002).

That rule cannot be squared with this Court's precedents. This Court has held that criminal defendants have a right to effective counsel in their first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *see also Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963). It follows that defendants have a right to effective counsel in trial court proceedings that represent the first opportunity to assert a federal claim. As the Court observed in *Martinez*,

where a state habeas "proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." 566 U.S. at 11. If indigent defendants were not afforded a right to counsel in those proceedings, they would have no way to vindicate their constitutional rights in state court whenever the state elects to channel federal claims into habeas. And for some defendants, whose constitutional claims depend on evidence outside the state court record, there would be no forum in which to vindicate their constitutional rights at all.

This death-penalty case exemplifies the problem. The prosecution's most important rebuttal witness at the punishment phase testified that Mendoza attacked another inmate while awaiting trial. That testimony was critical to the prosecution's argument that Mendoza posed a future danger. The prosecution emphasized it in closing. And the jury specifically asked about it in deliberations. But it was false. In two affidavits, the inmate averred that he was the aggressor, not Mendoza. But the jury never heard that because Mendoza's trial counsel were ineffective—they never interviewed the other inmate in the fight. Nor did Mendoza's appointed state habeas counsel. So evidence supporting Mendoza's IATC claim did not enter the state court record.

Mendoza attempted to litigate his IATC claim in federal court, but that avenue was ultimately foreclosed by this Court's decision in *Shinn v. Ramirez*, 596 U.S. 366 (2022). And when Mendoza returned to state court, the Court of Criminal

Appeals denied Mendoza leave to assert a claim that state habeas counsel was ineffective for not asserting his IATC claim. Because of state habeas counsel's ineffectiveness, in short, Mendoza had no forum in which to vindicate his "bedrock" right to counsel. *Martinez*, 566 U.S. at 12.

As in *Martinez*, the Court should grant certiorari to decide whether Mendoza had a right to effective assistance in state habeas proceedings that represented his first opportunity to vindicate his Sixth Amendment right to counsel. It should answer that question in the affirmative, vacate the decision below, and remand the case to state court for further proceedings.

STATEMENT OF THE CASE

A. Trial And Sentencing

Mendoza was convicted of capital murder for killing Rachelle Tolleson in Farmersville, Texas in March 2004. The facts of the offense are laid out in the Texas Court of Criminal Appeals's opinion, *Mendoza v. State*, 2008 WL 4803471 (Tex. Crim. App. Nov. 5, 2008) (unpublished).

After the jury found Mendoza guilty of capital murder, the case proceeded to the punishment phase. To impose a punishment of death, the jury had to find two special issues unanimously. Tex. Code Crim. Proc. art. 37.071, §§ 2(d)(2), (f)(2). First, the jury had to find beyond a reasonable doubt that there was a probability that Mendoza "would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* § 2(b)(1). Second, the jury had to find that there were no "mitigating circumstance[s] . . . to warrant" sparing Mendoza's life. *Id.* § 2(e)(1). If even one of Mendoza's jurors had dissented on a single special issue,

Mendoza could not have been sentenced to death. *Id.* § 2(g). This petition focuses on the first special issue—i.e., Mendoza's future dangerousness.

The prosecution's case-in-chief on future dangerousness focused exclusively on Mendoza's conduct outside prison, adducing evidence of Mendoza's past criminal conduct and his misbehavior in school, at home, and among his friends. *See Mendoza*, 2008 WL 4803471, at *5-6. To counter the prosecution's theory, Mendoza's trial counsel pursued a narrative that Mendoza would not be a danger within the confines of prison. On "Special Issue Number 1," defense counsel argued, "you have to remind yourself that you're dealing with that question in the context of prison," where Mendoza would no longer "have access to the culture that he did before." App. 76a ("those walls are not gonna get any thinner, the steel's not gonna get any lighter, the doors aren't going to open up for him").[1] Defense counsel pursued this narrative through a "focal expert." App. 82a. Read charitably, the expert's theory was that Mendoza would not be a danger in a highly controlled environment where he would "experience[] consequences if his behavior is inimical or antagonistic" and receive "rewards if his behavior is productive." App. 87a.

In response to defense counsel's theory of the case, the prosecution called as its very first rebuttal witness Officer Robert Hinton, who testified that, in jail, "Mendoza approached" another inmate "in an aggressive fashion" and then attacked

[1] This petition includes citations to the page number of the concurrently filed Appendix. This petition also cites to documents contained in the state court habeas record (using the convention #:SCHR:# to denote the volume of the state court habeas record and page number), and to documents from the federal habeas

him. App. 93a. Mendoza, Hinton told the jury, was the "aggressor," and began beating the other inmate, Melvin Johnson, with his fist. *Id.* Hinton testified that he ordered the men to stop fighting, but "couldn't break it up" until additional officers arrived. *Id.*; *see* App. 94a. And Hinton testified that the fight occurred notwithstanding the fact that Mendoza was a "keep-away-from-all-other inmates" prisoner. App. 94a. Hinton's testimony was the only direct evidence that Mendoza remained a danger while incarcerated.[2]

The attack featured prominently in the prosecution's closing. The prosecution argued that Mendoza remained a "danger" in part because he had already "committed assault." App. 75a; *see id.* ("best predictor of future behavior is past behavior"). And after defense counsel urged the jury to answer the first special issue by focusing on the "context of prison," App. 76a, the prosecution returned to the theme in rebuttal. It argued that the "pattern of violence" had not been broken because "[w]e've got him in the Collin County jail . . . in administrative segregation in a single cell. And surely to goodness it has to stop there, right? No. Wrong." App. 77a. Relying on Hinton's testimony, the prosecution continued: "You know that he comes out of that rec yard, and he runs right up there as the aggressor

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proceedings in *Mendoza v. Director, TDCJ-CID*, No. 5:09-cv-00086 (E.D. Tex.) (using ECF No. to denote the docket number).

[2] The prosecution's rebuttal case was dedicated to Mendoza's conduct in jail. And Hinton's testimony was by far the most significant piece. That is, after all, why the prosecution called him first. The other evidence consisted of equivocal testimony by other officers that they found "tin or aluminum" in Mendoza's cell that either could have been a "shank" or "[t]he foil from an orange juice drink," App. 95a; that they

toward Melvin Johnson and starts a fight with Melvin Johnson . . . . He charges Melvin Johnson and starts to assault him. And sure, Melvin Johnson decides he's going to defend himself out there from this man's attack." App. 78a.

Before returning its verdict, the jury asked the court to further define terms in the future dangerousness special issue and for additional information about Mendoza's "criminal acts while in jail," including his "assault on other inmate." App. 79a. Shortly after, the jury returned a death sentence.

B. Hinton's Testimony Was False

Hinton's testimony about the attack was "false." *See* App. 102a; App. 104a-07a. When Mendoza's federal habeas counsel finally interviewed Johnson in 2016, Johnson swore under oath that he started the fight, not Mendoza:

> As Mr. Mendoza was heading toward the rec yard, my cell[] was rolled. What this means is for some reason, my cell door was opened. This can only happen by a guard opening the door. As soon as the door opened, I figured what the guards wanted and I exited my cell and started a fight with Mr. Mendoza. I was definitely the aggressor. Mr. Mendoza was defending himself, but wasn't fighting back. After a short period of time, guards arrived and broke the fight up. That night I received an extra tray of food which I figured was a bonus for my actions in fighting Mr. Mendoza. Although, no one ever spoke to me about this incident, I am sure that the guards had planned this situation. I was told that there was trial testimony that Mr. Mendoza was in the rec yard when I was allowed to exit my cell to finish mopping the floor in the day room and Mr. Mendoza attacked me, this testimony is patently false. I have never been contacted until recently by anyone in regards to the facts of this situation, but had I been so contacted, I would have testified at trial as to what really happened on that occasion which is what I have stated in this affidavit.

App. 102a.

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found a "portion of [a] comb" that "[p]ossibly" could be a shank, App. 96a-97a; and

In March 2025, in connection with the proceedings below, Johnson reaffirmed his previous statements and provided additional detail in a new affidavit:

> [Mendoza and I] were both in the Special Housing Unit (SHU). The SHU has 2 floors with 25 cells on each floor. I was on the first floor and Mendoza was on the second floor. One day, I don't remember the date, I was in my cell when I heard a cell door on the second floor open. I did not know whose cell it was, I just heard it open. A few seconds later, I saw Mendoza walking down the stairs on his way to the rec area. Because his was a high profile case, Mendoza was given rec by himself. As I saw him walking down the stairs, my cell door opened. I was shocked because a guard has to open my door and I was not supposed to be out with Mendoza. When my door opened with Mendoza out, I knew the guards wanted me to jump him, and that's what I did. I rushed out of my cell and attacked Mendoza. He immediately fell to the ground and covered up to protect himself. He never threw a punch.

App. 104a-05a.

Johnson reiterated that "Mendoza did not attack [him]. It was the other way around." App. 106a-07a. Further, Johnson explained that the guards opened his cell door just after Mendoza had been let out, and before Mendoza had even made it to the rec yard. This conflicts with Hinton's testimony that he had seen Mendoza enter the rec yard, then re-enter the SHU through a "self-locking door" before attacking Johnson. *Compare* App. 92a-93a, *with* App. 105a-06a. Johnson highlighted that the guards "did not get there as quickly as normal" and did not use pepper spray to break up the fight (as was their usual practice). App. 105a. Finally, Johnson confirmed that he was "rewarded" for his actions with an extra tray of food. App. 106a.

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that they found rap lyrics that they believed Mendoza had written, App. 98a-100a.

None of this evidence made its way into the state court record because Mendoza's appointed lawyers never contacted Johnson.

C. First State Habeas Proceedings

After the jury rendered its sentence, Mendoza appealed. Consistent with Texas practice, *see Trevino v. Thaler*, 569 U.S. 413 (2013), Mendoza did not assert any claims that his appointed trial counsel were ineffective. *See generally Mendoza*, 2008 WL 4803471. The Court of Criminal Appeals affirmed. *Id.* at *1.

Following his direct appeal, Mendoza was appointed new counsel to represent him in state habeas, Lydia Brandt. App. 169a. Brandt raised seven claims on Mendoza's behalf in state habeas, including five IATC claims. 1:SCHR:4-199. Like Mendoza's appointed trial lawyers, Brandt did not contact Johnson, and therefore failed to raise any claims related to Hinton's testimony. The trial court recommended denial of relief on all grounds, 4:SCHR:1772-1849, and the Court of Criminal Appeals adopted those recommendations, *Ex parte Mendoza*, 2009 WL 1617814 (Tex. Crim. App. June 10, 2009) (per curiam) (unpublished).

D. Federal Habeas Proceedings

The Eastern District of Texas appointed Brandt to continue her representation in federal court, ECF No. 3, and Brandt's federal petition raised the same claims that she asserted in state habeas, ECF No. 6. The district court denied Mendoza's petition, ECF No. 64, but later issued certificates of appealability on four claims, ECF No. 71.

Mendoza proceeded to the Fifth Circuit. While on appeal, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino*, 569 U.S. 413, which together

permit a federal habeas petitioner to assert defaulted IATC claims where a petitioner's ineffective state habeas counsel was responsible for the default. In light of those decisions, the Fifth Circuit remanded Mendoza's case to the district court to appoint conflict-free federal habeas counsel and "to consider in the first instance" whether Mendoza could raise any IATC claims Brandt had failed to raise. *Mendoza v. Stephens*, 783 F.3d 203, 203-04 (5th Cir. 2015) (per curiam).

On remand, Mendoza was appointed new conflict-free federal habeas counsel, who interviewed Johnson, and raised for the first time an IATC claim based on trial counsel's failure to investigate Hinton's false testimony. ECF No. 86 at 1-2. The district court ultimately acknowledged that "trial counsel's failure to investigate the alleged incident [between Johnson and Mendoza was] concerning," ECF No. 101 at 23-24, but denied Mendoza's request for an evidentiary hearing or additional discovery, *id.* at 26-27, and ultimately denied relief on both claims, *id.* at 28.

Mendoza moved for a certificate of appealability in the Fifth Circuit. *Mendoza v. Lumpkin*, No. 12-70035 (5th Cir. Sept. 9, 2020), Dkt. 228. While Mendoza's application for a certificate of appealability was pending, this Court decided *Shinn v. Ramirez*, 596 U.S. 366 (2022), which held that "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." *Id.* at 382. This development meant that Mendoza could not litigate on the merits in federal court his IATC claim based on Hinton's testimony because Johnson's affidavit was not in the state-court record. Mendoza acknowledged in all

his filings after *Shinn* that he could no longer litigate his IATC claim in federal court. *See, e.g.*, *Mendoza v. Lumpkin*, No. 12-70035 (5th Cir.), Dkt. 296-1 at 3; *id.* at Dkt. 262 at 2; App. 34a. Instead, he sought a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), to permit him to return to state court to develop the claim.

In December 2022, the Fifth Circuit concluded (as relevant here) that Mendoza's IATC claim based on Hinton's testimony was "substantial" and granted him a certificate of appealability. *Mendoza v. Lumpkin*, No. 12-70035 (5th Cir. Dec. 23, 2022), Dkt. 276 ("COA Order"). Nevertheless, in August 2023, the Fifth Circuit resolved all of Mendoza's claims against him and denied his motion for a *Rhines* stay. *Mendoza v. Lumpkin*, 81 F.4th 461 (5th Cir. 2023). Importantly, the Fifth Circuit did not review the merits of the district court's rejection of Mendoza's IATC claim, which would have been impermissible under *Shinn*. Rather, it denied Mendoza's request for a *Rhines* stay because it thought Texas courts would deem Mendoza's IATC claim barred under Texas's subsequent-writ bar. *See id.* at 482 (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)).

Mendoza then filed a petition for a writ of certiorari raising issues other than those here, which this Court denied. *Mendoza v. Lumpkin*, 145 S. Ct. 138 (2024) (mem.). Immediately after, the 401st Judicial District Court of Collin County, Texas issued a death warrant setting Mendoza's execution date as April 23, 2025.

E. Proceedings Below

On April 2, 2025, Mendoza sought authorization under Texas Code of Criminal Procedure article 11.071, § 5(a), to litigate three claims related to Hinton's testimony. App. 12a-113a. Only one is relevant here. Mendoza's third claim

asserted that he was denied effective assistance of state habeas counsel because state habeas counsel failed to investigate and assert trial counsel's ineffectiveness in connection with Hinton's testimony. App. 58a-66a.

The State moved to dismiss. Citing *Graves*, the State argued that "ineffective assistance of state writ counsel is not a cognizable issue" in state habeas. App. 121a. As a fallback, the State asserted that the federal district court's denial of Mendoza's underlying IATC claim should be afforded preclusive effect, App. 119a-20a, notwithstanding the fact that Mendoza had no opportunity for appellate review on the merits, *see* Restatement (Second) of Judgments § 28(1) & cmt. a; *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 n.22 (1982).

On April 15, 2025, the Court of Criminal Appeals denied authorization in an unreasoned, two-page order. As relevant here, the court stated: "We have reviewed the application and find that Applicant has failed to show that he satisfies the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised." App. 2a.

REASONS FOR GRANTING THE PETITION

This Court should grant review for the same reason it granted review in *Martinez v. Ryan*, 566 U.S. 1 (2012). Whether criminal defendants have a right to effective habeas counsel where state habeas represents the defendant's first opportunity to assert an IATC claim is a profoundly important question for defendants and states across the country. This question has become even more urgent in the wake of *Shinn v. Ramirez*, 596 U.S. 366 (2022). As a consequence of that decision, state habeas is the only venue in which criminal defendants in Texas

and other similar states can litigate IATC claims that rely on evidence outside the state court record. But defendants in those states have no meaningful opportunity to litigate such IATC claims in state habeas if they are not appointed effective habeas counsel. In practice, Texas's conclusion that there is no right to effective assistance of habeas counsel means many defendants, like Mendoza here, will never have an opportunity to vindicate their Sixth Amendment right to counsel. That outcome conflicts with several of this Court's foundational precedents. And this is an appropriate case to revisit the question left open in *Martinez*.

A. Texas's Rule Conflicts With This Court's Precedents

Texas's conclusion that "no constitutional right to effective assistance of counsel exists on a writ of habeas," *Ex parte Graves*, 70 S.W.3d 103, 110 (Tex. Crim. App. 2002), is incompatible with this Court's precedents. Although there may be no general right to effective assistance of counsel in habeas proceedings, initial habeas proceedings in Texas are different, at least when it comes to IATC claims. As this Court recognized in *Trevino v. Thaler*, 569 U.S. 413, 429 (2013), habeas proceedings in Texas typically represent a criminal defendant's *first* opportunity to assert an IATC claim. And it should go without saying that the right to effective assistance of counsel would be hollow if a criminal defendant were left without an effective attorney—or any attorney—to assert that right.

1. Three of this Court's decisions make this principle unmistakably clear.

In *Douglas v. California*, 372 U.S. 353 (1963), this Court held that indigent defendants have a right to appointed counsel in their first appeal as of right. "Two considerations were key to" this Court's "decision in *Douglas* that a State is

required to appoint counsel for an indigent defendant's first-tier appeal as of right." *Halbert v. Michigan*, 545 U.S. 605, 611 (2005). First, the appeal "entails an adjudication on the merits." *Id.* (quoting *Douglas*, 372 U.S. at 357). Second, first-tier review is the first time an appellate court will pass on claims of trial error, and in this way "differs from subsequent appellate stages 'at which the claims have once been presented by appellate counsel and passed upon by an appellate court.'" *Id.* (brackets omitted) (quoting *Douglas*, 372 U.S. at 356).

Two decades later, in *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court held that the right recognized in *Douglas* necessarily embraces the right to an effective lawyer. "A first appeal as of right . . . is not adjudicated in accord with due process of law," *Evitts* held, "if the appellant does not have the effective assistance of an attorney." *Id.* at 396. The Court's holding was "hardly novel," *id.* at 397, even though the Court had earlier "held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors," *id.* at 393. Where the state makes available a procedure for finally adjudicating trial errors—that is, where "a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful," *id.* at 396—the state must afford indigent defendants effective counsel. Otherwise, "[a]n unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Id.*

Finally, in *Halbert v. Michigan*, 545 U.S. 605 (2005), this Court held that criminal defendants have a right to counsel even in discretionary "first-tier"

appellate proceedings. Although intermediate appellate review of criminal convictions in Michigan was technically discretionary—in that the Michigan Court of Appeals could decline to hear appeals—Michigan's "discretionary" appeal constituted a defendant's first opportunity for review. It "provide[d] the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id.* at 619.

It follows *a fortiori* from these cases that criminal defendants have a right to an effective attorney in state habeas proceedings where those proceedings represent the defendant's first opportunity to assert a claim of trial error. As this Court observed in *Martinez*, "[w]here, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." 566 U.S. at 11. The same protections should apply. If, as this Court's cases establish, a criminal defendant is entitled to effective counsel to *reargue* federal claims on direct appeal, then a criminal defendant must be entitled to an effective lawyer to raise those claims in the trial court in the *first instance*.

A few simplified examples confirm this point. If a state required criminal defendants to raise *all* federal claims in follow-on state habeas proceedings, all would agree that the state could not refuse to provide the defendant a lawyer in those proceedings. The defendant otherwise would have no meaningful way to vindicate his federal rights in state court. Now take a less extreme example.

Imagine that the state, instead of channeling all federal claims into habeas, channeled only Confrontation Clause claims or Speedy Trial claims. Again, it should be uncontroversial that the state would be obligated to provide the defendant an effective lawyer in those proceedings for the same reason. Absent an effective attorney in the habeas proceeding, the defendant would have no meaningful way to raise such a claim in defense of his conviction.

This case is exactly the same. As this Court recognized in *Trevino*, 569 U.S. at 425-26, Texas channels IATC claims into state habeas proceedings. There is nothing per se problematic about that rule. But having channeled IATC claims into an alternative proceeding, the state is obligated to provide effective assistance in those proceedings to raise an IATC claim; otherwise, a defendant, like Mendoza, has no meaningful opportunity in state court to vindicate his Sixth Amendment right to counsel. Put simply, under this Court's precedents, a state cannot circumvent a criminal defendant's constitutional rights by channeling federal claims into alternative proceedings in which no lawyer—or an ineffective lawyer—is provided.

2. Texas reached a contrary conclusion because it failed to appreciate that state habeas represents a defendant's *first* opportunity to assert IATC claims.

a. Citing several of this Court's decisions, the Court of Criminal Appeals in *Graves* reasoned "that because a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, then clearly, he has no such right when attacking a conviction that has long since become final upon the exhaustion of the appellate process." 70 S.W.3d at 110

(quotations omitted). In other words, *Graves* reasoned that because a criminal defendant has no constitutional right to effective counsel for discretionary review of a criminal conviction, he must also lack a right to effective counsel in state habeas proceedings that come even later in the process. Without doubt, that logic holds as a general matter. If a defendant has no right to effective counsel to file a discretionary petition for review with this Court or a state court of last resort, he has no right to effective counsel to relitigate the same issues *after* appeals have been exhausted. The Constitution does not guarantee criminal defendants the right to an effective lawyer to reargue issues that have been resolved in the trial court and on direct appeal.

But again, when it comes to IATC claims, state habeas in Texas is different. State habeas is not a later stage in the review process for IATC claims, where the court is reviewing a claim that has already been twice decided. Instead, it is a criminal defendant's *first* chance to raise such a claim. It is the functional equivalent of original trial proceedings for certain types of trial errors. It therefore does not follow from the fact that criminal defendants are not entitled to effective counsel for second-level discretionary appeals that they have no right to counsel in habeas proceedings that represent the petitioner's first opportunity to assert a federal claim. As just explained, the logic runs in the opposite direction. Because criminal defendants have a right to effective counsel for first-tier appellate review, it follows *a fortiori* that they have a right to effective counsel *to assert* claims of trial-level error.

b. Contrary to the Court of Criminal Appeals's reasoning, this Court has not suggested that criminal defendants lack a right to effective assistance of counsel in habeas proceedings that represent the defendant's first opportunity to assert a claim. Just the opposite. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court recognized that the Constitution might require "an exception" to the rule that there is no right to counsel in state habeas proceedings "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755. But the Court was not required to answer that question because the defendant contended that he received ineffective assistance of appellate counsel, not trial counsel, in habeas proceedings. *Id.* ("We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment.").

So too in *Martinez*. There, the Court granted certiorari to answer the question *Coleman* "left open": "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." 566 U.S. at 8. But the Court did not answer the question because it held that the underlying IATC claims could be asserted in federal court if the federal petitioner could show his state habeas counsel was ineffective. *Martinez* thus ensured that IATC claims would receive "review by at least one state or federal court." *Davila v. Davis*, 582 U.S. 521, 532 (2017) (calling this *Martinez*'s "chief concern"). But the class of cases covered by *Martinez*'s rule has since been narrowed. If the IATC claim rests on evidence outside the state court record, it is

not cognizable in federal habeas under *Shinn*, even if state habeas counsel was ineffective for failing to develop the record. 596 U.S. at 382.

Davila makes the same basic point as *Martinez*. In declining to expand *Martinez* to encompass claims of ineffective assistance of appellate counsel, the Court observed that such a rule was not needed to ensure "that a claim of trial error—specifically, ineffective assistance of trial counsel—might escape review in a State that required prisoners to bring the claim for the first time in state postconviction proceedings rather than on direct appeal." *Davila*, 582 U.S. at 532.

Texas's rule produces that untenable result. If there is no right to effective assistance in state habeas proceedings that represent a defendant's first opportunity to assert an IATC claim, there will be *no forum* in which an indigent defendant has a meaningful opportunity to litigate such a claim based on extra-record evidence. State court will be closed for any defendant saddled with an ineffective attorney appointed by the state. And federal court will be closed for the very same reason: If the ineffective lawyer fails to develop the record in state court, a defendant asserting an IATC claim based on extra-record evidence (like a failure-to-investigate claim) cannot litigate the claim in federal court. Not only is that outcome incompatible with *Douglas*, *Evitts*, and *Halbert*, it contravenes an even more foundational premise of our "constitutional structure"—namely, "that some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation." Richard H. Fallon, Jr. &

Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007).

B. The Question Presented Is Important

There is no doubting the importance of the question presented. That is why the Court granted certiorari to resolve it in *Martinez*. In *Martinez*, the petition asked "[w]hether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim." Pet. for Cert. at *1, *Martinez v. Schriro*, No. 10-1001, 2011 WL 398287 (U.S. Feb. 3, 2011). As mentioned, the *Martinez* Court did not answer the question because it was not required to.

After *Shinn*, the question left open in *Coleman* and *Martinez* has taken on even more urgency. State defendants cannot litigate the merits of their IATC claims in federal court if the IATC claim depends on evidence outside the state court record—i.e., evidence that ineffective state habeas counsel may have failed to develop. That describes a wide swath of IATC claims, most notably failure-to-investigate claims, "which often turn[] on evidence outside the trial record." *Martinez*, 566 U.S. at 12. *Trevino* itself is a prime example. There, the petitioner's claim relied on "a wealth" of "mitigating evidence" that was first developed in federal court. 569 U.S. at 420 (quotations omitted). But as things stand today, that claim would not be litigated anywhere. It would not be litigated in federal court

under *Shinn*. And it would not be litigated in state court because Texas rejects the conclusion that habeas petitioners have a right to effective counsel in the first proceeding to assert the claim.

"The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez*, 566 U.S. at 12. The Court should grant review of the question presented again to ensure that at least one forum remains open to vindicate this bedrock right.

C. This Case Is An Appropriate Vehicle To Resolve The Question Presented

This case is an appropriate vehicle to resolve the question whether defendants have a right to effective assistance of counsel in habeas proceedings that represent the defendant's first opportunity to assert a federal claim.

1. To see why, it is necessary to briefly unpack the Court of Criminal Appeals's denial of Mendoza's application. The court stated that it denied Mendoza's application "without reviewing the merits of the claims raised." App. 2a. In reaching that conclusion, the Court of Criminal Appeals must have been referencing its holding in *Graves* that there is no right to effective habeas counsel. As the Court of Criminal Appeals has explained: "In *Graves*, this Court held that a writ applicant is not entitled to effective assistance of habeas counsel. If an applicant's habeas counsel fails to raise a potentially meritorious IAC claim in an initial writ application, under our holding in *Graves*, that claim cannot be revived in a subsequent writ application by asserting ineffective assistance of habeas counsel." *Ex parte Ruiz*, 543 S.W.3d 805, 825 (Tex. Crim. App. 2016) (citations omitted). Put

simply, the only reasonable way to understand the court's holding in this case is that it refused to consider Mendoza's ineffective assistance of habeas counsel claim based on its conclusion that such claims are not cognizable as a matter of law because the Constitution provides no such right.

That appears to be how the State argued the claim in its motion to dismiss. Its threshold argument was that, under *Graves*, "effective assistance of writ counsel cannot form the basis of a subsequent writ under article 11.071 § 5." App. 121a. The State also presented a preclusion argument on the merits, App. 122a, but the Court of Criminal Appeals said it was not "reviewing the merits," App. 2a. When the court said that, it must have meant it was not considering whether, assuming an ineffective assistance of habeas counsel claim is viable, Mendoza's allegations made out such a claim. It resolved the application on the threshold point that there is no right to effective assistance in state habeas.

There is no other plausible explanation for the Court of Criminal Appeals's holding. To obtain authorization under Section 5(a)(1), Texas also requires petitioners to show that the legal or factual basis for a claim was unavailable when they filed their prior application. Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). But Mendoza's claim of ineffective assistance of state habeas counsel could not possibly have been available when state habeas counsel filed his first application, for two obvious reasons. First, Mendoza's claim is that state habeas counsel was ineffective for failing to assert his IATC claim in his first state habeas petition. That claim did not come into existence until *after* the first state habeas petition was filed without

the claim. Second, even if there were no such temporal problem, state habeas counsel could not have filed in the first petition a claim asserting her *own* ineffectiveness in failing to assert a different claim in the same petition. *See Mendoza v. Stephens*, 783 F.3d 203, 207-08 (5th Cir. 2015) (per curiam) (rejecting as "entirely circular" the State's argument that Mendoza was not entitled to "conflict-free counsel unless conflicted counsel does what no court has thus far expected an attorney to do, which is argue that she was ineffective in assisting her client").

If that is what the Court of Criminal Appeals really meant, then its decision is nonsensical. If counsel knew enough to assert in her petition that she was ineffective for not asserting an IATC claim in that petition, why wouldn't she just assert the IATC claim in the first place? "If there is a lawyer who would deliberately forgo" asserting a claim and elect instead to assert his own ineffectiveness, one "suspect[s] that, like the unicorn, he finds his home in the imagination, not the courtroom." *Henderson v. United States*, 568 U.S. 266, 276 (2013).

If adopted, this strange interpretation of the Court of Criminal Appeals's opinion would make this one of those "exceptional cases" in which the application of a state procedural rule "does not constitute an adequate ground to preclude this Court's review of a federal question." *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (quotations omitted). As shown above, it would have been "impossible" for Mendoza to comply with this version of Texas's procedural rule. *Id.* at 29. To assert his federal claim, Mendoza's counsel would have needed to argue that she was

ineffective for failing to assert a different claim in the very same petition—a claim that did not actually mature until the petition was filed. In practice, Texas's unavailability rule would shield *all* claims of ineffective assistance of state habeas counsel from review.

By definition, a rule that effectively prohibits the raising of a federal claim in state court is not adequate. *See, e.g.*, *id.* at 26 (state rule cannot be "essentially arbitrary, or merely a device to prevent a review of the other federal ground of the judgment" (quotations and brackets omitted); 16B Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 4026 (3d ed. 2025) (explaining that "state grounds for [a] decision cannot be allowed to 'evade' or 'avoid' federal rights"). That type of rule would violate the Supremacy Clause. *See Haywood v. Drown*, 556 U.S. 729 (2009). A state cannot shield federal claims from this Court's review by setting up a procedural scheme in which those claims cannot be asserted.

In fairness to the Court of Criminal Appeals, that is probably not what it meant. Respect for its decisionmaking counsels against reading its summary order to adopt a nonsensical standard that would plainly violate federal law. But if the Court were unsure of the import of the decision below, it could always grant review and order briefing on the question as well, as it recently did in *Glossip v. Oklahoma*, 144 S. Ct. 691, 692 (2024). *See also Cruz*, 598 U.S. at 20-21 (reviewing whether state court's interpretation of state procedural rule was "an adequate and independent state-law ground").

2. The rest is straightforward. By its own account, the Court of Criminal Appeals did not reach the merits of Mendoza's claim that his state habeas counsel was ineffective—i.e., Mendoza's *prima facie* case. Accordingly, the Court can simply grant certiorari to decide whether Mendoza had a right to effective counsel and leave for remand the question whether that right was violated, as it has in similar cases. *See, e.g.*, *Trevino*, 569 U.S. at 420 (granting certiorari "to determine whether *Martinez* applies in Texas," but remanding for resolution of merits); *Martinez*, 566 U.S. at 18 (remanding for a determination of whether Martinez's post-conviction counsel was actually ineffective). As this Court frequently observes, it is "a court of review, not of first view." *Thompson v. United States*, 145 S. Ct. 821, 828 (2025) (quotations omitted).

That outcome is especially appropriate given the procedural posture of this case. To obtain leave to file his subsequent habeas petition, Mendoza was required only to allege a *prima facie* case that his state habeas counsel was ineffective. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). That is, if the Court concludes that Mendoza had a right to effective assistance of habeas counsel, the next question would be whether Mendoza alleged that his right was violated such that the Court of Criminal Appeals should have authorized him to litigate that claim on the merits. The Court of Criminal Appeals should have the first opportunity to answer that question. There is no need for this Court to weigh in on the sufficiency of Mendoza's allegations.

That said, Mendoza's allegations of ineffective assistance were plainly sufficient. To establish ineffective assistance in any context, the defendant must show deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, both deficiency and prejudice turn on the merit of the underlying IATC claim that state habeas counsel defaulted—i.e., Mendoza's claim that trial counsel failed to investigate Hinton's testimony.

If the underlying claim was meritorious, then state habeas counsel likely was ineffective for not asserting it. Professional guidelines make clear that "collateral counsel ha[ve] a duty . . . to raise and preserve all arguably meritorious issues" during state habeas proceedings. American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("*ABA Guidelines*"), 31 Hofstra L. Rev. 913, 1086 (2003); *see also Guidelines and Standards for Texas Capital Counsel*, 69 Tex. B.J. 966, 982 (2006) (habeas "counsel must be especially sensitive to the need to preserve all potential issues for later review by including them in the first state application for writ of habeas corpus"). "Effective . . . counsel," this Court has emphasized, "preserves claims to be considered" in "habeas proceedings." *Martinez*, 566 U.S. at 12. Likewise, if the underlying claim was meritorious, then Mendoza was prejudiced by state habeas counsel not asserting it in Mendoza's first petition; in that circumstance, Mendoza's petition would have been granted but for habeas counsel's error. In this case at least, the analysis of Mendoza's claim of ineffective assistance of state habeas counsel merges with the underlying IATC claim. *Cf.*

Washington v. Davis, 715 F. App'x 380, 385 (5th Cir. 2017) (per curiam) (habeas counsel's failure to raise a "potentially meritorious IATC claim[] evidences both his ineffectiveness and the prejudice that resulted").

Mendoza alleged a *prima facie* case that trial counsel was ineffective.

Deficiency. Counsel's performance is deficient when it is "unreasonable" "under prevailing professional norms." *Strickland*, 466 U.S. at 688, 690-91. Under prevailing norms, reasonable counsel must perform a "thorough investigation of . . . facts relevant to plausible options." *Id.* at 690-91. In a "failure-to-investigate" case such as this one, the key question is whether counsel reasonably chose to forgo particular steps in an investigation, in light of information available to counsel at the time. *Wiggins v. Smith*, 539 U.S. 510, 523, 527 (2003) (reasonableness of counsel's investigation turns on whether decision to limit investigation is "itself reasonable").

It is unreasonable not to investigate "material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *see also, e.g.*, *ABA Guidelines*, 31 Hofstra L. Rev. at 1064 ("Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted, or undercut."). When "the known evidence would lead a reasonable attorney to investigate further," then counsel must pursue that investigation. *Wiggins*, 539 U.S. at 527. And where "red flags" indicate the need for

further investigation, they "c[annot] reasonably [be] ignored." *Rompilla*, 545 U.S. at 391 n.8.

Here, trial counsel knew that Hinton was a potential penalty-phase witness because the State had to disclose any witnesses that it "reasonably expect[ed] to call in rebuttal." App. 110a. The State also produced to counsel Hinton's written disciplinary report about the fight. App. 112a. And the fight unquestionably was important to defense counsel's theory that Mendoza would not be dangerous in prison. Yet trial counsel never spoke to a critical witness involved in the altercation—Johnson. The failure to investigate a potential witness whose testimony was material to counsel's theory of the case is textbook deficiency. *See, e.g.*, *Rompilla*, 545 U.S. at 377 ("[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase[.]"). Even the federal district court described trial counsel's failure to investigate Hinton's testimony as "concerning" and "particularly suspect," ECF No. 101 at 23-24, while the Fifth Circuit, too, concluded that Mendoza's failure-to-investigate claim was substantial, COA Order at 3.

Counsel's "unreasonableness" was only "heightened by the easy availability" of the truth. *Rompilla*, 545 U.S. at 389-91. All counsel had to do was ask Johnson about the fight, but they never did. *See* ECF No. 101 at 24 (calling counsel's failure "especially" problematic because "Johnson may have been willing to testify and . . .

his testimony would have benefited Mendoza's defense"). Once federal habeas counsel finally began that investigation, years later, Johnson testified that Hinton's testimony was not true. Had trial counsel investigated at all, they would have learned from Johnson that Hinton's testimony was "false" and that Johnson was willing to testify. App. 102a. But trial counsel instead did nothing.

Prejudice. To establish prejudice, Mendoza need only show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wiggins*, 539 U.S. at 534, 537; *see also Rompilla*, 545 U.S. at 377 (applying *Strickland* prejudice principles to capital sentencing-phase claim). In Texas, a jury cannot return a death sentence unless it finds unanimously and beyond a reasonable doubt that the future dangerousness special issue is satisfied—that is, that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). Because Mendoza's "death sentence required a unanimous jury recommendation, prejudice here requires only a reasonable probability that at least one juror would have struck a different balance" when answering this special issue. *Andrus v. Texas*, 590 U.S. 806, 822 (2020) (citations and quotations omitted).

There is a "reasonable probability" the outcome would have been different here. Defense counsel's strategy on the future dangerousness special issue was to focus the jury on Mendoza's propensity for violence once incarcerated. "[W]hen you answer the Special Issues, especially Special Issue Number 1," defense counsel told

the jury, "you have to remind yourself that you're dealing with that question in the context of prison." App. 76a. To rebut that strategy, the prosecution focused its entire rebuttal case on Mendoza's conduct in jail. And the very first (i.e., most important) witness the prosecution called in rebuttal was Hinton, who testified that Mendoza attacked Johnson in spite of the jail's best efforts to keep Mendoza away from other inmates through stringent security protocols.

As explained above, the prosecution seized on this evidence in closing. *Supra* at 6. Relying in large part on Hinton's testimony, the prosecution argued that the "pattern of violence" had not been "broken." App. 77a. The prosecution continued:

> You know that he comes out of the rec yard, and then runs right up there as the aggressor toward Melvin Johnson and starts a fight with Melvin Johnson. That wasn't something where we had people agreeing to meet out on Main Street at high noon. He charges Melvin Johnson and starts to assault him. And sure, Melvin Johnson decides he's going to defend himself out there from this man's attack.

App. 78a. The prosecution's emphasis on Hinton's testimony "in [] closing arguments" is strong evidence of prejudice. *See, e.g.*, *Buck v. Davis*, 580 U.S. 100, 120 (2017) (finding prejudice where "summations for both sides" focused on the challenged testimony). In summarizing a case, reasonable counsel do not focus the jury on immaterial bits of evidence.

There is no doubt the jury was listening. During its deliberations, the jury specifically asked about Mendoza's "criminal acts while in jail," including the "assault on other inmate." App. 79a. As evidenced by the jury's notes, there is a reasonable probability that trial counsel's error in failing to investigate Hinton's testimony affected the result. *See Buck*, 580 U.S. at 120 (finding prejudice where

"[t]he jury, consistent with the focus of the parties, asked during deliberations to see the expert reports" related to the testimony at issue).

3. In the Court of Criminal Appeals, the State argued that the federal district court's denial of Mendoza's IATC claim, *see* ECF No. 101 at 23-27, should be afforded preclusive effect. App. 122a. The State was mistaken, and the federal district court's decision is no barrier to this Court's review for one simple reason: Mendoza had no opportunity to contest that decision on the merits on appeal.

While Mendoza's appeal was pending, this Court decided *Shinn*. As applied to Mendoza's case, *Shinn* meant the Fifth Circuit could not consider Mendoza's evidence—namely, the affidavit from Johnson attesting that he was not contacted by state counsel and that Hinton had testified falsely. For this reason, Mendoza acknowledged that *Shinn* prohibited the Fifth Circuit from resolving the merits of his appeal. *Supra* at 10-11. And in ruling on Mendoza's appeal, the Fifth Circuit did not reach the merits. *Mendoza v. Lumpkin*, 81 F.4th 461, 482 (5th Cir. 2023). Under these circumstances, it is black-letter law that preclusion cannot apply. *See* Restatement (Second) of Judgments § 28(1) & cmt. a; *see also Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 647 (2006); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 n.22 (1982).

Although the Fifth Circuit did not weigh in on the merits of Mendoza's appeal, it did grant him a certificate of appealability. *See* COA Order at 2-3. In doing so, it held that Mendoza's IATC claim was substantial and "deserve[d] encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

That holding is much more pertinent at this stage in the case, where the question before the Court of Criminal Appeals will be whether Mendoza alleged facts demonstrating that his "application merits further inquiry." *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005). Mendoza has more than met that standard. Indeed, his application was corroborated by two affidavits. But the Court can and should leave the sufficiency of Mendoza's pleadings for the Court of Criminal Appeals.

The Court should grant certiorari to decide whether criminal defendants have a right to effective assistance of counsel in state habeas proceedings that represent their first opportunity to assert a federal claim, answer that question in the affirmative, and then remand for further proceedings in state court.

CONCLUSION

For the above reasons, this Court should grant a writ of certiorari, vacate the decision below, and remand.

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