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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Habeas Corpus

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Davila v. Davis, __ U.S. __ (2017)

Erick Davila shot at killed Annette Stevenson and her five-year-old granddaughter. At trial, Stephenson claimed that he was attempting to shoot Jerry Stephenson, a member of a rival gang. While deliberating, the jury asked for additional clarifying instructions. Over the objection of trial counsel, the judge gave the jury more specific instructions on transferred intent[1] before the jury indicated they might be deadlocked. The jury found Davila guilty and sentenced him to death. Davila's counsel appealed but did not raise the instruction about transferred intent on either his direct appeal or state habeas corpus petition. When Davila claimed in a federal habeas corpus proceeding against Lorie Davis, the Director of the Corrections institutions Division of the Texas Department of Criminal Justice, that his state habeas counsel had rendered ineffective assistance for failing to challenge the instruction, the lower federal district court denied the petition on the ground of procedural default. Davila appealed to the U.S. Supreme Court.

The Supreme Court by a 5–4 vote sustained the lower federal court decision. Justice Clarence Thomas's majority opinion held that failure to raise constitutional issues in state habeas corpus proceedings bars federal consideration of those claims, even when counsel for the habeas petitioner provided incompetent representation by failing to raise that issue. Thomas insisted that because no right to counsel exists in state habeas appeals, no right to effective counsel existed. In absence of an allegation that trial counsel was ineffective in failing to raise or preserve an issue, any failure by appellate counsel barred federal review. Justice Stephen Breyer's dissent insisted that a right to counsel existed, at least on matters on which no court had ever ruled, that when ineffective counsel prevents appellate courts from ruling on an issue, no procedural bar should exist to federal habeas review. Both the majority and dissent claim that the general rule is that failure to raise a constitutional claim in state court is a bar to raising that claim on federal habeas corpus review. Under what conditions does the majority permit exceptions to this rule? Are those exceptions too narrow? Under what conditions does the majority permit exceptions to this rule? Are the exceptions too broad?

JUSTICE THOMAS delivered the opinion of the Court.

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Our decision in this case is guided by two fundamental tenets of federal review of state convictions. First, a state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court. The exhaustion requirement is designed to avoid the "unseemly" result of a federal court "upset[ting] a state court conviction without" first according the state courts an "opportunity to . . . correct a constitutional violation." Second, a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and

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[1] Transferred intent is the doctrine that a person who attempts to murder one person is guilty of murder if his or her actions cause the death of another person. If A hits B when attempting to punch C, A is guilty of assault.

independent state procedural rule. . . . The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine.

A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show "cause" to excuse his failure to comply with the state procedural rule and "actual prejudice resulting from the alleged constitutional violation." *Wainwright v. Sykes* (1977); To establish "cause"—the element of the doctrine relevant in this case—the prisoner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." A factor is external to the defense if it "cannot fairly be attributed to" the prisoner. Coleman, supra, at 753.

It has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel. . . . It follows, then, that in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default. Thus, in *Coleman v. Thompson* (1991), this Court held that attorney error committed in the course of state postconviction proceedings—for which the Constitution does not guarantee the right to counsel—cannot supply cause to excuse a procedural default that occurs in those proceedings. 501 U. S., at 755.

In *Martinez v. Ryan* (2012), this Court announced a narrow, "equitable . . . qualification" of the rule in Coleman that applies where state law requires prisoners to raise claims of ineffective assistance of trial counsel "in an initial-review collateral proceeding," rather than on direct appeal. It held that, in those situations, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if" the default results from the ineffective assistance of the prisoner's counsel in the collateral proceeding. . . .

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On its face, *Martinez* provides no support for extending its narrow exception to new categories of procedurally defaulted claims. *Martinez* did not purport to displace *Coleman* as the general rule governing procedural default. Rather, it "qualifie[d] *Coleman* by recognizing a narrow exception" that applies only to claims of "ineffective assistance of counsel at trial" and only when, "under state law," those claims "must be raised in an initial-review collateral proceeding. . . . [T]he Court in *Martinez* was principally concerned about trial errors—in particular, claims of ineffective assistance of trial counsel. Ineffective assistance of appellate counsel is not a trial error. Nor is petitioner's rule necessary to ensure that a meritorious trial error (of any kind) receives review.

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The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not. The Constitution twice guarantees the right to a criminal trial, but does not guarantee the right to an appeal at all. The trial "is the main event at which a defendant's rights are to be determined," "and not simply a tryout on the road to appellate review." And it is where the stakes for the defendant are highest, not least because it is where a presumptively innocent defendant is adjudged guilty, and where the trial judge or jury makes factual findings that nearly always receive deference on appeal and collateral review,.

The Court in *Martinez* made clear that it exercised its equitable discretion in view of the unique importance of protecting a defendant's trial rights, particularly the right to effective assistance of trial counsel. As the Court explained, "the limited nature" of its holding "reflect[ed] the importance of the right to the effective assistance of *trial* counsel," which is "a bedrock principle in our justice system." In declining to expand the *Martinez* exception to the distinct context of ineffective assistance of appellate counsel, we do no more than respect that judgment.

. . . *Martinez* was concerned 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. Because it is difficult to assess a trial attorney's performance until the trial has ended, a trial court ordinarily will not have the opportunity to

rule on such a claim. And when the State requires a prisoner to wait until postconviction proceedings to raise the claim, the appellate court on direct appeal also will not have the opportunity to review it. If postconviction counsel then fails to raise the claim, no state court will ever review it. Finally, because attorney error in a state postconviction proceeding does not qualify as cause to excuse procedural default under *Coleman*, no federal court could consider the claim either.

Claims of ineffective assistance of appellate counsel, however, do not pose the same risk that a trial error—of any kind—will escape review altogether, at least in a way that could be remedied by petitioner's proposed rule. . . . If trial counsel preserved the error by properly objecting, then that claim of trial error "will have been addressed by . . . the trial court." A claim of appellate ineffectiveness premised on a preserved trial error thus does not present the same concern that animated the *Martinez* exception because at least "one court" will have considered the claim on the merits.

If trial counsel failed to preserve the error at trial, then petitioner's proposed rule ordinarily would not give the prisoner access to federal review of the error, anyway. Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed. Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court. . . . In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors. Thus, in most instances in which the trial court did not rule on the alleged trial error (because it was not preserved), the prisoner could not make out a substantial claim of ineffective assistance of appellate counsel and therefore could not avail himself of petitioner's expanded *Martinez* exception.

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Adopting petitioner's argument could flood the federal courts with defaulted claims of appellate ineffectiveness. For one thing, every prisoner in the country could bring these claims. *Martinez* currently applies only to States that deliberately choose to channel claims of ineffective assistance of trial counsel into collateral proceedings. If we applied *Martinez* to claims of appellate ineffectiveness, however, we would bring every State within *Martinez*'s ambit, because claims of appellate ineffectiveness necessarily must be heard in collateral proceedings.

Extending *Martinez* to defaulted claims of ineffective assistance of appellate counsel would be especially troublesome because those claims could serve as the gateway to federal review of a host of trial errors, while *Martinez* covers only one trial error (ineffective assistance of trial counsel). . . . An expanded *Martinez* exception . . . would mean that *any* defaulted trial error could result in a new trial. . . . Prisoners could assert their postconviction counsel's inadequacy as cause to excuse the default of their appellate ineffectiveness claims, and use those newly reviewable appellate ineffectiveness claims as cause to excuse the default of their underlying claims of trial error. Petitioner's rule thus could ultimately knock down the procedural barriers to federal habeas review of nearly any defaulted claim of trial error. The scope of that review would exceed anything the *Martinez* Court envisioned when it established its narrow exception to *Coleman*.

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Expanding *Martinez* would not only impose significant costs on the federal courts, but would also aggravate the harm to federalism that federal habeas review necessarily causes. Federal habeas review of state convictions "entails significant costs," "'and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" It "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." It "degrades the prominence of the [State] trial," and it "disturbs the State's significant interest in repose for concluded litigation [and] denies society the right to punish some admitted offenders."

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JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

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Two simple examples help make clear why I believe *Martinez v. Ryan* (2012) . . . should govern the outcome of this case.

Example One: Ineffective assistance of trial counsel. The prisoner claims that his trial lawyer was ineffective, say, because counsel failed to object to an obviously unfair jury selection, failed to point out that the prosecution had promised numerous benefits to its main witness in return for the witness' testimony, or failed to object to an erroneous jury instruction that made conviction and imposition of the death penalty far more likely. Next suppose the prisoner appeals but, per state law, may not bring his ineffective-assistance claim until collateral review in state court (i.e., state habeas corpus), where the prisoner will have a better opportunity to develop his claim and the attorney will be better able to explain his (perhaps strategic) reasons for his actions at trial. Suppose that, on collateral review, the prisoner fails to bring up his ineffective-assistance claim, perhaps because he is no longer represented by counsel or because his counsel there is ineffective. Under these circumstances, if his ineffective-assistance claim is a "substantial" one, i.e., it has "some merit," then *Martinez* . . . hold[s] that a federal court can hear the claim even though the state habeas court did not consider it. The fact that the prisoner had no lawyer in the initial state habeas proceeding (or his lawyer in that proceeding was ineffective) constitutes grounds for excusing the procedural default.

Example Two: Ineffective assistance of appellate counsel. Now suppose that a prisoner claims that the trial court made an important error of law, say, improperly instructing the jury, or that the prosecution engaged in misconduct. He believes his lawyer on direct appeal should have raised those errors because they led to his conviction or (as here) a death sentence. The appellate lawyer's failure to do so, the prisoner might claim, amounts to ineffective assistance of appellate counsel. The prisoner cannot make this argument on direct appeal, for the direct appeal is the very proceeding in which he is represented by the lawyer he says was ineffective. Next suppose the prisoner fails to raise his appellate lawyer's ineffectiveness at the initial state habeas proceeding, either because he was not represented by counsel in that proceeding or because his counsel there also was ineffective. When he brings his case to the federal habeas court, the State contends that the prisoner's failure to present his claim during the initial state habeas proceeding constitutes a procedural default that precludes federal review of his claim.

Given *Martinez* . . . , the prisoner in the first example who complains about his trial counsel can overcome the procedural default but, in the Court's view today, the prisoner in the second example who complains about his appellate counsel cannot. Why should the law treat the second prisoner differently? Why should the Court not apply the rules of *Martinez* . . . to claims of ineffective assistance of both trial and appellate counsel?

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Four features of the claim of ineffective assistance of trial counsel led *the Martinez* Court to its conclusion. Each equally applies here. First, the Court stressed the importance of the underlying constitutional right to effective assistance of trial counsel, describing it as "a bedrock principle in our justice system." Our cases make clear that the constitutional right to effective assistance of appellate counsel is also critically important. . . .

Second, we pointed out in *Martinez* that the "initial" state collateral review proceeding "is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial." We added that it "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." . . .

This consideration applies *a fortiori* where the constitutional claim at issue is ineffective assistance of appellate counsel. The prisoner cannot raise that kind of claim in the very appeal in which he claims his counsel was ineffective. It makes no difference that the nature of the claim, rather than the State's express rule, makes that so. . . .

Third, *Martinez* pointed out that, unless "counsel's errors in an initial-review collateral proceeding . . . establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." The same is true when the prisoner claims ineffective assistance of appellate counsel.

The Court argues to the contrary. It says that at least one court—namely, the trial court—will have considered the underlying legal error. . . . But I believe the Court here misses the point. The prisoner's complaint is about the ineffectiveness of his appellate counsel. That ineffectiveness could consist, for example, in counsel's failure to appeal 10 different erroneous decisions of the trial court. The fact that the trial court made those decisions (assuming they are erroneous) does not help the prisoner. To the contrary, it forms the basis of his ineffectiveness claim. In the absence of a *Martinez*-like rule, the prisoner here (and prisoners in similar cases) would receive no review of their ineffective-assistance claims. Moreover, there will be cases in which no court will consider the underlying trial error, either. Suppose that, during the pendency of the appeal, appellate counsel learns of a *Brady* violation, juror misconduct, judicial bias, or some similar violation whose basis was not known during the trial. And suppose appellate counsel fails to pursue the claim in the manner prescribed by state law. Without the exception petitioner here seeks, no court will hear either the appellate-ineffective-assistance claim or the underlying *Brady*, misconduct, or bias claim.

Fourth, the *Martinez* Court believed that its decision would "not . . . put a significant strain on state resources." That is because *Martinez* imposed limiting conditions: It excuses only those defaults that (1) occur at the initial-review collateral proceeding; (2) where prisoner had no counsel, or ineffective counsel, in that proceeding; and (3) where the underlying claim of ineffective assistance is "substantial," i.e., has "some merit." Moreover, as the Court pointed out, because many States provide prisoners with counsel in initial-review collateral proceedings (or at least when the prisoner seems to have a meritorious claim), it is unlikely that prisoners will default substantial ineffective-assistance claims. Finally, there is no evidence before us that Martinez has produced a greater-than-expected increase in courts' workload, even though Martinez applies, as Texas concedes, "in most States."

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