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TREVINO V. THALER: FALLING SHORT OF MEANINGFUL FEDERAL HABEAS CORPUS REFORM

Cristina Law*

Prisoners face many barriers when petitioning for federal habeas corpus relief, especially when asserting ineffective assistance of trial counsel claims. The Supreme Court's decision in Trevino v. Thaler *attempted to lower these barriers by carving out a narrow exception to the procedural default rule. Although a step in the right direction, this narrow exception fell short of meaningful habeas corpus reform. This Comment argues that although the Supreme Court's decision in* Trevino *appears to guarantee habeas corpus petitioners the ability to raise ineffective assistance of trial counsel claims in federal court, it is unlikely to provide prisoners meaningful opportunities to assert these claims.*

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INTRODUCTION

As guaranteed by the Sixth Amendment of the United States Constitution,[1] the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system."[2] In order to protect this constitutional right, convicted criminal defendants are able to bring ineffective assistance of trial counsel (IATC) claims; however, they must closely follow procedural rules to obtain access to this form of relief.[3] For example, a prisoner who wants to raise an IATC claim in a federal habeas corpus proceeding based on a state conviction must first exhaust all available state court remedies.[4] This means that the prisoner must have previously raised the claim either on direct appeal or in a state habeas corpus petition.[5]

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[1] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

[2] Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

[3] Trevino v. Thaler, 133 S. Ct. 1911, 1917 (2013) (noting that a federal habeas court cannot normally hear habeas corpus petitions if state procedural rules have not been followed).

[4] *See* Coleman v. Thompson, 501 U.S. 722, 731 (1991) ("This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights."); *see also* Rose v. Lundy, 455 U.S. 509, 515–18 (1982) (recounting the historical development of the exhaustion requirement). In addition to principles of comity, both federal and state courts are bound by the Constitution and thus equally equipped to address constitutional violations. *Ex parte* Royall, 117 U.S. 241, 251 (1886).

[5] It is worth noting that the state exhaustion requirement can take several years to achieve. For example, Carlos Trevino's trial was in 1997, but he did not set foot into federal court until 2009. *See* Trevino v. Thaler, 678 F. Supp. 2d 445, 452–55 (W.D. Tex. 2009), *aff'd*, Trevino v.

Otherwise, the claim is considered procedurally defaulted and barred from federal habeas review.[6]

In *Trevino v. Thaler*, the Supreme Court preserved its longstanding rule that states need not provide postconviction counsel to prisoners bringing IATC claims[7]; however, the Court's decision did ensure that substantial IATC claims—claims that previously had been procedurally barred from federal court as a consequence of errors by state postconviction counsel—would be reviewed on their merits.[8] By doing so, the Court sought to create a special safeguard to ensure that the Sixth Amendment right to counsel—the right that secures all other rights[9]—is meaningfully protected.

The Court based its decision in *Trevino* on the limitations of Texas procedural law. Although Texas law does not place an outright ban on IATC claims on direct review, the "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of [IATC] on direct appeal."[10] In order to raise an IATC claim on direct appeal, counsel must file a motion for a new trial. However, in Texas, the trial transcript is not required to be available until *after* the motion for new trial deadline,[11] and the trial transcript is essential for arguing an ineffective assistance of counsel claim.[12] Therefore, it is highly unlikely that direct appeal counsel will have the requisite information and time to properly contest trial counsel's performance on direct appeal, thereby precluding any chance for relief later.

If the direct appeal is unsuccessful, filing a petition for a writ of habeas corpus in state court is the prisoner's final opportunity for relief in that forum. But if the IATC claim is not raised in the state habeas corpus petition, the claim is procedurally defaulted, and federal courts are barred from reviewing

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Thaler, 449 F. App'x 415 (5th Cir. 2011), *vacated*, Trevino v. Thaler, 133 S. Ct. 1911 (2013).

[6] *See generally Coleman*, 501 U.S. at 729–30.

[7] 133 S. Ct. 1911, 1921 (2013).

[8] *Id.* at 1914–18.

[9] *See* United States v. Cronic, 466 U.S. 648, 653 (1984) ("Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured." (internal quotation marks omitted)).

[10] *Trevino*, 133 S. Ct. at 1921.

[11] *See* TEX. R. APP. P. 21.4 (2013) (a motion for a new trial must be filed within thirty days of sentencing); *id.* at 21.8(a), (c) (a trial court must dispose of motion for new trial within seventy-five days of sentencing); *id.* at 35.2(b), 35.3(c) (when a motion for a new trial is filed, the trial transcript must be prepared within 120 days of sentencing; this deadline may be extended).

[12] Unless appellate counsel was present at the trial, the trial transcript is essential to evaluating the performance of trial counsel.

the trial counsel's performance. Consequently, under the old Texas system, if state habeas counsel failed to raise an IATC claim, prisoners could exhaust all of their postconviction remedies without ever being given the opportunity challenge the deficient performance of their trial attorney. In *Trevino*, the Supreme Court fashioned a remedy to respond to this perceived procedural injustice. This remedy allows prisoners to obtain federal review of the constitutional effectiveness of their trial counsel. In Trevino's case, this decision enabled him to seek review of his death sentence.[13]

This Comment argues that even though *Trevino* appears to guarantee habeas corpus petitioners the ability to raise IATC claims in federal court, it is unlikely to provide prisoners meaningful opportunities to assert these claims. First, *Trevino*'s broad language allows judges to distinguish a different state's procedural rules from the rules at issue in *Trevino*, substantially limiting the impact of its holding. Second, the Court showed no inclination to reconsider its prior precedent, holding that there is no constitutional right to effective counsel in collateral proceedings. Without a constitutional right to counsel in habeas corpus proceedings—even if *Trevino* makes federal habeas review available—indigent prisoners are left to their own devices. Without the help of an attorney, it can be difficult to raise successful IATC claims.

Part I of this Comment briefly discusses the history of federal habeas corpus review for state prisoners and examines Supreme Court precedent prior to *Trevino.* Part II presents *Trevino*'s facts and procedural posture, and discusses the majority and dissenting opinions. Part III analyzes the lower courts' interpretations of *Trevino* and also predicts the impact *Trevino* will have on prisoners' access to federal habeas review. Finally, Part IV proposes that Georgia's minority approach to IATC claims is a superior method for protecting the Sixth Amendment right to effective counsel. In coming to this conclusion, this Comment argues that IATC claims should be raised first on direct appeal, where prisoners retain a constitutionally protected right to effective counsel, as opposed to a collateral proceeding, where there is no such constitutional right to counsel.

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[13] *Trevino*, 133 S. Ct. at 1921.

I. A BRIEF OVERVIEW OF FEDERAL HABEAS CORPUS REVIEW AND IATC CLAIMS BEFORE *TREVINO*

A. FEDERAL HABEAS CORPUS REVIEW FOR STATE PRISONERS[14]

The writ of habeas corpus enables a prisoner to petition for postconviction relief if he has been incarcerated "in violation of the Constitution or laws or treaties of the United States."[15] A habeas claim is "an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody."[16] Successful habeas corpus petitions result in a new trial, a new sentence, or release.[17] These significant remedies demonstrate the integrity of the American justice system, which is reluctant to incarcerate a prisoner whose conviction is at odds with Constitutional and federal law.[18] The Constitution recognizes the importance of personal liberty, and the writ of habeas corpus ensures one's freedom is not taken away without just cause. A justice system without habeas corpus proceedings would be disadvantageous for prisoners because direct appeal would be the only forum for a prisoner to challenge his conviction or sentence.[19] Habeas corpus proceedings provide a means to correct errors in earlier proceedings and ensure prisoners are rightly incarcerated.

The Supreme Court has recognized "the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being

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[14] "Postconviction," "collateral," and "habeas corpus" are all used interchangeably to describe proceedings and forms of relief available after conviction and separate from direct appeals.

[15] 28 U.S.C. § 2254(a) (2012) (limiting habeas to violations of the Constitution, laws, or treaties of the United States in state proceedings); *id.* § 2255 (affording a parallel remedy for federal prisoners).

[16] Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

[17] *See Trevino*, 133 S. Ct. at 1917.

[18] Fay v. Noia, 372 U.S. 391, 402 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977) (noting that the writ of habeas corpus's "root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.").

[19] The Supreme Court has expressed the need for the writ of habeas corpus's corrective function. Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 565 (1994) ("[I]f the state appellate courts failed to provide adequate 'corrective process' for full consideration of any denial of the prisoner's rights, *whether or not* 'jurisdictional,' the court could properly examine the merits to determine if a detention is lawful." (citing Frank v. Mangum, 237 U.S. 309, 333–36 (1915)).

held in custody in violation of federal law."[20] Originally, only federal prisoners were able to obtain federal habeas corpus relief,[21] but habeas relief has also been available to state prisoners for nearly a century.[22] However, a state petitioner must first exhaust all available state court remedies before a federal court will review his habeas petition.[23] Exhaustion requires that a prisoner either raise his claims on direct appeal or in a state habeas corpus petition, as long as it is the forum identified by state law as the proper one for the claim involved.[24]

B. POSTCONVICTION IATC CLAIMS BEFORE *TREVINO*

The first part of this section provides a brief overview of a defendant's constitutional right to the assistance of effective counsel and when in the judicial process that right ends. The second part of this section discusses two Supreme Court cases that laid the foundation for *Trevino*.

1. Gideon *and* Strickland

The story begins with *Gideon v. Wainwright* and the right to counsel in criminal cases.[25] In this landmark decision, the Supreme Court extended the Sixth Amendment right to the assistance of counsel to all criminal defendants, requiring states to provide counsel to any defendant who cannot pay for legal assistance.[26] Soon after, the Supreme Court articulated that a defendant not only has a right to counsel, but also a right to *effective* counsel.[27] In *Strickland v. Washington*, the Court established a national standard for reviewing claims of ineffective assistance of counsel.[28] To raise such a claim, *Strickland* requires a defendant to show both that counsel's

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[20] *Trevino*, 133 S. Ct. at 1916–17.

[21] *Ex Parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845).

[22] *See, e.g.*, Moore v. Dempsey, 261 U.S. 86, 91 (1923) (vacating conviction of state prisoners complaining that they were convicted after a mob-dominated trial). Congress subsequently codified this extension of federal habeas corpus to state prisoners in 28 U.S.C. § 2254(a) (2012).

[23] *Id.* § 2254(b)(1)(A).

[24] Like federal habeas corpus review, state habeas corpus review gives state prisoners an opportunity to assert claims under constitutional and federal law that cannot be brought on direct appeal. Additionally, in the "absence of available State corrective process" or if "circumstances exist that render such process ineffective to protect the rights of the applicant," relief may be granted. *Id.* § 2254(b)(1).

[25] 372 U.S. 335, 345 (1963); *see also* U.S. CONST. amend. VI.

[26] *Gideon*, 372 U.S. at 345.

[27] Strickland v. Washington, 466 U.S. 668, 685 (1984).

[28] *Id.* at 686–87.

performance was deficient and that counsel's errors prejudiced the defense.[29] *Strickland* sets a high bar for petitioners because there is a strong presumption that counsel performed adequately.[30] Additionally, proving that counsel made an error is not enough. The petitioner must show that, but for the error, the outcome of the proceeding would have been different.[31] As a result of *Strickland*'s rigorous standard, ineffective assistance of counsel claims are difficult to win.[32]

Although criminal defendants are constitutionally guaranteed effective assistance of counsel, the Supreme Court has consistently interpreted the right to counsel as ending after direct appeal.[33] The rationale for this cutoff is that "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review [where the constitution likewise does not guarantee counsel]. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."[34] As a result, a defendant who wishes to fight his conviction is not guaranteed appointed counsel after direct appeal. However, most states require that counsel be appointed to postconviction

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[29] *Id.* at 687. To show deficiency, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

[30] *Id.* at 689 (holding that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy" (internal quotation marks omitted)).

[31] *Id.* at 694.

[32] *See* Padilla v. Kentucky, 559 U.S. 356, 371 (2010) (stating that "[s]urmounting Strickland's high bar is never an easy task"); *see also* Martin C. Calhoun, Comment, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 427 (1988) ("*Strickland*'s basic flaw is that, while paying lip service to the importance of the sixth amendment right to effective assistance of counsel, it creates an almost insurmountable hurdle for defendants claiming ineffective assistance.").

[33] *Cf.* Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). Additionally, "[t]he Supreme Court has repeatedly held that the right to effective counsel ends at direct appeal and that prisoners do not have a constitutional right to counsel in collateral challenges to their convictions." Mary Dewey, Comment, Martinez v. Ryan*: A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U. L. REV. 269, 275 (2012); *see, e.g.*, Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("[t]here is no constitutional right to an attorney in state post-conviction proceedings"); Murray v. Giarratano, 492 U.S. 1, 10–12 (1989) (holding that there is no constitutional right to postconviction counsel in a capital case); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (observing that "the right to appointed counsel extends to the first appeal of right, and no further").

[34] *Finley*, 481 U.S. at 556–57.

defendants facing capital punishment,[35] as was the case in *Trevino*.[36] But the vast majority of defendants are not facing capital punishment, and thus they are not guaranteed counsel.

2. Limitations on Federal Habeas Corpus Review

Beginning in the 1970s, the Supreme Court established numerous restrictions that substantially limited state prisoners' access to federal habeas review.[37] These rules were designed to ensure that state court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism.[38]

While it is against American principles to imprison innocent people or deny people their constitutional rights,[39] habeas corpus review can be problematic for federal courts for several reasons. First, collateral review creates federal–state tension, since federal courts are second-guessing the legitimacy of state court convictions based on state law.[40] Additionally, finality is an issue because federal courts are essentially reopening state judgments that the state courts have certified as legally valid.[41] Finally, review is costly, because additional judicial resources are spent reviewing a judgment that has already survived examination by the state courts.[42] With

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[35] *See* Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086 (2006).

[36] Trevino v. Thaler, 133 S. Ct. 1911, 1915 (2013).

[37] *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 493 (1991) (restricting subsequent federal habeas corpus petitions unless petitioner demonstrates cause and prejudice for not including the claim in the first federal petition); Teague v. Lane, 489 U.S. 288, 316 (1989) (barring federal courts from retroactively applying new rules of criminal procedure to grant a writ of habeas corpus); Rose v. Lundy, 455 U.S. 509, 520–21 (1982) (establishing a "total exhaustion" rule by requiring federal courts to dismiss petitions containing unexhausted claims even if some claims have been exhausted); Sumner v. Mata, 449 U.S. 539, 547 (1981) (the "presumption of correctness" requires federal courts to defer to factual findings by state appellate courts); Wainwright v. Sykes, 433 U.S. 72, 91 (1977) (holding that, to obtain federal habeas corpus review, petitioners must show "cause" and "prejudice," or that failing to review the claim will result in a fundamental "miscarriage of justice"); Stone v. Powell, 428 U.S. 465, 481–82 (1976) (precluding petitioners from federal review of Fourth Amendment claims when state courts "provided an opportunity for full and fair litigation" of the claim).

[38] Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012); *see generally* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 265–70 (2006) (providing a more detailed account of Supreme Court cases limiting federal habeas review).

[39] *See* Herrera v. Collins, 506 U.S. 390, 398 (1993) (noting that "the central purpose of any system of criminal justice is to convict the guilty and free the innocent").

[40] *See* Blume, *supra* note 38, at 274.

[41] Dewey, *supra* note 33, at 274.

[42] *Id.*

these problems in mind, the Court and Congress have established certain limitations that make habeas corpus relief difficult to obtain.

For its part, the Supreme Court has adopted the "total exhaustion" rule, which demands that the entire federal habeas petition be dismissed if it contains any unexhausted claim.[43] This means that each and every claim asserted in a federal habeas petition must have been raised in state court, either on direct appeal or in state habeas proceedings.[44] Failing to properly observe state procedural requirements for presenting a federal claim in state court results in "procedural default," precluding a federal habeas court from reviewing the claim.[45] Procedural default is "an independent and adequate state ground" for denying relief, regardless of the merits of a petitioner's claim.[46] Since these are state convictions, in the interest of federalism, federal courts will only hear prisoners' claims after the state courts have been given the opportunity to resolve the alleged violations.

Further, Congress severely limited prisoners' access to federal habeas review through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[47] AEDPA codified several of the Supreme Court's restrictions on federal habeas review and added additional stringent conditions.[48] Most notably, AEDPA created a one-year statute of limitations on the habeas cause

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[43] *See* Rose v. Lundy, 455 U.S. 509, 522 (1982).

[44] *See* O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").

[45] *See* Coleman v. Thompson, 501 U.S. 722, 729–30 (1991); Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977). For example, in order for a prisoner to successfully raise an IATC claim in federal habeas proceedings, the prisoner must have previously raised the claim in his state court proceedings and complied with all relevant state-law procedural requirements in doing so. Raising the claim in state court "preserves" the claims for federal review. Conversely, if the prisoner has failed to assert the IATC claim in his state proceedings, the claim is procedurally defaulted and a federal court will not adjudicate its merits.

[46] *Coleman*, 501 U.S. at 729–30 ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."). The "independent and adequate state ground" can be the state's procedural rules. *Id.*

[47] *See generally* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 702 (2002) (discussing AEDPA's barriers to federal habeas corpus relief).

[48] Dewey, *supra* note 33, at 272; s*ee* Blume, *supra* note 38, at 270–74 (discussing implications of AEDPA).

of action,[49] severely restricted subsequent habeas petitions,[50] limited the availability of evidentiary hearings,[51] and granted federal courts the ability to deny (but not grant) unexhausted claims on the merits.[52] AEDPA also retained the total exhaustion rule[53] and did not alter the existing regime of procedural default created by the Supreme Court decisions of the preceding quarter century.[54]

Prior to AEDPA, Congress had passed up many opportunities to amend or reform the habeas corpus statutes, leaving the Supreme Court to establish the governing rules.[55] With this broad power, the Court generally took a particularly strict approach to the procedural default doctrine.[56] In adopting AEDPA, Congress enhanced the existing rules and added additional stringent policies, making it "very difficult for habeas petitioners to prevail."[57]

Nevertheless, AEDPA did not reject the equitable exception of *Wainwright v. Sykes*, under which a prisoner's procedural default may be excused if he shows "cause and prejudice."[58] "'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him."[59] In other words, "cause" exists when

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[49] 28 U.S.C. § 2244(d)(1) (2012).

> The limitation period shall run from the latest of— (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

[50] *See id.* § 2244(b)(1).

[51] *See id.* § 2254(e)(2).

[52] *See id.* § 2254(b)(2)–(3).

[53] *See id.* § 2254(b)–(c).

[54] *See id.*; *see also* Coleman v. Thompson, 501 U.S. 722, 750 (1991).

[55] *See* Blume, *supra* note 38, at 269–70.

[56] *Id.* For example, in *Coleman v. Thompson*, the Court held that the capital defendant's claims were procedurally barred because his attorney filed a notice of appeal less than a week late. 501 U.S. at 728–29.

[57] *See* Blume, *supra* note 38, at 268.

[58] Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

[59] *Coleman*, 501 U.S. at 753 (noting when procedural default is a result of ineffective assistance of counsel during a proceeding where petitioner has a constitutional right to effective counsel); *see also* Murray v. Carrier, 477 U.S. 478, 488 (1986) (defining prejudice as when an "objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule"). Examples of adequate "cause" include "a constitutional claim . . .

"some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[60] The petitioner must also show that defaulting the claim would result in "prejudice" due to the alleged violation of federal law.[61] The "prejudice" inquiry appears to be similar to the harmless error doctrine:[62] whether there is a reasonable possibility that the error contributed to the defendant's conviction.[63]

3. The Path to Trevino*:* Coleman v. Thompson *and* Martinez v. Ryan

Two Supreme Court cases were critical legal developments leading to *Trevino*'s ultimate holding: *Coleman v. Thompson* created a robust procedural default rule, which *Martinez v. Ryan* chipped away.

In *Coleman v. Thompson*, the Supreme Court considered whether the failure of an attorney in a state collateral proceeding to file a timely direct appeal (to obtain appellate review of a state court's postconviction denial of an ineffective assistance of counsel claim) precluded federal habeas review.[64] In other words, the crux of the appeal was whether ineffective assistance of counsel constitutes "cause" to overcome procedural default under *Wainwright*.[65]

The Court held that where counsel was not guaranteed by the constitution, "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'"[66] Thus, the Court concluded that without a constitutional right to postconviction counsel, ineffective assistance of counsel in the

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so novel that its legal basis is not reasonably available to counsel," Reed v. Ross, 468 U.S. 1, 16 (1984); the availability of new factual evidence that was not reasonably discoverable during the state proceeding, Amadeo v. Zant, 486 U.S. 214, 222 (1988); and situations in which the failure to develop facts in the state proceeding was caused by the state's suppression of relevant evidence, Banks v. Dretke, 540 U.S. 668, 671 (2004).

[60] *Carrier*, 477 U.S. at 488. For instance, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some interference by officials' . . . made compliance impracticable, would constitute cause under this standard." *Id.*

[61] *Coleman,* 501 U.S. at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

[62] *Wainwright*, 433 U.S. at 117 (Brennan, J., dissenting).

[63] Chapman v. California, 386 U.S. 18, 24 (1967).

[64] *Coleman*, 501 U.S. at 728–29.

[65] *Id.* at 755.

[66] *Id.* at 753 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

postconviction context is not adequate "cause" to excuse default.[67] As a result, even if state postconviction counsel performs so poorly as to be ineffective under *Strickland*, the prisoner remains barred from raising any new claims in federal postconviction proceedings.

Coleman does not provide the answer to a key constitutional question: whether a prisoner has a right to effective counsel in a state postconviction proceeding where that is his first opportunity to raise an IATC claim.[68] This situation occurs where, for example, state procedural rules do not allow prisoners to raise IATC claims on direct appeal, leaving state postconviction proceedings as the first opportunity to raise the claim. Over a decade after *Coleman*, the Supreme Court granted certiorari in *Martinez v. Ryan*[69] to answer that very question. In this case, after being convicted in Arizona state court, petitioner Martinez was appointed new counsel for his direct appeal.[70] Arizona procedural law does not permit a prisoner to raise an IATC claim on direct appeal; instead, the first opportunity to bring the claim is in state postconviction proceedings.[71] Accordingly, Martinez's attorney did not assert a claim of IATC on direct appeal, and instead argued numerous other claims in hopes of obtaining a new trial.[72] While Martinez's direct appeal was still pending, his attorney filed a "Notice of Post-Conviction Relief."[73] Unbeknownst to Martinez, his attorney filed a habeas corpus petition in Arizona state court, but later filed a statement explaining that she had "reviewed the transcripts and trial file and [could] find no colorable claims."[74] The court then gave Martinez forty-five days to file a *pro se* petition but his attorney failed to inform him of this opportunity. As a result, Martinez did not file a *pro se* petition. The Arizona trial court dismissed the petition for postconviction relief, affirming the attorney's statement that there were not meritorious claims.[75] The Arizona Court of Appeals affirmed, and

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[67] *Id.* at 757 ("Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas.").

[68] Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

[69] *Id.* at 1309.

[70] *Id.* at 1314. Martinez was convicted of two counts of sexual assault of a minor, and sentenced to two consecutive terms of life imprisonment without parole for thirty-five years. *Id.* at 1313.

[71] *Id.* at 1313.

[72] *Id.* at 1314.

[73] ARIZ. R. CRIM. P. 32.4(a) (2011); Martinez v. Schriro, 623 F.3d 731, 733–34 (9th Cir. 2010), *rev'd*, Martinez v. Ryan, 132 S. Ct. 1309 (2012).

[74] Martinez v. Schriro, 623 F.3d at 734.

[75] *See id.*

the Arizona Supreme Court denied review, leaving his conviction intact.[76]

A year and a half later, Martinez obtained new counsel and filed a second state habeas petition, raising an ineffective assistance of trial counsel claim for the first time.[77] This petition was dismissed as procedurally defaulted.[78] Martinez then filed a habeas corpus petition in federal court, this time raising an IATC claim *and* an ineffective assistance of state postconviction counsel claim.[79] Martinez argued that the court should excuse his procedural default for good "cause" because he had inadequate counsel both during his trial and during his initial state habeas proceeding.[80] The federal district court and the Ninth Circuit denied his petition, citing *Coleman*.[81] The Supreme Court granted certiorari to decide whether a prisoner has a right to effective counsel when a state's procedural system does not allow IATC claims to be raised on direct appeal; in other words, where the state postconviction proceeding is the first opportunity for the prisoner to question the adequacy of trial counsel's performance.[82]

The Supreme Court found that *Coleman* did not control. In *Coleman*, the petitioner claimed that his state habeas attorney was inadequate for failing to file a timely appeal *after* the initial state habeas proceeding, but not that his attorney was ineffective *during* the actual postconviction proceeding in state trial court.[83] As a result, the Supreme Court found that during that initial habeas proceeding, Coleman's federal constitutional claims were properly adjudicated on the merits by the state court.[84] *Coleman* did not resolve whether attorney error *during* the state habeas proceeding would qualify as "cause" to overcome procedural default.[85]

Justice Kennedy, writing for the majority, carved out an exception to *Coleman* for several reasons. First, Martinez's situation was troubling because he was not afforded adequate trial counsel, nor was he given the opportunity to assert an IATC claim.[86] Second, without the assistance of an

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[76] *See id.* at 733.

[77] Martinez v. Ryan, 132 S. Ct. at 1314.

[78] *Id.*

[79] *Id.*

[80] Trevino v. Thaler, 133 S. Ct. 1911, 1914 (2013); Martinez v. Ryan, 132 S. Ct. at 1314.

[81] *See* Martinez v. Schriro, 623 F.3d at 735; Martinez v. Schriro, No. CV 08–785–PHX–JAT, 2008 WL 5220909, at *11 (D. Ariz. Dec. 12, 2008). *See also* Martinez v. Ryan, 132 S. Ct. at 1314.

[82] Martinez v. Ryan, 132 S. Ct. at 1315.

[83] Coleman v. Thompson, 501 U.S. 722, 755 (1991).

[84] *Id.*

[85] Martinez v. Ryan, 132 S. Ct. at 1316.

[86] *Id.* at 1312 ("[T]he right to effective trial counsel is a bedrock principle in this Nation's

effective appellate attorney, a prisoner would have difficulty asserting an IATC claim because he might not be able to conduct the necessary investigation and might lack critical knowledge about the law, including state procedural rules.[87] Last, under Arizona's procedural system, an attorney's inability to raise an ineffective assistance of trial counsel argument on direct appeal, coupled with the failure to raise the claim during the initial state habeas proceeding, could altogether deprive a prisoner of review of this important Sixth Amendment claim.[88] For these reasons, the Court created an exception to *Coleman*, holding that

> [w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, 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.[89]

Although *Martinez* expanded prisoners' access to postconviction review, Justice Kennedy formulated what appeared to be a very narrow holding to ensure the Court's decision would not drastically impact habeas jurisprudence.[90] The Court did not disturb its established rule that petitioners do not have a constitutional right to counsel in collateral proceedings.[91] Moreover, *Coleman* and *Martinez* govern different proceedings. Technically, *Coleman* did not involve an initial state habeas proceeding, but an *appeal* from the initial state habeas proceeding. Finally, *Coleman* still applies to most circumstances; *Martinez* reaches only procedural regimes where state habeas proceedings are the first opportunity to raise IATC claims.[92]

Since *Martinez* only carved out a narrow exception to the *Coleman* rule,

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justice system.").

[87] *See id.* ("Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim.").

[88] *See id.* at 1314 (finding that Arizona's procedural rules do not allow for ineffective assistance of trial counsel claims to be raised on direct appeal, thus making state habeas proceedings the first opportunity to raise a claim of attorney error).

[89] *Id.* at 1320.

[90] *See* Dewey, *supra* note 33, at 280 (citing Martinez v. Ryan, 132 S. Ct. at 1319–20).

[91] *See* Martinez v. Ryan, 132 S. Ct. at 1326 (Scalia, J., dissenting).

[92] *See id.* at 1320 ("The rule of *Coleman* governs in all but the limited circumstances recognized here . . . . It 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.").

lower courts have been able to distinguish other states' procedural systems from Arizona's and prevent the exception from spreading.[93] Those courts read *Martinez* literally and have limited its holding to states where the procedural rules explicitly forbid raising IATC claims on direct appeal. *Martinez* thus laid the foundation for *Trevino* because Texas's procedural system did not explicitly bar IATC claims on direct appeal, but made it nearly impossible to raise them successfully.

II. *TREVINO V. THALER*

A. FACTS AND PROCEDURAL HISTORY

A jury in Texas state court convicted petitioner Carlos Trevino of capital murder.[94] Eight days after sentencing, Trevino was appointed new counsel for his direct appeal.[95] Seven months after that, as soon as the trial transcript became available, Trevino's new attorney filed his direct appeal.[96] The appeal, however, did not contain an IATC claim.[97] While Trevino's direct appeal was still pending, the court appointed Trevino new counsel for state

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[93] *See* Dewey, *supra* note 33, at 290–91.

> [A] federal district court in California held that *Martinez* did not apply because California prisoners are required to bring ineffective-assistance-of-counsel claims on collateral appeal only when matters outside the trial record must be considered; otherwise, they may raise the claim on direct appeal. Other courts have ruled that *Martinez* does not apply in Arkansas, Alabama, and Tennessee because those states allow prisoners to raise ineffective-assistance claims on direct appeal.
>
> These courts ruled *Martinez* inapplicable because state rules do not bar prisoners from raising ineffective-assistance claims on direct appeal, but the courts did not consider the feasibility of raising those claims on direct appeal.

Id. (internal citations omitted).

[94] *See* Trevino v. Thaler, 133 S. Ct. 1911, 1915 (2013). At the penalty phase, the jury found that he "would commit criminal acts of violence in the future which would constitute a continuing threat to society" and that there were "insufficient mitigating circumstances to warrant a sentence of life imprisonment." Trevino v. Thaler, 449 F. App'x 415, 418 (5th Cir. 2011), *vacated*, *Trevino*, 133 S. Ct. 1911. Pursuant to these findings, Trevino was sentenced to death. *See id.* at 418.

[95] *See Trevino*, 133 S. Ct. at 1915.

[96] *See id.*

[97] *See id.* Death penalty trials are bifurcated. *See* Gregg v. Georgia, 428 U.S. 153 (1976). The "guilt-determination phase" determines whether or not the defendant is guilty of the capital crime. Next, if the defendant is found guilty, a separate "sentencing phase" proceeding is held and both aggravating and mitigating evidence is presented and the jury determines whether the defendant should receive the death penalty or a lesser sentence. *See* Robert Alan Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical & Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411, 426–28 (1992).

collateral relief.[98] Trevino's state collateral attorney raised a claim that his trial attorney had been ineffective during the penalty phase of trial. However, he failed to include that part of trial counsel's ineffectiveness was his failure to conduct an adequate investigation and present mitigating evidence during the penalty phase of trial.[99]

Trevino's state collateral attorney's error was particularly grave because Texas law effectively makes state collateral proceedings the first forum for defendants to raise IATC claims,[100] and any such claim not raised during state collateral review is forfeited for federal collateral review.[101] In theory, within thirty days after his sentence was imposed, Trevino's direct appeal counsel could have moved for a new trial on grounds of ineffective assistance of trial counsel.[102] However, as discussed above, making such a motion is nearly impossible, leaving the state collateral proceedings the first real opportunity to raise an IATC claim. This is where Trevino's counsel was deficient: by failing to include a claim that trial counsel had been ineffective at the penalty phase, the claim was precluded from federal collateral review.

After state collateral relief was denied, Trevino filed a writ of habeas corpus *pro se* in federal district court. The court subsequently appointed a new attorney—Trevino's fourth.[103] This attorney finally argued that "Trevino had not received constitutionally effective counsel during the penalty phase of his trial in part because of trial counsel's failure to adequately investigate and present mitigating circumstances during the penalty phase."[104] Trevino's federal habeas attorney explained that trial counsel's presentation of mitigating evidence was clearly deficient.[105] Trial counsel called only one witness: Trevino's aunt.[106] Further investigation by Trevino's federal habeas

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[98] *Trevino*, 133 S. Ct. at 1915 (holding that Texas's procedural rules require collateral counsel to commence collateral proceedings while appeals are still pending).

[99] *Id.* at 1915 ("[C]ounsel's failure to investigate and present mitigating circumstances deprived defendant of effective assistance of counsel[.]" (citing Wiggins v. Smith, 539 U.S. 510, 523 (2003)).

[100] *See Trevino*, 133 S. Ct. at 1915.

[101] *See* Trevino v. Thaler, 449 F. App'x 415, 426 (5th Cir. 2011).

[102] *See* TEX. R. APP. P. 21.4 (2013) (requiring a motion for a new trial to be filed within thirty days of sentencing).

[103] *Trevino*, 133 S. Ct. at 1915.

[104] *Id.*

[105] *Id.* at 1916 ("Federal habeas counsel then told the federal court that Trevino's trial counsel should have found and presented at the penalty phase other mitigating matters that his own investigation had brought to light.").

[106] *Id.* at 1915–16. She testified about Trevino's difficult childhood, his mother's alcoholism, his family's reliance on welfare, and that he had dropped out of high school. *Id.* She added that Trevino was the father to one child and offered broad statements that he was

attorney discovered persuasive mitigating evidence that reasonable and effective trial counsel should have found.[107]

In the interest of federalism, the federal district court stayed the federal proceedings so Trevino could bring this more specific IATC claim—that his trial counsel was ineffective during the penalty phase because he failed to conduct an adequate investigation and present mitigating evidence—in a second proceeding in Texas state court.[108] The state court found that Trevino was procedurally barred from bringing the claim because it should have been raised in the initial state postconviction proceeding.[109] Despite the clearly deficient trial investigation, the federal district court agreed with the state court's decision and ultimately dismissed Trevino's habeas corpus petition on that same basis.[110] Trevino appealed and the Fifth Circuit affirmed, agreeing that Trevino's procedural default barred review of his petition on the merits.[111] The Supreme Court subsequently granted certiorari to determine whether the *Martinez* exception applied to Texas's procedural scheme.[112]

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good with children and nonviolent. *Id.*

[107] *Id.* at 1916.

> These included, among other things, that Trevino's mother abused alcohol while she was pregnant with Trevino, that Trevino weighed only four pounds at birth, that throughout his life Trevino suffered the deleterious effects of Fetal Alcohol Syndrome, that as a child Trevino had suffered numerous head injuries without receiving adequate medical attention, that Trevino's mother had abused him physically and emotionally, that from an early age Trevino was exposed to, and abused, alcohol and drugs, that Trevino had attended school irregularly and performed poorly, and that Trevino's cognitive abilities were impaired.

Id.

[108] *Id.*

[109] *See id.*

[110] *Id.* Interestingly, the District Court found that even though "'the most minimal investigation . . . would have revealed a wealth of additional mitigating evidence,' an independent and adequate state ground (namely Trevino's failure to raise the issue during his state postconviction proceeding) barred the federal habeas court from considering the ineffective-assistance-of-trial-counsel claim." *Id.*

[111] Trevino v. Thaler, 449 F. App'x 415, 426 (5th Cir. 2011).

[112] *Trevino*, 133 S. Ct. at 1916. *Martinez* was not available to Trevino because it was decided after the Fifth Circuit dismissed Trevino's case. However, the Fifth Circuit's decision in a subsequent case, *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012), suggests that *Martinez* would not have affected their decision. In *Ibarra*, the Fifth Circuit noted that Texas procedural law does not *explicitly* require the defendant to raise an ineffective assistance of trial counsel claim in the initial state collateral proceeding because *technically* the law allows defendants to raise the claim on direct appeal. *Id.* at 227. Accordingly, since the Fifth Circuit held the petitioner in *Ibarra* was not entitled to relief under *Martinez*, Trevino also would not have been eligible for relief. *See Trevino*, 133 S. Ct. at 1916.

B. *TREVINO*'S MAJORITY OPINION

The Supreme Court found Texas's system functionally the same as the system at issue in *Martinez*, concluding that *Trevino* required the same equitable result, an exception to the procedural default rule.[113] Justice Breyer, writing for the majority, recognized that while Texas's procedural rules did not explicitly forbid raising IATC claims on direct review, the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . . ."[114]

Justice Breyer identified two aspects of Texas's procedural law that puts it on equal footing with Arizona's. First, Texas's procedural system makes it "virtually impossible" for a defendant to bring a successful IATC claim on direct review.[115] Direct appeal counsel can move for a new trial but the trial transcript may not be available for the attorney until after the motion for new trial deadline.[116] Without the trial transcript, the attorney on direct appeal is unable to evaluate trial counsel's performance. More importantly, a successful IATC claim often requires not only an analysis of the trial record, but also additional time to investigate evidence not presented at trial.[117]

Second, if *Martinez* did not apply, "the Texas procedural system would create significant unfairness."[118] The Court was skeptical that the procedural scheme was enforced flexibly, as the State argued: "We do not believe that this, or other, special, rarely used procedural possibilities can overcome the Texas courts' own well-supported determination that collateral review normally constitutes the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel claim."[119]

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[113] *Trevino*, 133 S. Ct. at 1921.

[114] *Id.*

[115] *Id.* at 1918 (quoting Robinson v. State, 16 S.W.3d 808, 810–811 (Tex. Crim. App. 2000) (internal quotation marks omitted)).

[116] *See* TEX. R. APP. P. 21.4 (2013) (holding that a motion for a new trial must be filed within thirty days of sentencing); *id.* at 21.8(a), (c) (a trial court must dispose of motion for new trial within seventy-five days of sentencing); *id.* at 35.2(b), 35.3(c) (noting that when a motion for a new trial is filed, the trial transcript must be prepared within 120 days of sentencing; this deadline may be extended).

[117] *See Trevino*, 133 S. Ct. at 1919 (stating that frequently, ineffective assistance of trial counsel claims are supported by the trial record providing evidence of why counsel acted as he or she did) (citing 42 G. DIX & J. SCHMOLESKY, TEXAS PRACTICE SERIES § 29:76 (3d ed. 2011)).

[118] *Id.*

[119] *Id.*

Additionally, while the State argued that if counsel fails to raise an IATC claim on direct appeal, appellate counsel's ineffectiveness might constitute cause to excuse the procedural default, the Court noted that the State was unable to point to a single case where appellate counsel had been found ineffective.[120] In concluding that the Texas system was fundamentally the same as Arizona's, the Court noted that "[t]he very factors that led this Court to create a narrow exception to *Coleman* in *Martinez* similarly argue for the application of that exception here."[121] In both procedural systems, precluding the review of a lawyer's ineffectiveness during state habeas proceedings as a potential "cause" for overcoming a procedural default would deprive defendants of any opportunity to assert an IATC claim.[122]

C. *TREVINO*'S DISSENTING OPINION

In his dissent, Chief Justice Roberts[123] criticized the majority for expanding *Martinez* and hypothesized negative consequences that may result from the majority's broad holding. First, Chief Justice Roberts argued that the majority's extension of *Martinez* was an unwarranted intrusion on state sovereignty.[124] He emphasized traditional federalism principles, arguing that federal courts were not intended to be an alternative forum for the adjudication of state convictions and that constitutional claims stemming from state convictions should be settled in state courts.[125] Additionally, he believed the "aggressively limiting language" used in *Martinez* "was not simply a customary nod to the truism that 'we decide only the case before us,'" but was also intended to ensure the *Coleman* rule would remain relevant.[126] The once "crisp" limitation of *Martinez* had now been replaced with ambiguous language—"an assortment of adjectives, adverbs, and modifying clauses"[127]—that would make it difficult for the lower courts to interpret and apply the new *Trevino-Martinez* exception.

Chief Justice Roberts tore apart the holding, asking, "how meaningful is meaningful enough, how meaningfulness is to be measured, how unlikely

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[120] *Id.* at 1920.

[121] *Id.* at 1921.

[122] *Id.*; *see also* Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012).

[123] Joined by Alito.

[124] *See Trevino*, 133 S. Ct. at 1922 (Roberts, C.J., dissenting).

[125] *See id.* at 1921–22 (Roberts, C.J., dissenting) (citing Harrington v. Richter, 131 S. Ct. 770, 787 (2011); Williams v. Taylor, 529 U.S. 420, 437 (2000)).

[126] *Id.* at 1923 (Roberts, C.J., dissenting) (quoting Upjohn Co. v. United States, 449 U.S. 383, 396 (1981)); *see also* Martinez v. Ryan, 132 S. Ct. at 1320.

[127] *Trevino*, 133 S. Ct. at 1923 (Roberts, C.J., dissenting).

highly unlikely is, how often a procedural framework's 'operation' must be reassessed, or what case qualifies as the 'typical' case."[128] He predicted that the majority's broad language would lead to "endless . . . state-by-state litigation."[129] He believed that these open-ended terms would allow the lower courts to liberally interpret *Trevino*, thus extending the exception to more jurisdictions.[130]

Ultimately, Chief Justice Roberts's concern was that the majority's approach would "excuse procedural defaults that, under *Coleman*, should preclude federal review,"[131] thereby frustrating state sovereignty and denying the states their interest in finality.[132]

III. ANALYSIS OF CURRENT LAW

Although the spirit of the *Trevino* opinion suggests the decision will provide more federal habeas petitioners a day in court for their ineffective assistance of counsel claims, *Trevino*'s impact on prisoners' access to federal courts is limited for three reasons. First, *Trevino*'s vague language has made it difficult for lower courts to interpret and apply its holding. Second, being generally reluctant to expand prisoners' access to the courts, the lower courts have been able to distinguish different state procedural rules from Texas's rules. Accordingly, the lower courts have rarely applied *Trevino*'s holding. Lastly, the Supreme Court in *Trevino* held fast to its view that the constitutional right to effective counsel should not be extended to collateral proceedings. Therefore, even if federal habeas review is granted under *Trevino*, indigent prisoners in noncapital cases are left without counsel when attempting to raise claims of ineffective assistance of trial counsel—claims that are notoriously difficult to win even with the assistance of counsel.[133]

A. *TREVINO*'S BROAD LANGUAGE

While *Trevino* was certainly a positive development for prisoners' rights, the Court's holding was articulated in broad terms, without clear guidance as to its application. The majority left several key terms in their

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[128] *Id.* (Roberts, C.J., dissenting) (citing the majority opinion, *id.* at 1921). Roberts also believes that *Trevino* does not accurately reflect Texas's procedural "operation" because a capital murder trial is far from a typical case. *See id.* (Roberts, C.J., dissenting) (noting that jury trials are rare and capital convictions are even less common).

[129] *Id.* (Roberts, C.J., dissenting).

[130] *Id.*

[131] *Id.* at 1924.

[132] *See id.* (citing Coleman v. Thompson, 501 U.S. 722, 748 (1991)).

[133] *See supra* Part I.B.1.

holding undefined: *Martinez* applies "where . . . [the] state procedural framework, by reason of its design and *operation*, makes it highly unlikely in a *typical* case that a defendant will have a *meaningful* opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal."[134] In his dissent, Chief Justice Roberts points to these undefined terms and questions their meaning.[135] Compared to the clear exception established in *Martinez*—"where the State barred the defendant from raising the [IATC] claims on direct appeal"[136]—*Trevino*'s broad language provides little guidance in determining when a procedural system is comparable to Texas's.[137]

While Chief Justice Roberts's dissent foresees an increase of state-by-state litigation and predicts that prisoners will use *Trevino* to circumvent *Coleman*'s procedural default rule,[138] this prediction is misguided. *Martinez* and *Trevino* only establish sufficient "cause" in very specific circumstances, namely where:

> (1) the claim of "ineffective-assistance-of-trial-counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that the claim "be raised in an initial-review collateral proceeding,"[139]

or where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal."[140]

The first requirement alone is difficult to satisfy. Not only does it require a successful showing of an IATC under *Strickland*'s two-prong standard,[141]

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[134] *Trevino*, 133 S. Ct. at 1921 (emphasis added).

[135] *See id.* at 1923 (Roberts, C.J., dissenting) (stating that the majority opinion does not accurately reflect Texas's procedural "operation" because a capital murder trial is far from a typical case, noting that jury trials are rare and capital convictions are even less common).

[136] Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012).

[137] *See* Devon Lash, Comment, *Giving Meaning to "Meaningful Enough": Why* Trevino *Requires New Counsel on Appeal*, 82 FORDHAM L. REV. 1855, 1896 (2014) ("Although this flexible standard seems to be an attempt to fit the varied rules of state criminal procedure, it gives lower federal courts little guidance in deciding what rules constitute a meaningful opportunity in the states where they sit.").

[138] *Trevino*, 133 S. Ct. at 1923 (Roberts, C.J., dissenting).

[139] *Id*. at 1913 (citing Martinez v. Ryan, 132 S. Ct. at 1320).

[140] *Id.* at 1918 (quoting Martinez v. Ryan, 132 S. Ct. at 1318–21).

[141] Strickland v. Washington, 466 U.S. 668, 687 (1984). *Strickland* requires first, that counsel's performance was deficient; and second, that deficient performance prejudiced the defense. *Id.*

but it also requires the claim to be "substantial."[142] Meeting "*Strickland*'s high bar is never an easy task,"[143] especially since the court's "scrutiny of counsel's performance must be highly deferential."[144] Moreover, *Trevino* requires that the IATC claim be stronger than the average IATC claim as it requires a "substantial" claim.[145]

Even more, under the second requirement the prisoner must have two ineffective assistance of counsel claims—both trial counsel and state collateral counsel[146] must have provided deficient representation. The Supreme Court has yet to mandate a clear standard to measure the effectiveness of collateral counsel since representation in collateral proceedings is not constitutionally required. *Strickland* is little help because assessing counsel's performance requires some professional consensus about the standard of practice for collateral counsel—i.e., what must such a lawyer do in handling a postconviction case? Even if the most liberal standard is used, under *Trevino*, prisoners must raise *two* ineffective assistance of counsel claims (against both trial and state habeas counsel), thus raising the already high bar even higher.

The third requirement dictates that the IATC claim be reviewed for the first time in a state habeas proceeding. Accordingly, any time where the IATC claim was raised on direct review and again in a state habeas proceeding is beyond the scope of *Trevino*.

The fourth requirement relates to the state's procedural system and the practicalities of raising an IATC claim prior to the state habeas proceeding. A prisoner must demonstrate that his state's procedural system fits one of two circumstances: either the state's procedural rules must *explicitly* bar or the rules must *effectively* bar IATC claims from being raised on direct review.[147] In both procedural systems, state collateral review is the defendant's first real opportunity to raise an IATC claim.

In sum, a petitioner must prove two ineffective assistance of counsel claims and be subject to a procedural system comparable to the one described in *Trevino.* Despite the dissent's apprehensions about *Trevino's* liberal expansion of the *Martinez* exception, obtaining relief under *Trevino* is both

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[142] There seems to be no agreed-upon definition of a "substantial" IATC claim.

[143] *See* Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

[144] *Strickland*, 466 U.S. at 668.

[145] A "substantial" IATC claim was not defined by the Court in *Trevino.*

[146] A prisoner can also satisfy this requirement if he has an IATC claim and was unrepresented during his state habeas proceeding. *See* Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013).

[147] The third requirement is the same as in *Martinez*; therefore, the fourth requirement is the more notable change.

difficult and unlikely.

B. LOWER COURTS DISTINGUISHING AND REJECTING *TREVINO*

Trevino's vague language has not led to the liberal expansion of the *Trevino-Martinez* exception Chief Justice Roberts predicted; instead, the majority's open-ended language has actually led lower courts to interpret *Trevino* very narrowly and preclude habeas relief to petitioners elsewhere. As the following examples illustrate, lower courts have been able to distinguish other states' procedural rules from Texas's so the fourth requirement is not satisfied, thereby limiting *Trevino*'s impact.

In *Murphy v. Atchison*, the Eastern District of Illinois confirmed the Illinois Supreme Court's determination that Illinois law provides a petitioner adequate opportunity to develop the record in support of an IATC claim before direct appeal.[148] Conversely, "*Trevino* turned on Texas law, under which it is 'virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim' on direct review."[149] For this reason, the *Murphy* court held that the Illinois procedural system is critically different than Texas's and outside of *Trevino*'s scope.[150]

Furthermore, federal courts have denied relief by making nuanced distinctions. In *Baze v. White*, for example, the Eastern District of Kentucky noted that *Trevino* "softened" the fourth *Martinez* requirement, "[b]ut *Trevino* still requires prisoners to show that their underlying ineffective-assistance-at-trial claim is substantial and that their initial habeas attorney was ineffective."[151] The court understood "substantial" under *Martinez* to mean "debatable amongst jurists of reason,"[152] therefore demanding a full *Strickland* analysis.[153] Accordingly, the court avoided a full *Trevino-Martinez* analysis of Kentucky's procedural system because the petitioner

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[148] Murphy v. Atchison, No. 12 C 3106, 2013 WL 4495652, at *22 (N.D. Ill. Aug. 19, 2013) (citing People v. Krankel, 464 N.E.2d 1045 (Ill. 1984)) (holding that a defendant is entitled to new counsel to represent him on posttrial motions alleging ineffective assistance of trial counsel); *see also* Butler v. Hardy, No. 11 C 4840, 2012 WL 3643924, at *3 (N.D. Ill. Aug. 22, 2012).

[149] *Murphy*, 2013 WL 4495652, at *22 (quoting Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013)).

[150] *See id.* Since district court decisions are not binding over other districts, these issues will not be resolved until they are adjudicated at the circuit court level.

[151] Baze v. White, Civil No. 01–31–ART, 2013 WL 2422863, at *4 (E.D. Ky. June 3, 2013).

[152] *Id.* at *4 (citing Miller–El v. Cockrell, 537 U.S. 322, 336 (2003)) (articulating the standard cited in *Martinez*).

[153] *See id.*

failed to establish that the underlying IATC claim was "substantial."[154] The court concluded that it was not ineffective for an attorney to object to evidence on state-law grounds rather than federal-law grounds, where counsel viewed the state-law grounds as stronger.[155]

In *Lutz v. Valeska*, the district court for the Southern District of Alabama denied the petitioner Lutz relief because he had not alleged an IATC claim on direct appeal and had failed to file a timely state habeas petition, despite having appellate counsel.[156] Lutz had been left to proceed *pro se* after his direct appeal.[157] In Alabama, in order to be appointed state habeas counsel, a petitioner must actively request counsel from the court.[158] As a result, Lutz was never appointed state habeas counsel and he did not file a state habeas petition. Almost a year later, now represented by counsel, Lutz filed a petition for federal habeas review.[159] The district court concluded Lutz was not entitled to relief under *Martinez* and *Trevino* because it was his own fault for missing the state habeas petitioner deadline. The court found that "based on the pleadings, documents, and records in this case, . . . Lutz has not established the existence of any 'objective factor external to the defense that prevented [him] from raising the claim[s] and which cannot be fairly attributable to his own conduct.'"[160] Consequently, the federal habeas court denied relief under *Martinez-Trevino*. Instead the court cited *Coleman*, finding "cause and prejudice" had not been established because procedural default was due to the petitioner's own error, and not counsel's.[161]

In *Fowler v. Joyner*, the Fourth Circuit found that "North Carolina does not fall neatly within *Martinez* or *Trevino.*"[162] The district court had appointed the same attorney to represent Fowler in both state and federal habeas proceeding.[163] Despite representation by four different attorneys for his federal habeas proceedings,[164] Fowler, now represented by a fifth attorney, argued that his prior federal habeas attorneys were deficient and

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[154] *Id.*

[155] *See id.* at *5.

[156] Lutz v. Valeska, Civil Action No. 1:10cv950–TMH, 2014 WL 868870, at *7 (M.D. Ala. Mar. 5, 2014).

[157] *Id.* at *5 n.12.

[158] *Id.*

[159] *Id.* at *2.

[160] *Id.* at *5 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

[161] *Id.* at *4–5.

[162] Fowler v. Joyner, 753 F.3d 446, 463 (4th Cir. 2014).

[163] *Id.* at 464.

[164] *Id.*

thus sought relief under *Martinez-Trevino*.[165] He argued that his new attorney should have been appointed as "*Martinez* counsel" and that his case should have been remanded to the district court to allow for further investigation of his IATC claims.[166]

Under North Carolina procedural law, a motion for habeas relief must be denied if "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the . . . motion but did not do so."[167] Unlike in *Trevino*—where Texas law made "it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise [the] claim on direct appeal"[168]—North Carolina law requires the "courts to determine whether the particular claim at issue could have been brought on direct review."[169] As a result, the Fourth Circuit found that the North Carolina "statute is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review"[170] and therefore "[i]neffective-assistance-of-trial-counsel claims that are apparent from the record must be brought by the prisoner on direct appeal."[171] Additionally, here, because Fowler's attorney "undertook representation *after* the initial-review collateral proceeding concluded, that counsel cannot be found ineffective before or after *Martinez*."[172] Accordingly, the court held that the petitioner was subject to procedural default and that he was not entitled to relief under *Martinez-Trevino*.[173]

These lower court decisions demonstrate that courts are reluctant to extend *Trevino* beyond its precise conditions.[174] Overall, whatever the

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[165] *Id.* at 460–61.

[166] *Id.* at 460.

[167] N.C. GEN. STAT. § 15A–1419(a)(3).

[168] Trevino v. Thaler, 449 F. App'x 415, 428 (5th Cir. 2011), *vacated*, Trevino v. Thaler, 133 S. Ct. 1911 (2013).

[169] *Fowler*, 753 F.3d at 463 (quoting McCarver v. Lee, 221 F.3d 583, 589 (4th Cir. 2000)).

[170] *Id.* at 462–63 (quoting *McCarver*, 221 F.3d at 589) (internal quotation marks omitted).

[171] *Id.* at 463.

[172] *Id.* at 465.

[173] *Id.* at 463. However, the court noted that IATC claims that are not so apparent fall within the *Martinez-Trevino* exception. *Id.*

[174] Although beyond the scope of this Comment, it is important to note that it remains unclear if *Trevino* applies to other claims beyond ineffective assistance of counsel. In *Hunton v. Sinclair*, the Ninth Circuit acknowledged the "plausible position" that *Trevino* may apply to *Brady* claims. 732 F.3d 1124, 1127 (9th Cir. 2013). Nevertheless, it chose not to extend *Trevino* due to *Martinez*'s limiting language and the dissent's concern for strict limitation. *Id.* In the end, the Ninth Circuit exercised judicial restraint, but its recognition of the plausible rationale for extending the *Trevino-Martinez* exception to *Brady* claims suggests such an extension is possible in the future.

Trevino majority intended, the lower courts' narrow interpretation and ability to distinguish *Trevino* demonstrate how *Trevino* has fallen short of accomplishing meaningful habeas corpus reform.

IV. *TREVINO*'S IMPACT ON CAPITAL DEFENDANTS IS LIMITED WITHOUT A CONSTITUTIONAL RIGHT TO FEDERAL POSTCONVICTION COUNSEL

Trevino is further limited because there is no constitutional right to counsel in federal postconviction proceedings. Although not constitutionally required,[175] almost every death penalty state automatically appoints indigent capital defendants counsel for their state postconviction proceedings.[176] For instance, if a capital defendant is convicted under a statute that creates the unqualified right to appointed counsel in federal habeas corpus proceedings, that right adheres before the federal habeas petition is filed.[177] As a result, counsel will be appointed with sufficient time to assist with the filing of a habeas petition.

But the majority of states do not provide counsel for noncapital prisoners in state postconviction proceedings by statute, and the Constitution does not require it.[178] In these jurisdictions, indigent prisoners have no choice but to seek habeas relief *pro se*.[179] Judges have the discretion to appoint counsel once a federal habeas corpus petition is filed, but there are no guarantees that they will do so.[180] Consequently, if a noncapital defendant cannot afford counsel and is not appointed counsel, the defendant must file

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[175] Murray v. Giarratano, 492 U.S. 1, 12 (1989) (holding neither the Eighth Amendment nor Due Process Clause of the Fourteenth Amendment requires states to provide counsel for indigent capital defendants seeking state postconviction relief).

[176] Freedman, *supra* note 35, at 1086. ("[In 2006] thirty-three of the thirty-seven death penalty states" automatically appoint postconviction counsel to capital defendants.). Since 2006, the number of death penalty states has dropped to thirty-two. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Nov. 22, 2014), *archived at* http://perma.cc/62AU-P9MK.

[177] *See* McFarland v. Scott, 512 U.S. 849, 859 (1994).

[178] *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 14 (2002) ("[I]n thirty-seven states they are not automatically entitled to appointed counsel to prepare and present petitions for state postconviction relief."). *See also* John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 445 (2011) ("[M]any states do not provide for the appointment of counsel to assist an incarcerated prisoner in a noncapital collateral challenge, no matter how serious his allegations and no matter how incapable he is of presenting his own case pro se.").

[179] Noncapital defendants can hire counsel or find pro bono counsel, but counsel will not be provided by the state as in capital cases.

[180] *See* 18 U.S.C. § 3006A (2012).

his initial federal habeas corpus petition *pro se* to obtain relief under *Trevino.*

Filing a *pro se* application for a writ of habeas corpus claiming ineffective assistance of counsel is problematic for several reasons. Even with the help of adequate counsel, it is challenging to vindicate a substantial ineffective assistance of counsel claim, and *pro se* prisoners face even more difficulty attempting to do it alone. Not only do such claims "often require investigative work and an understanding of trial strategy," but they must also be presented in accordance with the state's procedures.[181] Even the Supreme Court has acknowledged that prisoners are unlikely to succeed in raising habeas claims *pro se*.[182] The Court has explained that "[t]he prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law."[183] Further, investigation beyond the trial record is often necessary for a successful ineffective assistance claim,[184] and few prisoners can adequately investigate such a claim from the confines of a cell.[185]

Another consequence of not having a constitutional right to postconviction counsel is that there is no clear standard to measure the performance of postconviction counsel. Unlike IATC claims that are reviewed based on the *Strickland* standard, the Supreme Court has not established a standard for postconviction counsel. Without an enumerated standard, it is unclear what conduct would be considered ineffective in a postconviction proceeding. This lack of clarity makes it difficult for both prisoners and attorneys when attempting to raise a claim based on *Trevino* in federal court.[186]

IV. SUGGESTED APPROACH

Since the Supreme Court has been reluctant to construe a right to counsel in postconviction proceedings, unrepresented prisoners inevitably face significant barriers when asserting ineffective assistance of counsel

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[181] Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

[182] *Id.* at 1317 ("To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.").

[183] *Id.* (referencing in a *cf.* citation Halbert v. Michigan, 545 U.S. 605, 620–621 (2005) (discussing the prison population's educational background)).

[184] *Id.*

[185] *Id.*

[186] *Trevino* claims (two-layered ineffective assistance of counsel claims) are more likely to arise in capital cases because most states appoint capital defendants with attorneys for state collateral proceedings due to the severity and finality of the death penalty. It is technically possible for noncapital defendants to bring *Trevino* claims if they can afford to hire an attorney for the state collateral proceeding.

claims. To ensure prisoners are given a fair opportunity to present their IATC claims, these claims should be heard on direct appeal, where there is a still a constitutional right to counsel. Georgia has adopted this approach.[187]

However, the overwhelming majority of state and federal jurisdictions have chosen to adopt the Supreme Court's rule in *Massaro v. United States*[188]: "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal."[189] However, until the Supreme Court declares a constitutional right to postconviction counsel, states need not provide counsel to assist indigent prisoners in these proceedings. Therefore, Georgia's minority approach—requiring prisoners to raise IATC claims on direct review or forfeit them—is the only way to ensure prisoners will be adequately represented when litigating such a claim.

A. OVERVIEW OF GEORGIA'S MINORITY APPROACH

Georgia is the only state to *require* defendants to raise IATC claims on direct appeal—regardless of the sufficiency of the record—or waive their claims.[190] The Georgia Supreme Court has expressed the view that "a claim of ineffectiveness of trial counsel must be asserted at 'the earliest practicable moment.'"[191] Under Georgia law, "this moment is prior to the direct appeal, at a motion for new trial. If the defendant fails to raise the claim at such time,

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[187] *See* Bailey v. State, 443 S.E.2d 836, 837 (Ga. 1994); *see also* Glover v. State, 465 S.E.2d 659, 660 (Ga. 1996).

[188] Ryan C. Tuck, Note, *Ineffective-Assistance-of-Counsel Blues: Navigating the Muddy Waters of Georgia Law After 2010 State Supreme Court Decisions*, 45 GA. L. REV. 1199, 1202 (2011)) (citing Massaro v. United States, 538 U.S. 500, 509 (2003)); *see also* Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301, 311–12 (2010) ("In a number of states, the defendant may elect whether to present the claim on direct appeal or in a post-conviction proceeding. Increasingly, states have moved in the direction of deferring ineffectiveness claims to the post-conviction process, following the lead of a number of jurisdictions that generally preclude consideration of ineffectiveness claims on direct appeal.").

[189] *Massaro*, 538 U.S. at 504.

[190] *See* Place, *supra* note 188, at 310 n.69 (only Georgia requires all ineffective assistance of counsel claims to be heard on direct appeal; other states only require the claim to be brought on direct review if the trial record is adequate to adjudicate the claim). Under the majority approach, the bulk of IATC claims are raised in the initial collateral proceeding. However, "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal." *Massaro*, 538 U.S. at 508.

[191] *Bailey*, 443 S.E.2d at 837 (quoting Smith v. State, 341 S.E.2d 5, 7 (Ga. 1986)); *see also Glover*, 465 S.E.2d at 660.

it is waived."[192]

After the Georgia Supreme Court's 2008 decision in *Garland v. State*, the appointment of new counsel for direct appeal became virtually automatic,[193] without requiring the defendant to show that his IATC claim has merit.[194] The court decided not to impose a threshold requirement because such a hurdle would

> compel indigent defendants to proceed without benefit of counsel, inasmuch as trial counsel could not ethically assert or argue their own ineffectiveness, thereby placing on pro se indigent defendants the burden of proving the existence of a meritorious ineffectiveness claim in order to "earn" what they have a constitutional right to receive, namely, representation by conflict-free counsel.[195]

The Georgia Supreme Court acknowledged that most indigent defendants lack the legal knowledge to assert an ineffective assistance claim themselves.[196]

Under Georgia's scheme, although defendants are guaranteed new counsel on direct appeal, the decision to bring an ineffective assistance claim against trial counsel is left to appellate counsel.[197] Thus, if appellate counsel chooses not to bring an IATC claim on appeal, the defendant is precluded from bringing it in collateral proceedings.[198] However, if the trial attorney also represents the defendant on direct appeal, the defendant may bring an IATC claim on collateral review.[199]

While Georgia's minority approach has its benefits, it also has its fair share of critics.[200] The strongest argument against Georgia's system is that if appellate counsel does not raise an ineffective assistance claim on direct appeal, the claim is waived, and the defendant is precluded from bringing the claim on collateral review.[201] This is problematic for two reasons. First, appellate counsel is ultimately responsible for deciding whether to include an

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[192] Tuck, *supra* note 188, at 1202.

[193] Garland v. State, 657 S.E.2d 842, 844–46 (Ga. 2008).

[194] *Id.*

[195] *Id.* at 845 (citing Hood v. State, 651 S.E.2d 88, 89 (2007)) (internal citation omitted).

[196] *Id.* (citing Reid v. State, 219 S.E.2d 740 (Ga. 1975)).

[197] *See* Williams v. Moody, 697 S.E.2d 199, 202–03 (Ga. 2010).

[198] Glover v. State, 465 S.E.2d 659, 660 (Ga. 1996).

[199] *Moody*, 697 S.E.2d at 201.

[200] *See, e.g.*, Tuck, *supra* note 188, at 1230–34 (outlining the shortcomings of Georgia's approach).

[201] *See id.* at 1229–30 ("To critics of Georgia's rules, this aspect of the minority approach outweighs any of the advantages of the motion for new trial process by creating an assortment of novel problems.").

IATC claim on direct appeal, regardless of the prisoner's wishes.[202] Second, if the appellate attorney is also ineffective and fails to raise an IATC claim, the prisoner is in the same position as a prisoner in a majority approach jurisdiction.[203]

Additionally, without a threshold requirement, there is a greater chance that new counsel will be appointed on direct appeal because a defendant does not need to articulate a reason for wanting new counsel.[204] Thus, unlike trial counsel who has full knowledge of the case and can file a direct appeal relatively quickly, newly appointed counsel has to review the client's file and trial transcripts before filing the direct appeal, which is a time consuming process.[205] As a result, these increased time commitments could further backlog public defender offices. In the end, the increased pressure on public defenders might not realistically lead to better representation on appeal.

B. ADVOCATING FOR THE GEORGIA APPROACH

Despite these flaws, Georgia's minority approach is more beneficial to prisoners. Although critics argue that the minority approach gives appellate counsel too much control when deciding whether to raise IATC claims, the majority approach leaves the prisoner in a worse position: without control or without counsel. Under the majority approach, when IATC claims are directed into state collateral proceedings, collateral counsel may make the strategic decision not to raise the IATC claim or find that the claim has no merit, thus effectively waiving the claim. Ultimately, when a defendant is represented by counsel, the decision to raise an IATC claim is counsel's. The key difference is that under the majority approach, indigent, noncapital defendants—who are not constitutionally guaranteed counsel[206] and often proceed *pro se*—are able to make the decision to raise an IATC claim, but they will have to argue the claim without the assistance of counsel. On the other hand, under the minority approach, if appellate counsel decides to raise an IATC claim, the defendant will do so with the assistance of counsel.

Georgia's system of requiring ineffective assistance of counsel claims to be heard on direct appeal has several advantages over the majority approach. First, Georgia's approach ensures defendants will be afforded the assistance of new counsel when raising IATC claims. Trial counsel is not going raise an IATC claim against himself on direct appeal, so providing new

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[202] *See Moody*, 697 S.E.2d at 202–03.

[203] The prisoner may file a federal habeas petition *pro se*.

[204] *See* Garland v. State, 657 S.E.2d 842, 844–45 (Ga. 2008).

[205] *See* Tuck, *supra* note 188, at 1233–34.

[206] *See* Murray v. Giarratano, 492 U.S. 1, 2 (1989).

counsel on direct appeal provides an immediate evaluation of trial counsel's performance. Bearing in mind the intricacy of the *Strickland* standard, "the right to counsel, like the ability to expand the trial record and an audience with the trial court, seems vital to a fair system for IATC timing."[207] The majority approach leaves indigent noncapital defendants unrepresented to assert these complex claims on collateral review. Conversely, the minority approach requires that these claims be asserted on direct appeal, where defendants are constitutionally guaranteed counsel.

Second, prisoners benefit from having IATC claims initially reviewed on direct appeal. Under the majority approach, if an IATC claim is not raised in state collateral review, the claim is procedurally defaulted unless a *Trevino-Martinez* exception is established. Conversely, under Georgia's approach, if direct appeal counsel does not raise an IATC claim, the prisoner can always raise an ineffective assistance of appellate counsel claim in a subsequent collateral proceeding. Since there is a constitutional right to counsel on direct appeal, the prisoner maintains a cause of action and appellate counsel's performance is evaluated based on the *Strickland* standard.

Third, requiring IATC claims to be heard on direct appeal allows the defendant to move for a new trial and obtain an opportunity to expand the trial record with the help of counsel. Because such claims often involve evidence outside the trial record—such as evidence counsel did not discover because of an inadequate investigation—expanding the record is essential to having any chance of winning relief.[208] Under the majority approach, adjudicating IATC claims in collateral proceedings, the majority of noncapital prisoners will be proceeding *pro se*. Expanding the trial record is extremely difficult for *pro se* prisoners due to their physical incarceration, lack of legal expertise, and monetary constraints.[209] Consequently, it is extremely difficult for *pro se* prisoners to successfully raise IATC claims in collateral proceedings. Arguably, under the majority approach, the right to effective counsel has become "a right without a remedy" because prisoners are unable to conduct an investigation beyond the record.[210]

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[207] Tuck, *supra* note 188, at 1229.

[208] *See* Massaro v. United States, 538 U.S. 500, 505 (2003) ("The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced.").

[209] *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 693–95 (2007).

[210] *Id.* at 693.

Lastly, the motion for a new trial can be a useful tool for prisoners since it increases the chance to argue the IATC claim before the trial judge, "whose observations of counsel's performance in the proceedings below are likely useful in meeting the tough *Strickland* standard."[211] Under the majority approach, where such claims are aired in collateral proceedings, the collateral proceeding judge may not always be the same as the trial judge and therefore may be unfamiliar with counsel's previous performance. Further, *Strickland* requires judges reviewing IATC claims to give trial counsel the benefit of the doubt. Proving ineffectiveness is even more difficult when the collateral proceeding judge did not see trial counsel's performance.[212]

In sum, Georgia's approach better provides defendants with the opportunity to assert IATC claims with the assistance of effective counsel. While this approach is not perfect, the majority's approach leaves indigent prisoners without counsel when attempting to raise these famously difficult IATC claims. Without the right to counsel in postconviction proceedings, the mere ability to assert an IATC claim is more a gesture than a protection of constitutional rights.

CONCLUSION

Trevino acknowledged that a defendant could exhaust all available state remedies but still not receive adequate counsel until a federal habeas proceeding. Although the Court has attempted to protect a defendant's right to effective trial counsel, until a constitutional right to postconviction counsel is established, the majority approach will remain flawed. The Georgia approach gives prisoners a greater chance to protect their constitutional rights because it recognizes how vital counsel is when asserting an ineffective assistance of counsel claim. Without the right to counsel, the mere opportunity to assert IATC is like providing a construction worker with wood but no tools.

Overall, *Trevino* was a step in the right direction for prisoners' rights. The Supreme Court acknowledged that under Trevino's circumstances, a prisoner should not be deprived of the opportunity to litigate the attorney errors that deprived the prisoner of a fair trial.[213] *Trevino* strives to provide a remedy where state procedural systems unjustly preclude prisoners from bringing ineffective assistance of counsel claims in federal habeas corpus proceedings. Despite the Court's efforts, the majority was not precise enough

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[211] Tuck, *supra* note 188, at 1228.

[212] Strickland v. Washington, 466 U.S. 668, 689 (1984).

[213] *See* Trevino v. Thaler, 133 S. Ct. 1911, 1917 (2013) (acknowledging that "the right to counsel is the foundation for our adversary system") (quoting Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012)) (internal quotation marks omitted).

in its language, thus allowing lower federal courts to distinguish the procedural systems of other states and thereby maintain the status quo. Furthermore, even if *Trevino*'s holding had been precise and *Trevino* was strictly followed, prisoners still have no right to effective counsel in collateral proceedings. Ultimately, no matter how liberally *Trevino* is interpreted, indigent noncapital prisoners will still be left unrepresented when attempting to navigate the complex waters of federal habeas review, and that is not much of an improvement.