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THE GAP BETWEEN *MARTINEZ* AND *DAVILA*: SERVING THE NEXT GENERATION OF FEDERAL HABEAS CORPUS CASES

LEXIE WARD

INTRODUCTION

During the summer of 2017, the United States Supreme Court announced a decision in *Davis v. Davila*, which bars substantial claims of ineffective assistance of appellate counsel that have been procedurally defaulted.¹ However, despite the merits of limiting the number of cases which were not diligently pursued by an inmate, the Court states its conclusion too broadly and now effectively bars a prisoner from bringing claims of significant trial error in front of any court. A prisoner's claim that was not available until a trial-level appeal, and was then avoided due to ineffective post-conviction counsel, may now be dodged by a court on federal habeas corpus, and a significant constitutional trial right may never be heard by a United States Court.

Before a discussion of the gap present between two significant landmark habeas corpus cases, *Davila* and *Martinez v. Ryan*, a few things are important to note. It is important to understand the history of the federal habeas corpus system, its constitutional foundations, its procedural mechanisms, and how state courts come into the mix while still ensuring a system of federalism is respected. A brief history of the federal habeas system outlines its pre-constitutional roots derived from the English court system and emphasizes the importance placed on the writ of habeas corpus by our founding fathers, which led to the inclusion of the writ in the Constitution. As part of the creation of a federal system of government, the importance of states' right to fully hear and exhaust state claims before a federal court may review it emerged, promoting notions of supremacy and state sovereignty.

Further, the concept of a procedural default demonstrates that there are some state claims that can never be brought in a federal court, based solely on a prisoner's failure to present a claim to a state court, serving the notion of federalism. However, evolution of the writ of habeas corpus led the Court to allow a petitioner to bring certain procedurally exhausted claims

1. *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017).

after satisfying both that they have a cause for the procedural default, and that actual prejudice has befallen them because of such omission.

Next, a trilogy of cases, culminating with the latest decision of *Davila*, gives a thorough background of the federalism concerns addressed in the realm of federal habeas corpus. These cases also establish when a federal court may hear certain claims from a state prisoner, and when those claims are procedurally barred from a federal appeal. *Coleman v. Thompson* discusses the idea of allocating the costs of burdens between the state and the prisoner depending on when counsel is constitutionally guaranteed.² Then, *Martinez* recognizes a finely narrow exception to the decision in *Coleman*, that allows in the narrowest of circumstances, for a federal court to hear a claim of ineffective assistance of trial counsel, when post-conviction counsel was ineffective in failing to raise such a claim.³ And finally, the *Davila* Court's decision to reject an extension of the *Martinez* exception discusses the difference in ineffective assistance claims of trial and appellate counsel,⁴ and inadvertently creates a gap that will result in significant trial errors evading review from any court.

Finally, a look into the *Davila* decision, along with illustrative examples found in Justice Breyer's dissent, reveals a glaring gap between the majority opinions in *Martinez* and *Davila* that ultimately calls for an equally narrow exception, which extends the *Martinez* exception to claims of ineffective assistance of appellate counsel based on stand-alone constitutional errors.

I. ORIGINS AND IMPORTANCE OF FEDERAL HABEAS CORPUS

While at common law there existed six different types of writs of habeas corpus, the modern "great writ" of habeas corpus, literally translated to "let us have the body," simply requires a person be brought forth before a court.⁵ Once a prisoner is brought before a court by way of the writ, that court may look into the legality of that prisoner's confinement to either grant or deny the requested relief of release.⁶ The use of the writ, however, to physically bring a prisoner to court to challenge his confinement is not necessary to grant a release based on a petition of habeas corpus, especially when the constitutionality of confinement has been blatantly violated.⁷

The modern writ of habeas corpus is viewed as a shield to those improperly imprisoned, but the origins of the writ were not as protective.⁸ The earliest use of the writ of habeas corpus was not to free individuals from

2. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991).

3. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

4. *Davila*, 137 S. Ct. at 2066–68.

5. 20 Am. Jur. Trials 1 (Originally published in 1973).

6. *Id.*

7. *Id.*

8. Book Note, 95 HARV. L. REV. 1186 (1982) (reviewing WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980)).

the judicial system, but rather to bring them within the court's reach.⁹ Originally, the writ was used to bring certain criminal offenders before the king's court, and was widely used to haul various people into court, whether or not a serious crime was committed.¹⁰ During the fourteenth century, a shift occurred where the Court of Chancery began to not only use the writ as a court summons, but also to review the detention of prisoners, a reflection of the modern writ.¹¹

As time progressed, English political strife led to altered forms of the writ used primarily for jurisdictional battles.¹² The Chancellor of Parliament and the King's Bench, each claiming jurisdiction, would use the writ to attempt to circumvent unfavorable decisions by the other.¹³ The Chancellor would endeavor by way of injunction to block a prisoner from bringing a claim to the King's Bench.¹⁴ In return, the Crown would attempt to implement the writ to free that very same prisoner.¹⁵ This original use of the writ was not determined by a prisoner's guilt or innocence; this use of the writ was a power struggle over jurisdiction by the opposing forces of the Chancellor and Crown.¹⁶ Eventually, the struggle between the two ceased as Parliament successfully passed the Habeas Corpus Act of 1679, and the writ's official use protected prisoners from arbitrary imprisonment by the Crown.¹⁷

This clash of powers between Parliament and the Crown, both attempting to use the writ for two different purposes, reflects our modern clash between federal and state courts.¹⁸ Of course, with the United States' original court system deeply rooted in the English system, recognition of the writ of habeas corpus has been present in the states since the original founding of the colonies.¹⁹ With the creation of the Constitution, and its deliberate separation of state and federal governments, the First Congress and the Framers were careful to draft the habeas clause in line with the notions of state sovereignty, limiting Congress's power to suspend state habeas for federal prisoners.²⁰

Article 1, Section 9 of the United States Constitution guarantees that the privilege of the writ of habeas corpus shall not be suspended, unless required in the interest of public safety.²¹ There are three types of federal

9. *Id.*

10. *Id.*

11. *Id.* at 1186-87.

12. *Id.* at 1187.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1187-88.

19. *Id.* at 1188.

20. *Id.*

21. 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4261 (3d. ed. 2017).

habeas corpus remedies, but the two most common are found in 28 U.S.C. §§ 2254 and 2255.²² Under § 2254 a state prisoner can challenge his state court conviction or sentence in federal court based on constitutional grounds.²³ Section 2255 is the equivalent of § 2254, but offers federal prisoners the chance to challenge their federal convictions or sentences.²⁴ Reform of these modern statutes used by practitioners today began as early as the 18th century, and has involved great expansion, and then contraction, of judicial power in implementing the writ.²⁵

The Judiciary Act of 1789 granted courts federal jurisdiction to issue writs of habeas corpus, which originally only extended to federal prisoners.²⁶ In 1867, Congress extended the authorization of courts to “grant the writ ‘in all cases where any person may be restrained of his or her liberty in violation of the constitution [sic], or of any treaty or law of the United States.’”²⁷ This act of Congress effectively made the writ of habeas corpus not only available to federal prisoners, but state prisoners as well.²⁸

This expansive availability to both federal and state prisoners brought on a series of phases in habeas corpus that drastically expanded courts’ power in exercising the writ. Originally, a federal court’s authorization to issue the writ of habeas corpus was limited to that in accordance with the common law; federal court examination was limited to determining the jurisdiction of the sentencing court.²⁹ Further, the Supreme Court declined to encroach on state court judgments of conviction.³⁰ In *Ex parte Parks*, the Court determined that where a sentencing court properly held jurisdiction over a case, the writ could not lie.³¹ However, this decision did not limit the established notions of supremacy; when a judgment was unconstitutional on its face, the writ would lie.³²

Gradually, the scope of review was expanded to assess what were previously thought of as “unreviewable decisions involving fundamental rights.”³³ The Court began to hold that constitutional claims may be reviewed on habeas corpus, relying on the theory that unconstitutional deprivations necessarily stripped a trial court of jurisdiction.³⁴ After the legislation

22. Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, CHAMPION, June 2005, at 16, 17.

23. *Id.*

24. *Id.*

25. WRIGHT ET AL., *supra* note 21, § 4261.

26. Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 563–64 (1994).

27. WRIGHT ET AL., *supra* note 21, § 4261.

28. *Id.*

29. Margolis, *supra* note 26, at 564.

30. 39 AM. JUR. TRIALS *Historical Aspects and Procedural Limitations of Federal Habeas Corpus* § 4 (1989).

31. *Id.*

32. *Id.*

33. Margolis, *supra* note 26, at 564.

34. *Id.*

extending the writ to state prisoners passed in 1867, this broad interpretation of reviewing constitutional claims allowed for an expansive use of the writ for any incarcerated person, whether held federally or by a state, when the challenge was purely constitutional.³⁵

Several landmark decisions by the Supreme Court progressively produced the modern era of habeas corpus, when the Court expanded its use to bring a state prisoner's claim before federal courts. In *Frank v. Mangum*, the Court indicated in dictum that if a state appellate court's procedures were found inadequate to fully consider a prisoner's rights, the Court could properly examine the merits of such a case.³⁶ In *Brown v. Allen*, the Court held that even when a state's highest court has fully adjudicated a case, a petitioner is entitled to full and fair consideration of his constitutional claims on federal habeas corpus, and a federal court may consider both law and fact on rehearing.³⁷ By far, the most expansive and far-reaching expansion of federal habeas relief came from the Court's holding in *Fay v. Noia* that a federal court may, and should, consider a constitutional claim on habeas review even if a petitioner failed to fully exhaust state appellate procedures, if at the time the issue was raised in a federal court state review options were no longer available.³⁸

In *Fay v. Noia*, a new test emerged to examine procedural defaults of prisoner's claims. In *Fay*, even though the petitioner was not said to have committed a "deliberate bypass" of the state courts, the Court's decision created such a test to determine whether a procedural default had in fact occurred to effectively bar a prisoner's constitutional claim.³⁹ The Court held that a procedural default (a failure to raise a claim below in a state court that would bar a federal court from subsequently hearing that same claim) would not apply unless it could be shown that a prisoner had "deliberately bypassed" a state court's opportunity to hear the claim, by intentionally failing to raise a constitutional issue until he or she could gain access to a federal court through habeas corpus petition.⁴⁰ Proving a deliberate bypass, rather than an accidental omission, had occurred was left to the court to decide, creating an unpredictable application of habeas corpus.⁴¹

This drastic expansion of the writ of habeas corpus continued steadily until the 1976 decision in *Stone v. Powell*.⁴² In *Stone*, where two prisoners were convicted based on evidence obtained through an illegal search, the majority held that since the state court had fully and fairly litigated the Fourth Amendment claim, a federal court may not hear it.⁴³ Despite

35. *Id.*

36. *Id.* at 564-65.

37. *Id.* at 565.

38. *Id.* at 565-66.

39. *Id.* at 566.

40. *Id.*

41. *Id.* at 568.

42. *Id.* at 566.

43. *Id.* at 567.

agreement amongst the Court that these two prisoners' Fourth Amendment rights had been severely violated, the Court determined that their constitutional right to challenge such claims was exhausted once a state court had fully litigated the issue.⁴⁴ Justice Brennan, in his dissenting opinion, pointed out that this method of eliminating review of constitutional claims by federal courts "effectively cast the district courts sitting in habeas in the role of surrogate Supreme Courts."⁴⁵

Finally, along came the pivotal case *Wainwright v. Sykes*, putting a much-desired end to the "deliberate bypass" test from *Fay*, and reigning in the unfettered judicial power over petitions for federal habeas.⁴⁶ *Sykes* ushered in a new test that is still used in modern habeas cases today to assess whether a procedural default has occurred, and whether a court may nonetheless hear that procedurally defaulted claim.⁴⁷ In *Sykes*, the Court reduced the effects of *Fay* by limiting the basis on which a state prisoner can bring a constitutional claim in his or her habeas petition if a state court has already heard the issue.⁴⁸ *Sykes* initially precludes habeas relief, *unless* a state prisoner can demonstrate both a "cause" for his failure to assert a claim, or to timely bring such claim in a lower state court, and "actual prejudice" resulting from the alleged constitutional deprivation.⁴⁹

Today, the most significant use of the statutes is issuance of the writ when a prisoner is held in violation of the federal Constitution or federal laws.⁵⁰ A petitioner must satisfy the *Sykes* "cause and prejudice" standard to overcome any procedural defaults.⁵¹ The Supreme Court has noted in past cases that a failure to satisfy the "cause" prong is fatal to a petitioner's case.⁵² What may satisfy the "cause" prong of the *Sykes* standard to allow a petitioner to overcome a procedural default of a claim has evolved over the years and, most pertinently to this note, is detailed by a trilogy of cases discussed below: *Coleman*, *Martinez*, and *Davila*. However, before a discussion of these pivotal cases, it is important to grasp the doctrines of exhaustion and procedural exhaustion, and to appreciate the procedural differences between the two concepts.

44. *Id.* at 568.

45. *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 511–12 (1976) (Brennan, J., dissenting)).

46. *Id.* at 568–69.

47. *Id.* at 569.

48. *Id.*

49. *Id.*

50. WRIGHT ET AL., *supra* note 21, § 4261.

51. Margolis, *supra* note 26, at 569.

52. *Id.* at 570.

II. JUDICIALLY-CREATED PROCEDURAL HURDLES: THE BASIC NOTIONS OF EXHAUSTION AND PROCEDURAL DEFAULT

A. Exhaustion

The exhaustion requirement in federal habeas corpus mandates full and fair presentation of claims under § 2254 to all available levels of state courts for review before presenting the exact same claim to a federal court, which may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted all available state remedies.⁵³ “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.”⁵⁴ The “mere similarity of [state and federal] claims” is insufficient for fair presentation.⁵⁵ A petitioner does not fairly present a federal claim “by present[ing] the state courts only with the facts necessary to state a claim of relief.”⁵⁶ General appeals to broad constitutional principles are insufficient to establish fair presentation for exhaustion purposes.⁵⁷

These decisions are supported by well-established principles of comity between the state and federal governments.⁵⁸ The Supreme Court has a strong aversion to original consideration of federal claims that were not made clearly apparent to the state courts, which are equally as capable of reviewing and resolving both federal and state-law issues.⁵⁹ “The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”⁶⁰ Fair presentation protects our country’s adversarial system, promotes established principles of comity, and enhances administration of justice in the state appellate courts.⁶¹

B. Procedural Default

The procedural-default doctrine is ancillary to the exhaustion requirement.⁶² A “procedural default” is a distinct and separate sanction for failing to fully exhaust remedies, and is therefore given a separate

53. 28 U.S.C. § 2254(b)–(c) (2012); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Wagner v. Smith*, 581 F.3d 410, 418–19 (6th Cir. 2009).

54. *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995).

55. *Id.* at 366.

56. *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996).

57. *Id.* at 162.

58. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000).

59. *Id.*

60. *United States v. Brocksmith*, 991 F.2d 1363, 1366 (7th Cir. 1993) (quoting *Carducci v. Regan*, 741 F.2d 171, 177 (D.C. Cir. 1983)).

61. *Edwards*, 529 U.S. at 452.

62. *Edwards*, 529 U.S. at 452–53.

denomination as it has its own administrative procedures.⁶³ If a state court was never fully and fairly presented a federal claim, and a state-court remedy is no longer available, commonly because of statutes of limitations on appeals, the claim is technically exhausted but procedurally barred.⁶⁴ Additionally, if a constitutional claim is presented to federal courts resting on one theory, but was presented to a state court resting on a separate theory, the claim is procedurally defaulted.⁶⁵ Further, “reconsideration of [a] federal issue on federal habeas [is curtailed] as long as the state court explicitly invokes a state procedural bar rule as a . . . basis for decision.”⁶⁶ As an illustration, in *Harris v. Reed*, a waiver supplied an adequate and independent state-law ground to bar federal habeas review, notwithstanding a petitioner demonstrating cause and prejudice.⁶⁷ A claim that has been procedurally defaulted is barred from federal review, unless a petitioner can satisfy the *Sykes* “cause and prejudice” standard to excuse the default.⁶⁸

Just as the doctrine of exhaustion has roots respecting comity, the purpose of the procedural default doctrine serves the notions of finality and federalism.⁶⁹ “[T]he federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds.”⁷⁰ *Sykes* allows for “cause” to lie and excuse a procedural default, even when a state procedural ground bars the claim in federal court. What constitutes “cause” under the *Sykes* standard has been the subject of a series of cases, including *Coleman*, *Martinez*, and *Davila*.

III. A TRILOGY OF CASES MOLDING THE WAYS THAT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MAY SERVE AS “CAUSE” FOR ANOTHER PROCEDURALLY DEFAULTED CLAIM.

A. *Coleman v. Thompson*

Justice O’Connor, writing for the Court, coined *Coleman* as a case concerning federalism, about “the respect that federal courts owe to the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus.”⁷¹ A Virginia County court convicted Roger Keith Coleman of rape and capital murder.⁷² The trial court sentenced Coleman to

63. 20 Am. Jur. Trials 1 (Originally published in 1973).

64. *Coleman v. Thompson*, 501 U.S. 722, 729-30, 752-53 (1991).

65. *Wong v. Money*, 142 F.3d 313, 321-22 (6th Cir. 1998) (ineffective assistance of counsel claim was procedurally defaulted when petitioner’s argument in state courts relied upon different grounds than argument on habeas appeal).

66. *Harris v. Reed*, 489 U.S. 255, 264 (1989).

67. *Id.*

68. 20 Am. Jur. Trials 1 (Originally published in 1973).

69. *Id.*

70. *Id.* citing *Dretke v. Haley*, 124 S. Ct. 1847 (2004).

71. *Coleman v. Thompson*, 501 U.S. 722, 727 (1991).

72. *Id.*

death, and the Virginia Supreme Court affirmed.⁷³ In his state habeas claim, Coleman raised several constitutional claims, not raised before on direct appeal, all of which failed.⁷⁴ Eventually, Coleman filed for appeal of his state habeas claim to the Virginia Supreme Court.⁷⁵ The parties filed briefs addressing the Commonwealth's motion to dismiss for his untimely filing of appeal, as well as the merits of the claims; the Virginia Supreme Court ultimately dismissed Coleman's appeal.⁷⁶

Coleman filed a petition for writ of habeas corpus in the United States District Court for the Western District of Virginia, presenting four federal constitutional claims, all of which he previously raised on direct appeal to the Virginia Supreme Court, as well as seven additional claims that were raised in the first instance in his state habeas claim.⁷⁷ The District Court held that "by virtue of the dismissal of his appeal by the Virginia Supreme Court in state habeas, Coleman had procedurally defaulted the seven claims."⁷⁸ Nonetheless, the District Court addressed the merits of all eleven claims, and denied petition.⁷⁹ The United States Court of Appeals for the Fourth Circuit affirmed.⁸⁰ The Fourth Circuit held that Coleman's seven claims that were presented for the first time in his state habeas proceeding were all procedurally defaulted because of the failure for timely filing of the appeal.⁸¹ However, Coleman argued that the Virginia Supreme Court did not specify whether their dismissal was based on a procedural default, and therefore it should not be treated as such without clear indication.⁸² The Fourth Circuit disagreed, and held that the Virginia Supreme Court's decision was based "on independent and adequate state grounds and that Coleman had not shown cause to excuse the default."⁸³ Therefore, Coleman's claims presented only in his state habeas proceeding were held procedurally barred.⁸⁴

The United States Supreme Court granted certiorari to determine the relationship between state procedural defaults and federal habeas review. The Court held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted all available state remedies as to any of his federal claims.⁸⁵ The exhaustion requirement is grounded in principles of comity, where "the States should have the first opportunity to address and

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 728.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 728-29.

84. *Id.* at 729.

85. *Id.* at 731.

correct alleged violations of state prisoner's federal rights."⁸⁶ So when a prisoner or a habeas petitioner fails to exhaust all State procedural requirements for presenting his federal claims, he has denied the state court the first opportunity to address those claims and provide an independent and adequate state ground to support the judgment.⁸⁷ Without applying the independent and adequate state ground doctrine in habeas proceedings, petitioners would attempt to avoid exhaustion by defaulting their federal claims in state court.⁸⁸ Applying the independent and adequate state ground doctrine gives the states a shot at correcting mistakes in all federal habeas cases.⁸⁹

In his petition, Coleman stated that there *was* in fact cause for his default caused by the untimely filing of his state habeas appeal.⁹⁰ Coleman claimed that the late filing was the result of attorney error on the part of his post-conviction counsel, and that this should have excused the procedural default in his federal habeas proceeding.⁹¹ Essentially, Coleman was putting before the Court, the idea that ineffective counsel's failure to timely raise his claims should serve as "cause" within the *Sykes* standard to excuse the underlying procedural default of those seven claims brought initially in his state habeas appeal.

Until this case, the Court provided only the narrowest of exceptions to excuse a default based on attorney error.⁹² "So long as a defendant is represented by counsel, whose performance is not constitutionally ineffective, under the standard established in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."⁹³ The Court further noted that there is no constitutional right to counsel in a state post-conviction proceeding; therefore, the error cannot be constitutionally ineffective, and cannot serve as "cause" needed to excuse a procedural default.⁹⁴ The *Coleman* Court held that the existence of cause for a procedural default must turn on an objective external factor that prevented their counsel from complying with a State's procedural rules, such as "interference by officials", or "a showing that the factual or legal basis for a claim was not reasonably available to counsel."⁹⁵ But the Court clearly stated "[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

86. *Id.*

87. *Id.*

88. *Id.* at 732.

89. *Id.*

90. *Id.* at 752.

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Murray v. Carrier*, 477 U.S. at 487).

94. *Id.* at 752.

95. *Id.* at 753.

of attorney error.”⁹⁶ Thus, the Court effectively stated that Coleman’s habeas attorney’s error could only serve as cause to excuse the procedural default of his seven claims if that attorney’s error was due to external factors, rather than plain attorney error.

The Court distinguished this by stating that if attorney error constitutes ineffective assistance of counsel, the Sixth Amendment would require that error to constitute cause for a default.⁹⁷ “[I]t is not the gravity of the attorney’s error that matters, but that it constitutes a violation of petitioner’s right to counsel, so that the error must be seen as an external factor.”⁹⁸ Therefore, in a direct appeal proceeding, where counsel is guaranteed by our Constitution, if a petitioner defaults a claim as the result of ineffective assistance of counsel or attorney error, it is the State that is responsible for bearing that cost of the resulting default, not the prisoner.⁹⁹ The *Coleman* Court found “a different allocation of costs” occurs in proceedings where the State has no responsibility to ensure that counsel is provided to a prisoner, such as post-conviction proceedings, and the prisoner must bear the cost in that instance.¹⁰⁰ In such cases where no right to counsel is guaranteed, such as Coleman’s state habeas proceeding, the Court effectively held that ineffective counsel could not serve as “cause” to excuse a procedural default, absent a clear violation of a petitioner’s constitutional rights.

However, the unique structure of Virginia’s appeals process gave the Court pause to consider another aspect of when a claim for ineffective assistance of counsel could be brought. Coleman’s claims that were brought in his state habeas proceeding included ineffective assistance of counsel during trial, sentencing, and appeal.¹⁰¹ Coleman asserted that these claims *must* constitute cause, because under Virginia law ineffective assistance of counsel claims, related to counsel’s conduct during trial or appeal, could only be brought in a state habeas proceeding.¹⁰² He argued that his state habeas attorney’s error in failing to timely file his claims in his state habeas proceeding, the first forum in which his claims could be raised, justified cause.¹⁰³

In response, the Court reiterated, “Counsel’s ineffectiveness will constitute cause only if it is an independent constitutional violation.”¹⁰⁴ There is no right to counsel in a state post-conviction or collateral proceeding, and one state court has already addressed Coleman’s claims: the state habeas trial

96. *Id.*

97. *Id.* at 754.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 756.

102. *Id.*

103. *Id.*

104. *Id.* at 755.

court.¹⁰⁵ Further, the Court answered the question of whether Coleman had a constitutional right to counsel on appeal from a state habeas trial court judgment in the negative.¹⁰⁶ Because Coleman, just as any other criminal defendant, had no right to counsel beyond his first appeal, he could not be said to have a right to counsel in appealing a state collateral determination of his claims of trial error.¹⁰⁷ Without a right to counsel in his state habeas proceeding, the *Coleman* Court proclaimed any attorney error resulting in a default of his claims cannot constitute cause to excuse a default in federal habeas.¹⁰⁸

Essentially, the *Coleman* Court determined his state habeas counsel's error was not a violation of a constitutional right and, therefore, could not serve as cause to overcome the procedurally defaulted claims. Because the error by the attorney was not a violation of Coleman's constitutional rights and was instead a late filing error, the ineffectiveness of counsel was not severe enough to serve as "cause" under the *Sykes* standard. Without "cause" to overcome the procedural default, Coleman's claims of ineffective assistance of trial and appeal counsel could not be heard.

B. Martinez v. Ryan

The harsh result in *Coleman* was later visited again in *Martinez v. Ryan* when a new state procedural wrinkle was introduced to the Court. In *Martinez v. Ryan*, the United States Supreme Court announced a narrow exception to their decision from *Coleman*; ineffective assistance by a prisoner's state post-conviction counsel may serve as cause to overcome a procedural default of a claim of ineffective assistance of trial counsel, where the State requires a defendant to bring that claim in state post-conviction proceedings, rather than on direct appeal, in the first instance.¹⁰⁹

This precise scenario occurred in *Martinez* and drove the Court to create a narrow exception to ensure that claims of ineffective assistance of counsel, where it is constitutionally guaranteed, have their chance to be heard. The state of Arizona does not allow a prisoner to bring claims of ineffective assistance of trial counsel on direct review.¹¹⁰ Instead, the prisoner must bring those claims in a state collateral proceeding in the first instance.¹¹¹ In *Martinez*, petitioner's post-conviction counsel did not raise the claim of ineffective assistance of trial counsel, and even stated that she "found no meritorious claims helpful to petitioner."¹¹² During his federal habeas review,

105. *Id.*

106. *Id.*

107. *Id.* at 756-57.

108. *Id.* at 757.

109. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012); see also *Trevino v. Thaler*, 569 U.S. 413 (2013).

110. *Id.* at 1313.

111. *Id.*

112. *Id.*

petitioner sought to bring his claims of ineffective assistance of both trial and state post-conviction counsel.¹¹³ Petitioner asserted that because the state post-conviction proceeding was the first place to challenge his conviction on the grounds of ineffective assistance of trial counsel, he had a constitutional right to an effective attorney in those post-conviction proceedings.¹¹⁴ Essentially, petitioner asked, “whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim, when the claim was not properly presented in state court due to an attorney’s errors in an initial-review collateral proceeding.”¹¹⁵ Martinez hoped that the Court would consider his procedurally defaulted claim of ineffective assistance of trial counsel, with his ineffective state habeas counsel’s actions serving as the necessary cause.

Martinez was convicted of two counts of sexual conduct with a minor.¹¹⁶ On appeal, Martinez was assigned new counsel, who brought several claims on his behalf.¹¹⁷ However, pursuant to Arizona state law, his appellate counsel was unable to bring claims of ineffective assistance of trial counsel on direct appeal.¹¹⁸ After his appellate counsel initiated a post-conviction claim for Martinez, counsel made no claim that his trial counsel was ineffective.¹¹⁹ Further, the state trial court allowed Martinez forty-five days in which to bring a *pro se* petition for post-conviction relief.¹²⁰ However, Martinez failed to bring such a claim because he was unaware that his appellate counsel had initially filed collateral proceedings at all.¹²¹ Martinez was essentially unaware that his case continued any further than his original appeal, because counsel had failed to inform Martinez of the post-conviction filings. The state trial court therefore dismissed his action for post-conviction relief, the Arizona Court of Appeals affirmed his conviction, and the Arizona Supreme court denied review.¹²²

Represented by new counsel, Martinez attempted to file a second notice of post-conviction relief with an Arizona trial court, alleging his trial counsel had been ineffective for failing to challenge the prosecution’s evidence.¹²³ Essentially, Martinez attempted to do what his initial post-conviction counsel failed to do, timely file his claim of ineffective assistance of trial counsel. The court dismissed his petition, relying on an Arizona rule barring relief on a claim that could have been raised in a previous collateral

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1314.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

proceeding.¹²⁴ The Arizona trial court stated that Martinez should have brought these claims in his first post-conviction proceeding and, therefore, denied relief.¹²⁵ The Arizona Supreme Court declined review.¹²⁶

Finally, Martinez sought relief by filing a petition for a writ of habeas corpus with the United States District Court for the District of Arizona, raising his claims of ineffective assistance of trial counsel.¹²⁷ While he acknowledged that his claims were barred under state procedural rules of defaults, Martinez argued that he had cause to overcome such default.¹²⁸ Martinez claimed that “[h]is first post-conviction counsel was ineffective in failing to raise any claims in the first notice of post-conviction relief and in failing to notify Martinez of her actions.”¹²⁹ The District court denied the petition, and the Court of Appeals for the Ninth Circuit affirmed relying on *Coleman*; “absent a right to counsel in a collateral proceeding, an attorney’s errors in the proceeding do not establish cause for a procedural default.”¹³⁰ As noted above, the *Coleman* Court required a claim of ineffective counsel to rise to the level of constitutional violation before it may serve as cause to excuse a procedural default. The *Coleman* Court held that when counsel is not constitutionally guaranteed, ineffectiveness of such counsel necessarily could not violate one’s constitutional rights. The United States Supreme Court granted cert to determine whether there was an exception reserved for “those cases ‘where ‘state collateral review is the first place a prisoner can present a challenge to his conviction.’”¹³¹

The *Martinez* Court stated that the *Coleman* Court suggested, “the Constitution may require States to provide counsel in initial-review collateral proceedings because ‘in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.’”¹³² These cases, where a prisoner is required to bring claims of ineffective assistance of counsel claims in the first instance in a collateral proceeding, are their “one and only appeal” of such claims.¹³³ The *Martinez* Court refused to decide whether this exception exists as a constitutional matter, and instead narrowed the question to “whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.”¹³⁴ The *Martinez* Court ultimately provided that a narrow exception to *Coleman* must exist where “[i]nadequate assistance of counsel at initial-review collateral proceedings

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1314-15.

130. *Id.* at 1315.

131. *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 755 (1991)).

132. *Id.*

133. *Id.*

134. *Id.*

may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."¹³⁵

The *Martinez* Court began by recognizing that the rule created by the *Coleman* Court did not present the occasion to apply this exact principle, to a case where attorney errors in initial-review collateral proceedings may qualify as cause for procedural default.¹³⁶ Several distinguishing factors between the two cases make this apparent. *Coleman* alleged a failure of counsel on appeal from an initial-review collateral proceeding, while *Martinez* alleged failure of counsel on initial-review.¹³⁷ Additionally, *Coleman*'s claims had been addressed by the state habeas court, while Arizona law mandated *Martinez*'s claims be brought in an initial-review collateral proceeding in the first instance.¹³⁸ "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."¹³⁹ Further, without counsel's error in an initial-review collateral proceeding being able to serve as cause to excuse a procedural default in a federal habeas proceeding, no court will ever review petitioner's claims of ineffective assistance of trial counsel, where counsel is constitutionally guaranteed.¹⁴⁰

The *Martinez* Court recognized that this does not apply to all post-conviction proceedings; only those where the initial-review collateral proceeding is the first designated proceeding where a prisoner can raise a claim of ineffective assistance at trial.¹⁴¹ In these instances, such collateral proceeding is functioning as a prisoner's direct appeal of his ineffective assistance of counsel claims.¹⁴² If a prisoner is denied counsel on direct appeal, they have been denied fair process and the opportunity to adjudicate the merits of his claims.¹⁴³ The *Martinez* Court held that the same logic applies in cases where ineffective assistance of trial counsel claims must be brought in initial-review collateral proceedings.¹⁴⁴ Without counsel, a prisoner would be ill equipped to perform the necessary investigative work, unversed with trial strategy, unfamiliar with applicable law or procedural rules.¹⁴⁵ "While confined in prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record."¹⁴⁶

135. *Id.*

136. *Id.* at 1316.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1316-17.

142. *Id.* at 1317.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

The *Martinez* Court emphasized the importance of ineffective assistance of trial counsel claims and the requirement that effective counsel be provided in order for a petitioner to effectively bring such claims. Recognizing that a prisoner's right to trial counsel is a foundational requirement of the adversary system to ensure the prosecution's case is properly tested, the *Martinez* Court noted that an initial-review collateral proceeding undertaken without counsel, or with ineffective counsel, may not properly ensure that sufficient consideration is given to a potentially substantial claim for ineffective assistance of trial counsel.¹⁴⁷ Therefore, when a state's procedural rules mandate that a claim of ineffective assistance of counsel claim be brought up, in the first instance, in a post-conviction setting, ineffective or absent counsel in the post-conviction setting may now serve as the "cause" necessary to overcome a procedural default of those original claims of ineffectiveness in a federal habeas case.¹⁴⁸

C. *Davila v. Davis*

In *Davila v. Davis*, the Supreme Court considered whether the particular exception presented in *Martinez* should also be extended to a defaulted claim of ineffective assistance of appellate counsel, and ultimately declined to extend.¹⁴⁹ Recognizing that an extension of "cause" was given to claims of ineffective assistance of trial counsel, the Court now reached the question of whether a claim of ineffective assistance of appellate counsel brings about the same constitutional concerns that drove the Court to excuse a procedural default based on post-conviction counsel's ineffectiveness to initially bring such claim.

The jury in *Davila* convicted the Petitioner of capital murder and sentenced him to death.¹⁵⁰ Despite objections by petitioner's trial counsel, the trial court instructed the jury on transferred intent after the jury requested clarification.¹⁵¹ On appeal, petitioner's appellate counsel did not challenge the instruction on transferred intent, and the Texas Court of Criminal Appeals affirmed the conviction and sentence.¹⁵² The Petitioner sought habeas relief in Texas state court, where his state habeas counsel did not challenge the jury instruction or the failure of his appellate counsel to raise the issue on direct appeal.¹⁵³ The Texas Court of Criminal Appeals denied relief.¹⁵⁴

Petitioner sought federal habeas relief in Federal District Court, arguing that his appellate counsel provided ineffective assistance by failing

147. *Id.* at 1318.

148. *Id.*

149. *Davila v. Davis*, 137 S. Ct. 2058, 2063 (2017).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

to challenge the jury instruction.¹⁵⁵ Invoking both *Martinez* and *Trevino*, Petitioner argued that his state habeas counsel's ineffectiveness provides cause to excuse the procedural default on his claim of ineffective assistance of appellate counsel.¹⁵⁶ The District Court denied the petition concluding that *Martinez* and *Trevino* do not apply to excuse the procedural default of Petitioner's claim for ineffective assistance of appellate counsel.¹⁵⁷ The Petitioner sought a writ of certiorari asking the Supreme Court to reverse the Fifth Circuit, seeking to extend *Martinez* and *Trevino* to his claim.¹⁵⁸ The Supreme Court affirmed the Fifth Circuit and denied such an extension of the rule established in *Martinez*.¹⁵⁹

The *Davila* Court rejected an expansion of *Martinez* because to do so would "replace the rule of *Coleman* with the exception of *Martinez*."¹⁶⁰ *Coleman* provided that attorney error committed in the course of state post-conviction proceedings, where the constitution does not guarantee the right to counsel, cannot supply cause to excuse a procedural default that occurs in those proceedings.¹⁶¹ *Martinez* qualified, rather than replaced, *Coleman* by creating an equitable exception to procedurally defaulted claims of ineffective assistance of trial counsel only when a state mandates that those claims be raised in the first instance in an initial-review collateral proceeding rather than on direct appeal.¹⁶²

The Constitution guarantees the right to a criminal trial, but does not guarantee the right to an appeal at all.¹⁶³ The *Martinez* court was primarily concerned with a defendant's ability to have trial errors reviewed to reflect the importance of the constitutional right to the effective assistance of trial counsel.¹⁶⁴ The *Davila* Court emphasized that a claim of ineffective assistance of appellate counsel does not equate to trial error, and therefore found that ineffective appellate counsel does not raise the same constitutional concerns as were found in *Martinez*.¹⁶⁵

The *Martinez* Court, by recognizing this narrow exception to provide for cause when a state explicitly or implicitly requires claims of ineffective assistance of trial counsel be brought during initial-review collateral proceedings, made an equitable decision in light of the unique importance of protecting trial rights.¹⁶⁶ This exception was intended to be a narrow one,

155. *Id.*

156. *Id.* at 2063-64.

157. *Id.* at 2064.

158. *Id.*

159. *Id.*

160. *Id.* at 2066.

161. *Coleman*, 501 U.S. at 755.

162. *Davila*, 137 S. Ct. at 2065.

163. *Id.* at 2066.

164. *Id.*

165. *Id.*

166. *Id.*

reflecting the importance of such trial rights specifically.¹⁶⁷ By refusing to expand the *Martinez* exception, the *Davila* Court proclaimed that it does nothing more than respect that intention.¹⁶⁸

The Petitioner in *Davila* then argued that his claim for ineffective assistance of appellate counsel might never be reviewed if the rule in *Coleman* were not expanded to fit his case.¹⁶⁹ The *Davila* Court rejected this argument stating that ineffective assistance of appellate counsel is not a trial error, therefore the constitutional concerns in *Martinez* regarding a defendant's chance to have a trial error reviewed do not apply.¹⁷⁰ While these claims may be viable, and brought before a court, the *Davila* Court held that such a claim does not carry the same constitutional weight as a trial error and therefore does not necessarily require review as a violation of a constitutional right would.¹⁷¹

The chief concern the *Martinez* Court addressed by creating the narrow exception, was that a claim of ineffective assistance of trial counsel, a trial error, would escape review if the State required that defendant's wait to bring the claim, in the first instance, in post-conviction proceedings.¹⁷² Typically, the first time a trial error could be reviewed is on direct appeal, except when a state court mandates it be brought first in the post-conviction proceedings.¹⁷³ If post-conviction counsel fails to raise the claim when it is first available to be raised, the claim will completely evade state review.¹⁷⁴ Additionally, "because attorney error in a state post-conviction proceeding does not qualify as cause to excuse a procedural default under *Coleman*, no federal court could consider the claim either."¹⁷⁵ Essentially, by eliminating the typical first chance review on initial appeal, and mandating review on post-conviction appeal, a state is moving a constitutionally guaranteed appeal outside of the arena where counsel is constitutionally guaranteed. Further, because a state has moved review to a stage in litigation where counsel is not constitutionally guaranteed, and the *Coleman* Court held that attorney error in such settings does not qualify to serve as "cause" to excuse a procedural default, without the exception from *Martinez*, these claims of ineffective trial counsel have the potential of falling through the crack of review. The *Martinez* court recognized the danger of a constitutional right evading review, and created this narrow exception to provide for trial error review in the narrowest of circumstances.¹⁷⁶

167. *Id.* 2066-67.

168. *Id.* at 2067.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

The *Davila* Court held that a claim of ineffective assistance of appellate counsel does not pose the same risk of evading review as a trial error does.¹⁷⁷ The Court reasoned that a claim of ineffective appellate counsel based on a preserved trial error means that at least one court, the trial court, has considered the claim on the merits, even though appellate counsel failed to raise it again.¹⁷⁸ If trial counsel failed to preserve an error, the *Davila* Court held that Petitioner's proposed extension of the rule would still not necessarily give access to federal review of that error either.¹⁷⁹ To be effective, appellate counsel is only required to raise arguments most likely to succeed on appeal.¹⁸⁰ Even if the trial error is unpreserved, that error will not necessarily be plainly stronger than those errors that were preserved, thus appellate counsel is not required to bring every non-frivolous claim to be effective.¹⁸¹ Essentially, the Court stated it is unlikely a defendant could make a substantial claim for ineffective assistance of appellate counsel because in most instances where the trial court did not rule on a preserved error, appellate counsel is not required to raise every argument to be considered effective.¹⁸² Finally, if a trial error goes unpreserved and was so obvious that appellate counsel is constitutionally required to raise it on appeal, it is likely the trial counsel's ineffective assistance caused the error, and the defendant could then invoke *Martinez* or *Coleman* instead.¹⁸³

Further, the *Davila* Court found the equitable considerations from *Martinez* to be inapplicable in the present case.¹⁸⁴ In *Martinez*, the State purposefully moved trial counsel ineffectiveness claims outside of the direct-appeal process, where the constitution requires counsel, and into the realm of post-conviction proceedings where the constitution does not guarantee counsel.¹⁸⁵ The *Martinez* court held that it would be inequitable for courts to refuse to hear claims of ineffective trial counsel when defendants are procedurally mandated to bring them first in a proceeding where counsel is not guaranteed to assist in raising it.¹⁸⁶

In contrast, the *Davila* Court reasoned that claims of ineffective assistance of appellate counsel, by nature, could not be presented until after the end of the direct appeal.¹⁸⁷ "Put another way, they *necessarily* must be heard in collateral proceedings, where counsel is not constitutionally guaranteed."¹⁸⁸ The fact that these claims are heard in proceedings where

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 2068.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

counsel is not constitutionally required is an inherent function of the claim, and not a choice of the State; therefore, the Court found that the same equitable concerns from *Martinez* are inapplicable.¹⁸⁹

IV. THE INADVERTENT GAP CREATED BETWEEN *MARTINEZ* AND *DAVILA*, REQUIRING A SLIGHT EXTENSION OF *MARTINEZ*

The majority opinion's decision to decline to extend the *Martinez* exception to all claims of ineffective assistance of counsel may prove too broad and prevent genuine trial errors from receiving review, therefore denying a prisoner of his constitutional right to a fair trial. There appears to be a gap between the rules of *Martinez* and *Davila*, where a small number of cases will fit, and require an extension of *Martinez* to claims of ineffective assistance of appellate counsel. These are the cases where a claim of ineffective assistance of appellate counsel does not rely on an underlying trial counsel error, and both appellate and post-conviction counsel's error in failing to raise results in a violation of a petitioner's constitutional right to a fair trial. Further, these are the claims that were not available for a trial court to hear, and now face the potential of never being heard if both appellate counsel, and post-conviction counsel, fails to raise it. These upcoming cases likely to reach the Court should, in keeping with the historic spirit of the writ to protect from unconstitutional confinement and the use of the "cause and prejudice" standard, be granted a *Martinez* extension to close the gap between *Davila*, to ensure all trial errors are properly heard.

Writing for the dissent, Justice Breyer believed the *Davila* Court missed the point when it said that at least one court will have considered the underlying legal error.¹⁹⁰ Breyer's illustrative dissent points toward this gap of cases that are not provided for between *Martinez* and *Davila*. Breyer views the defendant's complaint in *Davila* as regarding the ineffectiveness of his appellate counsel, not about the underlying trial error.¹⁹¹ He writes that claims of ineffectiveness, likely based on failure to appeal a trial court's erroneous decision, do not help the defendant correct the trial court's errors.¹⁹² Those errors form the basis of the ineffectiveness claim, but the main claim is still the ineffectiveness of appellate counsel's failure to raise such appeals.¹⁹³ Justice Breyer deems that without extending the exception from *Martinez*, a court will never review the ineffectiveness of their appellate counsel.¹⁹⁴

The more intriguing point brought out by Justice Breyer's dissent deals with claims of ineffective assistance of appellate counsel, where no

189. *Id.*

190. *Davila*, 137 S. Ct. at 2073 (J. Breyer dissenting).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

error was committed by trial counsel at all. Essentially, the *Davila* Court's holding created a gap by inadvertently overlooking claims of ineffective assistance of appellate counsel that do not rely on an underlying claim of ineffective trial counsel. When an error in trial occurs, but does not rest on an error committed by trial counsel, appellate counsel must bring it in the first instance on direct appeal. It is these claims of ineffective assistance of appellate counsel, that do not rest on a trial attorney's error, that simply arose through trial, which appellate counsel should have brought up to be heard initially on direct appeal, but for some reason failed to do so rendering counsel ineffective. The gap is not created by claims that appellate counsel made a small error, where it is not of a constitutional magnitude, for example by failing to raise a fact that trial counsel did not properly raise; the gap is found where appellate counsel makes a constitutional error in failing to bring up a severe trial error that should have been reviewed at least once before post-conviction proceedings, and could have only been reviewed in the first instance on direct appeal.

The concern focuses on those errors which amount to a violation of the constitutional guarantee of a fair trial. The majority in *Davila* was correct to reject those claims of ineffective appellate counsel that merely rely on error committed by trial counsel, as those ultimately were either heard by the trial court when preserved, or do not amount to a constitutional violation of the right to counsel when appellate counsel chooses not to raise them. The majority also correctly focused on the need to reserve the *Martinez* exception for significant trial concerns to protect a constitutionally guaranteed fair trial. However, when those two concerns merge, appellate counsel's error amounting to a violation of a constitutionally guaranteed fair trial, then an extension of *Martinez* to claims of ineffective assistance of appellate counsel becomes not only appropriate, but necessary.

Justice Breyer, illustrates that there will be some cases where no underlying trial error serves as the basis for appellate counsel's ineffectiveness.¹⁹⁵ "Supposed that, during the pendency of the appeal, appellate counsel learns of a *Brady* violation, juror misconduct, judicial bias, or some similar violation whose basis was not known during the trial."¹⁹⁶ If appellate counsel fails to pursue such claims, that ineffectiveness now serves as the basis for the claim, and without the *Martinez* exception extension, no court will hear this appellate counsel ineffectiveness claim.¹⁹⁷ No error by trial counsel here serves as the basis for appellate counsel's ineffectiveness, however these are trial errors that amount to a constitutionally unfair trial.

Justice Breyer's dissent helpfully provides a vivid example, which he believes demonstrates a case where an extension of *Martinez* to claims of ineffective assistance of appellate counsel is required:

195. *Id.*

196. *Id.*

197. *Id.*

Now suppose that a prisoner claims that the trial court made an important error of law, say, improperly instructing the jury, or that the prosecution engaged in misconduct. He believes his lawyer on direct appeal should have raised those errors because they led to his conviction or (as here) a death sentence. The appellate lawyer's failure to do so, the prisoner might claim, amounts to ineffective assistance of appellate counsel. The prisoner cannot make this argument on direct appeal, for the direct appeal is the very proceeding in which he is represented by the lawyer he says was ineffective. Next suppose the prisoner fails to raise his appellate lawyer's ineffectiveness at the initial state habeas proceeding, either because he was not represented by counsel in that proceeding or because his counsel there also was ineffective. When he brings his case to the federal habeas court, the State contends that the prisoner's failure to present his claim during the initial state habeas proceeding constitutes a procedural default that precludes federal review of his claim.¹⁹⁸

Based on this example, Justice Breyer pointed out that a prisoner in this circumstance could not be treated any differently than one whose claim falls within the *Martinez* exception because the end result either way is a constitutional claim completely evading review.¹⁹⁹

Another illustrative example of a case falling between *Martinez* and *Davila* would include a claim of ineffective assistance of appellate counsel for a failure to raise a claim of a *Brady* violation. In *Brady v. Maryland*, the United States Supreme Court held that suppression of requested evidence, favorable to an accused, by the prosecution violates due process.²⁰⁰ Therefore, if a *Brady* violation by the prosecution is discovered post trial, it becomes the duty of appellate counsel to raise this violation of trial rights in the first instance on direct appeal. If appellate counsel is ineffective for failing to raise this issue, then a significant due process right, which has been covered under the Fifth Amendment of the Constitution, has been violated. This clearly demonstrates the cases where the two concerns of *Martinez* converge; an error from appellate counsel, not relying on trial counsel error, results in a constitutionally unfair trial.

Further, if a prisoner's post-conviction counsel is then additionally ineffective for failing to raise appellate counsel's ineffectiveness, according to the majority opinion in *Davila*, this claim is procedurally barred in a federal habeas court. This claim evades review on direct appeal, the initial

198. *Id.* at 2071-72.

199. *Id.* at 2072.

200. 158 A.L.R. Fed. 401 (Originally published in 1999).

chance to be raised, because only appellate counsel was ineffective for a failure to raise. Then, because *Coleman* tells us that ineffectiveness of post-conviction counsel cannot serve as cause to excuse the procedural default of the claim of ineffective assistance of appellate counsel, this claim may not be raised on federal habeas corpus, and thus receives no review at all.

In this scenario, a significant trial error affecting the prisoner's constitutional rights to a fair trial and effective counsel on direct appeal, will completely evade review of any court. This is completely inconsistent with the aspirations of *Martinez*, that significant trial errors be heard by at least one court, and that ineffective post-conviction counsel may occasionally serve as cause to excuse those procedural defaults of constitutionally sound trial error claims.

A claim, such as a *Brady* violation, that might only be brought on direct appeal is procedurally identical to a claim of ineffective assistance of trial counsel that is mandated to be brought in post-conviction proceedings in the first instance. In both instances we have claims that are initially brought up in their initial trial or direct proceedings, and then have a single chance to be heard by a court on appeal in a post-conviction proceeding. If trial counsel is ineffective for any reason, or if appellate counsel is ineffective for failing to raise a legal issue, such as a *Brady* violation from trial, it is necessary for post-conviction counsel to bring such ineffectiveness claims in the first instance. If a failure on post-conviction counsel's part to bring such claims of ineffectiveness arises, without the exception in *Martinez* allowing such post-conviction ineffectiveness to serve as cause, there are now two claims resting solely on a legal error in trial that will completely evade review; one based on trial counsel's error, and one based on a trial error that appellate counsel was constitutionally obligated to raise. These errors infringe on a prisoner's constitutional rights to a fair trial and the right to effective trial counsel, which has been coined by the *Coleman*, *Martinez*, and *Davila* Courts as bedrock of our adversarial trial system.

An extension of *Martinez* to include this narrow class of claims is the best solution in closing the gap of cases between *Martinez* and *Davila*. The *Davila* Court properly draws the line against extending the exception to ineffective appellate counsel claims that are based on trial counsel errors. However, there will soon be a case where no such trial counsel error exists, and appellate counsel's error constitutionally affects a petitioner's right to a fair trial. It is this small class of cases, where the constitutional concerns of a fair trial that led to the *Martinez* exception initially, will be properly served by allowing post-conviction counsel's ineffectiveness to serve as "cause" in order to have a significant trial error be heard by a court and corrected.

Not creating this exception will lead to claims of ineffective appellate counsel being ignored or forgotten by post-conviction counsel, and thus giving no reprieve on petition for federal habeas corpus because of its procedural labels. Just because appellate counsel initially committed the error, and then post-conviction counsel failed to raise that ineffectiveness,

this should not prevent the claim from going unheard. The focus should not be on the type of counsel who was ineffective. The focus should be on the underlying claim, as the *Davila* Court focused on when rejecting the extension to claims where appellate counsel's ineffectiveness relied on a trial counsel as the underlying basis. The Court determined that a simple trial error, based on trial counsel's error, already had an opportunity for review and could not be heard again. The underlying claim in these situations is trial counsel's error and appellate counsel's error in not raising trial counsel's error.

However, the underlying claims in these next cases of ineffective appellate counsel will not rely on any action or error of trial counsel. These claims will rely on constitutional errors in trial, where appellate counsel had the initial chance to raise the claim and was ineffective for failing to do so. Just as the *Martinez* Court allowed post-conviction counsel's ineffectiveness to serve as cause when the underlying claim affected a constitutional right to counsel and fair trial, so too will an extension to those constitutional claims of ineffective assistance of appellate counsel. This will properly close the gap between the two cases, balancing those underlying claims that are constitutionally grounded and those that are not. The notions of federalism and comity are properly served by allowing states the first chance review, but not closing federal court doors to hearing significant constitutional trial claims.

V. CLOSING THE GAP; THE SOLUTION MOST CONSISTENT WITH FEDERAL HABEAS CORPUS HISTORY AND CURRENT CASE LAW.

In support of the conclusion that an extension of *Martinez* is necessary to fill the gap of cases created by *Davila*, we come full circle back to the origins and importance of the writ of habeas corpus. The writ of habeas corpus gives a prisoner a chance to invoke the writ, come to court, and plead their case of wrongful imprisonment. Over time, the writ has served many purposes, and our Founding Fathers believed it was significant enough to include within our country's constitution. While serving the notions of comity and federalism, federal habeas corpus has evolved in such a manner to respect the state court's rights to hear claims initially and attempt to provide a remedy when available, before a federal court hears the claims. This prevents a prisoner from bypassing the state courts and taking their federal claims straight to a federal court initially. However, obvious exceptions arose; the doctrines of exhaustion and procedural default serve such exceptions. One must exhaust all state appeal options and give the state a fair first hearing of all claims. However, if no state remedial paths are utilized, and a claim was never brought before a state court, the claim is considered procedurally defaulted. The harsh realities of the procedural default were quelled ultimately by the *Sykes* Court, instituting a "cause and prejudice" standard, necessary for a petitioner to establish before a court may

excuse a procedural default. The “cause and prejudice” standard ensures that there was a justifiable reason why the claim was not brought before a court prior to issuance of a petition of federal habeas corpus, and demonstrates that there would be actual prejudice to the petitioner if the claim were wholly evaded.

Agreeing upon what constitutes “cause”, the so called “fatal-prong” of the *Sykes* standard lead to the development of many circumstances that are significant enough to serve as cause. The most notable of these, for the purposes of this note, is a claim of ineffective assistance of post-conviction counsel. The trilogy of cases regarding when ineffectiveness of post-conviction counsel may serve as “cause” for a procedural default highlights exactly why a gap exists between *Martinez* and *Davila*, and just how it can be resolved when these next generations of cases appears before the Court.

Coleman established the importance of federalism, the application of federal habeas corpus, and puts a substantial limitation of a defendant’s ability to raise arguments for the first time. The *Coleman* Court held that when counsel is not constitutionally guaranteed such as in post-conviction proceedings, then ineffectiveness of such counsel necessarily does not amount to a violation of constitutional rights. Without a violation of such constitutional magnitude, “cause” cannot lie to excuse a procedural default.

Next, along came *Martinez*, recognizing that certain state procedural structures constitutionally require a narrow exception to *Coleman*. In cases where a state requires that claims of ineffective assistance of trial counsel be brought, in the first instance, in post-conviction proceedings, then a claim of ineffective assistance of post-conviction counsel must serve as “cause” to excuse the procedural default of the initial claim of ineffective trial counsel. When post-conviction counsel is ineffective in failing to bring a claim of ineffective assistance of trial counsel, a court may never review a significant trial error.

Several important pillars of federal habeas are served by the *Martinez* decision. First, the Court held the constitutional guarantee of effective trial counsel on the high pedestal it deserves, and recognized the need to preserve such claims. The *Martinez* Court, by creating the exception to *Coleman*, ensured that every prisoner would have the opportunity to have trial errors reviewed, no matter the state’s mandated procedural structure. Second, while *Coleman* holds that post-conviction counsel’s ineffectiveness necessarily cannot serve as cause, the *Martinez* Court recognized that there are times when such ineffectiveness rises to a level of constitutional violation and must serve as cause. When post-conviction counsel fails to raise a claim of ineffective trial counsel, a violation of a person’s constitutional right to counsel during trial, then counsel’s failure to raise that claim is a constitutional abuse as well.

Finally, the *Davila* Court distinguished the claims of ineffective assistance of trial and appellate counsel, and reserved the *Martinez* exception only to claims for trial counsel. However, this broad categorization of trial

counsel and appellate counsel ineffectiveness overlooks a gap between the two types of errors. The focus of the *Davila* Court was upon which counsel committed the initial error, and whether or not that counsel was constitutionally guaranteed as the *Coleman* Court detailed. The *Davila* Court made the correct decision when it comes to appellate counsels' errors that rely on a mistake made by trial counsel. A trial judge likely heard these claims when trial counsel first raised them for preservation, or these are claims such that appellate counsel is not obligated to raise again. Appellate counsel need only raise those claims which are likely to succeed, or are constitutionally obligated.

However, the *Davila* Court neglected to account for those constitutional trial errors, occurring not because of trial counsel's errors, which necessarily must be brought in the first instance on direct appeal. The *Davila* Court's focus was too attached to the idea that appellate counsel committed the error, and that appellate counsel is not guaranteed. The focus must shift to the underlying claim that a petitioner wants tried; their constitutional claims of trial error. These are the errors that occurred either during or after trial, were not discovered until after trial, and significantly harmed a petitioner's right to a fair trial. The first opportunity to raise such claims would be on direct appeal, and directly concern the trial itself. If appellate counsel is ineffective for failing to raise these claims that they are obligated to raise, the onus to raise an ineffective assistance of appellate counsel claim is on post-conviction counsel. The responsibility to preserve a person's constitutionally guaranteed fair trial shifts onto post-conviction counsel, and just as in *Martinez*, post-conviction counsel's failure to raise these claims would constitute a violation of petitioner's constitutional right to a fair trial. As discussed in *Coleman*, and solidified in *Martinez*, the only time post-conviction counsel's ineffectiveness may serve as "cause" to excuse a procedural default, is when that error rises to a constitutional deprivation. These are the cases that require an extension of *Martinez* to fill the gap.

Progressing through the historical evolution of the writ, the purposes it is intended to serve, and the cases that have evolved over time to serve exceptions not originally thought of lead us to this conclusion today. History tells us that our Founding Fathers intended to allow courts to use the writ to hear cases where a prisoner believes his confinement is unlawful. The Congressional Act of 1867 ensured that federal and state prisoners alike would have that opportunity. The doctrine of exhaustion ensures that federalism is served by letting states have the first opportunity to hear and cure a case. The doctrine of procedural default, and the *Sykes* "cause and prejudice" standard ensured that even significant claims accidentally overlooked would be heard. The *Coleman* Court ensured that "cause" only meant those claims of ineffective assistance of post-conviction counsel that were constitutionally egregious. The *Martinez* Court determined when those claims became a constitutional concern, and held when post-conviction

counsel's ineffectiveness meant deprivation of review for a significant trial error, cause must be available. And finally, *Davila* left a gap that now requires filling. If we follow the path set by history and case law, the only logical conclusion is that when post-conviction counsel's ineffectiveness threatens a significant constitutional guarantee of counsel or a fair trial, then the "cause" prong must be satisfied. *Martinez* must be extended to ensure that those trial errors appellate counsel fails to raise, which affect the constitutionality of a fair trial, receive proper review when sought through a petition of federal habeas corpus.