No. 11-10189

IN THE

Supreme Court of the United States

CARLOS TREVINO,

Petitioner,

vs.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Under the rule of *Coleman* v. *Thompson*, in force for over two decades, ineffective assistance of state collateral counsel is not "cause" for a default, allowing a claim defaulted in state court to be heard on the merits on federal habeas. In *Martinez* v. *Ryan*, this Court created an exception it described as "narrow" for states that bar all ineffectiveness claims from direct appeal.

The question in this case is whether the narrow exception in *Martinez* should be expanded to overrule *Coleman* in its primary area of operation in most states.

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

This case involves one of the most important protections for the finality of criminal judgments established by this Court. Rather than allowing an endless chain of petitions with each lawyer attacking the competency of the one before as "good cause" for not raising the claim earlier, the rule of *Coleman* v. *Thompson* cuts off such "ineffectiveness as cause" claims at the conclusion of the first appeal. This protection is essential if the victims' right to proceedings free from unreasonable delay, see 18 U. S. C. § 3771, subds. (a)(7), (b)(2)(A), is ever to become a reality. Although the Court recognized two *narrow* exceptions to this rule in the last term, the petitioner's claim in the present case threatens to make an "exception" that swallows the rule.

If petitioner's proposal is adopted, federal habeas petitions asserting ineffectiveness claims never raised in state court and claiming ineffectiveness of state collateral counsel as cause will be routine, requiring fact-intensive litigation to decide even when the claims are meritless, as the vast majority of habeas claims are. This drastic change in the long-established law governing federal habeas corpus would be severely detrimental to the rights of victims that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Petitioner Carlos Trevino and his cohorts committed a crime of unspeakable savagery. They abducted, raped, sodomized, and stabbed to death Linda Salinas, just 15. See *Trevino* v. *Thaler*, 678 F. Supp. 2d 445, 449-451 (WD Tex. 2009), J. A. 29-34. Any claim that Trevino was anything other than a major participant in this atrocity is negated by a DNA test of a blood stain on Linda's underwear. Although not a conclusive match to Trevino, it excludes everyone else involved in the crime.

See *id*., at 452, J. A. 35; *Trevino* v. *Thaler*, 449 Fed. Appx. 415, 418, n. 1 (CA5 2011), J. A. 137.

Following the trial, newly appointed direct-appeal counsel made a motion for a new trial in the trial court, including an allegation of ineffective assistance. See Brief for Respondent 13. The Texas Court of Criminal Appeals affirmed on direct appeal. *Trevino* v. *State*, 991 S. W. 2d 849 (1999). Concurrently, Trevino collaterally attacked the judgment in a state habeas corpus proceeding, in which he was represented by counsel and received an evidentiary hearing. Yet another attorney had been appointed for this proceeding, see Brief for Respondent 15, and he made claims of ineffective assistance at both the guilt and penalty phases. See J. A. 321-349. The trial judge recommended denial of this petition, and the Court of Criminal Appeals adopted the recommendation. J. A. 25-26.

Trevino filed a federal habeas corpus petition, which was stayed while he pursued a second state habeas petition. This petition included a claim that trial counsel had been ineffective in the penalty phase for not finding and introducing supposedly mitigating evidence regarding Trevino's childhood having no demonstrable connection to the crime. The Texas Court of Criminal Appeals denied the second petition under the state's successive petition rule. J. A. 27-28. After yet more back-and-forth, the federal court finally lifted the stay and proceeded with the case six years after it was filed. See J. A. 41-42.

On the issue of ineffective assistance of trial counsel, the District Court found the claim procedurally defaulted, straightforwardly applying the well-established rule that ineffective assistance of state collateral counsel is not considered "cause" for a default. J. A. 69-70. The court also found that there had been no miscarriage of justice because the new, supposedly

mitigating evidence[2] had no effect on Trevino's guilt of the offense or eligibility for the penalty. J. A. 71.

Despite the default, the District Court went on to hold in the alternative that Trevino's claim would fail on the merits. The horrific crime and Trevino's complete lack of remorse are such strong aggravating circumstances that there is no reasonable possibility that the new, weak mitigating evidence would have changed the result. J. A. 78.

The Court of Appeals denied a certificate of appealability on this claim. "Reasonable jurists cannot disagree with the district court's procedural ruling in this regard." J. A. 156.

SUMMARY OF ARGUMENT

This case could be decided on grounds specific to the system of review in Texas, for the reasons explained in the Brief for Respondent. Alternatively, it can be decided simply by reaffirming what the Court said in *Martinez* v. *Ryan*, that *Coleman* v. *Thompson* remains the law with only a *narrow* exception for states that choose to *bar* ineffective assistance claims from direct appeal.

The rule of *Coleman* v. *Thompson* is a long-established precedent that is part of a line of decisions designed to give greater finality to the state court process and reduce federal intrusion. Petitioner is not asking for a narrow exception like the ones created in *Maples* v. *Thomas* and *Martinez* v. *Ryan*. He asks the Court to take general language from *Martinez* and

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2. The court also characterized the evidence as "double-edged." J. A. 71, 75-76. A history of crime and gang membership is not mitigating in most people's eyes.

expand it into an exception so large that it overrules the *Coleman* rule in its primary area of operation. He asks for an exception that swallows the rule.

While Congress did not codify *Coleman* in AEDPA, that rule was a clearly understood aspect of habeas jurisprudence at the time, and overruling it would severely undercut essential reforms that Congress did enact. The critically important reform of § 2254(d) depends for its efficacy on a procedural default rule that requires claims to be raised first to the state courts. The factual development default rule, § 2254(e)(2), is partially a codification of a precedent of this Court, *Keeney* v. *Tamayo-Reyes*, a precedent that explicitly stated that *Coleman* precluded the use of ineffective assistance of state collateral counsel to establish cause for such a default.

Adoption of petitioner's proposed rule would create a powerful incentive to sandbag. Federal court is perceived to be a more favorable forum for capital petitioners than state court in many states. If petitioners with ineffective state collateral counsel get review of their claims from scratch in federal court, while those with effective state attorneys get review subject to § 2254(d), there will be enormous pressure to be ineffective on purpose.

There can be little doubt that the capital defense bar would exploit its new tool to the maximum, alleging in nearly every case that state collateral counsel was ineffective merely for omitting a claim that federal habeas counsel wants to bring. We have already seen this in California, where the *Coleman* rule is not followed in state courts, and it has been a disaster. Expanding this rule nationwide would add a permanent additional layer of litigation to a system that already has too many layers, contrary to the core purpose of AEDPA to achieve an effective death penalty.

Congress has already addressed the problem of inadequate counsel on state collateral review in Chapter 154 of Title 28. The correct role for the judiciary is to stop the foot-dragging and implement Congress's duly legislated solution.

ARGUMENT

The State of Texas has argued persuasively for a judgment in its favor based on factors unique to that State, the reforms enacted by its legislature. See Brief for Respondent 21-48. A decision on that basis would resolve this case and other Texas cases, but it would leave unresolved the status of cases in the many jurisdictions that have neither a procedure like Texas's nor a bar against raising ineffectiveness claims on direct appeal like the one at issue in *Martinez* v. *Ryan,* 566 U. S. __, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

Amicus CJLF therefore suggests an alternate basis of decision. That is simply to reaffirm the assurances this Court gave in *Martinez*, namely: (1) that the exception to the *Coleman*[3] rule created in that case is *narrow*; (2) that it is triggered by a State's decision to *bar* ineffectiveness claims from direct appeal; and (3) that *Coleman* remains the law in all other circumstances.

3. *Coleman* v. *Thompson*, 501 U.S. 722, 752-753 (1991)

I. Petitioner is asking for the *de facto* overruling of the long-established *Coleman* rule.

A. A Rule and Two Narrow Exceptions.

The rule that ineffective assistance of counsel is not "cause" for a procedural default if it occurs in a proceeding where there is no constitutional right to counsel is a vitally important one in protecting the States' interest in finality against a chain of petitions where each one claims ineffectiveness of counsel in the one before as a reason to reopen the case. "[I]n the context of procedural default, [this Court has] previously stated, *without qualification*, that a petitioner must bear the risk of attorney error." *Holland* v. *Florida*, 560 U. S. __, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130, 146 (2010) (quoting *Coleman* v. *Thompson*, 501 U. S. 722, 752-753 (1991)) (emphasis added) (internal quotation marks omitted).

The "without qualification" portion of this statement is no longer true. Last term, the Court made two narrow exceptions in the rule. In *Maples* v. *Thomas*, 565 U. S. __, 132 S. Ct. 912, 922, 181 L. Ed. 2d 807, 821 (2012), the Court reiterated the unequivocal *Coleman* rule for negligence of postconviction counsel but then held that the situation was "markedly different," *ibid*., for complete abandonment by the attorney. This exception is narrow because actual abandonment is an extreme and rarely occurring event.[4] The *Maples*

4. Predictably but regrettably, since *Maples* capital habeas counsel have tried to shoehorn ordinary negligence claims into "abandonment." See, *e.g.*, *Moormann* v. *Schriro*, 672 F. 3d 644, 647-648 (CA9 2012). Although these attempts have been unsuccessful, they have caused expense and delay, the inevitable consequence of every new wrinkle in this already too-complex area of law.

Court's characterization of the facts of that case as "uncommon," *ibid*., is an understatement.

In *Martinez* v. *Ryan*, 566 U. S. __, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272, 282 (2012), the Court explicitly stated that the exception created was narrow: "This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Although the Court's explanation of what constitutes an "initial-review collateral proceeding" is less than clear, the Court's characterization of the exception as "narrow" precludes any interpretation that would encompass all or most first state collateral review proceedings nationwide. Far from being a "narrow" exception, that would be an exception that swallows the rule.

Martinez clearly stated that its exception was based on "Arizona's decision to *bar* defendants from raising ineffective-assistance claims on direct appeal." 132 S. Ct., at 1320, 182 L. Ed. 2d, at 288 (emphasis added). This is narrow because it applies to few states, and those few can readily avoid it by reversing that decision. An exception that applies to states where collateral review is typically the first occasion to raise an ineffectiveness claim *as a practical matter* would apply to most states, given the way review of criminal cases is presently structured in most jurisdictions, because most ineffective assistance claims require facts outside the appellate record. See, *e.g.*, *Massaro* v. *United States*, 538 U. S. 500, 504-505 (2003). The *Martinez* Court stated that its exception did not extend to such cases. "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." 132 S. Ct., at 1320, 182 L. Ed. 2d, at 288 (emphasis added). This is consistent with the statement that, "The rule of *Coleman* governs in all but the limited circumstances recognized here." *Ibid*. An "exception" to *Coleman* that extended to cases where bringing the claim on direct review was merely impractical, as opposed to forbidden, would abrogate the *Coleman* rule in its *primary* area of operation. The "exception" would be the primary rule, and the tattered remnants of *Coleman* would be the exception.

B. Development of the Rule.

In this subpart, we will trace the development of the *Coleman* rule. In the subsequent parts of this brief, we will show how a *de facto* overruling of *Coleman* would subvert the operation and defeat the purpose of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), even if it would not be directly contrary to its wording.

The procedural default doctrine began as an aspect of the exhaustion rule. In *Brown* v. *Allen*, 344 U. S. 443 (1953), the Court held that the petitioner must have exhausted state remedies, and the expiration of the time to do so did not meet or excuse the requirement, so habeas relief was barred. See *id*., at 487. However, a precursor of the "cause" exception was present from the beginning, as the Court noted that relief would be available if the default was "because of lack of counsel, incapacity, or some interference by officials." *Id*., at 485-486. This aspect of *Brown* was effectively overruled in *Fay* v. *Noia*, 372 U. S. 391, 438 (1963), when the Court threw open the doors to habeas relief for defaulted claims unless the petitioner "has deliberately by-passed the orderly procedure of the state courts . . . ."

Noia itself was undermined in a series of decisions in the mid-1970s, culminating in *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), which adopted the cause and prejudice test as a general rule, rejecting "the sweeping language of *Fay* v. *Noia*." The *Sykes* rule was applied to a claim omitted from an appeal in *Murray* v. *Carrier*, 477 U. S. 478 (1986). Such an omission can be "cause" if it is "constitutionally ineffective," if the claim "was not reasonably available to counsel," or if there is interference by the state. See *id*., at 488. Mere "ignorance or inadvertence" is not sufficient. See *id*., at 491.[5] Recognizing that the latter rule could produce harsh results, *Carrier* explicitly recognized actual innocence as a free-standing exception to the procedural default rule. See *id*., at 495-496.

The *Sykes* rule was applied to an attorney's negligent missing of an appeal deadline in state collateral review in *Coleman* v. *Thompson*, *supra*. Following denial of the habeas petition on the merits by the trial court, Coleman's lawyers appealed three days late. See *Coleman* v. *Thompson*, 501 U. S. 722, 727 (1991). Regarding Coleman's claim of attorney negligence as cause, the Court clearly conditioned such a claim on a constitutional right to effective counsel in the proceeding at issue.

> "Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987); *Mur-*

5. A perfectly valid reason for omitting a claim is that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith* v. *Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983)). This is as true in capital cases, which *Smith* was, as in noncapital ones.

> *ray* v. *Giarratano*, 492 U. S. 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *Wainwright* v. *Torna*, 455 U. S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must 'bear the risk of attorney error that results in a procedural default.' " 501 U. S., at 752-753.

The *Coleman* Court unequivocally limited attorney error as "cause" to those proceedings in which there is a constitutional right to counsel.

> "Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. *In the absence of a constitutional violation*, the petitioner bears the risk in federal habeas for *all* attorney errors made in the course of the representation, as *Carrier* says explicitly." *Id*., at 754 (emphasis added).

The logic of *Coleman* can be stated as a syllogism. The first premise is that ineffective assistance can be "cause" only when it violates a constitutional right to

counsel, the *Carrier* rule. See *ibid*. The second premise is that there is no constitutional right to counsel in state collateral review, the rule of *Pennsylvania* v. *Finley*, 481 U. S. 551, 556 (1987), and *Murray* v. *Giarratano*, 492 U. S. 1, 10 (1989). Therefore, ineffective assistance of state collateral counsel is not "cause." The possible exception that *Coleman* pondered and left open was not whether there might be an exception to *Carrier* for the first opportunity to raise an ineffective assistance claim but whether there might be an exception to *Finley* and *Giarratano* in that circumstance. See *Coleman*, 501 U. S., at 755. The fact that *Coleman* did not resolve the question of whether to make an exception to that rule does not matter as far as the strength of precedent goes because *Finley* and *Giarratano* had made the rule without exceptions.

The very next term brought to the Court a case of attorney default in the initial state collateral review. In *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 3 (1992), the underlying claim involved "a plea hearing, at which petitioner was represented by counsel and his interpreter." On state collateral review, he attacked the voluntariness of the plea on the basis that the interpreter had not accurately and completely translated, a claim rejected by the state court as factually unfounded. See *id*., at 3-4. On federal habeas, he claimed the facts had not been adequately developed in the state-court hearing. *Id*., at 4. Citing *Coleman*, the Court held that this kind of fact default would be governed by the same cause-and-prejudice standard as claim defaults. See *id*., at 7-8. The case was remanded for determination of cause and prejudice. See *id*., at 12.

In dissent, the author of *Coleman* had no doubt what that precedent required regarding the cause determination. "Where, as in this case, the state factfinding occurs at a postconviction proceeding, the petitioner *has*

no constitutional right to the effective assistance of counsel, so counsel's poor performance can *never* constitute 'cause' under the cause and prejudice standard. *Coleman* v. *Thompson*, 501 U. S., at 752." *Id*., at 22 (opinion of O'Connor, J.) (emphasis in original).

In a responsive footnote, the Court agreed with this assessment.

> "We agree with Justice O'Connor that under our holding a claim invoking the fifth circumstance of *Townsend* will be unavailing where the cause asserted is attorney error. *Murray* v. *Carrier*, 477 U. S. 478 (1986), and *Coleman* v. *Thompson*, 501 U. S. 722 (1991), dictate as much. *Such was the intended effect of those cases*, but this does not make that circumstance a dead letter, for cause may be shown *for reasons other than attorney error*." *Id*., at 11, n. 5 (emphasis added).

Although narrowly divided on the main holding, the Court unanimously understood that *Coleman* completely barred the use of ineffective assistance of counsel at the initial collateral review as "cause" under a *Sykes* analysis. That was this Court's last word on the subject when Congress enacted AEDPA. See *infra*, at 15-21.

The *Martinez* v. *Ryan* opinion notes, "in the 20 years since *Coleman* was decided, we have not held *Coleman* applies in circumstances like this one." 132 S. Ct., at 1319, 182 L. Ed. 2d, at 287. That statement is true only if the "circumstances like this one" are narrowly circumscribed. It is definitely not true if the "circumstances" are expanded to include any attorney default at a state collateral proceeding which is the first proceeding where the particular type of claim could be brought as a practical matter. That is, precisely, *Keeney* v. *Tamayo-Reyes*, where the Court left no doubt as to

Coleman's application. Although that case was not strictly an ineffective assistance claim, it was a claim based on deficient performance of the defense team, a claim the defendant cannot be expected to make from the trial record for the same reason he cannot make an ineffective assistance claim from that record. Further, courts of appeals nationwide applied *Coleman* to ineffective assistance of counsel claims defaulted in the initial state collateral proceeding. See, *e.g.*, *Ortiz* v. *Stewart*, 149 F. 3d 923, 932 (CA9 1998); *Abdus-Samad* v. *Bell*, 420 F. 3d 614, 631-632 (CA6 2005); *Smallwood* v. *Gibson*, 191 F. 3d 1257, 1269 (CA10 1999). Even the most partisan, pro-petitioner, anti-death-penalty commentators acknowledged that *Coleman* simply precluded ineffectiveness of collateral counsel as cause, at least in the absence of a severance of the "agency" relationship. See 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 26.3b, pp. 860-863 (2d ed. 1994) (edition available when Congress enacted AEDPA); Steiker, Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States, 34 Am. J. Crim. L. 293, 307, n. 68 (2007).

The state is already burdened with the uniquely difficult task of defending two of its former adversaries, the trial attorney and the appellate attorney. To add a burden of defending the performance of state habeas counsel as well would further bog down a system of review that is already far too cumbersome. A simple rule keeping the entire issue of the effectiveness of state habeas counsel out of the federal court is of great value in furthering AEDPA's goal of reducing delay. See *Ryan* v. *Gonzales*, 568 U. S. __ (No. 10-930, Jan. 8, 2013) (slip op., at 17) (purpose of AEDPA). That is the rule Congress believed was in force when it enacted AEDPA, and while Congress did not codify that rule, it

enacted other provisions that depend on it for their efficacy.

II. Petitioner's proposed rule would provide a route to evade the central reform of AEDPA, create a conflict with § 2254(e)(2), and create a powerful incentive to sandbag.

A. Evading the Central Reform.

Of all the habeas reforms enacted in the Antiterrorism and Effective Death Penalty Act of 1996, the most controversial by far was 28 U. S. C. § 2254(d), ending the 43-year reign of *de novo* review of state court decisions by lower federal courts. See generally Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998). Evading this reform is the Holy Grail for those who wish to grind capital punishment to a halt. The rule proposed in the present case would provide the route to do just that. Further, evaluation of an ineffectiveness claim necessarily involves an evaluation of the strength of the underlying claims[6] not brought in state court, *Martinez* v. *Ryan,* 566 U. S. __, 132 S. Ct. 1309, 1318-1319, 182 L. Ed. 2d 272, 286 (2012), and therefore not decided on the merits there.

The state will not necessarily prevail in its defense of state habeas counsel's performance even if that

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6. This Court has not yet resolved the important question of whether ineffective assistance is one claim, as *amicus* CJLF believes it is, see Brief *Amicus Curiae* for Criminal Justice Legal Foundation in *Bell* v. *Kelly*, No. 07-1223, pp. 13-23, or multiple claims for the various alleged failings of defense counsel. See *Cullen* v. *Pinholster*, 563 U. S. __, n. 10, 131 S. Ct. 1388, 1401, n. 10, 179 L. Ed. 2d 557, 573, n. 10 (2011) (not resolved).

performance was more than adequate. The rule of *Strickland* v. *Washington*, 466 U. S. 668, 687-689 (1984), is so vague and its application so case-specific that different judges can come to very different conclusions. More than once, we have seen a state court reject a *Strickland* claim, a federal court of appeals declare that decision "unreasonable," and this Court reverse the latter determination, reinstating the state court decision. See *Woodford* v. *Visciotti*, 537 U. S. 19, 26-27 (2002) (*per curiam*); *Holland* v. *Jackson*, 542 U. S. 649, 655 (2004) (*per curiam*). A similarly wide range of disagreement is likely if the question of effectiveness of state habeas counsel is opened up for litigation. *Wong* v. *Belmontes*, 558 U. S. 15 (2009) (*per curiam*), a pre-AEDPA case, illustrates how very seriously wrong some federal courts can go on ineffective assistance claims in capital cases if freed from the restraints of § 2254(d).[7]

Even on the question of what "professional norms" are, we can expect a wide range of disagreement, and therefore erroneous findings of ineffectiveness. If an attorney examines the potential claims, winnows out the weak ones, and concentrates on the strong ones, some courts would rule that counsel had acted in exemplary fashion, citing on-point precedents of this Court. See *supra*, at 10, n. 5; see also *In re Reno*, 55 Cal. 4th 428, 466, 283 P. 3d 1181, 1212 (2012). Another court might rule that counsel had violated "professional norms" because a drastically different standard is set out in commentary accompanying a "guideline," which

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7. *Belmontes* also illustrates that the state cannot protect itself from ineffectiveness claims by appointing a highly respected attorney for the defendant. See Smith, Stockton Attorney, Professor Praised by Students, Peers, Stockton Record (Dec. 8, 2011) <http://www.recordnet.com/apps/pbcs.dll/article?AID=/20111208/A_NEWS/112080315>.

says counsel should raise all conceivable claims. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.8 (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1030; cf. *Reno*, *supra*, at 467-468, 283 P. 3d, at 1213. Justice Alito has explained why reliance on a guideline issued by a private organization is inappropriate for establishing constitutional minimums. See *Bobby* v. *Van Hook*, 558 U. S. 4 (2009) (concurring opinion). This is particularly true when the issuing organization has a long and notorious history of taking the defense side against the prosecution as a matter of course. See Scheidegger, ABA Briefs in the 1997-98 Supreme Court Term, 2 Crim. L. News No. 3, p. 12 (Winter 1998).[8] Even so, a petitioner might undeservedly prevail on this basis.

An ineffectiveness claim may depend on facts entirely within the prior defense attorney's knowledge, such as whether a decision not to raise a claim was an informed, strategic choice. See *Strickland* v. *Washington*, 446 U. S., at 690-691 (virtually unchallengable). The state's ability to defend against an ineffectiveness claim that is, in reality, meritless may well depend on the willingness of the prior attorney to cooperate with the state. See Newmark, The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims, 79 Fordham L. Rev. 699, 700-701 (2010). It would be unrealistic to expect that cooperation will always, or even usually, be forthcoming. See, *e.g.*, *id.*, at 702 (concluding "trial counsel should not assist the prosecution by defending against ineffectiveness allegations outside of court").

If state habeas counsel is found ineffective for not raising a claim, correctly or not, and if the state has a

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8. Available at http://www.fed-soc.org/publications/detail/aba-briefs-in-the-1997-98-supreme-court-term.

successive petition rule similar in strictness to the federal rule, then under petitioner's proposal the federal habeas court would proceed to decide from scratch the merits of a claim that was never presented to state court, deftly dancing around § 2254(d). Such a result may not be contrary to any specific language in AEDPA, but it is contrary to the core purpose and unmistakable intent of the enactment as a whole.

As this Court noted in *Pinholster*, 131 S. Ct., at 1398-1399, 179 L. Ed. 2d, at 570:

> " '[T]he broader context of the statute as a whole,' . . . demonstrates Congress' intent to channel prisoners' claims first to the state courts. [Citation.] 'The federal habeas scheme leaves primary responsibility with the state courts . . . .' [*Woodford* v.] *Visciotti*, [537 U. S. 19,] 27 [(2002) (*per curiam*)] Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*."

B. Conflict With § 2254(e)(2).

If a federal habeas court proceeds to decide a case under petitioner's proposed rule, how is it to decide that case? By hypothesis, the state is one where (as in most states) ineffectiveness claims are allowed on direct review by law, but as a practical matter claims requiring evidence outside the record need to be made on collateral review. Also, by hypothesis, state habeas counsel could have found the evidence if he had been diligent, since otherwise he would not be ineffective. Further, the applicant has "failed to develop the factual basis of [the] claim" within the meaning of the statute. *Wil-*

liams v. *Taylor*, 529 U. S. 420, 432 (2000), held that "failed" means a lack of diligence or greater fault on the part of the prisoner or counsel.[9] *Williams* also held "prisoners who would have had to satisfy *Keeney*'s[10] test for excusing deficiency in the state-court record prior to AEDPA are now controlled by §2254(e)(2)." *Id.*, at 434. As *Keeney* indicated, that includes prisoners whose state collateral counsel were ineffective. See *supra*, at 13.

When Congress enacted § 2254(e)(2), it partly codified *Keeney*, see *Williams* v. *Taylor*, 529 U. S., at 432-433, but it also tightened up the circumstances that will be considered sufficient cause for defaulting the presentation of facts to the state court. The retroactive new rule ground, § 2254(e)(2)(A)(i), is not relevant here. The alternate requirement in § 2254(e)(2)(A)(ii) is "a factual predicate that could not have been previously discovered through the exercise of due diligence . . . ." That form of cause is necessarily *not* met when counsel has failed the effectiveness standard. It is not ineffective to fail to find what cannot reasonably be found. See *Strickland*, 466 U. S., at 691 ("duty to make reasonable investigations").

In addition, new evidence that is relevant only to the penalty determination can never be a ground for an evidentiary hearing under § 2254(e)(2) regardless of whether it was previously available. In addition to the two requirements discussed above, Congress added a conjunctive requirement that the evidence establish the petitioner's innocence "of the underlying offense." By

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9. "Failure" may also include a deliberate decision not to raise a claim, see *Murray* v. *Carrier*, 477 U. S. 478, 491 (1991), which may be an entirely competent decision. See *Smith* v. *Murray*, 477 U. S. 527, 536 (1991).

10. *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992)

specifying the underlying offense and not the penalty determination, Congress determined that the penalty phase decision for a guilty murderer does not involve the same potential for a miscarriage of justice as the conviction of an innocent person, cf. *Schlup* v. *Delo*, 513 U. S. 298, 325-326 (1995), and therefore does not warrant bending the procedural rules.

To get to an evidentiary hearing in a case such as the present one, a federal habeas court would have to run roughshod over § 2254(e)(2). Conversely, that section, properly applied, would preclude the receipt of new evidence in virtually every case to which petitioner's proposed rule would apply. Subdivisions (d) and (e)(2) are designed to work in tandem to minimize the amount of factual adjudication in federal habeas. See *Pinholster*, 131 S. Ct., at 1401, 179 L. Ed. 2d, at 572-573. This design must not be undermined.

C. Sandbagging.

Yet the potential consequences get even worse. If the federal court is perceived as a forum more likely to grant relief or likely to delay longer, as it is in many jurisdictions, and if getting deference-free review there is seen as strongly in the petitioner's favor, state habeas counsel may feel pressure to intentionally withhold known claims in order to open the gate to the new bypass route around § 2254(d) and *Pinholster*.

Intentional withholding of claims is no idle speculation. In one of the most dramatic cases in modern capital punishment history, this Court was faced with a slew of last-minute habeas petitions challenging execution by cyanide gas, the effects of which had been known for many years. "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the

judicial process." *Gomez* v. *United States Dist. Court*, 503 U. S. 653, 654 (1992) (*per curiam*); see also *Sawyer* v. *Whitley*, 505 U. S. 333, 341, n. 7 (1992). At several points in the development of the law of procedural default and successive petitions, the Court has noted the importance of discouraging sandbagging as a reason for these rules. "[H]abeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *McCleskey* v. *Zant*, 499 U. S. 467, 491-492 (1991); see also *Murray* v. *Carrier*, 477 U. S., at 490-491. Now the Court is being asked to create an incentive to sandbag greater than any of those it has previously closed off. The Court should decline the invitation.

III. Opening up a permanent additional issue to be litigated in nearly every capital case would further obstruct the principal purpose of AEDPA—achieving an effective death penalty.

The basic plan that Congress had in mind, as set forth in the Powell Committee Report, is that capital cases should have a single, full round of review through the state and federal courts. That means a direct appeal, one state habeas petition, and one federal habeas petition. See *infra*, at 27. If the state has a reasonably strict successive petition rule,[11] then in most cases all federal claims would be either resolved on the merits or procedurally defaulted at the conclusion of the two state procedures. If an issue is decided on the merits in state court, then it is reviewed only for reasonableness by the federal court, and that review is

11. Such as the rule for successive petitions for federal defendants, 28 U. S. C. § 2255(h).

supposed to be done entirely on the state court record. See *Cullen* v. *Pinholster*, 563 U. S. __, 131 S. Ct. 1388, 1400, 179 L. Ed. 2d, 557, 572 (2011). There is no need for the time-consuming processes of discovery and an evidentiary hearing. "Any extrarecord evidence . . . concerning . . . claims [adjudicated on the merits in state court] would therefore be inadmissible." *Ryan* v. *Gonzales*, 568 U. S. __ (No. 10-930, Jan. 8, 2013) (slip op., at 16-17). With the AEDPA reforms properly observed, federal habeas review should be expeditious in most cases, including capital cases. That has not happened to date in most states, but with the clarification in *Pinholster*, the central goal of AEDPA is within reach. This achievement of that central goal is gravely threatened by the specter of a regime in which the effectiveness of state habeas counsel routinely becomes a litigatable issue in federal habeas.

The *Martinez* opinion makes an unduly light assessment of its impact in the states where it applies. "It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceedings." *Martinez* v. *Ryan*, 566 U. S. __, 132 S. Ct. 1309, 1319, 182 L. Ed. 2d 272, 286 (2012). But this misses the point. One important purpose of the finality-enhancing reforms adopted by this Court and Congress is to reduce the need for the state to continually marshal resources to defend its judgment repeatedly in multiple courts. See *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (plurality opinion). Procedural default is like qualified immunity in that one purpose is to avoid the burden of litigation, not just prevail in litigation. Cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985). If the state must incur a litigation burden comparable to litigating the merits in order to

prevail on the procedural default point, a primary purpose of the rule has been defeated.

If the petitioner's proposal is adopted, we can expect ineffective assistance of state habeas counsel claims to be made in the vast majority of capital cases. We need not speculate about this. We already see it in California, where the *Coleman* rule is not followed in state courts and ineffective assistance of habeas counsel is cause for a successive petition. See *In re Clark*, 5 Cal. 4th 750, 779-780, 855 P. 2d 729, 749 (1993). The result has been an unmitigated disaster.

Instead of the smooth, one-complete-review system envisioned by Congress and the Powell Committee, see *supra*, at 27, "capital defendants quite typically file a second habeas corpus petition in [the California Supreme] court to raise unexhausted claims." *In re Reno*, 55 Cal. 4th 428, 442, 283 P. 3d 1181, 1195 (2012). The petitions are filed by the truckload, with massive numbers of claims that are frivolous, obviously defaulted, or both. See *id*., at 443, 283 P. 3d, at 1195. Despite the state court's prior admonitions not to attack prior counsel on mere omission of claims alone, that is routinely done. See *id*., at 503, 283 P. 3d, at 1238.

Should the rule that has proved such a disaster in California be applied nationwide? If states wanted to avoid having claims adjudicated in federal court in the first instance, evading the important protection of § 2254(d), the only way they could do that is to soften their successive petition rules to resemble the California rule. But California is most definitely not an example

to be emulated in this area. Its system is widely regarded as dysfunctional on both sides of the aisle.[12]

Either way a state goes, a new layer of litigation will be introduced into a system of review that already has too many layers. If the state softens its procedural default rule, "exhaustion petitions" will be routine, and they will require examination of counsel's conduct in some detail to resolve. If the state holds the line on successive petitions, the effectiveness of state habeas counsel will have to be litigated in federal court in nearly every case, and a claim never presented to any state court will have to be litigated from scratch in federal court whenever state habeas counsel is correctly or erroneously found ineffective. Because both the gateway issue and the substantive claim will necessarily involve facts not in the state court record, the expeditious-resolution impact of § 2254(d) as interpreted in *Pinholster* will largely be negated.

This drastic step, contrary to the core purpose of AEDPA, is not necessary to deal with the problem of states refusing to appoint counsel or appointing unqualified counsel. Congress has already provided a remedy in AEDPA itself.

IV. The correct judicial response to the problem of postconviction counsel is to implement the solution enacted by Congress.

Deficiencies in the provision of state collateral counsel is a long-standing problem. The Congress of the United States has already enacted legislation to

12. The California Supreme Court's decision not to follow *Coleman* is not, of course, the sole reason for the dysfunction, but it is a major contributing cause, as the abuses documented in *Reno* illustrate.

address it. What is astonishing is that Congress's solution remains unimplemented almost 17 years after its enactment.

In *Murray* v. *Giarratano*, 492 U. S. 1, 3-4 (1989), "[t]he courts below ruled that appointment of counsel upon request was necessary for the prisoners to enjoy their constitutional right to access to the courts in pursuit of state habeas corpus relief." This Court reversed. Concurring in that judgment, Justice Kennedy explained,

> "Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures. Assessments of the difficulties presented by collateral litigation in capital cases are now being conducted by committees of the American Bar Association and the Judicial Conference of the United States, and Congress has stated its intention to give the matter serious consideration. [Citation.]
>
> "Unlike Congress, this Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us." *Id*., at 14.

Those committees did deliver their reports soon thereafter. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989) ("Powell Committee"), reprinted in 135 Cong. Rec. 24,694 (1989); American Bar Association, Toward a More Just and Effective System of Review in State Death Penalty Cases: Recommendations and Report of the American Bar Association Task Force on Death Penalty Habeas Corpus (Oct. 1989) ("ABA Report").

While both reports recognized that appointment of qualified counsel in state proceedings was a key reform, the two proposals offered very different approaches to achieve that. The ABA would threaten states with a stick. The federal government would impose "specific mandatory standards." ABA Report 15. A state that failed to comply would lose some of the protections it had under the law of that time.

> "To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding in which the state court, in deprivation of the right to counsel, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner: exhaustion of state judicial remedies, procedural default rules, and the presumption of correctness of state court findings of fact." *Id.*, at 16.

Yet the state could appoint the best attorney in the world and pay him lavishly and still be stuck with the consequences of his error under this proposal. "Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel . . . ." *Ibid.* This proposition, considered and rejected by Congress, sounds a great deal like petitioner's proposed rule in the present case.

The Powell Committee approach was to offer a carrot rather than a stick. The proposal was optional with the states. Habeas Corpus Reform: Hearings before the Committee on the Judiciary, 101st Cong., 1st & 2d Sess., 42 (Nov. 8, 1989 & Feb. 21, 1990) (S. Hearing 101-1253) (statement of Justice Powell). In return

for adopting an appointment of counsel mechanism, review of capital cases would be reduced to "one fair and complete course of collateral review through the state and federal systems." *Id*., at 41. This would be achieved by, among other reforms, a strict limit on successive petitions. See *id*., at 42.

The Powell Committee proposal was introduced by Senator Thurmond as S. 1760. The ABA proposal, as such, was a nonstarter. The Democratic alternative to the Thurmond bill, S. 1757 by Senator Biden, was the Powell Committee proposal amended by inserting some key elements lifted from the ABA proposal. Most pertinent of these for the present case was the "ignorance or neglect" exception to procedural default quoted above, a proposal that would have gutted this Court's procedural default jurisprudence. See S. Hearing 101-1253, at 46, and n. 6 (statement of Justice Powell).

Habeas reform did not pass in the 101st Congress or in the two succeeding Congresses. In the 104th Congress, on February 8, 1995, the House passed H. R. 729, the Effective Death Penalty Act of 1995. See 141 Cong. Rec. 4120-4121 (1995). This act carried forward the Powell Committee limitations for capital cases. See Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 5, 17 (1995).

In the Senate, the provisions for an effective death penalty were ultimately consolidated with antiterrorism provisions in S. 635 and enacted as the Antiterrorism and Effective Death Penalty Act of 1996. As enacted, some of the provisions of the Powell Committee proposal, including the strict limit on successive petitions, applied to all habeas cases. Additional incentives were added to the new Chapter 154 to encourage states to opt in by providing appointment of counsel mechanisms. Among these were time limits to ensure that the reforms really would speed up the process, see 28

U. S. C. § 2266, a feature that the Powell Committee had decided to omit. See S. Hearing 101-1253, at 42 (statement of Justice Powell).

The incentive approach initially succeeded in encouraging some states to adopt appointment of counsel mechanisms, but it utterly failed in its delay-reducing goal due to a hostile reception by the federal courts charged with enforcing it. *Spears* v. *Stewart*, 283 F. 3d 992 (CA9 2002), exemplifies the problem. In response to Congress's promise of expedited federal review, the State of Arizona established a mechanism for the appointment of counsel. See *id*., at 1009. After concluding, correctly, that Arizona's mechanism complies with all of the requirements that appear in the text of the statute, see *id*., at 1012-1016, the Ninth Circuit claimed to find an additional requirement of timeliness of appointment that appears nowhere in the text. See *id*., at 1016-1019. Arizona was denied the promised benefit of Chapter 154 even though it had done everything the text of the statute requires. With the promised reward snatched away by the federal courts, the states that had not yet created appointment of counsel mechanisms no longer had the incentive that Congress had intended.

Congress reacted to *Spears* and other decisions in the USA PATRIOT Improvement and Reauthorization Act of 2005, 120 Stat. 192 (2006). By making significant revisions to Chapter 154, Congress demonstrated its determination to see this dormant law implemented. The time limit on District Court adjudication was expanded from 180 days to 450 days in recognition that the earlier limit may have been too severe. See § 2266(b)(1)(A). The requirements to qualify for the chapter were expressly limited to those stated in the text, § 2265(a)(3), for the specific purpose of abrogating *Spears*. See 152 Cong. Rec. 2445-2446 (2006) (state-

ment of Sen. Kyl). The decision as to whether a state is qualified was removed from the habeas court, with its conflict of interest, and given to the Attorney General of the United States with review by the Court of Appeals for the District of Columbia Circuit, the one circuit that does not hear habeas petitions from state prisoners. See *ibid.*; § 2265.

Although enacted over seven years ago, the revised Chapter 154 has not been implemented to date because of an inordinate delay in promulgating the implementing regulations. See § 2265(b). There are multiple reasons for that delay, but it should be near an end. A revised set of regulations was published in the Federal Register nearly two years ago. See Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11705 (Mar. 3, 2011). The comment period ended June 1, 2011. Then the Department of Justice published a new notice asking for comment on a set of changes to the not-yet-final regulations, changes that added substantive requirements in addition to those established by Congress in direct contradiction of the unambiguous language of § 2265(a)(3). See Certification Process for State Capital Counsel Systems, 77 Fed. Reg. 7559 (Feb. 13, 2012). The comment period on this notice expired March 14, 2012, and the Department of Justice has done nothing since.

The argument before this Court is to address the problem by expanding the cause and prejudice exception to the procedural default rule, expanding *Martinez*'s narrow exception to *Coleman* into an exception so wide it swallows the rule. The ABA recommended that course, Congress considered that course, and Congress rejected that course.

If it was not proper for this Court to craft its own solution to this specific problem while Congress was considering the question, *Murray* v. *Giarratano*, 492

U. S., at 14 (Kennedy, J., concurring in the judgment), it would be even less proper for this Court to craft its own solution after Congress has enacted one. It would be still more improper for this Court's solution to be along the lines of the one that Congress considered and rejected.

The judiciary does indeed have a role in fixing the problem of appointment of counsel for state collateral review in capital cases. That role is to promptly implement the solution enacted by Congress. As soon as the administrative portion of that process is completed, which should be soon,[13] the D. C. Circuit and this Court should complete their portion of the qualification process expeditiously, and the habeas courts should then implement Chapter 154 faithfully and not grudgingly for those states that qualify.

Whether Texas has done a proper job of providing collateral counsel for capital defendants is a question that can and should be decided within the framework of Chapter 154. That is the solution that Congress enacted twice, and that is the solution that the judiciary should implement.

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13. If the Department of Justice continues to drag its feet, then a mandamus intervention may be necessary. Hopefully, it will not come to that.

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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