COMMENT

JUSTICE SCALIA WAS RIGHT: "NO ONE REALLY BELIEVES THAT [*MARTINEZ*] WILL REMAIN LIMITED TO INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CASES"*[1]

ABSTRACT

This Comment argues that there is no logical reason to limit the application of *Martinez* to only ineffective-assistance-of-trial-counsel claims. Extension to other nonrecord based claims, such as *Brady* violations, jury tampering, or ineffective-assistance-of-appellate-counsel, is the only logical, fair, and just conclusion. The principles behind *Martinez* demand expansion. Part II will provide a brief overview of federal habeas and the barriers to relief that have been erected over the years by Congress and the judicial system. Part III will address the problems of ineffective-assistance-of-post-conviction-counsel and how petitioners lack means of redress. Part IV will describe the Supreme Court of the United States case *Martinez v. Ryan*, as well as the Court's holding and reasoning. Part V will address how the courts have already expanded *Martinez*, current issues of expansion that will likely come before the Supreme Court imminently, and the future of *Martinez*.

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1. Martinez v. Ryan, 132 S. Ct. 1309, 1321 (2012) (Scalia, J., dissenting).

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I. INTRODUCTION

Federal habeas corpus proceedings are a state prisoner's last chance to have his constitutional violations rectified.[2] Over the past two decades, what started as a broad right has been eviscerated by the Judiciary and Congress. The majority of state

2. Rodriguez v. Fla. Dep't of Corr., 748 F.3d 1973, 1080 (11th Cir. 2014); Marni von Wilpert, Comment, Holland v. Florida*: A Prisoner's Last Chance, Attorney Error, and the Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 FORDHAM L. REV. 1429, 1434 (2010).

prisoners' federal habeas petitions are dismissed on procedural grounds, meaning that the federal courts never review the merits of their claims (and if they do reach the merits of those claims, the federal courts are further limited by the Antiterrorism and Effective Death Penalty Act (AEDPA)).[3] One such procedural barrier is that individual claims must be exhausted in state court.[4] If the claim is unexhausted in state court, or procedurally defaults on independent and adequate grounds, the federal courts can only review the claim if the petitioner shows "cause" and "prejudice."

Historically, "cause" had to be independent of the petitioner and by the rules of agency, the petitioner's counsel. Hence, until recently, ineffective-assistance-of-post-conviction-counsel could not constitute "cause," barring the federal courts from hearing the claims on their merits.[5] Further, a petitioner is not entitled to effective assistance of post-conviction counsel under the Constitution, which prohibits a petitioner from raising a straight ineffective-assistance-of-post-conviction-counsel claim in federal habeas.[6] As a result, the combination of these two factors has classically meant that petitioners who received ineffective representation at the post-conviction level had absolutely no recourse in federal habeas.[7]

The Supreme Court presented a surprise turnaround in its *Martinez v. Ryan* ruling, stating that ineffective-assistance-of-post-conviction-counsel could be "cause," but only in limited circumstances.[8] Prior to *Martinez* there was very little that could be done to the ineffective-assistance-of-post-conviction-counsel; petitioners were stuck at a dead end.[9]

This Comment argues that there is no logical reason to limit the application of *Martinez* to only ineffective-assistance-of-trial-counsel claims. Extension to other nonrecord based claims, such as *Brady* violations, jury tampering, or ineffective-assistance-of-appellate-counsel, is the only logical, fair, and just conclusion. The

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3. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 58 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/BKG5-DSUG] (noting a recent study which showed that noncapital prisoners were granted federal habeas relief in less than 0.5% of all cases); *infra* Part II.B (discussing the limitations imposed to AEDPA).

4. *See infra* Part II.B (discussing exhaustion).

5. *See infra* Part II.B (discussing cause and prejudice).

6. *See infra* Part III (discussing ineffective-assistance-of-post-conviction-counsel).

7. *See infra* Part II.B (discussing procedural default).

8. *See infra* Part IV (discussing *Martinez*).

9. *See infra* Part III.C (discussing a petitioner's options when he has had ineffective-assistance-of-post-conviction-counsel).

principles behind *Martinez* demand expansion. Part II will provide a brief overview of the origins of federal habeas and the barriers to relief that have been erected over the years by Congress and the judicial system. Part III will address the problems of ineffective-assistance-of-post-conviction-counsel and how petitioners lack means of redress. Part IV will describe the Supreme Court of the United States case *Martinez v. Ryan*, as well as the Court's holding and reasoning. Part V will address how the courts have already expanded *Martinez*, current issues of expansion that will likely come before the Supreme Court imminently, and the future of *Martinez*.

II. A BRIEF OVERVIEW

This Comment discusses the procedural aspects of a criminal defendant's options after he has been convicted. Accordingly, a brief overview of direct appeal, post-conviction, and federal habeas procedures is necessary for a full understanding of the discussion.[10]

A. The State Criminal Justice System Post-Conviction

Generally,[11] once a criminal defendant has been convicted and sentenced there are two separate courses of action he can take in state court to challenge his conviction and/or sentence. The direct appeal is the first state procedural device.[12] While the Supreme Court has held that there is no constitutional right

10. For a more in-depth discussion of the history and application of federal habeas, see generally John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271 (1996) (outlining the basics of federal habeas corpus procedure); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748 (1987) (discussing the four primary considerations of federal habeas issues: federalism, separation of powers, the purposes of the criminal justice system, and the nature of the litigation involved); Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y. L. SCH. J. HUM. RTS. 375 (1998) (focusing on how the historical debate concerning federal habeas has shaped the current debate); Kimberly A. Thomas, *Substantive Habeas*, 63 AM. U. L. REV. 1749 (2014) (discussing the implications of the U.S. Supreme Court's shift in jurisprudence from federal habeas procedure to the substance of federal habeas review).

11. General in that, while many states have similar procedures governing direct appeal and post-conviction, they are all governed by their own states' statutes and constitutions and so they are not uniform across the fifty states. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 6.1 (6th ed. 2011) (noting that state post-conviction structures are "too diverse and protean for easy generalization").

12. *See* Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIM. JUST., Fall 2009, at 6, 7 ("In most jurisdictions, state postconviction proceedings only start once direct appellate review ends.").

to direct appeal,[13] virtually all states provide for one statutorily.[14] The direct appeal is generally limited to claims that can be raised based on the trial record and as such, no extraneous evidence can be introduced at this stage.[15] The consequence of being limited to the record means there are claims that cannot possibly be raised on direct appeal.

Second, there are post-conviction proceedings.[16] Unlike the direct appeal, during a post-conviction proceeding the criminal defendant can introduce extraneous evidence to support his claims.[17] There are many claims that involve an inquiry into prejudice and, generally speaking, most prejudice inquiries require extraneous evidence.[18] This means that many claims cannot be successfully raised on direct appeal, but only in state post-conviction proceedings.[19] Third, a criminal defendant can bring federal habeas corpus proceedings.[20]

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13. Jones v. Barnes, 463 U.S. 745, 751 (1983); McKane v. Durston, 153 U.S. 684, 687 (1894).

14. *See* James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375, 376 (1985) ("[V]irtually every state recognizes a right to appeal . . . ."). Even where appellate counsel for an indigent defendant believes there are no nonfrivolous issues on which to appeal, she must advise the appellate court of any conceivable issue. Anders v. California, 386 U.S. 738, 744 (1967).

15. *See* Primus, *supra* note 12, at 7 ("In most states, direct appeals are limited to the facts and issues that are clearly reflected in the trial record").

16. *See* Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 351 (2003) ("Every state now offers inmates some form of post-conviction review" (citing DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF (1996 & Supp. 1999)). This stage is interchangeably referred to by the states, academics, and courts as "collateral proceedings," "state habeas," and "post-conviction relief." Allen L. Bohnert, *Wrestling With Equity: Identifiable Trends as the Federal Courts Grapple With the Practical Significance of* Martinez v. Ryan & Trevino v. Thaler, 43 HOFSTRA L. REV. 945, 946 n. 4 (2015) (citing Wall v. Kholi, 562 U.S. 545, 547 (2011)). For the sake of consistency and simplicity I will refer to this stage as "post-conviction" throughout this Comment.

17. State post-conviction structures are "too diverse and protean for easy generalization." HERTZ & LIEBMAN, *supra* note 11, § 6.1. However, "virtually all state post-conviction schemes . . . permit the prisoner to develop extra-record evidence." Hammel, *supra* note 16, at 351–52.

18. *See* Tiffany R. Murphy, *Futility Of Exhaustion: Why* Brady *Claims Should Trump Federal Exhaustion Requirements,* 47 U. MICH. J. L. REFORM 697, 707 (2014) ("Similar to *Brady* claims, constitutional claims regarding ineffective assistance of counsel, eyewitness identification, forensic science challenges, and police and prosecutorial misconduct requiring evidence beyond the trial transcript must be raised in state post-conviction . . . .").

19. *See* Eve Brensike Primus, *Structural Reform In Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 704 (2007) ("[A]ppellate attorneys routinely find that their cases lack meritorious appellate issues because the law has narrowly defined the issues that they may raise.").

20. *See generally* HERTZ & LIEBMAN, *supra* note 11, § 5.1 (discussing proceedings that ordinarily should precede federal habeas corpus).

B. A Brief Overview of Federal Habeas Corpus Proceedings[21]

After exhausting the two state procedures, a defendant still has the option to commence federal habeas corpus proceedings.[22] The Supreme Court of the United States and scholars alike are generally split between two schools of thought when it comes to federal habeas. One position holds that federal habeas review should be limited to cases "where state procedural remedies are either unavailable or violate basic notions of due process."[23] On the other hand, others believe that federal habeas review should be expansive, available for any constitutional violation.[24]

Federal habeas proceedings have long been an integral part of the American legal system.[25] In fact, "[f]or many prisoners, federal habeas corpus stands as the last opportunity to challenge the constitutionality of their convictions or sentences."[26] The fundamental importance of federal habeas notwithstanding, the Supreme Court of the United States has erected "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[27] In 1996, Congress further eroded a criminal defendant's access to federal habeas with the enactment of the Antiterrorism and Effective Death Penalty Act

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21. Federal habeas corpus proceedings for state prisoners are governed by 28 U.S.C. §§ 2241, 2254 (2012); federal habeas corpus proceedings for federal prisoners are governed by 28 U.S.C. § 2255 (2012).

22. 28 U.S.C. § 2254.

23. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1082 (1995).

24. *Compare* Stone v. Powell, 428 U.S. 465, 518 (1976) (Brennan, J., dissenting) (arguing that it is a "settled principle that federal habeas relief is available to redress *any* denial of asserted constitutional rights, whether or not denial of the right affected the truth or fairness of the factfinding process"), *and* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. CIV. RTS.-CIV. LIBR. L. REV. 579, 690–91 (1982) (suggesting that federal habeas corpus should be available "for all constitutional claims regardless of the extent of prior state court litigation"), *with* Forsythe, *supra* note 23, at 1083 (discussing how Justice Harlan "would have limited [federal] habeas to cases where a state prisoner had been denied a 'full and fair opportunity' in the state court to raise his constitutional claims" (citing Mackey v. United States, 401 U.S. 667 (1971) (Harlan, J., concurring)); Desist v. United States, 394 U.S. 244, 260–61 (1969) (Harlan, J., dissenting); Fay v. Noia, 372 U.S. 391, 453 (1963) (Harlan, J., dissenting))).

25. Dating back to 1789, the first statute enacted by the First Congress empowered the federal courts to grant writs of federal habeas corpus. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) (codified as amended at 28 U.S.C. § 2241 (1948)). At first, this power was limited to cases involving federal prisoners. *Id.* By 1867, the power had been broadened to include all prisoners, including those in state custody. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385; *see also* Brown v. Allen, 344 U.S. 443, 499 (1953) (interpreting the 1867 Act as expanding the availability of federal habeas to state prisoners).

26. Blume & Voisin, *supra* note 10, at 272.

27. Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting); *see also* Smith v. Murray, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting) ("I fear that the Court has lost its way in a procedural maze of its own creation . . . .").

(AEDPA).[28] Under the Act, Congress imposed numerous restrictions on a petitioner's access to federal habeas relief, including:[29] (1) imposing a one-year statute of limitations on petitions for federal habeas corpus relief;[30] (2) a prohibition on federal courts granting federal habeas corpus relief unless the decision of the state court "was contrary to, or involved an unreasonable application of clearly established Federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence";[31] (3) limitations on when a federal court may conduct an evidentiary hearing;[32] (4) a prohibition on second or "successive" petitions for federal habeas corpus relief except when granted by an appellate court;[33] (5) limits on appealing decisions of the trial court;[34] (6) exhaustion requirements prior to federal review;[35] and (7) additional restrictive procedures that states can apply to "opt-in" to.[36] The

28. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2254 (2012)); *see also* HERTZ & LIEBMAN, *supra* note 11, § 3.2 ("AEDPA was intended to 'streamline Federal appeals for convicted criminals sentenced to the death penalty' but not to make substantive changes in the standards for granting the writ.") (quoting Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996)).

29. *See generally* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. CIV. RTS.-CIV. LIBR. L. REV. 299 (2006) (discussing the difficulties faced by *pro se* litigants under AEDPA); Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 5 (1997) (arguing that modern limits on federal habeas review have made relief so unlikely that "it is appropriate to ask . . . whether fairness is irrelevant" to collateral review).

30. *See* 28 U.S.C. § 2244(d)(1) (2012) ("A 1-year period of limitation shall apply to an application for a writ of [federal] habeas corpus by a person in custody pursuant to the judgment of a State court.").

31. *Id.* § 2254(d)(1)–(2).

32. *Id.* § 2254(e)(2).

33. *See id.* §§ 2244(b), 2255 (limiting any successive federal habeas corpus petition to constitutional violations that result in conviction of an innocent person or involve new rule of law that applies retroactively to cases in post-conviction).

34. *See id.* § 2253(c) (limiting appeals to U.S. Courts of Appeal to only claims on which a certificate of appealability has been issued).

35. *Id.* § 2254(b)–(c).

36. *Id.* §§ 2261–66 (detailing the Chapter 154 opt-in provision). The opt-in provisions of Chapter 154 further restrict a capital inmate's access to federal habeas corpus review by allowing a state to take advantage of abbreviated deadlines for the filing and resolution of a federal habeas petition. *See id.* § 2263(a) (providing that an inmate has only 180 days to file a federal habeas petition from the "*affirmance* of the conviction and sentence on direct review") (emphasis added); *id.* § 2266(b)(1)(B) (providing that parties would be allowed at least 120 days to complete *all* work, including an evidentiary hearing, if granted, in the district court); *id.* § 2266(b)(1)(A) (providing that the federal district court must decide the case and issue its final order within 450 days from the filing of the petition); *id.* § 2266(c)(1)(A) (providing that if the federal district court denies relief, the Circuit Court of Appeals will be allowed only 120 days from the filing of the reply brief to issue its opinion);

denial of federal habeas review "for even the most glaring of constitutional violations ranks among the greater wrongs of our legal era."[37]

Under AEDPA, a writ of federal habeas corpus cannot be granted unless the petitioner has exhausted all available state court remedies.[38] To properly exhaust state remedies, the petitioner must have afforded the state courts an opportunity to rule on the matter.[39] An opportunity to rule on the matter means that a defendant must have "fairly presented" his claims to the state's highest court.[40] A claim is "fairly presented" if the petitioner has provided the state court with the "substance" of his claim[41] along with the federal legal theory on which his claim is based so that the state courts have a "'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim."[42]

A federal habeas petitioner's claims may be precluded from federal review in either of two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds.[43] The claim will be procedurally defaulted in federal court so long as the state procedural bar was "independent" of federal law and "adequate" to warrant preclusion of federal review.[44] Second, a claim may be procedurally defaulted if the

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id. § 2266(c)(1)(B)(i) (providing that petitions for rehearing must be decided upon within 30 days); *id.* § 2266(c)(1)(B)(ii) (providing that if a petition for rehearing is granted, a decision must be issued within 120 days). The accelerated litigation is available only to states that have opted-in by establishing a "mechanism for the appointment, compensation, and reimbursement of [post-conviction] counsel." *Id.* § 2261(a)–(c).

37. Stephen R. Reinhardt, *The Demise Of Habeas Corpus And The Rise Of Qualified Immunity: The Court's Ever Increasing Limitations On The Development And Enforcement Of Constitutional Rights And Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1219 (2015).

38. 28 U.S.C. § 2254(b)(1); *see also* Coleman v. Thompson, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims."); Rose v. Lundy, 455 U.S. 509, 510 (1982) (addressing the question of whether 28 U.S.C. § 2254(b)(1) requires the Court to dismiss a petition that contains both exhausted and unexhausted claims).

39. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

40. *Id.* at 848.

41. Picard v. Connor, 404 U.S. 270, 275–78 (1971); Duncan v. Henry, 513 U.S. 364, 365–66 (1995) (per curiam).

42. Anderson v. Harless, 459 U.S. 4, 6 (1982) (quoting *Picard*, 404 U.S. at 276–77). "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Id.* (citing *Picard*, 404 U.S. at 277).

43. *Coleman*, 501 U.S. at 729–30.

44. *See* Harris v. Reed, 489 U.S. 255, 262 (1989); Stewart v. Smith, 536 U.S. 856, 860 (2002) (per curiam) (suggesting that a state procedural default is not "independent" if, for

petitioner failed to present the claim in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred."[45] This is often referred to as "technical" exhaustion because although the claim was not actually exhausted in state court, the petitioner no longer has an "available" state remedy.[46]

Ultimately, the federal courts retain the power under 28 U.S.C. § 2254 to ignore the procedural default itself and consider the merits of procedurally defaulted claims.[47] As a general matter,[48] federal courts will not review the merits of procedurally defaulted claims unless a petitioner demonstrates legitimate "cause" for the failure to have properly exhausted the claim in state court and "prejudice as a result of the alleged violation of federal law," or shows that "a fundamental miscarriage of justice" would result if the claim were not heard on the merits in federal court.[49]

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[50] Objective factors that constitute cause include "interference by officials"[51] that make compliance with the state's procedural rule impracticable, a "showing that the factual or legal basis for a claim was not reasonably available to counsel,"[52] and constitutionally ineffective-assistance-of-counsel.[53]

Prejudice is "actual prejudice" resulting from the alleged constitutional error or violation.[54] To establish prejudice resulting from a procedural default, a federal habeas petitioner bears the "burden of showing, not merely that the errors at his trial

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example, it depends upon an antecedent federal constitutional ruling); Ford v. Georgia, 498 U.S. 411, 423–24 (1991) (noting that a state bar is not "adequate" unless it was "firmly established and regularly followed" at the time of application by the state court (quoting James v. Kentucky, 466 U.S. 341, 348–51 (1984))).

45. *Coleman*, 501 U.S. at 735 n.1.

46. *Id.* at 732 ("A [federal] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." (citing 28 U.S.C. § 2254(b)); Gray v. Netherland, 518 U.S. 152, 161–62 (1996) (quoting Castille v. Peoples, 489 U.S. 346, 351 (1989)).

47. Reed v. Ross, 468 U.S. 1, 9 (1984).

48. Wainwright v. Sykes, 433 U.S. 72, 81 (1977).

49. *Coleman*, 501 U.S. at 750.

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

51. *Carrier*, 477 U.S. at 488 (quoting Brown v. Allen, 344 U.S. 443, 486 (1953)).

52. *Id.* at 488 (citing *Ross*, 468 U.S. at 16).

53. *Id.*

54. United States v. Frady, 456 U.S. 152, 168 (1982).

constituted a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[55] If a petitioner cannot meet the cause and prejudice standard, the federal court may still hear the merits of procedurally defaulted claims if the failure to hear the claims would constitute a "fundamental miscarriage of justice."[56] Finally, a federal habeas court may reject a claim on the merits without reaching the question of exhaustion.[57]

III. THE NEED FOR CHANGE

The system of post-conviction procedures available to a convicted defendant have led to problems when a petitioner receives ineffective-assistance-of-post-conviction-counsel.[58] The next section addresses a defendant's right to effective counsel generally and the problems they encounter trying to navigate the procedural hurdles of federal habeas proceedings.

A. The Right to Effective Assistance of Counsel & Its Shortcomings

One of the most fundamental rights afforded to criminal defendants is the right to counsel.[59] This right has been qualified to mean *effective* counsel.[60] As such, the most commonly litigated claim in post-conviction and federal habeas is ineffective-assistance-of-counsel.[61]

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55. *Id.* at 170.

56. *See* Schlup v. Delo, 513 U.S. 298, 325, 327 (1995) ("[T]he habeas petitioner [must] show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" (quoting *Carrier*, 477 U.S. at 496)); *see also* Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (holding that the petitioner must show that but for the constitutional error, no reasonable factfinder would have found the existence of any aggravating circumstance or other condition of eligibility for the death sentence under the applicable state law).

57. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of unexhausted claims on the merits); Rhines v. Weber, 544 U.S. 269, 277 (2005) (noting that a stay is inappropriate in federal court to allow claims to be raised in state court if they are subject to dismissal under (b)(2) as "plainly meritless").

58. *See supra* Part II (describing the post-conviction procedures and how a petitioner generally must show cause "external to the defense impeded counsel's efforts").

59. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that all indigent defendants accused of felonies have a right to counsel).

60. *See* Strickland v. Washington, 466 U.S. 668, 686–87 (1984) (holding that the Sixth Amendment right to counsel guarantees the *effective* assistance of counsel and providing a two-prong framework for evaluating counsel's effectiveness).

61. *See* JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980–96, at 14 (1997), http://www.bjs.gov/content/pub/pdf/ppfc96.pdf [https://perma.cc/Y36U-BFEX] ("[Pre-AEDPA] reports indicate[] that 'ineffective assistance of counsel'

The right to counsel, and therefore the right to effective counsel, extends to trial[62] and direct appeal,[63] but not to post-conviction.[64] Because there is no constitutional right to post-conviction counsel,[65] there is no constitutional right to *effective* counsel.[66] The absence of a right to constitutionally effective counsel in post-conviction has two implications: (1) a petitioner cannot raise a standalone claim of ineffective-assistance-of-post-conviction-counsel in federal habeas because he has no constitutional right to such counsel,[67] and (2) a petitioner cannot claim that ineffective-assistance-of-post-conviction-counsel can meet the "cause and prejudice" requirement in federal habeas proceedings to excuse a procedural default because it is not *constitutionally* protected.[68]

The problem arises when considering the timing of raising an ineffective-assistance-of-trial-counsel claim.[69] The timing of which

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was the most frequently cited reason for [federal] habeas corpus petitions filed by State inmates—25% of habeas corpus petitions cited ineffective counsel as the basis for the petition."); KING, CHEESMAN & OSTRO, *supra* note 3, at 64 tbl.15 (finding that 50.4% of federal habeas petitioners raised ineffective-assistance-of-trial-counsel claims under AEDPA); Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1118 (1999) ("Challenges based on ineffective assistance of counsel are the most frequently filed claims in both federal and state post-conviction relief proceedings." (citing VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 45, 91 (1994))).

62. *Strickland*, 466 U.S. at 685.

63. Evitts v. Lucey, 469 U.S. 387, 393–94 (1985); *see also* Halbert v. Michigan, 545 U.S. 605, 610 (2005) (recognizing a criminal defendant's Fourteenth Amendment right to counsel on direct appeal even though appeal is discretionary); Douglas v. California, 372 U.S. 353, 357–58 (1963) (holding that an indigent defendant has a right to counsel in a direct appeal).

64. Because of this a large majority of prisoners must actually proceed pro se, because states do not provide them with lawyers. Primus, Eve Brensike, Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine (August 15, 2016). MICH. L. REV., Forthcoming. *available at* SSRN: https://ssrn.com/abstract=2828715 (citing Nancy J. King, Enforcing Effective Assistance After Martinez, 122 YALE L.J. 2428, 2442–45 (2013)).

65. *See* Pennsylvania v. Finley, 481 U.S. 551, 555–59 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting [post-conviction] attacks upon their convictions and we decline to so hold today.") (citation omitted); Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion) (applying the rule of *Finley* to capital cases).

66. *See* Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel . . . .").

67. *See Finley,* 481 U.S. at 555–59 (holding that there is no constitutional right to post-conviction counsel); *Torna,* 455 U.S. at 587–88 (holding that where there is no constitutional right to counsel there can be no deprivation of effective assistance).

68. Coleman v. Thompson, 501 U.S. 722, 755–57 (1991) (emphasizing that only *constitutionally* ineffective counsel constitutes cause sufficient to excuse a procedural default).

69. Primus, *supra* note 19, at 691.

depends on the jurisdiction.[70] Some jurisdictions require, or prefer, that ineffective-assistance-of-trial-counsel claims be raised on direct appeal.[71] Others only allow ineffective-assistance-of-trial-counsel claims to be raised in post-conviction proceedings.[72] Either way, in order to avoid being procedurally defaulted in federal court, any claim of ineffective-assistance-of-trial-counsel *must* be raised in state court first.[73]

The problem arises when a petitioner receives ineffective-assistance-of-post-conviction-counsel and has no recourse.[74] Petitioners rely on post-conviction counsel to make both ineffective-assistance-of-trial-counsel claims and ineffective-assistance-of-appellate-counsel claims.[75] Because of exhaustion and procedural default, the petitioner is unable to raise the claim in federal habeas if state post-conviction counsel failed to do so.[76] Neither can the petitioner raise a standalone claim of ineffective-assistance-of-post-conviction-counsel because there is no constitutional right to effective post-conviction counsel.[77] The overall result is that for many petitioners, no court will ever hear a petitioner's claim that a non-record-based constitutional violation occurred at his trial.[78] The incarcerated petitioner with no means of choosing his counsel or conducting his own investigation is left shouldering the burden of the errors made by his post-conviction counsel.

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70. *Compare* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) (requiring that ineffective-assistance-of-trial-counsel claims be raised in post-conviction proceedings), *with* Reyes v. State, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993) (holding that ineffectiveness claims may be raised in a motion for new trial).

71. Including Indiana, Iowa, Oklahoma, and Wisconsin. Riner v. State, 394 N.E.2d 140, 143–44 (Ind. 1979); Collins v. State, 477 N.W.2d 374, 376–77 (Iowa 1991); McCracken v. State, 946 P.2d 672, 676 (Okla. Crim. App. 1997); State v. Escalona-Naranjo, 517 N.W.2d 157, 162 (Wis. 1994).

72. Including Alaska, Delaware, Florida, Missouri, Rhode Island, and Virginia. Champion v. State, 908 P.2d 454, 470 (Alaska Ct. App. 1995); Jackson v. State, No. 157,1995, 1995 WL 439270, at *2 (Del. July 19, 1995); Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997); State v. Hurt, 931 S.W.2d 213, 214 (Mo. Ct. App. 1996); State v. Malstrom, 672 A.2d 448, 450 (R.I. 1996); Roach v. Commonwealth, 468 S.E.2d 98, 105 n.4 (Va. 1996).

73. *See supra* Part II.B (explaining exhaustion and procedural default).

74. *See* Pennsylvania v. Finley, 481 U.S. 551, 555–59 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting [post-conviction] attacks upon their convictions and we decline to so hold today.") (citation omitted).

75. *See supra* Part II (explaining a convicted defendant's procedural options).

76. *See supra* Part II.B (explaining exhaustion and procedural default).

77. *See supra* Part III.A (discussing an accused's right to effective assistance of counsel).

78. Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887, 887 (2012) (book review) ("[F]ederal judges . . . dismiss the vast majority of [federal habeas petitions] on procedural grounds.").

B. Ineffective Post-Conviction Counsel

A report by the Texas Defender Services highlighted the most egregious cases of ineffective post-conviction counsel in Texas capital cases.[79] The report includes instances of post-conviction counsel filing two page post-conviction petitions,[80] filing post-conviction petitions that contained no extra-record claims,[81] filing post-conviction petitions with no extra-record materials to support the claims,[82] filing post-conviction petitions that contained claims previously raised and rejected by the court,[83] missing deadlines,[84] and filing motions asking to be removed and replaced due to incompetence.[85]

Further, even though Chapter 54 of AEDPA—the "opt-in" provision—provides a "statutory incentive to provide effective post-conviction defense counsel in capital cases," no state has yet to qualify.[86]

C. Other Solutions to the Problem

The other potential options available to a criminal defendant involve either filing a grievance with the state bar or suing prior counsel for malpractice.[87] However, neither of these options assists

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79. TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS (2002), http://texasdefender.org/wp-content/uploads/Lethal-Indiff_web.pdf [https://perma.cc/MV8D-K2RT].

80. *Id.* at 14; *Ex parte* Granados, Writ No. 51,135 (Tex. Crim. App. Sept. 18, 2002).

81. *See* TEX. DEFENDER SERV., *supra* note 79, at 15 (finding that 28% of the post-conviction petitions filed since 1995 contained no references whatsoever to facts outside the trial record).

82. *See id.* (finding that 39% of the post-conviction petitions filed since 1995 contained no extra-record materials to support claims).

83. *See id.* at 13 ("Many of the appointed attorneys appear to have done little or no work at all, instead plagiarizing claims and arguments from previous appeals only to file them in the same court that had already rejected them.") (citing *Ex parte* Crawford, Writ No. 40,439–01 (Tex. Crim. App. Mar. 10, 1999); *Ex parte* Gribble, Writ No. 34,968 (Tex. Crim. App. Oct. 29, 1997)).

84. *See id.* at 39 (noting that court-appointed post-conviction counsel for Joe Lee Guy failed to ensure that his federal habeas corpus application was timely filed); *id.* at 16 (describing late filing of Paul Colella's post-conviction application); *Ex parte* Colella, Writ No. 37,418–01 (Tex. Crim. App. 1998).

85. TEX. DEFENDER SERV., *supra* note 79, at 32. In Johnny Joe Martinez's case the court refused to permit the attorney to withdraw. *Ex parte* Martinez, Writ No. 36,840–02 (Tex. Crim. App. Apr. 29, 1998); *Ex parte* Martinez, 977 S.W.2d 589, 589 (Tex. Crim. App. 1998).

86. Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*, 4 OHIO ST. J. CRIM. L. 183, 185 (2006).

87. *See* David L. Dranoff, Comment, *Attorney Professional Responsibility: Competence Through Malpractice Liability,* 77 NW. U. L. REV. 633, 647 (1983) ("[B]oards

him in his current predicament of having a criminal record and/or being incarcerated.[88] A complaint to the state bar alone, even if successful, will have no effect on the petitioner's current situation.[89] Further, a successful state bar complaint does not guarantee that counsel will not continue to represent indigent defendants.[90]

In most states, to succeed in a legal malpractice claim in criminal cases, clients are required to prove actual innocence.[91] Malpractice suits also require having the money to hire a malpractice lawyer, something that is completely impossible for indigent criminal defendants.[92] Even if a criminal defendant has the means to file a bar grievance or sue his prior counsel for malpractice, that does nothing to remove his criminal record or release him from incarceration.[93] His claims will still not have been heard by any court that could rectify his situation.

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generally refuse to conduct independent investigations, and instead rely almost exclusively on complaints as a basis for action. Because the boards take a passive role, the system is dependent on the existence of incentives for outside parties to file complaints.") (footnote omitted); Primus, *supra* note 19, at 700 (discussing taking the problem of ineffective-assistance-of-trial-counsel out of the criminal justice system).

88. A successful grievance results in disciplinary actions for counsel and a successful malpractice suit often involves a defendant having to prove "that they have been exonerated or have otherwise obtained post-conviction relief in order to show that they were actually harmed by their attorneys' malpractice." Primus, *supra* note 19, at 701.

89. *See id.* at 700 (discussing taking the problem of ineffective-assistance-of-trial-counsel out of the criminal justice system).

90. *See* TEX. DEFENDER SERV., *supra* note 79, at 18–19 (discussing post-conviction lawyers who have been suspended and disciplined sill representing death row inmates); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 648 (1981) ("[Attorney m]isconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated . . . If they are not excused, penalties are light.") (footnotes omitted).

91. Wile v. County of San Diego, 966 P.2d 983, 985 (Cal. 1998); Schreiber v. Rowe, 814 So. 2d 396, 399 (Fla. 2002); Griffin v. Goldenhersh, 752 N.E.2d 1232, 1238 (Ill. App. Ct. 2001); Glenn v. Aiken, 569 N.E.2d 783, 785–88 (Mass. 1991); State *ex rel.* O'Blennis v. Adolf, 691 S.W.2d 498, 503 (Mo. Ct. App. 1985); Rodriguez v. Nielsen, 609 N.W.2d 368, 374–75 (Neb. 2000); Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 998–99 (N.H. 1999); Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987); Bailey v. Tucker, 621 A.2d 108, 113 (Pa. 1993); Ang v. Martin, 114 P.3d 637, 640–41 (Wash. 2005); Hicks v. Nunnery, 643 N.W.2d 809, 823 (Wis. Ct. App. 2002). Further, "many states have held that public defenders are entitled to qualified immunity from suit for all discretionary acts." Primus, *supra* note 19, at 700 (citing Browne v. Robb, 583 A.2d 949, 951–52 (Del. 1990)); Dziubak v. Mott, 503 N.W.2d 771, 774 (Minn. 1993); Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994); Coyazo v. State, 897 P.2d 234, 241 (N.M. Ct. App. 1995); Scott v. Niagara Falls, 95 Misc. 2d 353, 356 (N.Y. Sup. Ct. 1978); Bradshaw v. Joseph, 666 A.2d 1175, 1177 (Vt. 1995).

92. *See* Eric M. Landsberg, Comment, *Policing Attorneys: Exclusion of Unethically Obtained Evidence*, 53 U. CHI. L. REV. 1399, 1401–02 (1986) ("[L]awyers seldom complain to these disciplinary agencies about other attorneys' violations of professional standards, and . . . even if violations are reported, the disciplinary actions these agencies undertake are often ineffective and very costly.").

93. *See* Abel, *supra* note 90, at 648 ("[Attorney m]isconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light.") (footnotes omitted).

IV. THE *MARTINEZ V. RYAN* DECISION

The landscape of federal habeas changed in 2012 with the Supreme Court of the United States' decision in *Martinez v. Ryan*.[94] The section will discuss the *Martinez* case, its holding, and the Court's reasoning.

A. Brief Facts & Procedural Posture of Martinez

In 2002, an Arizona jury convicted Luis Mariano Martinez of two counts of sexual conduct with a minor, and he was sentenced to two consecutive terms of life imprisonment.[95] Unbeknownst to Martinez, in May 2002 while his direct appeal was pending,[96] his appellate counsel initiated post-conviction proceedings by filing a Notice of Post-Conviction Relief pursuant to Arizona Rule of Criminal Procedure 32.4(a).[97] Post-conviction counsel then filed a statement with the court claiming that she could "find no colorable claims."[98] In the statement appellate counsel also requested that the post-conviction court give Martinez forty-five days to file a *pro se* post-conviction petition,[99] which the post-conviction court granted.[100] However, the forty-five days lapsed and Martinez's appellate counsel "failed effectively to inform [him] that he needed to file his own petition."[101] The post-conviction court then dismissed Martinez's post-conviction action.[102]

Represented by new post-conviction counsel, Martinez filed a second Notice of Post-Conviction Relief eighteen months later.[103] Martinez followed this notice with a post-conviction petition alleging that his trial lawyer's incompetence had deprived him of his right to effective counsel in violation of the Sixth and Fourteenth Amendments.[104] The trial court dismissed Martinez's post-conviction petition as both procedurally defaulted—because

94. Martinez v. Ryan, 132 S. Ct. 1309 (2012).

95. *Id.* at 1313; Brief for Petitioner at 4, Martinez v. Ryan, 132 S. Ct. 1309 (2012) (No. 10–1001).

96. Martinez's direct appeal did not contain any ineffective-assistance-of-trial-counsel claims, *Martinez*, 132 S. Ct. at 1314, because Arizona law does not allow for such claims on direct appeal. State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

97. Martinez v. Schriro, 623 F.3d 731, 733–34 (9th Cir. 2010), *rev'd sub nom*. Martinez v. Ryan, 132 S. Ct. 1309 (2012).

98. *Martinez*, 132 S. Ct. at 1314.

99. *Martinez*, 623 F.3d at 734.

100. *Martinez*, 132 S. Ct. at 1314.

101. *Martinez*, 623 F.3d at 734.

102. *Martinez*, 132 S. Ct. at 1314.

103. *Martinez*, 623 F.3d at 734

104. *Id.*

it should have been raised in his first post-conviction petition[105]—and meritless.[106] On review, the Arizona Court of Appeals denied relief to Martinez, agreeing with the post-conviction court that his petition was precluded because he failed to raise the claims in his first post-conviction proceeding.[107] The Arizona Supreme Court declined to review Martinez's case.[108]

Martinez then filed a federal habeas petition in the U.S. District Court for the District of Arizona alleging that his trial counsel was ineffective.[109] Martinez acknowledged that his ineffective-assistance-of-trial-counsel claim had been found by the Arizona courts to be defaulted on state procedural grounds.[110] Martinez further acknowledged that the rule the Arizona courts relied upon to find the post-conviction claim defaulted[111] was "well-established" and prohibited federal habeas review.[112] However, Martinez asserted that his 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" and that his first post-conviction counsel's ineffectiveness qualified as cause to excuse this default.[113] The federal district court denied Martinez's petition.[114] The federal district court ruled that "Arizona's preclusion rule was an adequate and independent state-law ground to bar federal review,"[115] and that Martinez had failed to show cause to overcome the default because "under *Coleman*[116] . . . an attorney's errors in a post-conviction proceeding do not qualify as cause for a default."[117] The Court of Appeals for the Ninth Circuit affirmed, agreeing that Supreme Court precedent did not support a right to post-conviction counsel.[118]

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105. *Martinez*, 132 S. Ct. at 1314. Arizona defendants are "precluded" from obtaining relief on any ground that "has been waived at trial, on appeal, or in any previous [post-conviction] proceeding." ARIZ. R. CRIM. P. 32.2(a)(3).

106. *Martinez*, 623 F.3d at 734.

107. *Martinez*, 132 S. Ct. at 1314.

108. *Id.*

109. *Id.*

110. *Id.*

111. ARIZ. R. CRIM. P. 32.2(a)(3).

112. *Martinez*, 132 S. Ct. at 1314.

113. *Id.* at 1314–15.

114. Martinez v. Schriro, No. 08–785, 2008 WL 5220909, at *5 (D. Ariz. Dec. 12, 2008).

115. *Martinez*, 132 S. Ct. at 1315.

116. Coleman v. Thompson, 501 U.S. 722, 753–54 (1991).

117. *Martinez*, 132 S. Ct. at 1315.

118. Martinez v. Schiro, 623 F.3d 731, 743 (9th Cir. 2010), *rev'd sub nom*. Martinez v. Ryan, 132 S. Ct. 1309 (2012). The Ninth Circuit "recognized that *Coleman* reserved ruling on whether there is 'an exception' to this rule in those cases 'where [post-conviction] review is the first place a prisoner can present a challenge to his conviction.'" *Martinez*, 132 S. Ct. at 1315 (quoting *Martinez*, 623 F.3d at 736.

On petition for a writ of certiorari, Martinez requested that the Supreme Court of the United States rule on whether a petitioner in his position had a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.[119] The Supreme Court granted certiorari on this issue.[120]

B. Holding of Martinez

Justice Kennedy[121] wrote the opinion for the court and began by stating that while *Coleman* had indeed "left open" the question of "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial," *Martinez* was "not the case" to answer that question.[122] Instead, the "precise question" here was "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."[123] The Supreme Court of the United States ruled that in situations where ineffective-assistance-of-trial-counsel claims must be raised for the first time in state post-conviction proceedings, procedural default will not bar a federal court from reviewing the claim if the state post-conviction counsel was ineffective.[124]

Importantly, the Supreme Court of the United States held that the *Martinez* ruling was limited to cases involving: (1) "substantial" claims of ineffective-assistance-of-trial-counsel; (2) post-conviction counsel which was either nonexistent or ineffective; (3) situations where the post-conviction proceeding was the first time the ineffective-assistance-of-trial-counsel claim was reviewed; and (4) cases in which state law requires that an ineffective-assistance-of-trial-counsel claim be raised in an post-conviction proceedings.[125]

In deciding *Martinez*, the Supreme Court of the United States reasoned that allowing ineffective-assistance-of-post-conviction-counsel to qualify as "cause" for a procedurally defaulted

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119. Petition for a Writ of Certiorari at i, Martinez v. Ryan, 132 S. Ct. 1309 (2012) (No. 10–1001).

120. Martinez v. Ryan, 131 S. Ct. 2960 (2011) (mem).

121. Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan. *Martinez*, 132 S. Ct. at 1313. Justice Scalia filed a dissenting opinion, which Justice Thomas joined. *Id.* at 1321 (Scalia, J., dissenting).

122. *Id.* at 1315.

123. *Id.*

124. *Id.* at 1320.

125. Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013) (citing *Martinez*, 132 S. Ct. at 1318–20).

ineffective-assistance-of-trial-counsel claim was important for several reasons. First, without the *Martinez* ruling there is a possibility that no state court at any level will hear and consider the claim.[126] Second, the right to the effective assistance of counsel at trial is a "bedrock principle in our justice system . . . [i]ndeed, the right to counsel is the foundation for our adversary system."[127] And, third, ineffective-assistance-of-appellate-counsel may provide cause to excuse procedural default of claims in federal court[128] and post-conviction proceedings are essentially the equivalent of a petitioner's direct appeal as to the ineffective-assistance-of-trial-counsel claim.[129] In post-conviction proceedings the state court "'looks to the merits of the clai[m]' of ineffective assistance, [because] no other court has addressed the claim, and 'defendants pursuing first-tier review . . . are generally ill equipped to represent themselves' because they do not have a brief from counsel or an opinion of the court addressing their claim of error."[130]

V. APPLYING *MARTINEZ*[131]

Many questions have arisen since *Martinez*, including, but not limited to: (1) whether *Martinez* applies to states that do not bar

126. *Martinez*, 132 S. Ct. at 1316.

127. *Id.* at 1317.

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

129. *Martinez*, 132 S. Ct. at 1317.

130. *Id.* at 1317 (citing Halbert v. Michigan, 545 U.S. 605, 617 (2005)).

131. *See generally*, Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 841–42 (2013) (remarking that *Martinez* "has now spawned voluminous commentary and extensive litigation") (footnote omitted); Bohnert, *supra* note 16, at 946–67 (identifying particular trends in how the federal courts are substantively applying *Martinez* and *Trevino*); Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071 (2014) (arguing that a recent trilogy of cases—Holland v. Florida, 560 U.S. 631 (2010), Maples v. Thomas, 132 S. Ct. 912 (2012), and Martinez v. Ryan, 132 S. Ct. 1309 (2012)—signals a potential shift in the Court's innocence orientation); Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604 (2013) (arguing that after *Martinez* states are changing procedures and therefore affecting whether their procedural default rules are "adequate"); Mary Dewey, Comment, Martinez v. Ryan: *A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U. L. REV. 269 (2012) (arguing that *Martinez* marks a shift in Supreme Court jurisprudence towards broadening federal habeas access); Michael Ellis, Comment, *A Tale of Three Prejudices: Restructuring the "*Martinez *Gateway"*, 90 WASH. L. REV. 405 (2015) (discussing problems concerning the four-pronged test, including multiple and conflicting standards for the same element, tensions between *Martinez* and the underlying *Strickland* standard, and confusion where the same term of art is used in different contexts); Nancy J. King, *Preview: A Preliminary Survey of Issues Raised by* Martinez v. Ryan 3–11 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 12–34, 2012), http://ssrn.com/abstract=2147164 (discussing numerous issues created by the *Martinez* decision, including: what constitutes an "initial review collateral proceeding"; measuring the effectiveness of post-conviction

ineffective-assistance-of-trial-counsel claims on direct appeal;[132] (2) whether petitioners now need new counsel in federal habeas in order to avoid conflict;[133] (3) whether *Martinez* should be expanded to claims beyond ineffective-assistance-of-trial-counsel[134] claims;[135] (4) what the correct standard of review should be;[136] (5) what effect, if any, *Martinez* has on the statute of limitations imposed by AEDPA;[137] and (6) whether a *Martinez* argument needs to be

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counsel after *Martinez*; what is a "substantial" claim of ineffective-assistance-of-trial-counsel; and the application of *Martinez* to defaults during proceedings after the "initial review collateral proceeding").

132. Trevino v. Thaler, 133 S. Ct. 1911, 1915 (2013).

133. Christeson v. Roper, 135 S. Ct. 891, 894 (2015); Speer v. Stephens, 781 F.3d 784, 785 (5th Cir. 2015); Mendoza v. Stephens, 783 F.3d 203, 203 (5th Cir. 2015) (per curiam); Tabler v. Stephens, 591 F. App'x 281, 281 (5th Cir. 2015) (per curiam); Fowler v. Joyner, 753 F.3d 446, 463 (4th Cir. 2014); Juniper v. Davis, 737 F.3d 288, 289–90 (4th Cir. 2013); Lawrence Kornreich & Alexander I. Platt, *The Temptation of* Martinez v. Ryan: *Legal Ethics for the Habeas Bar*, 8 AM. U. CRIM. L. BRIEF, no. 1, 2012, at 1, 2.

134. The U.S. Supreme Court gave no definition of "ineffective-assistance-of-trial-counsel," and one circuit court has already held that attorney conflict-of-interest claims fall within the greater category of ineffective-assistance-of-counsel claims, and thus fall within the *Martinez* exception to the default doctrine. Pizzuto v. Ramirez, 783 F.3d 1171, 1178 (9th Cir. 2015).

135. *See* Reed v. Stephens, 739 F.3d 753, 774 (5th Cir. 2014) (declining to consider ineffective-assistance-of-appellate-counsel claim under *Martinez*); Nguyen v. Curry, 736 F.3d 1287, 1289 (9th Cir. 2013) (*Martinez* applicable to ineffective-assistance-of-appellate-counsel claims); Huton v. Sinclair, No. 12–35363, 2013 U.S. App. LEXIS 20694, at *6 (9th Cir. Oct. 11, 2013) (holding that *Martinez* is not applicable to a *Brady* claim); Rodriguez v. Padula, 481 Fed. App'x. 81, 81 (4th Cir. 2012) (suggesting that *Martinez* appears to apply to failure-to-file-direct-appeal claims); Flores v. Stephens, No. 13–2888, 2014 WL 4924118, at *5–6 (S.D. Tex. Sept. 30, 2014) (holding that *Martinez* does not apply to a defaulted claim of state adduced false testimony from witnesses).

136. Under *Martinez*, a petitioner must show that post-conviction counsel's deficient performance resulted in the default of a *substantial* ineffective-assistance-of-trial-counsel claim. Martinez v. Ryan, 132 S. Ct. 1309, 1319 (2012). However, a three-judge panel of the Ninth Circuit appears to require more than the Supreme Court. By holding that a "petitioner must show that his post-conviction relief counsel was ineffective under *Strickland v. Washington*" in order to prove cause, the *Clabourne* panel suggests that a petitioner must prove *Strickland* prejudice (versus *Martinez* substantiality) in order to demonstrate cause. Clabourne v. Ryan, 745 F.3d 362, 376 (9th Cir. 2014) (citing Detrich v. Ryan, 740 F.3d 1237, 1265 (9th Cir. 2013) (*en banc*) (Graber, J., dissenting)). This approach is analytically confusing as it would require a petitioner to later demonstrate *Strickland* prejudice as to trial counsel in order to satisfy the underlying merits of the claim. *But see* Ngabirano v. Wengler, No. 11–00450, 2014 WL 517494, at *8 (D. Idaho Feb. 7, 2014) ("[A court must] *review* but not *determine* whether trial counsel's acts or omissions resulted in deficient performance and in a reasonable probability of prejudice, and . . . *determine* only whether resolution of the merits of the claim would be debatable among jurists of reason and whether the issues are deserving enough to encourage further pursuit of them.").

137. *See* Bluemel v. Bigelow, 613 F. App'x 698, 699 (10th Cir. 2015) (nothing that the statute of limitations period is not affected by *Martinez* or *Maples* because neither case recognized a new constitutional right); *Tabler*, 591 F. App'x at 281 (remanding to the district court for consideration of whether the statute of limitations bar can be overcome based on conflicted counsel in federal habeas (same counsel as in state post-conviction)); Arthur v. Thomas, 739 F.3d 611, 629 (11th Cir. 2014) (noting that *Martinez* said nothing about equitable tolling and has no effect for tolling purposes, nor does *Martinez* affect the statute of limitations).

exhausted.[138] This next part will look at the way *Martinez* has already been expanded, significant circuit splits that already exist with regards to *Martinez*'s application, and the future issue of expanding the application to *Martinez* to claims other than ineffective-assistance-of-trial-counsel.

A. Martinez *Has Already Been Expanded*

It took little time until the Supreme Court of the United States had to consider the reach of its *Martinez* decision. Just one term after ruling in *Martinez*, the Supreme Court considered extending *Martinez* in *Trevino*.[139] *Trevino* held that *Martinez* applies not only to states that *require* that ineffective-assistance-of-counsel claims be raised for the first time in post-conviction proceedings, but also to states where the claim can technically be raised on direct appeal.[140]

Carlos Trevino was convicted of capital murder and sentenced to death by a Texas jury.[141] On direct appeal, Trevino's appellate counsel did not raise an ineffective-assistance-of-trial-counsel at

138. *Compare* Decker v. Roberts, No. 11–3069, 2013 U.S. Dist. LEXIS 35195, at *8 (D. Kan. Mar. 14, 2013) (noting that an ineffective-assistance claim must be exhausted in state court). *and* Diaz v. Pfister, No. 12–286, 2013 WL 4782065, at *7–8 (N.D. Ill. Sept. 4, 2013) (implying that ineffective-assistance-of-post-conviction-counsel arguments must be exhausted in state court before they can serve as cause in federal habeas), *and* McIntyre v. McKune, 480 Fed. App'x 486, 489 n.3 (10th Cir. 2012) ("[A]n ineffective-assistance claim used to establish cause must itself be properly exhausted in the state courts."), *with* Carbonell v. Falk, No. 13–00074, 2013 WL 528931, at *7 (D. Colo. Sept. 18, 2013) (discussing why there is no exhaustion required for *Martinez* arguments), *and* Dickens v. Ryan, 740 F.3d 1302, 1322 n.17 (9th Cir.2014) (*en banc*) (noting that *Martinez* arguments do not need to be exhausted in state court).

139. Trevino v. Thaler, 133 S. Ct. 1911, 1915 (2013).

140. *Id.* at 1921. *See also* Ramirez v. United States, 799 F.3d 845, 853 (7th Cir. 2015) (applying *Martinez* to federal prisoners who bring motions for post-conviction relief under § 2255: "[T]he federal courts have no established procedure … to develop ineffective assistance claims for direct appeal," so "the situation of a federal petitioner is the same as the one the Court described in Trevino."); Coleman v. Goodwin, 833 F.3d 537, 543 (5th Cir. 2016) (*Martinez* applies in Louisiana); Runningeagle v. Ryan, 825 F.3d 970, 981–82 (9th Cir. 2016) (*Martinez* applies in Arizona); Woolbright v. Crews, 791 F.3d 628, 636 (6th Cir. 2015) (*Martinez* applies in Kentucky); Fowler v. Joyner, 753 F.3d 446, 463 (4th Cir. 2014) (North Carolina procedures do "not fall neatly within *Martinez* or *Trevino*" and doctrine applies only in certain circumstances); Sutton v. Carpenter, 745 F.3d 787, 795–96 (6th Cir. 2014) (*Martinez* applies in Tennessee); Sasser v. Hobbs, 735 F.3d 833, 852–53 (8th Cir. 2013) (*Martinez* applies to capital defendants in Arkansas); Lee v. Corsini, 777 F.3d 46, 61 (1st Cir. 2015) (*Martinez* does not apply in Massachusetts); Fairchild v. Trammell, 784 F.3d 702, 721 (10th Cir. 2015) (*Martinez* does not apply in Oklahoma); Brown v. Brown, 847 F.3d 502, 514 (7th Cir. 2017) (*Martinez* applies in Indiana).

141. *Id.* at 1915.

penalty phase[142] claim.[143] Unlike Arizona, Texas law on its face does not prohibit a petitioner from raising an ineffective-assistance-of-trial-counsel claim in direct appeal.[144] While Texas law does not prohibit raising ineffective-assistance-of-trial-counsel claims in direct appeal, it also does not require it.[145] In fact, Texas law strongly encourages petitioners to present ineffective-assistance-of-trial-counsel claims in post-conviction proceedings.[146] Subsequently, Trevino was appointed post-conviction counsel[147] who initiated post-conviction proceedings.[148] While post-conviction counsel did raise a general claim that trial counsel was ineffective in the penalty phase of Trevino's trial, they did not specifically claim that Trevino's trial counsel was ineffective for failing to "adequately . . . investigate and to present mitigating circumstances during the penalty phase of Trevino's trial."[149] The post-conviction court denied relief and the Texas Court of Criminal Appeals affirmed.[150]

In federal habeas proceedings, new counsel for Trevino filed a habeas petition alleging for the first time that trial counsel failed to investigate and present mitigating circumstances during the penalty phase of Trevino's trial.[151] The federal district court stayed Trevino's federal habeas proceedings, allowing him to return to state court to exhaust his claim.[152] The Texas state court dismissed Trevino's successor post-conviction petition as he had procedurally defaulted the claim when he failed to raise it in his first post-conviction proceeding.[153] On return to federal court, the

142. In Texas, a capital murder trial is split into two phases. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (West 2013). The first phase is the culpability phase where the jury decides on the defendant's guilt. *Id.* The second phase is the penalty phase where the jury decides the special issues that determine whether the defendant receives a life sentence or a death sentence. *Id.* §§ 2(b)(1)–(2), 2(e)(1). *See also* TEX. PENAL CODE ANN. § 19.03 (West 2013) (defining capital murder).

143. *Trevino*, 133 S. Ct. at 1915. *See* Trevino v. State, 991 S.W.2d 849, 851 (Tex. Crim. App. 1999) (noting that Trevino raised nineteen claims on direct appeal, none of which were ineffective-assistance-of-trial-counsel at penalty phase).

144. *Trevino*, 133 S. Ct. at 1915.

145. *Id.*

146. *Id.*; *see* Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000) ("[W]e have increasingly noted that, in most cases, the pursuit of [an ineffectiveness] claim on direct appeal may be fruitless."); *Ex parte* Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) ("In most instances, the record on direct appeal is inadequate to develop an ineffective assistance claim . . . a writ of habeas corpus is essential to gathering the facts necessary to adequately evaluate such claims.").

147. *Trevino*, 133 S. Ct. at 1915.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1916.

153. *Id.*; *Ex Parte* Trevino, No. 48153–02, 2005 WL 3119064, at *1 (Tex. Crim. App.

district court held that Trevino's claim was procedurally defaulted because ineffective post-conviction counsel could not satisfy cause to excuse procedural default.[154]

On appeal, the Court of Appeals for the Fifth Circuit agreed with the district court, holding that Texas's procedural rule barring successive writs is "a valid state procedural bar foreclosing federal habeas review."[155] The Fifth Circuit decided Trevino's case prior to the Supreme Court's decision in *Martinez*.[156] However it became clear three months[157] after *Martinez*, in *Ibarra v. Texas*,[158] that the "Fifth Circuit would have found that *Martinez* would have made no difference."[159] The Fifth Circuit held that *Martinez* applies in states where a criminal defendant *must* raise ineffective-assistance-of-trial-counsel claims in post-conviction.[160] Texas law does not mandate that criminal defendants *must* raise ineffective-assistance-of-trial-counsel claims for the first time in post-conviction.[161] Rather, Texas law permits ineffective-assistance-of-trial-counsel claims to be raised on direct appeal.[162] Therefore, *Martinez* does not apply in Texas.[163]

The Supreme Court granted certiorari in *Trevino* to determine *Martinez*'s application to Texas.[164] The Supreme Court held that "where . . . [a] state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our

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Nov. 23, 2005).

154. Trevino v. Thaler, 678 F. Supp. 2d 445, 472 (W.D. Tex. 2009), *aff'd,* 449 F. App'x 415 (5th Cir. 2011), *vacated and remanded,* 133 S. Ct. 1911 (2013).

155. Trevino v. Thaler, 449 F. App'x 415, 426 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 1911 (2013).

156. *Martinez* was decided on March 20, 2012. Martinez v. Ryan, 132 S. Ct. 1309 (2012). The Fifth Circuit decided Trevino's case on November 14, 2011. *Trevino*, 449 F. App'x at 415.

157. *Martinez* was decided on March 20, 2012. *Martinez*, 132 S. Ct. 1309. *Ibarra* was decided on June 28, 2012. Ibarra v. Thaler, 687 F.3d 222, 225–26 (5th Cir. 2012), *overruled by* Trevino v. Thaler, 133 S. Ct. 1911 (2013).

158. *Ibarra*, 687 F.3d at 225–26.

159. Trevino v. Thaler, 133 S. Ct. 1911, 1916 (2013).

160. *Ibarra*, 687 F.3d at 225–26.

161. *Id.* at 227.

162. *Id.*

163. *Id.*

164. *See* Trevino v. Thaler, 133 S. Ct. 524 (2012) (mem.) (granting cert to only the first question presented); Petition for Writ of Certiorari at ii, Trevino v. Thaler, 133 S. Ct. 524 (2012) (No. 11–10189) ("These circumstances present the following question: Whether the Court should grant certiorari, vacate the Court of Appeals' opinion, and remand to the Court of Appeals for consideration of Mr. Trevino's argument under *Martinez v. Ryan*?").

holding in *Martinez* applies."[165] The holding in *Trevino* is a direct expansion of the fourth prong under *Martinez*. Just one term after holding that *Martinez* only applies to states that *require* ineffective-assistance-of-trial-counsel claims to be raised for the first time in post-conviction proceedings, the Supreme Court of the United States expanded *Martinez* to apply to any state where the petitioner did not have a meaningful opportunity to raise the claim before post-conviction proceedings.[166]

B. Current Conflicts in Martinez*'s Application*

It is only a matter of time before the Supreme Court must once again consider the expansion and application of *Martinez*. Currently, there is a circuit split on the application of *Martinez* to ineffective-assistance-of-*appellate*-counsel claims.[167] The Ninth Circuit has held that *Martinez* applies to excuse the procedural default of substantial claims of ineffective-assistance-of-appellate-counsel;[168] in contrast, the Fifth,[169] Sixth,[170] Seventh,[171] Eighth,[172] and Tenth[173] Circuits have held that it does not.[174]

In applying *Martinez* to ineffective-assistance-of-appellate-counsel claims, the Ninth Circuit reasoned that: (1) the right to effective assistance of counsel is as important on appeal as it is at trial;[175] and (2) for both trial counsel and appellate counsel ineffective-assistance-claims, "the initial-review [post-conviction] proceeding is the first time an [ineffective-assistance-of-counsel] claim can be made," and a procedural default caused by ineffective

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165. Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013).

166. *Id.*

167. Petition for Writ of Certiorari at i, Dansby v. Kelley, No. 14–8782. Cert was denied on October 5, 2015. Dansby v. Kelley, 136 S. Ct. 297 (2015).

168. *See* Hurles v. Ryan, 752 F.3d 768, 781 (9th Cir. 2014) (applying *Martinez* in a case where the underlying ineffective-assistance-of-counsel is by appellate counsel rather than trial counsel); Nguyen v. Curry, 736 F.3d 1287, 1293–94 (9th Cir. 2013) (same). Further, it is noteworthy that the U.S. Supreme Court declined to address Respondent's Petition for Writ of Certiorari regarding the Ninth Circuit's expansion. Ryan v. Hurles, 135 S. Ct. 710 (2014) (denying petition for certiorari).

169. Reed v. Stephens, 739 F.3d 753, 778 (5th Cir. 2014).

170. Hodges v. Colson, 727 F.3d 517, 531 (6th Cir. 2013).

171. Long v. Butler, 809 F.3d 299, 315 (7th Cir. 2015).

172. Dansby v. Hobbs, 766 F.3d 809, 833 (8th Cir. 2014).

173. Banks v. Workman, 692 F.3d 1133, 1148 (10th Cir. 2012).

174. The U.S. Supreme Court is scheduled to hear oral argument on April 24, 2017, on the question of "Whether the rule established in *Martinez v. Ryan* and *Trevino v. Thaler*, that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim, also applies to procedurally defaulted, but substantial, ineffective assistance of appellate counsel claims." Davila v. Davis, No. 16–6219.

175. *Nguyen*, 736 F.3d at 1294.

post-conviction counsel means that "no court will ever hear that underlying IAC claim."[176]

Although the other circuits have dutifully followed *Martinez's* limitation to ineffective-assistance-of-trial-counsel claims, their ruling have failed to provide any real explanation or justification for doing so.[177]

C. Future Expansion of Martinez

Per Justice Scalia, the Supreme Court's "soothing assertion that its holding [in *Martinez*] 'addresses only the constitutional claims presented in this case,' insults the reader's intelligence."[178] Based on the underlying principles and reasoning in *Martinez*, federal courts should expand *Martinez* to apply to *any* procedurally defaulted claims that can only be raised for the first time in post-conviction review.[179] The circuit courts of appeal have been reluctant to expand *Martinez* beyond its original, limited holding—namely to only ineffective-assistance-of-trial-counsel claims—and as such, the Supreme Court of the United States will have to weigh in at some point.[180]

The Supreme Court ruled in *Martinez* that ineffective-assistance-of-post-conviction-counsel can be cause for failure to raise an ineffective-assistance-of-trial-counsel claim for three reasons: (1) a petitioner's claim may never be reviewed or considered by any court; (2) the right is a bedrock principle of our

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176. *Id.* at 1294–95.

177. Micah Horwitz, Comment, *An Appealing Extension: Extending* Martinez v. Ryan *to Claims of Ineffective Assistance of Appellate Counsel*, 116 COLUM. L. REV. 1207, 1220 (2016).

178. Martinez v. Ryan, 132 S. Ct. 1309, 1321 (2012) (Scalia, J., dissenting).

179. HERTZ & LIEBMAN, *supra* note 11, § 26.3 ("Although *Martinez* concerned a claim of [ineffective-assistance-of-trial-counsel], and thus the Court's discussion was limited to claims of this sort . . . the Court's reasoning logically extends to other types of claims that, as a matter of state law or of factual or procedural circumstances, could not be raised before the post[-]conviction stage.").

180. *See* Abdur'Rahman v. Carpenter, 805 F.3d 710, 714 (6th Cir. 2015) (holding that *Martinez* does not apply to cumulative error claims); Atkins v. Holloway, 792 F.3d 654, 663 (6th Cir. 2015) (holding that *Martinez* does not apply to ineffective-assistance-of-trial-counsel at juvenile transfer proceedings); Pizzuto v. Ramirez, 783 F.3d 1171, 1173 (9th Cir. 2015) (holding that *Martinez* does not apply to judicial bias claims); Dansby v. Hobbs, 766 F.3d 809, 833 (8th Cir. 2014) (holding that *Martinez* does not apply to trial error claims); Wilkins v. Stephens, 560 Fed. Appx. 299, 306 n.44 (5th Cir. 2014) (holding that *Martinez* does not apply to denial of public trial claims); Hunton v. Sinclair, 732 F.3d 1124, 1126–27 (9th Cir. 2013) (holding that *Martinez* does not apply to *Brady* claims); McKinney v. Ryan, 730 F.3d 903 (9th Cir. 2013) *on reh'g en banc*, No. 09–99018, 2015 WL 9466506 (9th Cir. Dec. 29, 2015) (holding that *Martinez* does not apply to dual jury claims (not discussed in en banc decision)); Gore v. Crews, 720 F.3d 811 (11th Cir. 2013) (holding that *Martinez* does not apply to *Ford* claims); Ponis v. Hartley, 534 Fed. Appx. 801 (10th Cir. 2013) (*Martinez* does not apply to due process claims).

adversary system; and (3) post-conviction proceedings are essentially the equivalent of a petitioner's direct appeal as to the claim.[181] These rationales apply equally to almost all other claims that cannot be raised until post-conviction proceedings.

1. A Petitioner's Claim May Never Be Reviewed or Considered by Any Court. Expanding *Martinez* to ineffective-assistance-of-appellate-counsel[182] claims and all other extra--record claims[183] is compelled by the principles underlying its holding. Post-conviction proceedings are the prisoner's first opportunity to present extra-record claims and ineffective-assistance-of-appellate-counsel claims and thus are "in many ways the equivalent of a prisoner's direct appeal"[184] with respect to the claims in question. And so, just as the Supreme Court had previously held for direct appeals, the absence of effective counsel during post-conviction would mean "the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."[185] *Martinez* noted that "[w]hile confined to 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."[186] This rationale applies equally to *all* other extra-record claims.[187] Any claim that requires extraneous evidence has to be raised in post-conviction proceedings for the first time given that the direct appeals process limits arguments to those on the record.

Broadly speaking, there are two categories of claims that cannot be raised until post-conviction: (1) ineffective-assistance-of-appellate-

181. *Martinez*, 132 S. Ct. at 1316–18; Trevino v. Thaler, 133 S. Ct. 1911, 1917–18 (2013).

182. Additionally, Justice Scalia explicitly identified ineffective-assistance-of-appellate-counsel as a likely candidate for a *Martinez* analysis. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting).

183. Such as, but not limited to: *Brady* violations, Brady v. Maryland, 373 U.S. 83 (1963) (concluding that the suppression of evidence favorable to the accused violates due process where the evidence is material to either guilt or penalty); and *Batson* violations, Batson v. Kentucky, 476 U.S. 79 (1986) (articulating the test that is used to determine whether a party has engaged in purposeful discrimination in his or her exercise of peremptory challenges against a cognizable group in violation of the Equal Protection Clause). *See also* Murphy, *supra* note 18, at 707 (listing eyewitness identification, forensic science challenges, and police and prosecutorial misconduct as claims requiring evidence beyond the trial transcript).

184. *Martinez*, 132 S. Ct. at 1317.

185. *Id.*

186. *Id.*

187. In fact, this rationale was used by the Supreme Court as justification for expanding *Martinez* in *Trevino*. Trevino v. Thaler, 133 S. Ct. 1911, 1917–18 (2013) (quoting *Martinez*, 132 S. Ct. at 1318).

counsel, and (2) all other extra-record claims.[188] Applying the *Martinez* rationale to *all* extra-record violations would not be an unreasonable expansion of the decision. *Martinez* is not the only case which allows initial federal review of claims procedurally defaulted by ineffective-assistance-of-post-conviction-counsel.[189] Earlier in 2012, the Supreme Court applied agency law and fundamental fairness to hold that a client who is abandoned by his attorney may raise otherwise procedurally defaulted claims on the grounds that when "an attorney no longer acts, or fails to act, as the client's representative. . . . His acts or omissions therefore 'cannot fairly be attributed to [the client].'"[190]

Justice Scalia, in his dissent to *Martinez*, recognized this inevitability: "[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial post-conviction will be the first opportunity for a particular claim to be raised."[191] Justice Scalia was right and *Martinez* should apply to all extra record claims, not just ineffective-assistance-of-trial-counsel claims.

2. The Right Is a Bedrock Principle off Our Adversary System. There is also no logical reason why *Martinez* should not apply to other violations that are equally fundamental to a petitioner's right to a fair trial under the Constitution.[192] *Martinez* held that the right to effective assistance of trial counsel is a "bedrock principle in our justice system," and that "[i]t is deemed as an 'obvious truth' the idea that 'any person hauled into court,

188. Ineffective-assistance-of-appellate-counsel claims are obviously unavailable in direct appeal because they have yet to occur, and extra-record claims are unavailable due to the nature of direct appeal and the statutory restrictions placed by the state. *See supra* Part II (discussing post-conviction procedures).

189. Maples v. Thomas, 132 S. Ct. 912 (2012).

190. *Id.* at 922–23 (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 31, cmt. f (AM. LAW INST. 1998)) (quoting Coleman v. Thompson, 501 U.S. 722, 753 (1991)) (alteration in original).

191. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting).

192. Emily Garcia Uhrig, *Why Only Gideon?: Martinez V. Ryan and the "Equitable" Right to Counsel in Habeas Corpus,* 80 MO. L. REV. 771, 775 (2015) (arguing that "the elevation in federal habeas proceedings of ineffective assistance above other Constitutional violations . . . is unsustainable."); *id.* at 807 ("claims that should excuse a procedural default necessarily includes allegations of a substantial denial of the Fifth and Fourteenth Amendments' Due Process Clause guarantees of fundamental fairness; the Fifth Amendment privilege against self-incrimination and the Double Jeopardy Clause; the Sixth Amendment's trial-related rights, including, as recognized by the U.S. Supreme Court, the right to present a defense; and the Eighth Amendment's protection against cruel and unusual punishment.") (footnotes omitted).

who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.' Indeed, the right to counsel is the foundation for our adversary system."[193]

There are many other constitutional rights that are bedrock principles. Maybe the most obvious, and the one mentioned by Justice Scalia in his dissent, is the defendant's rights under *Brady v. Maryland*.[194] The principles defined in *Brady* express that a miscarriage of justice, at least equal to the right to counsel, is committed when the prosecution withholds evidence from an accused.[195] A *Brady* violation inherently deprives a petitioner of one the most fundamental principles of justice on which our legal system is constructed.[196] In fact "discovery of a failure to disclose exculpatory or impeachment evidence, also known as a *Brady* violation, results in forty-two percent of the exonerations in this country."[197] Justice Scalia explicitly identified *Brady* as the most likely candidate for a *Martinez* analysis.[198] An accused who has experienced *Brady* violations is also effectively denied the right to adequate assistance of his own counsel, who are crippled by the misconduct or negligence of the prosecution.[199]

Martinez, therefore, provides a broader application than its strict holding would initially seem to suggest. Its expansion to *all* extra-record claims is not only inevitable, but a necessary function of the most fundamental and equitable principles of justice. The decision provides a gateway through which other core concepts of jurisprudence may be raised on federal habeas review: "The Court would have us believe that today's holding is no more than a 'limited qualification' to *Coleman* [] It is much more than that: a repudiation of the longstanding principle

193. *Id.* at 1317 (quoting Gideon v. Wainwright*,* 372 U.S. 335, 344 (1963)).

194. *Id.* at 1321 (Scalia, J., dissenting); s*ee* Hunton v. Sinclair, 732 F.3d 1124, 1127 (9th Cir. 2013) (Fletcher, J. dissenting) ("The question in this case is whether the Martinez rule applies to ineffectiveness of state court habeas counsel in failing to raise a claim under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). I conclude that it does.").

195. *See* Murphy, *supra* note 18, (arguing that *Brady* violations are so fundamental that they should be excluded from exhaustion requirements).

196. Brady v. Maryland, 373 U.S. 83, 87 (1963).

197. *See* Murphy, *supra* note 18, at 698 (citing SAMUEL R. GROSS & MICHAEL SHAFER, EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 67 (2012)).

198. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting).

199. *See* Blake v. Kemp, 758 F.2d 523, 532 n.10 (11th Cir. 1985) (discussing the importance of *Brady* information to adequate trial preparation); Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 560 (2007) (discussing the importance of a defendant having "meaningful opportunity to make effective use of the evidence at trial in order to cross-examination prosecution witnesses and present the defense case")

governing procedural default, which *Coleman* and other cases consistently applied."[200]

The Supreme Court explicitly recognized the crucial principle that "'fundamental fairness [remains] the central concern of the writ of habeas corpus.'"[201] The right to counsel, and by extension the right to *effective* counsel, is no more or less crucial to the fair and equitable operation of the justice system than many other rights.

3. Post-Conviction Proceedings Are Essentially the Equivalent of a Petitioner's Direct Appeal as to the Claim. As with the first two reasons, this rationale applies with equal force to any and all extra-record claims that cannot be raised until post-conviction proceedings. Due to the procedural nature of direct appeal, all extra-record claims can only be raised for the first time in post-conviction.[202] Post-conviction proceedings are the equivalent to the direct appeal for all extra-record claims, not solely ineffective-assistance-of-trial-counsel claims.

VI. CONCLUSION

An expansion of *Martinez* to other fundamental principles of American jurisprudence is inevitable. The Supreme Court's rationale for allowing ineffective-assistance-of-post-conviction-counsel to meet the requirements of "cause" to excuse procedural default applies equally to other claims that can only be raised, or have to be raised, in post-conviction for the first time.[203] While not happy about it, Justice Scalia was right: "There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised."[204] The only logical and fair conclusion is to expand *Martinez* to all claims that cannot be raised until post-conviction proceedings.

Kirsty Davis

200. *Martinez*, 132 S. Ct. at 1324 (Scalia, J., dissenting) (internal citations omitted).

201. Maples v. Thomas, 132 S. Ct. 912, 927 (2012) (quoting Dretke v. Haley, 541 U.S. 386, 393 (2004)).

202. *See supra* Part II.A (explaining the state direct appeal post-conviction processes).

203. *See supra* Part V.C (discussing the reasoning behind *Martinez* and the applicability of that reasoning to claims other than ineffective-assistance-of-trial-counsel claims).

204. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting).