No. 20-5570

IN THE
Supreme Court of the United States

RICHARD BERNARD MOORE,
Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections, MICHAEL STEPHAN, Warden of Broad River Correctional Institution,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

Jonathan L. Marcus
Counsel of Record
Thania Charmani
Judith A. Flumenbaum
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, DC 20005
(202) 371-7000
jonathan.marcus@skadden.com

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members. With its affiliates, it represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of laws. It frequently appears as an *amicus curiae* before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in ensuring that the equitable rule the Court adopted in *Martinez v. Ryan*, 566 U.S. 1 (2011), remains a vital mechanism for criminal defendants to have a meaningful opportunity for review of ineffective assistance of trial counsel claims that were never fairly presented in

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[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 person other than amicus and its counsel has made any monetary contribution to the preparation or submission of this brief. The parties received 10 days' notice of the intention to file this brief.

state habeas proceedings because of ineffective assistance of state post-conviction counsel.

SUMMARY OF THE ARGUMENT

This Court held in *Martinez v. Ryan* that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial, if in the state's initial review collateral proceeding there was no counsel or counsel was ineffective." 566 U.S. 1, 17 (2012). In doing so, the Court reiterated that "the right to the effective assistance of counsel at trial is a bedrock principle in our justice system," *id.* at 12, reasoning that "[w]hen an attorney errs in initial review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim," *id.* at 10-11. Thus, *Martinez*'s equitable remedy is necessary to ensure that substantial ineffective assistance of trial counsel claims are heard at least once in federal habeas proceedings where state post-conviction counsel was ineffective in failing to adequately present the claim.

This case presents the question of whether *Martinez*'s remedy can be invoked only when state post-conviction counsel has been ineffective by not even pleading a claim of ineffective assistance of trial counsel but not where counsel was equally ineffective and only nominally raised a boilerplate claim without developing or presenting the factual support necessary for a meaningful review of such claim by state courts.

The Fourth Circuit's newly developed "heart of the claim" test answers that question in the affirmative. Under that test, the doctrine of procedural default is narrowed to the point where *Martinez* can

provide protection of a defendant's Sixth Amendment right to counsel only in circumstances where counsel's ineffectiveness was of such magnitude that a substantial claim was not even identified in state court, let alone fairly presented. The Fourth Circuit instructs the courts in its districts to look at whether the "heart of the claim" has been "fundamentally altered," an inquiry seemingly focused solely on whether the general legal theory of the claim remains the same, with no regard to the factual support for the claim.

The Fourth Circuit's approach renders *Martinez* effectively meaningless. It ignores the practical reality that "[a] claim with no evidence to support it might as well be no claim at all." *Gallow v. Cooper*, 570 U.S. 933 (2013) (Breyer, J., statement respecting the denial of certiorari). *Martinez*'s emphasis on the unique importance of ineffective assistance of trial counsel claims to the fairness of our criminal justice process dictates that relief be available "where state habeas counsel deficiently neglects to bring forward any admissible evidence to support a substantial claim of ineffective assistance of trial counsel." *Id.*

Although the Eighth, Tenth, and Eleventh Circuits have similarly frustrated the remedy *Martinez* intended to provide, the Fifth, Sixth, and Ninth Circuits have properly applied *Martinez*, recognizing that it does not permit federal courts to avoid merits review of Sixth Amendment violations merely because state post-conviction counsel presented—but did nothing to develop or prove—an ineffective assistance of trial counsel claim.

The Court should grant certiorari to address the disparate application of *Martinez* and correct the Fourth Circuit's constriction of *Martinez* and its dis-

tortion of the well-established procedural default and exhaustion doctrines.

ARGUMENT

I. *MARTINEZ* RECOGNIZED THAT ITS EQUITABLE REMEDY IS NECESSARY TO ENSURE THAT STATE POST-CONVICTION COUNSEL ADEQUATELY PROTECTS THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. The Right to the Effective Assistance of Counsel Is a Bedrock Principle in Our Criminal Justice System

In *Martinez v. Ryan*, this Court recognized that ineffective assistance of trial counsel claims have a unique and critical role in safeguarding the integrity of the criminal justice process, and established a limited right to effective assistance of counsel in post-conviction proceedings to ensure those claims are heard. 566 U.S., 1 (2011). The Court emphasized that "the right to the effective assistance of counsel at trial is a bedrock principle in our justice system" and reiterated the "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 12 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

Martinez's emphasis on the right to counsel, including in state post-conviction proceedings for some purposes, is deeply rooted in this Court's jurisprudence recognizing that the right to counsel "is of such a character that it cannot be denied without vio-

lating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. State of Ala.*, 287 U.S. 45, 67 (1932). This right is essential to safeguard criminal defendants' legal rights, including their right to a "fair trial" where "every defendant stands equal before the law." *Gideon*, 372 U.S. at 343-44. "The defendant requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 U.S. at 69. These safeguards "require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over." *Penson v. Ohio*, 488 U.S. 75, 85 (1988).

Gideon and the fundamental right to counsel find meaning only if indigent defendants are provided with quality representation. To ensure the meaningful enforcement of *Gideon* and its line of precedent, the Court has held that these constitutional guarantees do not merely require assistance of counsel, but demand *effective* representation. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To meet this standard, counsel's performance must satisfy an "objective standard of reasonableness" and his duties must be discharged according to "prevailing professional norms." *Id.* at 688; *see Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam). If counsel's performance was deficient, then courts must also assess whether the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 694. The defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. *See id.*

Strickland's emphasis on the quality of representation finds special force in capital cases involving trial counsel who fail to secure expert services and to investigate, develop, and present mitigating evidence. *See, e.g.*, *Hinton v. Alabama*, 571 U.S. 263, 272 (2014) (per curiam) (under "straightforward application" of *Strickland*, defense counsel's failure in capital murder trial to request additional funding to replace inadequate expert amounted to deficient performance); *Porter*, 558 U.S. at 40 (holding that trial counsel's failure to develop and present evidence regarding the defendant's military service in Korea and other psychological impairments was unreasonable); *Rompilla v. Beard*, 545 U.S. 374, 376 (2005) (holding that trial counsel's failure to discover evidence regarding the defendant's social history and mental impairments, including possible fetal alcohol syndrome, was unreasonable); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (holding that trial counsel's failure to properly investigate the defendant's history of physical and sexual abuse, homelessness, and diminished mental state was unreasonable); *Williams v. Taylor*, 529 U.S. 362, 396-97 (2000) (holding that trial counsel's failure to discover mitigating evidence of the defendant's childhood abuse, mental retardation, and helpfulness to prison officials was unreasonable). These decisions recognize the importance of effective assistance of counsel in capital cases and emphasize that, in light of the gravity of the punishment, courts must safeguard the Sixth Amendment right to counsel in order to prevent irreversible miscarriages of justice.

B. *Martinez* Mandates Federal Judicial Review of Trial Counsel Ineffectiveness Claims Where State Post-Conviction Counsel Performed in a Constitutionally Deficient Manner

To safeguard this bedrock principle of the right to the effective assistance of counsel at trial, *Martinez* established an exception to the procedural default doctrine, which generally requires a federal court to dismiss, without considering the merits of, any constitutional claim that a state court has refused to address because of the petitioner's failure to comply with state rules. *See* 28 U.S.C.A. § 2254; *Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977). The doctrine is a corollary to the rule that federal courts will not review a state court decision "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," whether "the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729. Therefore, federal habeas review is barred when "a state court decline[s] to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Id.* at 730. In those cases, federal review is foreclosed under the procedural default doctrine because the claim "has not been fairly presented to the state courts." *Picard v. Connor*, 404 U.S. 270, 275 (1971).

Martinez demands relief from procedural default where the state does not provide for the appointment of post-conviction counsel or when post-conviction counsel was ineffective in presenting a substantial constitutional claim of a violation of the

Sixth Amendment right to effective assistance of trial counsel. In such cases, *Martinez* held that a federal court may reach the merits of the defaulted claims because such ineffective representation provides "cause" to excuse the procedural default. *Martinez*, 566 U.S. at 9. The Court framed this limited right to effective post-conviction counsel as "equitable" rather than "constitutional." *Id.* at 16, 19. Therefore, *Martinez* allows states to opt not to provide assistance of post-conviction counsel; if a state elects that option, or if counsel is appointed but is ineffective in pressing an ineffective assistance of trial counsel claim, this equitable right is vindicated by excusing procedural default when a prisoner presents in a federal habeas proceeding a substantial claim of ineffective assistance of trial counsel. *See id.* at 13-14.[2]

Martinez did not in any way alter the well-established process for determining whether a claim was procedurally defaulted in state court or redefine the line between procedurally defaulted claims and claims adjudicated on the merits. Rather, the Court instructed lower courts to examine whether a sub-

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[2] This Court held that an attorney's deficient representation may establish "cause" for a petitioner's failure to comply with state procedural rules "because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" *Martinez*, 566 U.S. at 17 (quoting *Coleman*, 501 U.S. at 755). In doing so, this Court expressly recognized that factual development may be critical to the fair presentation and litigation of such claims. *Id.* at 13 ("Ineffective-assistance claims often depend on evidence outside the trial record."); *see also Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (recognizing that a state's "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").

stantial claim of ineffective assistance of trial counsel has been procedurally defaulted based on existing doctrines that courts have known and followed for years and if so, whether the petitioner may establish cause to excuse the procedural default due to the ineffectiveness of post-conviction counsel.[3]

Notably, *Martinez* also drew no distinction between the ineffectiveness of post-conviction counsel resulting in the failure to present a claim of ineffective assistance of trial counsel and the failure to marshal any factual support for such a claim; in either case, the procedural default will be excused. As the *Martinez* Court held, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17; *see also Trevino*, 569 U.S. at 418 (applying *Martinez* where state post-conviction counsel raised an ineffectiveness claim based on trial counsel's deficient performance in the penalty phase, but failed to "include a claim that trial counsel's ineffectiveness consisted in part of a failure adequately to investigate and to present mitigating circumstances"). The holdings in *Martinez* and *Trevino* recognize

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[3] *See McQuiggin v. Perkins*, 569 U.S. 383, 392-93 (2013) (recognizing that the "failure to develop facts in state court" is a "procedural default" (citing *Keeney v. Tamayo–Reyes*, 504 U.S. 1, 11-12 (1992))); *see also Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988) (per curiam) (holding that new evidence in a federal habeas proceeding that "substantially improves" petitioner's claim renders the claim unexhausted; expert's studies using modern sound equipment rendered unexhausted petitioner's claim that interrogating officers ignored his requests for an attorney).

that claims for ineffective assistance of trial counsel are unique and paramount to the fair administration of justice and dictate that a petitioner have the opportunity to raise an ineffective assistance of trial counsel claim through competent counsel, at least *once*. *See Martinez*, 566 U.S. at 12. Treating an ineffective assistance claim that has been only nominally presented to the state court as though it had been fully developed with factual support will wrongly foreclose any opportunity for federal court review of that claim, no matter how meritorious that claim is, no matter that the claim is backed by material, admissible evidence, and no matter how ineffective and subpar counsel's performance in the state collateral proceeding was.

This conclusion is supported by the Court's precedent that makes clear that under *Strickland*, courts are not to adopt a formalistic approach to assess whether counsel had the meager skill of asserting a laundry list of available claims, without consideration of how the claim or argument was actually presented. Instead, this Court has made clear that it is not enough that counsel is merely present, nominally asserts factually unsupported claims, or makes entirely cursory arguments; instead, counsel is expected to exhibit the "legal skills" and "careful advocacy" needed to protect the fundamental right to effective assistance of counsel at trial. *Penson*, 488 U.S. at 85; *see also Murray v. Giarratano*, 492 U.S. 1, 18 n.3 (1989) (Stevens, J. dissenting) ("The Court consistently has adhered to Justice Sutherland's observation in *Powell v. Alabama*, 287 U.S. 45, 53 (1932), that when assistance of counsel is required, that assistance must be 'effective' rather than pro forma.").

Accordingly, this Court has not hesitated to find a violation of the constitutional right to effective assistance of counsel where trial counsel might have the wherewithal to present an issue in general terms or to recognize the existence of a possible avenue for mitigation or relief, but was nonetheless found to be ineffective for failing to support cursory arguments with real evidence that was later revealed could have been readily available. *See*, *e.g.*, *Porter*, 558 U.S. at 32, 39-40, 44 (finding constitutional violation where counsel failed to present mitigating evidence regarding defendant's mental health, family background, and military service, despite presenting testimony about defendant's behavior and telling jury that defendant was not "mentally healthy"); *Wiggins*, 539 U.S. at 515, 534-35 (finding constitutional violation where counsel failed to present mitigating evidence about defendant's life history, despite informing the jury in opening statements that it would hear such evidence); *Williams*, 529 U.S. at 397-98 (finding constitutional violation where counsel failed to investigate and present substantial mitigation evidence about defendant's childhood and intellectual deficiencies, despite presenting some mitigating evidence about defendant's background).

Honoring the principles that *Strickland* established and emphasizing that the same paramount considerations apply to a prisoner's first opportunity for post-conviction review, *Martinez* fulfills *Gideon*'s promise that an individual accused of a criminal offense that involves the potential loss of physical liberty—and, as in this case, life—has a Sixth Amendment right to effective assistance of counsel at trial.

C. The Fourth Circuit's Application of "Fair Presentation" Principles Eviscerates *Martinez*

Despite *Martinez*'s clear holding and this Court's guidance for its straightforward application, the Fourth Circuit has created a new test to determine whether a claim is eligible for relief under *Martinez*. Refusing to follow its own well-established precedent in applying the procedural default doctrine,[4] the Fourth Circuit now instructs lower courts to look at whether the new evidence before the federal court "fundamentally alter[s] the heart of the . . . claim." App. 3a. If the court finds that the "heart of the claim" was not "fundamentally altered," then the claim is not procedurally defaulted because, according to the Fourth Circuit, it has been fairly presented to the state court and the federal court is limited to reviewing the "record that was before the state court" without allowing petitioner to offer new evidence to

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[4] *See*, *e.g.*, *Wise v. Warden*, 839 F.2d 1030, 1034 (4th Cir. 1988) ("[W]hen critical evidence is presented for the first time to a federal habeas court, it cannot be said that the petitioner has 'fairly presented' to the state courts the 'substance' of his federal claim."); *see also Gray v. Netherland*, 99 F.3d 158, 161–62 (4th Cir. 1996) (noting that "[t]he general principles governing the preservation of constitutional challenges to state convictions are well settled" and stating that petitioner's claim was not fairly presented by a "general reference" to a due process claim without "a statement of facts sufficient to support a constitutional claim" and the legal basis for that claim with "particular analysis developed in cases"); *Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) ("The Supreme Court has flatly stated that '[e]xhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful.'" (quoting *Keeney v. Tamayo–Reyes*, 504 U.S. 1, 9 (1992))).

supplement his claim pursuant to *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). App. 11a-14a.

In this case, the Fourth Circuit held that Moore's post-conviction counsel fairly presented to state courts the claim that trial counsel "fail[ed] to adequately investigate and rebut the state's physical evidence." App. 7a, 14a. In support of that claim, Moore's state post-conviction counsel generally asserted at the pleading stage that trial counsel was ineffective in investigating and rebutting the State's evidence and for failing to present a defense expert or evidence to rebut the physical evidence "concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene analysis." App. 62a-63a. Post-conviction counsel did not plead with any more detail what expert testimony could have been presented. At the state court post-conviction hearing, counsel introduced testimony from "a crime-scene technician" supporting Moore's contention that the shell casing found on the scene must have come from someone firing the gun from behind the counter and was thus inconsistent with the State's theory of the case. App. 7a. The state court held that the crime technician testimony was not admissible, however, because the witness was not an expert in crime scene reconstruction. App. 78a-79a. The court then concluded that "Moore did not meet his burden of proof on this issue because *he did not call a crime scene expert of his own* . . . to testify to how counsel was ineffective in failing to call a crime-scene expert." App. 77a (emphasis added).

Seeking federal habeas review, Moore's new counsel asserted that Moore's trial counsel was ineffective based on the sworn testimony from two qualified experts that the forensic evidence was con-

sistent with Moore's assertions that he acted in self-defense. App. 10a. Moore's federal petition stated that the ineffective assistance of trial counsel claim was not fairly presented to the state court and was procedurally defaulted. Therefore, under *Martinez,* Moore asked the district court to consider the new evidence that established that both trial counsel and state post-conviction counsel were ineffective, thus providing cause and prejudice to excuse the procedural default.

The district court held that the state court had adjudicated Moore's claim on the merits because "the heart of the claim" in state and federal court "remained the same," despite the lack of admissible evidence offered in the state court proceeding and the substantial evidence federal habeas counsel presented for the first time. App. 10a-11a. The Fourth Circuit affirmed, holding that the claim had been "presented in substantially identical terms to the state court," App. 14a, and, despite the material differences in support for the claim, the new evidence "fail[ed] to change the heart of the claim," App. 17a. The Fourth Circuit did not offer any guidance as to the requirements of the "heart of the claim" test, nor did it explain its arbitrary deviation from the fair presentation and exhaustion doctrines that underlie *Martinez*'s reasoning, under which "[t]he exhaustion doctrine is not satisfied where a federal habeas petitioner presents evidence which was not presented to the state court and which places his case in a significantly different and stronger evidentiary posture

than it was when the state courts considered it." *Wise*, 839 F.2d at 1033.[5]

The Fourth Circuit's newly minted and undefined "heart of the claim" standard renders *Martinez* meaningless to an important category of cases to which it would otherwise apply. *Martinez* held that ineffective assistance of post-conviction counsel in presenting a substantial claim for ineffective assistance of trial counsel may provide cause to excuse a procedural default. 566 U.S. at 12, 14. *Martinez* clearly intended to provide relief where post-conviction counsel failed to develop the factual support for a meritorious ineffective assistance of trial counsel claim which was then necessarily procedurally defaulted. *See McQuiggin*, 569 U.S. at 392-93 (recognizing that the "failure to develop facts in state court" is a "procedural default" (citing *Tamayo-Reyes*, 504 U.S. at 11-12)); *see also supra* note 3.

The Fourth Circuit's approach effectively circumvents *Martinez*, by interpreting the "fair presentation" doctrine so broadly that it encompasses ineffective assistance of trial counsel claims that have not been in fact "fairly presented" to the state courts, thereby precluding a finding that the claims are procedurally defaulted and thus are eligible for *Strickland* review under *Martinez*.

Moreover, the Fourth Circuit's standard conflicts with this Court's principles governing whether a prisoner has exhausted state court remedies. The Court has made clear that for a claim to be consid-

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[5] The "heart of the claim" standard has indeed never been formulated or applied by the Fourth Circuit before this case, except as dicta in *Gray v. Zook*, 806 F.3d 783, 799 (4th Cir. 2015).

ered adjudicated on the merits, the prisoner must "fairly present" his claim in the appropriate state court and provide it with a "fair opportunity" to "apply controlling legal principles to the facts bearing upon (his) constitutional claim." *Picard v. Connor*, 404 U.S. 270, 277 (1971). As the Court noted in *Martinez*, these rules are designed "to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." 566 U.S. at 9. The Fourth Circuit's approach might appear at first glance as serving the states' dignitary interests, but in reality it does a disservice to comity interests by deferring to a judgment by a state court on a claim that that court never had a full and fair opportunity to review because of ineffective assistance of state habeas counsel.

Finally, the Fourth Circuit's "heart of the claim" standard overlooks numerous decisions by this Court recognizing that failure to produce material evidence to support a meritorious defense constitutes ineffective assistance of counsel under *Strickland*. *See supra* at p. 5.[6] The "heart of the claim" test leads

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[6] *See also Barnett v. Roper*, 904 F.3d 623, 631 (8th Cir. 2018) (finding state post-conviction counsel ineffective, inter alia, for failing to sufficiently plead a claim of trial counsel's ineffectiveness or presenting factual support for the claim); *Harris v. Thompson*, 698 F.3d 609, 613 (7th Cir. 2012) (finding trial counsel ineffective for failing to conduct adequate hearing regarding competence of exculpatory witness, despite proffering legal argument that witness was competent to testify); *Daniels v. Woodford*, 428 F.3d 1181, 1204-06 (9th Cir. 2005) (finding trial counsel ineffective, inter alia, for relying on expert witness testimony by "inexperienced" psychologist "who was not qualified to testify in a capital case" and who presented a potentially detrimental opinion); *Turner v. Calderon*, 281 F.3d 851, 892-95 (9th

to the illogical and unjust result that where the petitioner has a meritorious ineffective assistance of trial counsel claim, he could obtain review under *Martinez* if post-conviction counsel failed to raise the claim but not if counsel raised the claim without any supporting evidence when such evidence was available, even though in both situations, post-conviction counsel would be found ineffective under *Strickland*.

II. CERTIORARI IS WARRANTED TO PROVIDE CLARITY TO LOWER COURTS AND PRACTITIONERS, AND ENFORCE THIS COURT'S MANDATE IN *MARTINEZ*

A. Courts of Appeals are Divided on How to Apply *Martinez*

Certiorari is necessary to ensure that federal courts faithfully and consistently enforce *Martinez*. Although some courts have applied *Martinez* the way envisioned by this Court, other courts, like the Fourth Circuit, have carved a new path, blurring what used to be a clear line delineating those claims that have been fairly presented to state courts and those that have not.

Federal courts in the Ninth Circuit have faithfully followed this Court's holding in *Martinez* and the well-established jurisprudence regarding whether additional facts presented for the first time in federal court fundamentally alter an already exhausted claim. The Ninth Circuit's decision in *Dickens v.*

Cir. 2002) (remanding for evidentiary hearing to determine, inter alia, whether trial counsel's failure to present testimony of qualified expert on the effects of drug use constituted a Sixth Amendment violation).

Ryan, 740 F.3d 1302 (9th Cir. 2014), exemplifies this approach. Dickens's trial counsel failed to present critical evidence at the sentencing hearing. *Id.* at 1309. There, like here, Dickens's state habeas counsel had identified an ineffective assistance of counsel claim during post-conviction proceedings but failed to substantiate it with any evidence or factual underpinnings. *Id.* at 1317. Unsurprisingly, the claim was summarily rejected by the state court. *Id.* On appeal from the district court's denial of federal habeas relief, the Ninth Circuit held that "*Martinez* may provide a path for Dickens to demonstrate cause" for the procedural default of his "*newly-enhanced* claim of ineffective assistance of sentencing counsel," provided he could show on remand that "the claim [was] substantial and . . . that his PCR [*i.e.*, post-conviction] counsel was ineffective under *Strickland*." *Id.* at 1320 (emphasis added). In other words, even though Dickens's ineffective assistance of counsel claim was technically raised in state court, it was wholly unsubstantiated, and the factual support offered in federal court presented a fundamentally altered claim that was unexhausted and procedurally defaulted for *Martinez* purposes. *See also Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019) (affirming the district court's grant of habeas relief on defaulted claim that trial counsel unreasonably failed to investigate and present a defense that petitioner did not cause injuries resulting in victim's death); *Gallegos v. Shinn*, No. 01-CV-01909, ECF No. 160 (D. Ariz. Feb. 20, 2020) (holding state habeas counsel was constitutionally ineffective and ordering evidentiary hearing on defaulted constitutional claim that trial counsel was ineffective during the penalty phase); *Salazar v. Ryan*, No. 96-CV-00085, ECF No. 225 (D. Ariz. Sept.

9, 2016) (granting evidentiary hearing to determine whether state capital habeas counsel was ineffective); *Lopez v. Ryan*, No. CV-97-00224, ECF No. 173 (D. Ariz. Nov. 20, 2015) (ordering evidentiary hearing on defaulted constitutional claim that trial counsel was ineffective during the penalty phase).

The Fifth Circuit has also correctly applied *Martinez*. In *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014), the Fifth Circuit relied on *Dickens* to recognize that while "*Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court," *id.* at 394, *Martinez* could still apply where new evidence revealed that state habeas counsel pursued the ineffective assistance of trial counsel claim ineffectively, *id.* at 395. Similarly, the Sixth Circuit recently granted a petitioner a certificate of appealability to consider whether the petitioner's trial counsel ineffective assistance of trial counsel claims were procedurally defaulted (and therefore eligible for review under *Martinez*) because state post-conviction counsel "fail[ed] to submit any evidence in support of the claims." *Rogers v. Mays*, 814 F. App'x 984, 987 (6th Cir. May 18, 2020).

By contrast, the Fourth Circuit's "heart of the claim test" precludes consideration under *Martinez* of ineffective assistance of trial counsel claims that—albeit nominally presented to state courts—were not supported by material admissible evidence.

In addition to the Fourth Circuit, the Eighth, Tenth, and Eleventh Circuits have taken a similarly tortured approach to *Martinez*'s application. *See Thomas v. Payne*, 960 F.3d 465, 473 (8th Cir. 2020) (holding that as long as "the specific ineffective assistance at trial allegations" were "presented" in state court, the "weakness of support . . . in the [state

court] petition and hearing has no bearing on whether the claims were actually presented"); *Carter v. Bigelow*, 787 F.3d 1269, 1290 n.19 (10th Cir. 2015) (holding that *Martinez* provides "no relief" for claims nominally raised in state court because they "were not found to be procedurally defaulted"); *Hamm v. Comm'r, Alabama Dep't of Corr.*, 620 F. App'x 752, 778 n.20 (11th Cir. 2015) (a claim raised in state court, no matter how ineffectively, is "not defaulted and [is] considered on the merits in state court; accordingly, collateral counsel's ineffective assistance is irrelevant to that claim").

Given the lower courts' conflicting approaches, this Court's direction is essential in determining when an ineffective assistance of trial counsel claim supported by new facts in federal habeas proceedings warrants a finding that state collateral review counsel was ineffective and thereby provides cause for excusing a procedural default. Had petitioner here been able to raise his ineffective assistance of trial counsel claim in the Ninth Circuit rather than the Fourth, he would have received an evidentiary hearing. This Court should grant certiorari to ensure that a prisoner's fundamental Sixth Amendment right to effective assistance of trial counsel is not determined by geography.

B. Lower Courts and Practitioners Require Guidance on How the Supreme Court Interprets *Martinez*

This issue merits the Court's review not only because it has divided the Courts of Appeals, but also because practitioners require guidance in both determining when *Martinez* applies and how to

represent clients zealously, particularly in capital cases like this one.

Notably the State of Arizona will ask this Court to review this question, arguing the opposite position. On August 25, 2020, the state defendants in *Jones v. Shinn* requested a stay of the mandate from the Ninth Circuit to permit the filing of a petition for writ of certiorari of that court's decision that correctly held that *Martinez's* equitable exception "applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court." *Jones*, 943 F.3d at 1221. The state defendants there argued that the proper application of *Martinez* is a substantial issue that merits this Court's review. *See Jones v. Shinn*, No. 18–99006, ECF No. 88 (9th Cir. Aug. 25, 2020); *see also Jones v. Shinn*, No. 18–99006, ECF No. 89 (9th Cir. Aug. 25, 2020) (staying mandate).

The question presented in both this case and *Jones v. Shinn* is particularly important in capital cases, where ineffective assistance of trial counsel claims arise with particular frequency.[7] Under the Fourth Circuit's holding in this case, cases where post-conviction counsel completely ignore substantial ineffective assistance of counsel claims are eligible for the equitable exception of *Martinez*, while defendants whose attorneys assert an ineffective assistance of counsel claim but without meaningful and available factual support are treated as if they fully presented a claim for adjudication on the merits.

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[7] Ineffective assistance of trial counsel claims arise in over eighty percent of capital cases. Nancy J. King & Joseph L. Hoffman, *Habeas for the Twenty-First Century,* 147-48 & tbl. 8.1 (2011).

While both lawyers were ineffective and prejudiced their client's interests, the Fourth Circuit allows possible correction of only one of these errors. *But see Gallow v. Cooper*, 570 U.S. 933 (2013) (Breyer, J., statement respecting the denial of certiorari) ("A claim without any evidence to support it . . . might as well be no claim at all.").

This unwarranted distinction is particularly noteworthy given the documented lack of funding and resources for post-conviction counsel. The Court is well aware of issues plaguing state post-conviction counsel, and *Martinez* is one in a series of cases in which the Court has addressed these issues. *See, e.g.*, *Maples v. Thomas*, 565 U.S. 266, 273 (2012) (critically discussing post-conviction representation practices in Alabama and noting that "some prisoners sentenced to death receive no postconviction representation at all"); *Holland v. Florida*, 560 U.S. 631, 652-53 (2010) (ineffective performance by a state postconviction attorney could be the basis of a finding of extraordinary circumstances sufficient to equitably toll AEDPA's one-year statute of limitations). "Indigent capital defense remains scandalously underfunded."[8] To mount a sufficient defense, capital defenders require "thorough research into the facts surrounding the crime as well as the defendant's background, family, upbringing, mental health, and character. This research necessitates private investigators, paralegals, secretaries, and quite

[8] Benjamin H. Barton & Sephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PENN. L. REV. 967, 972-73 (2012); *see also* John H. Blume & W. Bradley Wendel, *Coming to Grips with the Ethical Challenges for Capital Post-Conviction Representation Posed by Martinez v. Ryan*, 68 FLA. L. REV. 765 (2016).

possibly forensic experts, psychiatrists, doctors, and social workers." *Barton & Bibas, supra* note 8, at 972-73. The development of a substantial ineffective assistance claim can require extensive fact-finding and resources. State post-conviction attorneys often lack the time, experience, or funding to provide effective capital defense.

Despite the well-documented risk that state habeas counsel may present a claim but not take the steps necessary to adequately support it, the Fourth Circuit's approach provides no relief, foreclosing federal habeas review where state habeas counsel raises but is unable to sufficiently develop the claim. For petitioners like Moore who suffered this fate, *Martinez*'s equitable right is a hollow one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jonathan L. Marcus
Counsel of Record
Thania Charmani
Judith A. Flumenbaum
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, DC 20005
(202) 371-7000
jonathan.marcus@skadden.com

October 2, 2020