# AN APPEALING EXTENSION: EXTENDING *MARTINEZ V. RYAN* TO CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

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## INTRODUCTION

In March of 2012, in *Martinez v. Ryan*,[1] the Supreme Court announced a new type of cause under the cause-and-prejudice exception to procedural default in federal habeas cases. This new type of cause allowed federal courts to review a subset of claims that had been procedurally defaulted in state habeas proceedings due to the ineffectiveness of postconviction counsel. The parameters of that subset were the source of a heated debate on the Supreme Court. The majority, limiting its analysis to the facts before it, claimed that the new cause excused only claims of ineffective assistance of trial counsel (IATC). The dissent, however, argued that the new cause would apply to other claims as well.[2] The application of *Martinez* to excuse procedurally defaulted claims of ineffective assistance of appellate counsel (IAAC) is the subject of this Note.

Following *Martinez*, the circuit courts split along the same lines as the majority and dissent in that case: The Fifth, Sixth, Seventh, Eighth, and Tenth Circuits held that *Martinez* cannot be used to excuse IAAC claims in addition to IATC claims,[3] whereas the Ninth Circuit held that *Martinez* can be used to excuse IAAC claims.[4]

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1. 132 S. Ct. 1309 (2012).

2. Compare id. at 1315 ("This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."), with id. at 1321 (Scalia, J., dissenting) (doubting "newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases" as "[t]here 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 . . . .").

3. See Long v. Butler, 809 F.3d 299, 315 (7th Cir. 2015) (holding *Martinez* does not serve to excuse procedurally defaulted IAAC claims); Reed v. Stephens, 739 F.3d 753, 778 n.16 (5th Cir. 2014) (same); Hodges v. Colson, 727 F.3d 517, 530–31 (6th Cir. 2013) (same); Banks v. Workman, 692 F.3d 1133, 1147–48 (10th Cir. 2012) (same); Dansby v. Norris, 682 F.3d 711, 728–29 (8th Cir. 2012) (same), rev'd on other grounds, 133 S. Ct. 2767 (2013).

4. See Nguyen v. Curry, 736 F.3d 1287, 1289–90 (9th Cir. 2013) (holding *Martinez* does serve to excuse procedurally defaulted IAAC claims).

Many scholars have written on the potential impact of *Martinez*.[5] Some have even predicted or acknowledged the circuit split.[6] None, however, have analyzed in detail the circuit courts' limitation of *Martinez* to excusing IATC claims or explored whether that limitation is the correct result. This Note examines the circuit courts' and commentators' arguments both in favor of and against limiting *Martinez* to the IATC context.

Beyond the purely procedural question, extending *Martinez* implicates significant constitutional and federalism concerns. On the one hand, *Martinez* itself acknowledges the importance of the constitutional right to effective counsel, though the Court focuses primarily on trial counsel.[7] On the other hand, the Supreme Court has often touted the states' legitimate interest in protecting the finality of state court decisions.[8] Extending *Martinez* to excuse the default of IAAC claims

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5. See, e.g., Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 26.3[b] (6th ed. Supp. 2013) (reviewing *Martinez* decision); 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, 948–49 (2015) (identifying trends in federal courts' application of *Martinez*); Justin F. Marceau, Is Guilt Dispositive? Federal Habeas Review After *Martinez*, 55 Wm. & Mary L. Rev. 2071, 2077–78 (2014) (positing *Martinez* signals shift in Supreme Court's focus from petitioner's guilt to adequacy of state procedures); Eve Brensike Primus, Effective Trial Counsel After *Martinez v. Ryan*: Focusing on the Adequacy of State Procedures, 122 Yale L.J. 2604, 2618–24 (2013) (arguing state courts are changing procedures in response to *Martinez,* thereby making themselves vulnerable to challenges on adequacy grounds); 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) ("[E]levation in federal habeas proceedings of ineffective assistance above other constitutional violations, such as *Brady v. Maryland* or *Batson* claims, is unsustainable."); Mary Dewey, Comment, *Martinez v. Ryan*: A Shift Towards Broadening Access to Federal Habeas Corpus, 90 Denv. U. L. Rev. 269, 270–71 (2012) (arguing *Martinez* signaled shift in Supreme Court jurisprudence toward broadening access to habeas relief but limiting language will not ensure defendants receive effective assistance in state criminal proceedings); Megan Raker, Comment, State Prisoners with Federal Claims in Federal Court: When Can a State Prisoner Overcome Procedural Default?, 73 Md. L. Rev. 1173, 1173–75 (2014) (arguing *Martinez* should be extended to excuse procedurally defaulted *Brady* claims).

6. See, e.g., Hertz & Liebman, supra note 5, § 26.3 ("Although *Martinez* concerned a claim of [IATC], 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 postconviction stage."); Raker, supra note 5, at 1189 ("Courts have held that *Martinez* does not extend to ineffective assistance claims emerging from post-conviction appeals or to other procedurally defaulted claims.").

7. *Martinez*, 132 S. Ct. at 1317 (reasoning right to "effective assistance of counsel at trial is a bedrock principle in our justice system"); see also Bohnert, supra note 5, at 975 (noting "Court's concern for protecting the fundamental, bedrock right to effective assistance of counsel"); Raker, supra note 5, at 1174 (quoting same language from *Martinez*).

8. See Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them."); Wainwright v.

would seem to further protect the right to counsel, but it could also increase the frequency of federal courts reviewing, and even overturning, state court convictions.

This Note contains three parts. Part I provides background on the Court's habeas jurisprudence in this area, including the Court's decision in *Martinez*. Part II details the circuit split. Part III argues that federal courts should excuse procedurally defaulted IAAC claims under the new *Martinez* cause exception.

## I. THE DEVELOPMENT OF PROCEDURAL DEFAULT RULES IN HABEAS CORPUS

A state prisoner has a right to federal judicial review of constitutional claims challenging his sentence or conviction.[9] He must generally first bring his federal constitutional claim in state court.[10] He can do so on direct appeal or, when appropriate, in a postconviction appeal. Today, a federal court cannot review the merits of a federal habeas claim if the state courts rejected the claim on a procedural ground that was "independent of the federal question and adequate to support the judgment."[11] For example, if the state courts reject a prisoner's federal constitutional claim for failure to comply with the state's timeliness rule for postconvinction relief applications, the federal district court cannot review that claim. This is because the state's timeliness rule is both independent of the underlying federal constitutional question and adequate to support the judgment.[12] This procedural default will be overlooked in two circumstances: (1) if the petitioner can show cause for his failure to comply and prejudice resulting therefrom or (2) if he is actually innocent and can show that failure to review his claims on the merits would result in a fundamental miscarriage of justice.[13]

This Note focuses on the first exception to the independent-and-adequate rule: cause and prejudice. This Part is organized chronologically and proceeds in two steps. Section I.A reviews the cases in which the Supreme Court developed the pre-*Martinez* cause-and-prejudice exception. Section I.B dissects *Martinez*'s procedural circumstances and the new type of cause that it announced.

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Sykes, 433 U.S. 72, 88–90 (1977) (favoring rule making state trial "'main event' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing").

9. 28 U.S.C. § 2254(a) (2012).

10. Id. § 2254(b)(1)(A); see, e.g., Engle v. Isaac, 456 U.S. 107, 124–29 & n.28 (1982) ("Section 2254(b) requires habeas applicants to exhaust those remedies 'available in the courts of the State.'" (quoting 28 U.S.C. § 2254(b)(1)(A))).

11. *Coleman*, 501 U.S. at 729.

12. See, e.g., id. at 740, 757 (declining to review state prisoner's federal constitutional claims because state court found claims defaulted due to late filing).

13. Id. at 750.

### A. *Supreme Court Precedent Before* Martinez

1. *Pre-*Coleman*:* Fay, Francis*, and* Sykes. — Before the independent-and-adequate rule and its cause-and-prejudice exception existed in their present form, the rules governing when federal courts were allowed to review procedurally defaulted claims were more lenient. In *Fay v. Noia*, a 1963 case, the Supreme Court articulated the so-called deliberate bypass rule.[14] In *Fay*, the petitioner claimed that his confession had been coerced, but the state courts refused to hear the claim in postconviction proceedings because he failed entirely to file a direct appeal from his state conviction.[15] Two of his codefendants did timely appeal and were later released on a finding that their confessions had been coerced.[16] The federal district court denied relief on the ground that the petitioner had not exhausted his state court remedies, and the Second Circuit reversed.[17] The Supreme Court affirmed, holding that a procedural default in state court bars federal review only where the petitioner "deliberately bypassed the orderly procedure of the state courts and in so doing . . . forfeited his state court remedies."[18] The federal courts were allowed to review the merits of the claim because Noia had not deliberately bypassed the state court procedures.[19]

In explaining the reasoning behind this rule, the Supreme Court first acknowledged that ordinarily federal review is prohibited if the state court decision rests on independent and adequate state law grounds.[20] The Court reasoned, however, that the balance of interests when the state law grounds are procedural, as in Noia's case, is different from the balance when the state law grounds are substantive.[21] In the latter case, the state seeks to protect the integrity of its laws, whereas in the former it is merely pursuing an interest in efficient procedures.[22] Accordingly, the Court held that the adequacy doctrine should be applied to forfeit claims defaulted under state *procedural* rules only when the defendant "deliberately sought to subvert or evade the orderly adjudication" of his claim in the state courts.[23]

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14. 372 U.S. 391, 433 (1963).

15. Id. at 394.

16. Id. at 395.

17. Id. at 397.

18. Id. at 438.

19. Id. at 440. The Court found that Noia's intent in not appealing was not to bypass the state court system but rather to avoid the risk of being sentenced to death on retrial. See id. at 439–40 (reasoning "[f]or Noia to have appealed in 1942 would have been to run a substantial risk of electrocution" and thus concluding that declining to appeal was not "deliberate circumvention of state procedures").

20. Id. at 428.

21. Id. at 431–33.

22. Id. at 432.

23. Id. at 433.

In the late 1970s, the Court began to chip away at *Fay*'s deliberate bypass rule. In *Francis v. Henderson*, the petitioner argued that the federal court should review his challenge to the composition of the grand jury.[24] The state court had refused to review the challenge because the petitioner failed to raise an objection before trial as required by state law.[25] Instead of the deliberate bypass rule, the Court applied the cause-and-prejudice exception that until that point had been applied only to claims defaulted in federal-law-based convictions in federal court.[26] The Court determined that there was "no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants."[27]

The Supreme Court continued its offensive against *Fay* in *Wainwright v. Sykes*. Sykes was convicted of murder in Florida state court.[28] In state collateral proceedings, he argued for the first time that certain inculpatory statements he made during and after his arrest were inadmissible because he did not understand the *Miranda* warning given to him by the officers.[29] Both the federal district court and the Fifth Circuit held that the claim was not barred from federal review because, in accordance with *Fay*, the defendant had not deliberately bypassed the state's contemporaneous-objection rule.[30] The Supreme Court explicitly rejected *Fay*'s deliberate bypass standard and held that the cause-and-prejudice standard should be applied to a waived objection to the admission of a confession at trial.[31] According to the Court, the deliberate bypass standard did not adequately respect the finality of state-court decisions and did not encourage state-court proceedings to be "as free of error as possible."[32] Applying the more lenient deliberate bypass standard encouraged sandbagging on the part of lawyers and less stringent enforcement on the part of state courts, or so the argument went.[33] Applying the cause-and-prejudice exception to Sykes's case, the Court concluded that Sykes had failed to show cause-and-prejudice: Sykes had not explained why he failed to object at trial, and the other evidence of guilt was so substantial that the inclusion of the inculpatory statements could not have prejudiced him.[34]

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24. 425 U.S. 536, 538–39 (1976).
25. Id. at 537–38.
26. Id.
27. Id.
28. Wainwright v. Sykes, 433 U.S. 72, 88–90 (1977).
29. Id. at 75.
30. Id. at 76–77.
31. Id. at 87.
32. Id. at 88–90.
33. Id. at 89.
34. Id. at 88–90.

2. Harris *and* Coleman. — Courts have long struggled over when state law grounds are truly independent of federal law questions. To solve this problem, the Court in *Harris v. Reed*, applied a presumption of jurisdiction in cases where state court decisions are ambiguous but seem to rest on federal law.[35]

The Court first applied this presumption in the direct review context in *Michigan v. Long*.[36] In that case, the Court determined that when "a state court decision fairly appear[ed] to rest primarily on federal law, or to be interwoven with the federal law" the federal court was able to review the claim.[37] To avoid federal review, state courts have to state explicitly that they are making decisions on independent and adequate state grounds.

The Court in *Harris* reasoned that it is just as difficult in habeas cases as in direct review cases to determine when a state court's reference to state law constitutes an independent ground for judgment.[38] Following the same logic, the Court ruled the *Long* presumption should apply to habeas default cases as well as to direct review cases.[39] As applied to *Harris*, because the state court did not explicitly say it was basing the decision on independent and adequate state procedural grounds—thus leaving ambiguity as to whether the state court relied on the waiver—the Supreme Court found that the claim was not barred from review.

Two years later, in *Coleman v. Thompson*, the Supreme Court reaffirmed the overruling of *Fay*, reiterated the application instead of "cause and prejudice," clarified the definition of cause, and most importantly for the purposes of this Note, expressly invited the *Martinez* exception. In *Coleman*, the petitioner was convicted of rape and capital murder and sentenced to death in a Virginia trial court.[40] After the

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35. 489 U.S. 255, 257 (1989). The petitioner in *Harris* was convicted of murder in an Illinois state court. Id. In his state postconviction proceeding, he raised an IATC claim for the first time. Id. The state court found that all of the IATC claims except one had been forfeited because Harris could have raised them on direct appeal. Id. at 258. The court went on, however, to consider all of the IATC claims on the merits. Id. On habeas review, the district court reviewed the merits of the IATC claims, reasoning that the state court did not make rulings in the alternative but rather noted a procedural default and then ignored it. Id. (The alternative rulings in this case would be: (a) the IATC claims had been forfeited or (b) the claims were not meritorious.) The Court of Appeals disagreed, asserting that when there is ambiguity as to whether a state court treated a claim as waived due to procedural default, the federal court should attempt to assess the state court's intention. Id. at 259. Applying that rule, the circuit court concluded that it was unable to review the merits because the state court intended to find the claims procedurally barred. Id.

36. 463 U.S. 1032, 1040–41 (1983).

37. Id.

38. See *Harris*, 489 U.S. at 262 ("Habeas review thus presents the same problem of ambiguity that this Court resolved in *Michigan v. Long*.").

39. Id.

40. Coleman v. Thompson, 501 U.S. 722, 726–27 (1991).

Virginia Supreme Court affirmed the conviction and sentence,[41] Coleman brought a state postconviction challenge alleging several new federal constitutional claims.[42] The court heard his claims and ruled against him. Coleman filed an appeal, but it was three days late[43] so the Virginia Supreme Court dismissed it.[44] On habeas review, the District Court for the Western District of Virginia held that the federal constitutional claims that had been raised for the first time in the postconviction challenge were procedurally defaulted and therefore barred from review on the merits.[45] The Court of Appeals for the Fourth Circuit and the Supreme Court affirmed.[46]

In his habeas petition, Coleman attacked the procedural default on both independence and cause grounds. First, Coleman argued that it was unclear whether the Virginia Supreme Court made its decision on independent state law grounds because the order lacked a clear statement to such effect.[47] The Virginia Supreme Court reviewed briefs from the parties on the merits of both the federal and state law claims, and thus the order could have been based on either the federal merits or the state procedural rule.[48] Given this ambiguity, in line with *Harris*, Coleman contended that the presumption weighed in favor of federal review.[49] Second, he claimed that even if the decision did rest on an independent and adequate state ground, his attorney's error in failing to file a timely appeal constituted cause and should therefore excuse the procedural default.[50]

Addressing the first contention, the Supreme Court posited that the presumption only applies where the decision "fairly appears" to rest on federal grounds, as it did in *Harris*, and that because this was not the case

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41. Coleman v. Commonwealth, 307 S.E.2d 864, 877 (Va. 1983).

42. *Coleman*, 501 U.S. at 727.

43. According to Virginia Supreme Court Rule 5:9(a), notice of appeal must be filed within thirty days of final judgment or the right to appeal is forfeited. Va. Sup. Ct. R. 5:9(a).

44. *Coleman*, 501 U.S. at 728. After Coleman filed his appeal, the Commonwealth of Virginia filed a motion to dismiss the appeal on the sole ground that the notice was not filed on time in accordance with the court's rules. Id. at 727. The Virginia Supreme Court issued an order detailing the procedural history of the motion to dismiss and concluding, "'Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.'" Id. at 728 (quoting Virginia Supreme Court order dismissing appeal).

45. Id. In his petition, Coleman raised a total of eleven claims, but only seven of them were dismissed as procedurally defaulted.

46. *Coleman*, 501 U.S. at 756; Coleman v. Thompson, 895 F.2d 139, 140 (4th Cir. 1990).

47. Brief for Petitioner at 8–20, *Coleman*, 501 U.S. 722 (No. 89-7662), 1990 WL 515096 [hereinafter Coleman Petitioner Brief].

48. Id. at *8–9.

49. *Coleman*, 501 U.S. at 735.

50. Coleman Petitioner Brief, supra note 47, at 39–46.

for Coleman, the presumption should not be applied.[51] As to the second argument, the Supreme Court initially reaffirmed the overruling of *Fay* in holding that the cause-and-prejudice exception, not the deliberate bypass rule, applied no matter whether the petitioner failed to appeal at all or simply failed to preserve particular claims.[52] Further, the Supreme Court reasoned that an "ignorant or inadvertent procedural default" does not constitute cause unless the performance of the attorney who caused the procedural default was constitutionally ineffective under the rule of *Strickland v. Washington*.[53]

In reaching this conclusion, the Supreme Court reiterated the general definition of cause as "something external to the petitioner, something that cannot be fairly attributed to him" directly or through his attorney.[54] This refers not only to those situations in which the "factual or legal basis for a claim was not reasonably available to counsel" or in which there was "some interference by officials [that] made compliance [with a state procedural rule] impracticable," but also to situations where counsel was constitutionally ineffective.[55] Ordinarily, counsel's errors are imputed to his client, the defendant, as from agent to principal, and are therefore not considered "external" to the defendant.[56] When counsel's assistance is so ineffective as to violate the Sixth Amendment, however, this falls outside the scope of the agent–principal relationship, and therefore the lawyer's conduct is imputed not to the defendant but to the state that appointed him.[57] In those instances, the attorney's errors *are* considered external to the defendant.[58]

As the Court subsequently ruled, however, where there is no constitutional right to an attorney, as in state postconviction

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51. *Coleman*, 501 U.S. at 740.

52. Id. at 750 ("All of the State's interests—in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors—are implicated whether a prisoner defaults one claim or all of them.").

53. Id. at 752. The Court first pronounced this rule in *Murray v. Carrier*, explaining that if the rule were otherwise, petitioners would be allowed to deliberately default claims in state court in order to bypass state procedural rules. 477 U.S. 478, 487 (1986). This is precisely the type of undercutting of states that the Supreme Court is trying to avoid when reviewing state decisions. Id.

*Strickland* uses a two-pronged test to define constitutionally ineffective assistance. First, counsel's performance must be so egregious as to have "undermined the proper functioning of the adversarial process" and deprived the defendant of a "fair trial." Strickland v. Washington, 466 U.S. 668, 686–87 (1984). Second, this performance must have actually prejudiced the defendant in the sense that, but for counsel's failings, the outcome of the proceeding probably would have been different. Id. at 687.

54. *Coleman*, 501 U.S. at 753 (quoting *Carrier*, 477 U.S. at 488).

55. *Carrier*, 477 U.S. at 488.

56. Id.

57. *Coleman*, 501 U.S. at 754.

58. Id.

proceedings,[59] a petitioner cannot claim that his counsel has been constitutionally ineffective.[60] The implication is that there is a stark contrast between the standards to which an attorney must adhere in circumstances when counsel is and is not constitutionally guaranteed: When counsel is not guaranteed, the Sixth Amendment places no limits on counsel's performance—even errors so egregious as to deprive the defendant of a fair proceeding do not necessarily constitute cause.[61] On the other hand, when counsel is guaranteed, *Strickland* bars defense counsel from crossing the line between inadvertence and incompetence.[62]

In *Coleman* dicta, the Court arguably left room for an exception to the general rule that postconviction counsel error cannot constitute cause for those cases in which collateral review happens to be the first and only place a petitioner may raise his constitutional claims. Coleman argued in his petition that because the collateral proceeding was the first time he could raise his constitutional claims, his counsel's error in that proceeding must constitute cause.[63] The Supreme Court responded by pointing out that Coleman had not alleged error during that first-tier collateral proceeding (his first postappeal proceeding), but rather during the appeal from that review (the second postappeal proceeding).[64] The Court found, therefore, that it was not required to address Coleman's contention that postconviction counsel's error in the first-tier proceeding could constitute cause as to claims that could only be raised in that first-tier postconviction proceeding.[65] It would be another twenty

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59. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . and we decline to so hold today."); see also Murray v. Giarratano, 492 U.S. 1, 10 (1989) ("We think that these cases require the conclusion that the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases.").

60. *Coleman*, 501 U.S. at 752.

61. As Bohnert explains:

> A state criminal defendant whose constitutional rights were violated at trial might have a remedy in federal habeas, even if the claim was defaulted in federal court, so long as the constitutional claim should have been raised on direct appeal and direct-appeal counsel was ineffective for failing to raise the claim; but, the same defendant would have no remedy at all if an equally compelling constitutional claim was defaulted because it should have been raised—but was not—in a state collateral-review proceeding.

Bohnert, supra note 5, at 946–47.

62. The Supreme Court intentionally declined to provide exact guidance as to where that line actually lies. See Strickland v. Washington, 466 U.S. 668, 688 (1984) ("More specific guidelines are not appropriate.").

63. Coleman Petitioner Brief, supra note 47, at 35–39.

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

65. The Court reasoned:

years before the Court found occasion to address that contention in *Martinez*.

### B. Martinez *and the* Trevino *Modification*

1. Martinez. — Although the outer limits of the *Martinez* rule are in dispute,[66] the circumstances in which Martinez's ineffective assistance claim arose are relatively straightforward. Martinez was convicted in Arizona state court of sexual conduct with a minor and sentenced to two consecutive terms of life imprisonment.[67] On direct appeal, he was appointed a new attorney, who argued that his case should be remanded due to insufficient evidence at trial, newly discovered evidence following trial, and prosecutorial misconduct.[68] After the appeal was denied and the same attorney filed a Notice of Postconviction Relief,[69] she filed an additional statement claiming that she could not find any meritorious claims to raise on state postconviction review, including any IATC claims.[70] The petitioner then had forty-five days to file a pro se petition for postconviction relief.[71] Martinez claimed that his attorney did not inform him of the collateral proceedings nor of his right to proceed pro se.[72]

After the Arizona Court of Appeals, on appeal of the state postconviction proceeding, affirmed his conviction and the Arizona

> For Coleman to prevail, therefore, there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court.

Id.

66. See infra Part II (describing circuit split concerning applicability of *Martinez*).

67. Martinez v. Ryan, 132 S. Ct. 1309, 1313 (2012).

68. Id. at 1313–14; State v. Martinez, 2 CA-CR 2002-0088, 2004 Ariz. App. Unpub. LEXIS 203, at *1 (Ct. App. Mar. 22, 2004).

69. See Ariz. R. Crim. P. 32.4(a) (stipulating petition for postconviciton relief is initiated by "timely filing a notice of post-conviction relief with the court in which the conviction occurred"). In his brief to the Supreme Court, Martinez noted that his attorney filed the notice before the direct appeal had actually concluded. This, according to Martinez, was yet another example of his counsel's ineptitude in the postconviction proceeding. Brief for Petitioner at 6, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 3467246 [hereinafter Martinez Petitioner Brief].

70. *Martinez*, 132 S. Ct. at 1314. Under Arizona law, claims of ineffective assistance of counsel cannot be argued on direct appeal, but instead must be raised in a postconviction relief proceeding. State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

71. See State v. Smith, 910 P.2d 1, 4 (Ariz. 1996) ("If, after conscientiously searching the record for error, appointed counsel in a [postconviction relief] proceeding finds no tenable issue and cannot proceed, the defendant is entitled to file a proper [postconviction relief].").

72. *Martinez*, 132 S. Ct. at 1314; see also Martinez Petitioner Brief, supra note 69, at 7 (noting counsel sent petitioner letter in English informing him of proceeding and right to proceed pro se, despite having been told petitioner did not speak English).

Supreme Court denied review,[73] Martinez, through yet another attorney, filed a second notice of state postconviction relief, this time claiming ineffective assistance of trial counsel.[74] The Arizona Court of Appeals, relying on state rules of criminal procedure, held that the IATC claims were barred because Martinez had waived them by failing to raise them in the first postconviction relief proceeding.[75] The District Court for the District of Arizona denied his habeas petition on the grounds that (1) Arizona's preclusion rule was an independent and adequate state ground and (2) there was no cause to excuse the default because, under *Coleman*, an attorney's errors in postconviction proceedings do not constitute cause.[76] Before the Ninth Circuit, Martinez argued that *Coleman* might have left room for "an exception 'where state collateral review is the first place a prisoner can present a challenge to his conviction.'"[77] But the Ninth Circuit affirmed on the grounds that there simply were no controlling cases to support such an exception.[78]

In his brief to the Supreme Court, Martinez attacked the Ninth Circuit's ruling on both adequacy and cause grounds.[79] The cause argument—the relevant argument for the purposes of this Note—was based on the contention that he had a "federal right to effective assistance of first post-conviction counsel with respect to his ineffective trial counsel claim."[80] This in turn was based on a relatively simple

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73. *Martinez*, 2004 Ariz. App. Unpub. LEXIS 203, at *5.

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

75. State v. Martinez, No. 2 CA-CR 2006-0001-PR, 2006 Ariz. App. Unpub. LEXIS 268, at *5 (Ct. App. Aug 31, 2006); see *Martinez*, 132 S. Ct. at 1314; see also Ariz. R. Crim. P. 32.2(a)(3) ("[D]efendant shall be precluded from relief under this rule based upon any ground . . . that has been waived . . . in any previous collateral proceeding."). Initially, Martinez filed for postconviction relief with the Arizona trial court. *Martinez*, 2006 Ariz. App. Unpub. LEXIS 268, at *1. On first hearing, the trial court ruled that the petition was untimely and alternatively that the ineffective assistance claims were precluded by Rule 32.2(a). Id. at *2. On rehearing, the trial court reversed its ruling that the petition was untimely but affirmed that the claims were precluded. Id.

76. Martinez v. Schriro, No. CV 08-785-PHX-JAT, 2008 WL 5220909, at *13–14 (D. Ariz. Dec. 12, 2008).

77. Martinez v. Schriro, 623 F.3d 731, 736 (9th Cir. 2010) (quoting Coleman v. Thompson, 501 U.S. 722, 755 (1991)); see also supra notes 63–65 and accompanying text (noting Supreme Court in *Coleman* declined to consider whether such exception exists).

78. *Martinez* , 623 F.3d at 743.

79. Martinez Petitioner Brief, supra note 69, at 11–12. The adequacy argument was based on the contention that Martinez had a federal constitutional right to first postconviction counsel on his IATC claim. Id. at 16. Since his first postconviction counsel was ineffective in violation of that right, the Arizona court's application of the preclusion rule was not an adequate state law ground. Id. at 21. While the adequacy discussion in Martinez's case is beyond the scope of this Note, Martinez also used the argument that he had a right to counsel on postconviction appeal as a premise in his cause argument, see infra text accompanying notes 80–81, though the Supreme Court ultimately rejected that argument.

80. Martinez Petitioner Brief, supra note 69, at 22.

principle—a defendant or convicted prisoner has a right to effective assistance of counsel for first-tier review of a claim.[81] Accordingly, when the state requires that a defendant bring IATC claims in a postconviction proceeding,[82] the defendant is entitled to effective assistance of counsel in that postconviction proceeding as to that claim. Thus, ineffective assistance on first-tier review, the argument goes, constitutes cause under the cause-and-prejudice exception.

Instead of pronouncing a constitutional right to counsel on first-tier postconviction review, seven Justices agreed on an equitable rule.[83] In the "limited circumstances" of *Martinez*, a prisoner's "inadequate" postconviction counsel may serve as cause to excuse a procedural default if: (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."[84]

In so holding, the majority concurred with the petitioner that the reasoning in *Halbert* and *Douglas* applies equally to first-tier postconviction review.[85] Indeed, the Court seemed particularly concerned with the possibility that if there were no exception to the externality rule, claims of petitioners like Martinez would go unheard.[86]

The majority in *Martinez* limited its analysis to the facts presented—to cases where the underlying claim is one of ineffective assistance of *trial counsel*. But such a narrow ruling is in tension with the more expansive principle supporting it. This is precisely what caused a division of

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81. See id. at 24; Halbert v. Michigan, 545 U.S. 605, 619 (2005) ("Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive.").

82. See supra note 69 and accompanying text (explaining Arizona state law requirement that defendants bring IATC claims in postconviction proceeding).

83. Professor Emily Garcia Uhrig argues that the Court chose to cast "the right to assistance of counsel as equitable, rather than constitutional" in order to avoid "the infinite continuum of habeas dilemmas posited by a constitutional right to counsel." Uhrig, supra note 5, at 786.

84. Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013) (quoting Martinez v. Ryan, 132 S. Ct. 1309, 1318–19, 1320–21 (2012)).

85. See *Martinez*, 132 S. Ct. at 1317 (noting similarity between initial-review collateral proceeding and direct appeal in that both examine merits, are first to address claim, and present difficulties for defendants who have no brief, counsel, or lower court opinion on issue); see also infra section III.A (discussing applicability of reasoning in *Halbert* and *Douglas* to postconviction proceeding in *Martinez*).

86. See *Martinez*, 132 S. Ct. at 1316 ("[I]f counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.").

opinion in the circuits as to whether the *Martinez* exception applies to IAAC claims as well as IATC claims.[87] Indeed, the circuit split came as no surprise to many, including Justice Scalia, who opined in his dissent:

> [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 state habeas will be the first opportunity for a particular claim to be raised . . . .[88]

Justice Scalia even contended that IAAC claims, as well as *Brady* claims and those of newly discovered exculpatory evidence, are indistinguishable from IATC claims for the purposes of the new *Martinez* exception.[89]

2. Trevino*'s Modification.* — A year later, in *Trevino v. Thaler*, the Supreme Court clarified the fourth prong of the *Martinez* rule, establishing that the exception can be applied when states, even if they do not actually bar IATC claims on direct appeal, make it "highly unlikely" that a petitioner will have a chance to raise them.[90] Trevino was convicted of murder in a Texas state court, after which he was appointed two new attorneys—one, appointed eight days after his sentencing, to pursue his direct appeal and one, appointed six months after sentencing, to pursue state collateral relief.[91] Trevino's postconviction counsel argued that his trial counsel was constitutionally ineffective during the penalty phase of his trial but did not raise a claim based on failure to investigate and present mitigating circumstances.[92] When Trevino brought this claim in a second postconviction proceeding, the state courts held that it was procedurally barred since he had not raised it in his first postconviction proceeding,[93] and this holding was upheld as "independent and adequate state grounds" on federal habeas review.[94]

The Supreme Court announced, however, that even though Texas does not require that IATC claims be raised in a collateral proceeding, two aspects of Texas's procedures necessitated the conclusion that *Martinez* applied nonetheless.[95] First, the Texas procedure made it "virtually impossible" to present an IATC claim on direct appeal, in part because the trial record does not typically contain the information

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87. See supra note 2 and accompanying text (explaining circuit split as to whether *Martinez* exception applies to IAAC claims).

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

89. Id. (Scalia, J., dissenting).

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

91. Id. at 1915.

92. Id.

93. Id. at 1916.

94. Id.

95. Id. at 1918.

necessary to support the claim.[96] Second, and relatedly, if *Martinez* were not to apply, it would "create significant unfairness" by denying "defendants the benefit of *Martinez* solely because of the existence of a theoretically available procedural alternative, namely direct appellate review, that Texas procedures render so difficult, and in the typical case all but impossible, to use successfully, and which Texas courts so strongly discourage defendants from using."[97] In this way, *Trevino* modified *Martinez* such that *Martinez* applies also to IATC claims that are effectively, though not explicitly, barred from direct appellate review.

## II. THE CIRCUIT SPLIT: APPLYING *MARTINEZ* TO DEFAULTED IAAC CLAIMS

Just as Justice Scalia had predicted in his dissent, a split of opinion quickly arose in the circuits as to whether *Martinez* could be applied to excuse procedurally defaulted IAAC claims as well as IATC claims. The Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all had occasion to rule on the question, and all but one have held that *Martinez* cannot be used to excuse procedurally defaulted IAAC claims. This Part explores the circuits' reasoning. Section II.A reviews, in chronological order, decisions from the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, which chose not to apply *Martinez* to excuse procedurally defaulted IAAC claims. Section II.B reviews the only case—from the Ninth Circuit—in which a court of appeals applied *Martinez* to excuse a procedurally defaulted IAAC claim.

This examination of the circuit cases leads to the conclusion that efforts to limit *Martinez* to procedurally defaulted IATC claims have proved unpersuasive. Although the courts of appeals might have done their duty in following the Supreme Court's language limiting *Martinez* to IATC claims,[98] their attempts to explain and justify the limitation are unsatisfactory.

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96. Id. at 1918–19. In theory, a defendant can move for a new trial in order to develop the record for appeal. This tool, however, is not particularly helpful because often the motion must be made before the trial transcript has even been prepared. See Tex. R. App. P. 21.4 (requiring motion for new trial be made within thirty days of sentencing); Tex. R. App. P. 35.3(b)–(c) (requiring transcript of trial be prepared within 120 days of sentencing when motion for new trial is filed but allowing extension of this deadline). For example, in Trevino's case, his appellate counsel was appointed eight days after sentencing. That gave him twenty-two days to provide support for a motion for a new trial, but he did not yet have the trial transcript, which only became available many months later. *Trevino*, 133 S. Ct. at 1919.

97. *Trevino*, 133 S. Ct. at 1919–20.

98. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) ("It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at *trial* . . . ." (emphasis added)).

### A. *Circuits Against Applying* Martinez *to Defaulted IAAC Claims*

1. *The Eighth Circuit:* Dansby v. Norris. — The Eighth Circuit read *Martinez* to withhold its narrow exception to *Coleman* from IAAC claims.[99] In its first opinion, the Eighth Circuit dismissed petitioner Dansby's request to expand his certificate of appealability to include his IAAC claim. The court opined, "[T]he narrow exception of *Martinez* is limited to claims of ineffective assistance of *trial* counsel and does not extend to alleged ineffectiveness of appellate counsel."[100] After the Supreme Court granted certiorari and remanded for reconsideration in light of *Trevino*,[101] the Eighth Circuit issued a slightly more discursive adjudication of the IAAC claim. The unanimous panel declined to "extend" *Martinez* to excuse procedurally defaulted IAAC claims for two reasons. First, "a claim for equitable relief in [the IAAC] context is less compelling" because the rights to appeal and to appellate counsel are of more recent origin and stem from general due process rather than from the more specific Sixth Amendment.[102] Second, *Martinez* explicitly limited its application to underlying IATC claims.[103]

2. *The Tenth Circuit:* Banks v. Workman. — In *Banks v. Workman*, the Tenth Circuit similarly declined to apply *Martinez* to a habeas petitioner's procedurally defaulted IAAC claim.[104] The Tenth Circuit concluded that *Martinez* provided only a limited qualification to the previous rule articulated in *Coleman* that habeas petitioners do not have a right to postconviction counsel. According to the Tenth Circuit, the qualification applies only to defaulted IATC claims and only where the states require that such claims be brought on collateral review.[105] Because Banks was claiming that his *appellate* counsel was ineffective, the *Martinez* qualification did not apply to his case.[106] In reaching this conclusion, Judge Gorsuch's opinion focused primarily on the reasons for instituting the *Martinez* exception. The opinion cited the Supreme Court's rationale that if the state had allowed the defendant to bring such claims on direct appeal, "the defendant would have been constitutionally entitled to the

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99. Dansby v. Norris (*Dansby I*), 682 F.3d 711, 729 (8th Cir. 2012), vacated on other grounds sub nom. Dansby v. Hobbs (*Dansby II*), 766 F.3d 809, 833–40 (8th Cir. 2014).

100. Id.

101. Dansby v. Hobbs (*Dansby III*), 133 S. Ct. 2767, 2767 (2013).

102. *Dansby II*, 766 F.3d at 833.

103. Id.; see also *Martinez*, 132 S. Ct. at 1320 (holding *Coleman* rule—that ineffective assistance of counsel during postconviction proceedings cannot serve as cause to excuse procedural default—"governs in all but the limited circumstances recognized here").

104. 692 F.3d 1133, 1148 (10th Cir. 2012).

105. Id. Based on this reading of *Martinez*, the court concluded that *Martinez* did not apply to Banks's IATC claim because Oklahoma, unlike Arizona, does not require that defendants bring these claims in collateral proceedings. Id. (citing Le v. State, 953 P.2d 52, 56 (Okla. Crim. App. 1998)). *Banks* was decided before *Trevino* softened this part of the *Martinez* rule. See supra section I.B.2 (discussing *Trevino*'s holding).

106. *Banks*, 692 F.3d at 1148.

aid of counsel to help him prepare."[107] Having been denied that aid, the prisoner's ability to file and argue his claims was so diminished that federal courts are able to "exercise their equitable power to excuse the default and review the claims *de novo*."[108] Despite this reasoning, the Tenth Circuit found that the Supreme Court, "in no uncertain terms," limited *Martinez* to the IATC context.[109]

3. *The Sixth Circuit:* Hodges v. Colson. — The Sixth Circuit also held that *Martinez* does not apply to excuse procedurally defaulted IAAC claims. Before explaining its conclusion, the panel noted that the *Martinez* exception grew out of *Coleman*'s declining "to address the situation in which 'state collateral review is the first place a prisoner can present a challenge to his conviction.'"[110] Then, perhaps by way of justification, the Sixth Circuit cited a lengthy passage from *Martinez* in which the Supreme Court noted that the "'limited nature of the qualification . . . reflects the importance of the right to the effective assistance of trial counsel.'"[111] The court, finding the Supreme Court's holding "unambiguous,"[112] gave no additional reasons for distinguishing between the rights to appellate and trial counsel.

4. *The Fifth Circuit:* Reed v. Stephens. — In *Reed v. Stephens*, the Fifth Circuit joined the Eighth, Tenth, and Sixth Circuits in holding that *Martinez* does not apply to excuse procedurally defaulted IAAC claims.[113] Reed was convicted of murder by a Texas jury and sentenced to death.[114] Following a complicated procedural saga, Reed's case finally made it up to the Fifth Circuit.[115] There, Reed argued that his appellate counsel's representation was constitutionally deficient and that the failure to raise his IAAC claim, as well as an IATC claim, in his postconviction proceeding should be excused under *Martinez*.[116] Texas responded that the IAAC claim should be waived for inadequate briefing but in any event was procedurally barred.[117] In evaluating Reed's IAAC claims in the request for a certificate of appealability, the Fifth Circuit panel summarily rejected the argument that *Martinez* provides a basis for excusing the

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107. Id. at 1147–48 (citing *Martinez*, 132 S. Ct. at 1317).

108. Id. at 1148 (citing *Martinez*, 132 S. Ct. at 1318).

109. Id. (citing *Martinez*, 132 S. Ct. at 1320).

110. Hodges v. Colson, 727 F.3d 517, 531 (6th Cir. 2013) (quoting Coleman v. Thompson, 501 U.S. 722, 755 (1991)).

111. Id. at 531 (emphasis omitted) (quoting *Martinez*, 132 S. Ct. at 1320).

112. Id.

113. 739 F.3d 753 (5th Cir. 2014).

114. Id. at 760.

115. See id. at 761–63 (describing procedural history).

116. Brief in Support of Application for Certificate of Appealability at 24, *Reed*, 739 F.3d 753 (No. 13-70009).

117. *Reed*, 739 F.3d at 778.

procedurally defaulted IAAC claim.[118] The court decided simply that "[t]o the extent Reed suggests that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so."[119]

5. *The Seventh Circuit:* Long v. Butler. — Most recently, the Seventh Circuit declined to apply *Martinez* to excuse procedurally defaulted IAAC claims. In *Long v. Butler*, the petitioner argued that the prosecution's use of a quote from *Gone With the Wind* and a personal anecdote violated his due process rights.[120] Before the Seventh Circuit, Long argued that his procedurally defaulted IAAC claim should be excused because his postconviction counsel was ineffective in presenting it.[121] Noting the circuit split, the panel held that it did not believe *Martinez* supported the argument that ineffective postconviction counsel could serve as cause to excuse a procedurally defaulted IAAC claim.[122]

### B. *The Ninth Circuit Stands Alone*

The Ninth Circuit is the only Circuit that has applied *Martinez* to procedurally defaulted IAAC as well as IATC claims. The court in *Nguyen v. Curry* reasoned as follows:

> Trial-counsel [ineffective assistance] typically cannot be raised on appeal because of the necessity to develop and rely on evidence that is not in the trial-court record. Appellate-counsel [ineffective assistance] cannot be raised on appeal because the appeal was the proceeding in which the constitutionally ineffective assistance occurred. In either case, the initial-review state-court collateral proceeding is the first time an [ineffective assistance] claim can be made.[123]

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118. Id.

119. Id. at 778 n.16.

120. 809 F.3d 299, 313 (7th Cir. 2015).

121. Id. at 314.

122. Id. at 314–15 ("[T]his Court has recently interpreted *Martinez* and *Trevino* as holding [postconviction counsel ineffectiveness can excuse default of IATC claims], and we do not see any reason to depart from that understanding, or the majority of circuits, here. The default of these claims is not excused under *Martinez*.").

123. 736 F.3d 1287, 1294–95 (9th Cir. 2013). This argument is in tension with the Ninth Circuit's holding in Hunton v. Sinclair, 732 F.3d 1124 (9th Cir. 2013). In that case, the Ninth Circuit rejected the extension of *Martinez* to cases where postconviction counsel's ineffectiveness forfeited a *Brady* claim. Id. at 1126. The petitioner was convicted in Washington state court of bank robbery. Id. at 1125. He raised his *Brady* claim on direct appeal, but was told it needed to be raised in postconviction proceedings. Id. He initiated such proceedings pro se, but did not raise the *Brady* claim. Id. On habeas review, the district court rejected the claim as procedurally defaulted. Id. In a short, formalistic opinion, the Ninth Circuit affirmed this holding. Id. at 1127. According to this panel, the Supreme Court in *Martinez* made clear that the holding was a narrow exception to the general rule in *Coleman*, and so it does not apply unless the underlying claim is one of trial-counsel ineffectiveness. Id. at 1126.

In short, the Ninth Circuit chose to apply the reasoning in *Martinez* to cases where postconviction counsel's ineffectiveness forfeited an IAAC claim. It justified this by drawing parallels between the right to effective counsel at trial and on appeal as these rights have been articulated by the Supreme Court.[124] The Ninth Circuit noted what no other circuit has acknowledged—that "[t]here is nothing in our jurisprudence to suggest that the Sixth Amendment right to effective counsel is weaker or less important for appellate counsel than for trial counsel."[125]

## III. *MARTINEZ* SHOULD APPLY TO PROCEDURALLY DEFAULTED IAAC CLAIMS

The *Martinez* exception should apply to excuse procedurally defaulted IAAC claims.[126] Despite several attempts to justify the limitation of *Martinez* to IATC claims, the principles underlying the exception compel its application to IAAC claims as well.

This Part consists of three sections. Section III.A contends that courts should focus on whether the underlying claim has been reviewed by a court as opposed to the nature of that claim. But this, many would argue, would allow postconviction-counsel ineffectiveness to excuse default of *all* underlying claims, not just IAAC claims, that were raised for the first time in a postconviction proceeding.[127] In response to this, section III.B asserts that *Martinez* can be limited to excusing procedural defaults of IAAC because the right to effective appellate counsel is just as fundamental as the right to effective trial counsel. Finally, section III.C explores a more practical argument in favor of applying *Martinez* to IAAC claims: There are backstops, including the prejudice prong and state statutes of limitation, to prevent such an extension from opening the litigation floodgates.

### A. *Focus on Whether the Claim Has Been Reviewed*

As the petitioner in *Martinez* argued in his brief, the Supreme Court has often focused more on whether the underlying claim has had the

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But if the reasoning in *Nguyen* stands—namely, that *Martinez* should be used to excuse claims that, for whatever reason, cannot be brought on direct appeal—it would seem that *Brady* claims should also be excused under *Martinez*: Like IATC claims, *Brady* claims cannot be raised on appeal because they rely on evidence that is not in the trial court record.

124. See *Nguyen*, 736 F.3d at 1293–94 (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985); Douglas v. California, 372 U.S. 353, 357 (1963); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 69 (1932)) ("The Sixth Amendment right to effective counsel applies equally to both trial and appellate counsel.").

125. Id. at 1294.

126. The Supreme Court recently turned down an opportunity to rule on this question. Hurles v. Ryan, 752 F.3d 768 (9th Cir.), cert. denied, 135 S. Ct. 710 (2014).

127. See Uhrig, supra note 5, at 790–93, for an argument that this is the correct result and is supported by the history of the Great Writ.

benefit of review by a court than on the nature of that claim.[128] In *Douglas v. California*, the Supreme Court held that an indigent defendant has a right to counsel in a first appeal as of right.[129] In *Halbert v. Michigan*, the Supreme Court held that an indigent defendant who was convicted after pleading nolo contendere also has a right to counsel on appeal, even though review of that appeal is discretionary and not of right.[130] Unlike the postconviction proceeding in *Martinez*, these cases concerned the right to counsel on direct appeal—one of right and one discretionary. Nonetheless, Martinez argued, those cases were relevant because the Court buttressed its holdings with an argument that applies just as well in postconviction proceedings that happen to be the first instance post-trial at which particular claims of trial error can be reviewed.[131] This argument, in short, is that defendants have a right to counsel on first-tier review of such claims.[132]

Martinez urged the Court to do what it had done in those cases—focus on whether the claims had had the benefit of a lawyer's "review of the record and legal research."[133] Because Martinez's IATC claim had not had the benefit of such review, he has a right to counsel as to that claim.[134]

If this reasoning holds, default of IAAC claims would naturally be excused, but so too would any other claim that was raised for the first time in the postconviction proceeding.[135] However, the right to effective appellate counsel, like the right to effective trial counsel, is fundamental and deserving of protection.

### B. *The Fundamental Right to Effective Appellate Counsel*

In attempting to justify the limitation, the Eighth Circuit relied on *Martinez*'s focus on the importance of the right to effective trial counsel. However, the Supreme Court has also recognized the significance of the right to appellate counsel. And there is little to suggest that the former is more important than the latter. Indeed, as *Dansby* highlights, when the appeal is the first forum in which a claim can be argued, appellate

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128. Martinez Petitioner Brief, supra note 69, at 16.

129. 372 U.S. at 358.

130. 545 U.S. 605, 610 (2005).

131. See Martinez Petitioner Brief, supra note 69, at 18 ("*Douglas* and *Halbert* apply squarely to this case . . . . With respect to Petitioner's [IATC] claim, the first tier of review available to him was a state post-conviction relief proceeding—because he was not permitted to raise any such claim on appeal under Arizona law.").

132. Id. at 24; see supra notes 80–81 and accompanying text (discussing Martinez's use of *Halbert*).

133. *Halbert*, 545 U.S. at 620; Martinez Petitioner Brief, supra note 69, at 18, 23.

134. Martinez Petitioner Brief, supra note 69, at 32.

135. See Uhrig, supra note 5, at 790–93.

counsel is just as important as trial counsel.[136] This was certainly true for Dansby, whose forfeited IAAC claim contained within it an IATC claim, which by its very nature, could not have been argued at trial.[137]

Additionally, *Dansby* implicates two related doctrinal arguments in favor of applying *Martinez* to IAAC claims. First, the derivation of the right to effective appellate counsel from the right to effective trial counsel implies that these two rights are both important. Second, the fact that certain violations of the rights to both trial and appellate counsel are per se prejudicial and therefore never harmless indicates that they are both fundamental.[138]

The Eighth Circuit case provides some insight on the first contention. In support of its assertion that the right to effective appellate counsel was of a different and more recent genesis than the right to effective trial counsel, the Eighth Circuit cited *Evitts v. Lucey*, but *Evitts* strongly suggests the opposite conclusion.

*Evitts* declared that criminal defendants in state court are constitutionally guaranteed effective counsel on their first appeal as of right by analogizing to the very same guarantee in the *trial* context. The Court relied in *Evitts* primarily on the presumption that appeals of right are just as important as trial proceedings.[139] At both levels, the proceedings are focused on the same goal—ensuring a reliable verdict.[140] Thus the fundamental liberty interest that the Due Process clause protects is the same in both trial and appellate proceedings.[141] The *Evitts* Court even questioned whether it was creating a new rule.[142] Thus the Eighth Circuit's contention that the rights to effective trial and appellate counsel have different roots in the Due Process Clause is unconvincing. And even if the rights had different constitutional origins, it is not clear why this fact alone makes one right more or less compelling than the other.

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136. See supra text accompanying notes 99–103 (discussing Dansby's IAAC and IATC claims).

137. See supra text accompanying notes 99–103 (discussing Dansby's IAAC and IATC claims).

138. See Hertz & Liebman, supra note 5, § 31.3 ("[T]he Court repeatedly has reaffirmed that '[s]ome constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless.'" (quoting Satterwhite v. Texas, 486 U.S. 249, 256 (1988))).

139. See Evitts v. Lucey, 469 U.S. 387, 396–400 (1985) ("An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake.").

140. See id. ("In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful.").

141. See id. at 399–400 ("A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed.").

142. See id. at 396–97 ("This result is hardly novel.").

Second, that certain violations of the rights to both trial and appellate counsel are per se prejudicial and therefore never harmless indicates that they are both fundamental.[143] The Supreme Court has implied that certain fundamental rights are more important than others by holding that violations of those rights are per se prejudicial.[144] For example, a complete denial of counsel is considered per se prejudicial.[145] This is true, notably, when counsel is denied both at trial and on appeal.[146] The implication is thus that the rights to trial and appellate counsel are both important. If those fundamental rights are both important, it naturally follows that the right to *effective* assistance on appeal is just as compelling as that same right at trial. These two lines of jurisprudence clearly place the right to effective appellate counsel on the same level as the right to effective trial counsel. As such, there is no reason why the *Martinez* exception should apply to excuse IATC but not IAAC claims.

### C. *The Backstops*

In addition to limiting the extension of *Martinez* to IAAC claims, there are two backstops that can prevent meritless claims from getting through: the prejudice prong of the cause-and-prejudice exception to procedural default and the substantiality requirement of the *Martinez* test.

1. *The Fifth Circuit Example.* — The Fifth Circuit case provides an example of the prejudice prong as a backstop.[147] After concluding that the IAAC claim was procedurally barred from review and could not be excused under *Martinez*, the panel nonetheless went on to address the

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143. See Hertz & Liebman, supra note 5, at § 31.3.

144. See id.

145. Id.; see also Brecht v. Abrahamson, 507 U.S. 619, 629–30 (1993) (giving deprivation of right to counsel as example of structural constitutional error requiring reversal of conviction).

146. See, e.g., Bell v. Cone, 535 U.S. 685, 695–96 (2002) (holding prejudice is presumed where "accused is denied the presence of counsel at 'a critical stage'" (quoting United States v. Cronic, 466 U.S. 648, 659, 662 (1984))); Mickens v. Taylor, 535 U.S. 162, 166 (2002) ("We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding."); Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000) (holding where "defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was—either actually or constructively—denied the assistance of counsel altogether . . . . '[n]o specific showing of prejudice [is] required,' because 'the adversary process itself [is] presumptively unreliable'" (quoting *Cronic*, 466 U.S. at 659)); Hertz & Liebman, supra note 5, § 31.3 (noting Court's designation of "right to counsel . . . at critical stages of the proceedings before and at trial and on appeal, including . . . the right to effective assistance of counsel" as "'so basic to a fair trial that their infraction can never be treated as harmless error'" (quoting Chapman v. California, 386 U.S. 18, 23 (1967))).

147. See supra section II.A.4 (discussing Fifth Circuit's holding in *Reed v. Stephens*).

merits of the IAAC claim and by extension the claims underlying it.[148] The court found that even if the three underlying claims had not been barred, each was meritless.[149] Though the court does not say so explicitly, this is equivalent to a finding of no prejudice. In other words, Reed, the petitioner, cannot claim that his appellate lawyer was ineffective for failing to raise a meritless claim. Thus, even if there were cause to excuse the defaulted IAAC claim, the IAAC claim would not have been eligible for merits review.[150] This provides some support for the practical argument Martinez made in the Supreme Court—that allowing an exception to *Coleman* would not open the floodgates.[151] In short, no matter how wide one opens the gates on the cause prong, the prejudice prong will provide a backstop to allow only meritorious, or potentially meritorious, claims to get through. This is clearly evidenced in *Reed*: Even if the Fifth Circuit had allowed postconviction counsel's ineffectiveness to constitute cause, it nonetheless should have found the claim procedurally barred from review for lack of prejudice.

2. *Substantiality as a Sufficient Alternative Backstop.* — This is all assuming, however, that the prejudice prong is still relevant in the *Martinez/Trevino* context, which is far from certain. Indeed, most of the circuits that have had occasion to rule on that question have found that in the Martinez context, the cause and prejudice prongs are conflated.[152] In other words, if a petitioner satisfies each of the four elements in the *Martinez/Trevino* test, there is no need to satisfy the prejudice prong—his default will be excused and the federal court may review his claim.[153] This might seem at first to undermine the claim that the prejudice prong provides a backstop to the onslaught of claims that might occur if *Martinez* is allowed to excuse default of claims other than IATC.

However, the first of the four elements of the *Martinez* test—requiring that the claim of ineffective assistance be "substantial"—is itself a backstop. Scholars and courts have debated whether this substantiality should be conflated with "prejudice" or whether it is a more relaxed

148. Reed v. Stephens, 739 F.3d 753, 778–80 (5th Cir. 2014).

149. Id. at 780.

150. The cause-and-prejudice exception is a bit circular in this way—in order to determine whether to evaluate a claim on its merits, a court must determine whether the default prejudiced him, and in order to make that determination, the court must evaluate the merits of the claim. Apparently all roads lead to merits review.

151. Martinez Petitioner Brief, supra note 69, at 29–30. Martinez also preempts a potential counterargument to this. Petitioners might claim that because counsel at first tier was constitutionally ineffective, they did not have the benefit of counsel at the first review of their claim and thus are constitutionally entitled to it at second tier. In response, Martinez argues that since the risk of both trial and first-tier counsel being ineffective is substantially lower than the ab initio risk, it would be reasonable for states not to require counsel at second tier. Id. at 30.

152. Bohnert, supra note 5, at 952.

153. Id.

standard.[154] If it is a more relaxed standard, opponents might argue that there is a greater risk of flooding the federal courts. However, as Allen Bohnert points out, this ignores the Court's constitutional motivation for instituting the *Martinez* exception in the first place: The right to effective assistance of counsel is fundamental and preventing merits review of even one substantial IATC, or as this Note argues, IAAC, claim "absolutely undermines confidence in the reliability of proceedings."[155]

The circuits' limitation of *Martinez* to the factual circumstances under which that case came up to the Supreme Court, while justified, is at odds with the principles supporting the Court's decision. If given the opportunity, the Supreme Court should ground any limitations in the underlying principles. These principles suggest that *Martinez* should allow review of procedurally defaulted IAAC claims.

## CONCLUSION

*Martinez* and its progeny were an important step in allowing review of claims that would otherwise be procedurally barred from federal review on habeas. For some claims, for structural or statutory reasons, the postconviction proceeding is the first forum at the state level in which a claim can be heard. If a defendant's counsel at that proceeding is ineffective, he risks losing a potentially meritorious claim for good. And the federal system, if it abstains from reviewing the claim, impairs its ability to protect important federal constitutional rights. Yet the Supreme Court in *Martinez* attempted to impose a limitation on its applicability without adequately justifying the limitation. The circuits, in attempting to follow the Supreme Court's instruction, also have not justified the limitation. Their attempts, however, have implicated several reasons why *Martinez* should be applied to excuse claims of IAAC that would be otherwise procedurally barred.

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154. Id. at 974–75.

155. Id. at 975. Bohnert limits his assertion to IATC claims and does not address the argument that *Martinez* should be used to excuse procedural default of IAAC claims as well.