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State Prisoners with Federal Claims in Federal Court: When Can a State Prisoner Overcome Procedural Default?

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Comment

STATE PRISONERS WITH FEDERAL CLAIMS IN FEDERAL COURT: WHEN CAN A STATE PRISONER OVERCOME PROCEDURAL DEFAULT?

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When can the deficient performance of state post-conviction counsel excuse defects in a constitutional claim adjudicated in a federal habeas proceeding? Once a federal court decides whether to review the conviction or sentence of a state prisoner on federal habeas review, it will consider both the merits of the prisoner's constitutional claim and whether the prisoner brought the claim to the federal court free of procedural defects.[1] A frequent procedural defect—known as procedural default—occurs when a state court denies relief based on an adequate and independent state procedural ground.[2]

Errors committed during post-conviction litigation might force an inmate to forfeit a meritorious claim in state court. Although the Sixth and Fourteenth Amendments to the United States Constitution guarantee effective assistance of trial counsel in criminal proceedings,[3] this right has not been extended to prisoners in state habeas proceedings.[4] State habeas

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1. *See infra* Part I.B.

2. *See infra* notes 60–67.

3. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel."); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (extending the Sixth Amendment's fundamental guarantee of counsel through the Fourteenth Amendment to prisoners in state court).

4. Murray v. Giarratano, 492 U.S. 1, 12 (1989) (extending *Finley* to apply to capital and noncapital cases); Pennsylvania v. Finley, 481 U.S. 551, 559 (1987) (holding that states are not required to provide counsel for prisoners seeking post-conviction relief); *see also* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 466 (2007) (noting that a federal statute provides prisoners with counsel in federal post-conviction proceedings yet there is "no federal requirement that offenders have effective counsel during any state collateral review").

proceedings are distinct from and collateral to the direct review process where a prisoner may raise constitutional challenges to the conviction and sentence. When prisoners are forced to face this process without the assistance of counsel, the complex state habeas procedural rules may prevent a federal court—or any court—from adjudicating the prisoner's meritorious claim alleging that the state is holding the prisoner in violation of the U.S. Constitution.[5]

In recent years, the Supreme Court has crafted an exception to the procedural default doctrine,[6] allowing a federal court to excuse default of a state prisoner's ineffective-assistance-of-trial-counsel claim ("IATC")[7] if the prisoner's post-conviction counsel was ineffective as well.[8] In *Martinez v. Ryan*,[9] the Supreme Court reasoned that "[t]he right to the effective assistance of counsel at trial is a *bedrock principle* in our justice system."[10] The Court held that, in states where a prisoner may only raise IATC claims on collateral review, ineffective assistance of post-conviction counsel may constitute cause to excuse a procedurally defaulted IATC claim.[11] A year later, in *Trevino v. Thaler*,[12] the Court clarified the *Martinez* exception, noting that the exception applied to states in which the procedural framework made it "highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise [an IATC claim] on direct appeal."[13] Rather than declare a constitutional right to adequate state post-conviction counsel, the Court invoked its equitable authority over the habeas remedy to allow federal habeas courts to consider a prisoner's IATC claim despite the procedural default in state court.[14] The *Martinez* Court emphasized that because IATC claims are directed usually to state collateral review proceedings, these proceedings are analogous to the prisoner's direct appeal to that claim.[15] Viewed from that perspective, a prisoner should not be

5. *See infra* Part I.D.

6. For an explanation of the procedural default doctrine, see *infra* notes 60–76 and accompanying text.

7. Although ineffective-assistance-of-trial counsel claims are traditionally referred to with the acronym "IAC," this Comment uses the acronym "IATC". The purpose is to distinguish between the ineffective-assistance-of-trial-counsel claims, the "IATC" claims, and claims that the prisoner's counsel was ineffective in a state habeas proceeding. IATC claims challenge the counsel's performance at trial as being so constitutionally deficient as to not function as the "counsel" guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 687 (1984).

8. *See infra* Part I.D.1.

9. 132 S. Ct. 1309 (2012).

10. *Id.* at 1317 (emphasis added).

11. *Id.* at 1315.

12. 133 S. Ct. 1911 (2013).

13. *Id.* at 1921.

14. *Id.* at 1919–20.

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

denied the benefit of federal habeas review of a substantial IATC claim because of ineffective post-conviction counsel.[16]

IATC claims and *Brady v. Maryland*[17] claims that the prosecution withheld exculpatory evidence[18] are among the claims raised most often on collateral review.[19] This Comment ultimately concludes that the nature of *Brady* claims—in how they are raised on collateral review and the constitutional rights they protect—are such that the *Martinez* exception can, and should, apply to *Brady* claims as well.[20]

Part I of this Comment will follow the path of a prisoner's federal post-conviction claims in both the state and federal habeas review processes and will examine the effect of *Martinez* and *Trevino* on these processes. Part II.A will explain why the "narrow exception" referred to in the *Martinez-Trevino* duo is not so narrow. Part II.B will focus on why *Brady* claims, so similar in nature to IATC claims, should fall within the exception covered by *Martinez*. Finally, Part II.C will explain why denial of the *Martinez* exception in *Brady* claims serves as an injustice to the principle that a prisoner receive at least one opportunity to litigate substantial due process challenges to a conviction.

I. BACKGROUND

In the context of federal habeas review of state criminal convictions, federal courts today employ the writ of habeas corpus to review the constitutionality of state criminal proceedings.[21] When a state prisoner is

16. *Id.*

17. 373 U.S. 83 (1963).

18. *See id.* at 87 (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

19. Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 600 (2009).

20. *See infra* Parts II.B–C.

21. *See* Brown v. Allen, 344 U.S. 443, 485 (1953) (rejecting the idea that the writ of habeas corpus in federal courts is "authorized for state prisoners at the discretion of the federal court," but that it may "only [be] authorized when a state prisoner is in custody in violation of the Constitution of the United States"). *Brown*, a landmark case in modern post-conviction jurisprudence, extended the scope of federal habeas review to include constitutional errors in state criminal process. Prior to this case, only state court jurisdictional errors could be reviewed by a federal habeas court. *See, e.g.*, Frank v. Magnum, 237 U.S. 309, 327 (1915) ("[T]he writ of *habeas corpus* will lie only in case the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it . . . ."); Charles Alan Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802, 806 (1983) ("The expansion of the writ in the 1950s and 1960s has strengthened the federal courts at the expense of their state counterparts and has been a means for imposing federal constitutional standards on state criminal proceedings.").

held in "custody in violation of the Constitution or laws or treaties of the United States," the prisoner may be entitled to federal habeas relief.[22]

Although habeas review entitles an inmate to challenge a conviction or sentence in federal court, the availability of relief turns on the absence of procedural defects in the claim.[23] Part I.A begins with an overview of the post-conviction review process, specifically focusing on how an inmate advances from challenging the conviction on direct appeal in state court, to a collateral, state habeas review proceeding.[24] Part I.B then follows the path of the prisoner's claim when raised in a federal writ of habeas corpus, specifically focusing on what happens when the prisoner failed to follow state procedural rules prior to seeking federal adjudication of the claim. Part I.C describes two of the primary justifications federal courts have imposed upon limited federal habeas review for state prisoners: federalism and finality. Finally, Part I.D introduces a recent Court-created exception to the traditional rule that state post-conviction counsel's ineffectiveness cannot constitute cause to overcome a procedurally defaulted IATC claim.

A. State Collateral Review of State Convictions

After a state court convicts and sentences a criminal defendant, the prisoner may then challenge either the conviction or sentence.[25] The first step is to bring a direct appeal to a state appellate court.[26] In most instances, claims brought on direct appeal must arise directly from evidence and facts on the trial record.[27] Also in many instances, the same attorney

22. 28 U.S.C. § 2254(a) (2006).

23. *See infra* Part I.B. A federal court, for example, is barred from granting a state prisoner's application for a writ of habeas corpus unless the prisoner has exhausted all available state remedies, 28 U.S.C. § 2254(b) (2006), and if a state court has adjudicated the claim on the merits, and such adjudication was not inconsistent with clearly established federal law, 28 U.S.C. § 2254(d) (2006).

24. *See infra* Part I.A; *see also* BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS 171 (2013) ("The formal name for the state post-conviction process varies by jurisdiction; some call it 'state habeas,' some call it 'state post-conviction' review, and some states use other names.").

25. *See* Abney v. United States, 431 U.S. 651, 656 (1977) (discussing the history and evolution of the right of appeal).

26. Although a convicted criminal defendant has no constitutional right to an appeal to a higher state court, *McKane v. Durston*, 153 U.S. 684, 687 (1894), each of the fifty states has implemented its own "court of last resort" where appeals from final judgments of trial courts may be raised. *See, e.g.*, Allen v. Clark, 126 F. 738, 740 (4th Cir. 1903) (using the terms "court of last resort" and "state Court of Appeals" interchangeably); Beatty v. Monahan, 240 Ill. App. 240, 242 (Ill. App. Ct. 1926) (same); *see also* Loschiavo v. Port Auth. of N.Y., 448 N.E.2d 1351, 1352 (N.Y. 1983) (Fuchsberg, J., dissenting) (recognizing that the issue at bar had been decided by every other court of last resort).

27. *See, e.g.*, United States v. Hoyle, 33 F.3d 415, 418 (4th Cir. 1994) (noting that in order for an IATC claim "to be heard on direct appeal, it must conclusively appear[] in the trial record

who represented the defendant at trial will continue representation through the direct review process.[28] Although the assistance of counsel may be beneficial to the prisoner in the appellate process,[29] if the prisoner wishes to raise an IATC claim, it is unlikely that in a direct appeal proceeding—represented by the same counsel from trial—the attorney will claim that counsel was ineffective at the prior trial proceeding.[30]

The collateral, habeas review process is another avenue available to challenge unlawful convictions and sentences.[31] There are both state and federal collateral review processes, and a prisoner held in custody pursuant to a state court judgment must exhaust all state collateral remedies prior to seeking federal habeas relief.[32] Although state post-conviction procedures vary by jurisdiction, ordinarily collateral review is the only means by which a prisoner can enforce constitutionally guaranteed fair trial rights when challenges to a prisoner's custody depend on facts outside of the trial record.[33]

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itself that the defendant was not provided with effective representation" (alteration in original) (internal quotation marks omitted)).

28. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 16-205 (LexisNexis 2013) (mandating that appointed counsel of an indigent individual "continue until the final disposition of the case" unless otherwise relieved); WIS. STAT. ANN. § 809.85 (West 2014) (same); United States v. Dangdee, 608 F.2d 807, 810 (9th Cir. 1979) (holding that state appointed counsel's representation continues through appeal unless otherwise relieved); Flansburg v. State, 103 Md. App. 394, 405, 653 A.2d 966, 971 (1995) (same).

29. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985) (recognizing that an unrepresented appellant "is unable to protect the vital interests at stake" and even an insufficiently represented appellant, "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all").

30. *See* People v. Bailey, 12 Cal. Rptr. 2d 339, 340 (Cal. Ct. App. 1992) (finding that "there is an inherent conflict when appointed trial counsel in a criminal case is also appointed to act as counsel on appeal"); Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2619 (2013) (recognizing that "an attorney cannot be expected to raise his own ineffectiveness" on appeal, and therefore, "the first practical opportunity these defendants have to raise ineffective assistance of trial counsel is in initial collateral review proceedings").

31. *See, e.g.*, Massaro v. United States, 538 U.S. 500, 509 (2003) (distinguishing between the direct and collateral review processes by recognizing "that failure to raise an [IATC] claim on direct appeal does not bar the claim from being brought in a later, appropriate [collateral] proceeding"); United States v. Berry, 624 F.3d 1031, 1038 (9th Cir. 2010) (distinguishing between the direct and collateral review processes by noting that collateral review "may not be used as a chance at a second appeal," but instead "must be based upon an independent constitutional violation").

32. 28 U.S.C. § 2254(b) (2006); *see also* Rose v. Lundy, 455 U.S. 509, 522 (1982) (establishing the "total exhaustion rule").

33. *See, e.g.*, Harris v. State, 299 Md. 511, 517, 474 A.2d 890, 893 (1984) (recognizing collateral proceedings as the preferable route for raising IATC claims because "claims of counsel incompetency are rarely raised at trial"); *see also* Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968, 968–69 (2005) (describing the collateral process as "a vital part of our criminal justice system" because it is "usually the sole means by which a convicted person can enforce fundamental fair-trial rights").

Two leading examples of claims that, by their nature, tend to be raised only on collateral review are ineffectiveness of trial counsel[34] and claims the prosecution withheld exculpatory evidence under *Brady v. Maryland*.[35] To prevail on an IATC claim, a prisoner must establish that counsel's representation was so deficient "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[36] In most cases, the deficiency and resulting prejudice are not clear at trial, and by directing IATC claims to collateral proceedings, prisoners have the opportunity to make a record by presenting additional testimony, introducing new evidence, and offering factual findings as to trial counsel's incompetence.[37] In a similar manner, *Brady* claims require: "the evidence at issue must be favorable to the accused, either because it is exculpatory or . . . impeaching evidence; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[38] Most often, the evidence will not be available on the trial record to challenge on direct review because the evidence at issue was not disclosed to the defense during trial.[39]

It is, no doubt, difficult for an individual confined to prison to maneuver through the state collateral review process and gather the evidence necessary to raise a successful IATC or *Brady* claim.[40] Despite the complexity of the claims directed toward state collateral review

34. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012) (discussing briefly the nature of IATC claims). The success of an IATC claim often depends on evidence outside the trial record. *Id*.

35. A *Brady* claim refers to prosecutorial misconduct for failing to disclose exculpatory evidence; usually, it follows that this failure to disclose will not be part of the facts or evidence present in the trial record. *See* Hunton v. Sinclair, 732 F.3d 1124, 1130 (9th Cir. 2013) (Fletcher, J., dissenting) ("For both [IATC] and *Brady* claims, much—sometimes all—of the important evidence is outside the trial record.").

36. Strickland v. Washington, 466 U.S. 668, 694 (1984).

37. *See* Johnson v. State, 292 Md. 405, 435, 439 A.2d 542, 559 (1982) (encouraging IATC claims to be raised on collateral review because without additional testimony and investigation, the direct appellate court could not adequately determine the attorney's ineffectiveness or incompetence), *abrogated on other grounds by* Hoey v. State, 311 Md. 373, 536 A.2d 622 (1988); *see also Ex parte* Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (same).

38. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

39. *See* Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455, 479 (1989) (noting such "nonrecord facts" have proved critical to some capital post-conviction attorneys).

40. *See* Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1409 (1999) (recognizing that without assistance of counsel to develop post-conviction claims, "[i]t is virtually impossible to conduct any kind of investigation from prison" and that "there is no realistic chance that a prisoner will be able to disentangle even the law surrounding ineffective assistance and *Brady* sufficiently to present a credible claim to the post-conviction court").

proceedings, a prisoner bringing a constitutional claim in a state collateral proceeding has no constitutional right to counsel.[41] In *Pennsylvania v. Finley*,[42] the Supreme Court held that states have no constitutional obligation to provide state post-conviction relief; and if states choose to do so, the Fourteenth Amendment does not require the state to provide for the assistance of counsel in these proceedings.[43] Some states provide counsel to post-conviction prisoners facing capital punishment.[44] The vast majority of prisoners, however, appear *pro se* in post-conviction proceedings.[45]

B. Federal Habeas Review of State Convictions

State prisoners may seek further habeas relief in federal court.[46] A federal writ of habeas corpus alleges that the prisoner's conviction and custody is in violation of the federal Constitution, federal laws, or federal treaties.[47] A meritorious claim, however, is not enough to obtain federal habeas relief.[48] Before entertaining a claim on the merits, federal courts are required to determine whether the claim is free of procedural defects.[49]

State prisoners typically face several procedural barriers when attempting to raise constitutional challenges to state convictions in federal court.[50] A federal court will accept a state prisoner's petition for a writ of

41. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012) (highlighting the difficulty a prisoner has in raising an IATC claim without effective assistance of post-conviction counsel); *see also* Hunton v. Sinclair, 732 F.3d 1124, 1126 (9th Cir. 2013) (emphasizing that absent a constitutional right to an attorney in state post-conviction proceedings, attorney error in these proceedings could not constitute cause to excuse a procedural default).

42. 481 U.S. 551 (1987).

43. *Id.* at 555–57. *But see* Douglas v. California, 372 U.S. 353, 357–58 (1963) (reasoning that although there is no constitutionally guaranteed right to appeal a state criminal conviction, when a state provides an appeal as of right, the state must also provide counsel to represent the defendant on that first appeal).

44. Christopher T. Robertson, *Contingent Compensation of Post-Conviction Counsel: A Modest Proposal to Identify Meritorious Claims and Reduce Wasteful Government Spending*, 64 ME. L. REV. 513, 519–20 (2012) (recognizing that "[s]ome states provide very minimal compensation for attorneys representing capital prisoners, but most states provide no compensation at all for non-capital prisoners").

45. *See* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 23 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (finding that out of a random sample of over 3,000 federal habeas writs filed by state prisoners, 87.5% of capital prisoners were *pro se* when they first filed and 95% of non-capital prisoners were *pro se* at the beginning of their case).

46. 28 U.S.C. § 2254(a) (2006).

47. *Id.*

48. *See id.* § 2254(b)(1) (identifying several procedural requirements that must be met before a federal court will grant a state prisoner's application for a writ of habeas corpus).

49. *See* Coleman v. Thompson, 501 U.S. 722, 729–30 (1991) (noting that federal courts are generally barred from reviewing a prisoner's federal claim when the prisoner failed to meet a state procedural requirement).

50. *See supra* note 48.

habeas corpus, only after the prisoner raised all the claims contained in the writ before a state court, thereby giving the state a chance to adjudicate the prisoner's claims first.[51] If the prisoner failed to follow a procedural rule when raising these claims in state court, the federal court will deem the claim to be procedurally defaulted and will deny adjudication on the merits.[52] Even though the claims are federal in nature, failure to follow state procedural rules may bar federal habeas review under the independent and adequate state grounds doctrine.[53] This doctrine provides that a federal court "will not review a question of federal law decided by a state court 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."[54]

1. The Independent and Adequate State Grounds Doctrine

A federal court receiving a state prisoner's petition for a writ of habeas corpus must first determine the source of law on which the state judgment was grounded.[55] Often, state courts are presented with federal questions, but if a state court decides the issue on independent and adequate state law grounds,[56] a federal court sitting in habeas review will not review the question of federal law.[57] If, however, the court finds that the state decision

51. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . .").

52. *Coleman*, 501 U.S. at 731–32. Procedurally defaulted claims will also be considered fully exhausted claims, thereby barring federal habeas review rather than giving the prisoner an opportunity to bring the federal claim before a federal court. *See id*. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him."). This rule requires that a federal court give state procedural rules the same effect it would give to federal ones, thus furthering considerations of comity and federalism. *Id*. at 746.

53. *See id.* at 728 (emphasizing that a federal district court should respect a state court's decision not to address a prisoner's federal claims when the prisoner failed to meet state procedural requirements because that state decision rested on "independent and adequate state procedural grounds"); *see also* Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998) ("If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim.").

54. *Coleman*, 501 U.S. at 729 (emphasis added).

55. *Id*. at 732–35 (discussing appropriate application of the independent and adequate state ground doctrine in federal court).

56. When a state court makes a "plain statement" that its opinion rests on state grounds independent of the federal question, federal law or federal precedent, a federal court will not review the state court judgment. Michigan v. Long, 463 U.S. 1032, 1041–42 (1983). A rule is "adequate" if it is firmly established and regularly followed. Beard v. Kindler, 558 U.S. 53, 60–61 (2009) (holding that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review if it is "firmly established" and "regularly followed").

57. *Coleman*, 501 U.S. at 729. The Court reasoned that "it is primarily respect for the State's interests that underlies the application of the independent and adequate state ground doctrine in

"appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion,"[58] then the federal court may address the prisoner's federal habeas petition.[59]

One source of independent and adequate state law grounds is state procedural rules.[60] A state court's decision not to address a prisoner's federal claims because the prisoner failed to meet state procedural requirements rests on independent and adequate state procedural grounds.[61] In the context of post-conviction proceedings, if a prisoner does not raise a claim in the first collateral proceeding in which it could be heard,[62] the prisoner will be considered to have procedurally defaulted on this claim.[63] Unless a prisoner can overcome the procedural default, a federal court will be barred from reviewing the prisoner's federal claims.[64]

2. Overcoming Procedural Default

In order for a state prisoner to overcome a procedurally defaulted federal claim, the prisoner must "demonstrate cause for the default and actual prejudice as a result," or establish that "a fundamental miscarriage of justice" will result if the federal court refuses to hear the prisoner's claim.[65] This Comment and the cases cited within focus on the predominant cause-

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federal habeas." *Id.* at 739. For further discussion on states' interests justifying the hesitancy of federal courts to review state prisoners' habeas corpus petitions, see *infra* Part I.C.

58. *Long*, 463 U.S. at 1040–41.

59. *Coleman*, 501 U.S. at 734–35.

60. *Id.* at 729–30.

61. *See id.* ("The [independent and adequate state ground doctrine] applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement.").

62. There is not necessarily a limit on the number of habeas petitions a prisoner can file, but because a successive petition involves claims attacking the same custody and involving the same parties as a first petition, there are statutory and judicially created restrictions as to what claims may be validly asserted in successive petitions. *See, e.g.*, 28 U.S.C. § 2244(b)(1) (2006) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."); *id.* § 2254(e)(2) (requiring the dismissal of new claims raised in successive habeas petitions unless the claim only became available upon a newly enacted rule of constitutional law, or the claim is based on newly discovered evidence proving the prisoner's innocence); McCleskey v. Zant, 499 U.S. 467, 489 (1991) (acknowledging that the "abuse of the writ" doctrine, a restraint upon successive habeas petitions, refers to a "body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions").

63. *See McCleskey*, 499 U.S. at 489 ("[A] petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first . . . .").

64. *See Coleman*, 501 U.S. at 750 (noting that a prisoner can overcome a procedurally defaulted claim pursuant "to an independent and adequate state procedural rule").

65. *Id.*

and-prejudice test as the standard for the miscarriage-of-justice exception is exceptionally high and rarely met.[66]

The first element of the cause-and-prejudice standard focuses on the source—the cause—of the procedural default. Specifically, the prisoner must prove that an "objective factor external to the defense," sometimes referred to as the external factor requirement, caused the prisoner's failure to comply with the state procedural rule.[67] The most commonly asserted form of cause is ineffectiveness of counsel.[68] Under the standard established in *Strickland v. Washington*,[69] ordinary attorney error does not constitute cause for a prisoner's procedural default.[70] In *Pennsylvania v. Finley*, the Supreme Court held that the Sixth Amendment's right to counsel did not extend to prisoners in post-conviction proceedings.[71] Therefore, ineffective assistance in post-conviction proceedings is not considered an objective factor external to the prisoner's defense and generally will not establish cause to excuse a procedurally defaulted post-conviction claim.[72]

The second element of the cause-and-prejudice test focuses on the result of the procedural default and the harm to the prisoner if the federal habeas court refuses to review the merits of the defaulted claim. The "actual prejudice" requirement ensures that an excused procedurally defaulted claim is substantial enough to justify the consideration of the claim in federal court despite the procedural default.[73] Even if the prisoner can show good cause for failing to adhere to state procedural rules, the

66. The Court has made clear that the "fundamental miscarriage of justice exception" is "rare" and only applied to the "extraordinary case." Schlup v. Delo, 513 U.S. 298, 321 (1995). Although the Court has not definitively stated when a "fundamental miscarriage of justice" will excuse a procedurally defaulted claim, the Court did note that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" and such a showing of actual innocence may excuse the defaulted claim, "even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 477 U.S. 478, 495–96 (1986).

67. *See Carrier*, 477 U.S. at 488 ("We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. . . . [W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.").

68. GARRETT & KOVARSKY, *supra* note 24, at 216.

69. 466 U.S. 668, 687–88 (1984) (holding that effective assistance of counsel must be determined according to the objective standard of reasonableness).

70. *Carrier*, 477 U.S. at 488 (1986).

71. Pennsylvania v. Finley, 481 U.S. 551, 559 (1987).

72. Coleman v. Thompson, 501 U.S. 722, 753–54 (1991) (providing that absent a constitutional right to counsel in post-conviction proceedings, the prisoner, not the state, bears the burden for a failure to follow state procedural rules).

73. *See, e.g.*, Martinez v. Ryan, 132 S. Ct. 1309, 1321 (2012) (remanding Martinez's IATC claim to the district court to decide the issue of prejudice after holding that Martinez's ineffective post-conviction counsel constituted cause to excuse his procedurally defaulted IATC claim).

prisoner must also show that "but for" the error, "there is a reasonable probability that . . . the result of the proceeding would have been different."[74] A presumption once existed in favor of federal habeas review of procedurally defaulted claims,[75] but the Supreme Court has shifted away from that presumption in favor of the requirement for a showing of cause and prejudice.[76]

C. Policies Limiting Federal Habeas Review

The Supreme Court has justified its preference for the cause-and-prejudice standard by emphasizing principles of federalism and states' interest in finality.[77] The Court has indicated its preference to adhere to state procedural rules and respect a procedural default that results from a failure to follow those rules.[78] This preference is due, in part, to the role state courts play in deciding federal constitutional questions.[79] The Court has noted specifically the importance of the independent and adequate state

74. Strickland v. Washington, 466 U.S. 668, 694 (1984); *see also* Williams v. French, 146 F.3d 203, 210 (4th Cir. 1998) ("To establish actual prejudice, the petitioner must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (internal quotation marks omitted)).

75. Fay v. Noia, 372 U.S. 391, 438 (1963) (holding that a federal judge was not necessarily barred from reviewing a claim procedurally defaulted in state court, but that "the judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies"); *see also Coleman*, 501 U.S. at 745 ("*Fay* thus created a presumption in favor of federal habeas review of claims procedurally defaulted in state court.").

76. *See* Wainwright v. Skyes, 433 U.S. 72, 87–88 (1977) (limiting *Fay* to its facts and rejecting the sweeping language of the bypass standard); *see also, e.g.*, Francis v. Henderson, 425 U.S. 536, 542 (1976) (requiring the prisoner show cause and prejudice before a federal court would review the prisoner's procedurally defaulted claim); Davis v. United States, 411 U.S. 233, 242–45 (1973) (same).

77. *See Coleman*, 501 U.S. at 748 (recognizing the most significant costs associated with "the Great Writ" to be "the cost to finality in criminal litigation" and "[f]ederal intrusions into state criminal trials" (alteration in original) (internal quotation marks omitted)); *see also* Maples v. Thomas, 132 S. Ct. 912, 929 (2012) (Scalia, J., dissenting) ("As we have long recognized, federal habeas review for state prisoners imposes significant costs on the States, undermining not only their practical interest in the finality of their criminal judgments, but also the primacy of their courts in adjudicating the constitutional rights of defendants prosecuted under state law." (citations omitted)); *Martinez*, 132 S. Ct. at 1316 ("Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules 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.").

78. *See Coleman*, 501 U.S. at 747 ("The cause and prejudice standard in federal habeas evinces far greater respect for state procedural rules than does the deliberate bypass standard of *Fay*.").

79. *See id*. at 729 (recognizing that when a state court decides a federal question based on state law independent and adequate to support the judgment, interference by a federal court would be advisory).

grounds doctrine in supporting state rules and state courts' decisions of federal issues.[80] If a federal court disregards the independent and adequate state basis of a state court's judgment and renders the prisoner's custody unconstitutional, it "ignores the State's legitimate reasons for holding the prisoner."[81]

The Court has recognized the value of the cause-and-prejudice standard in promoting a state's interests in the finality of criminal trials.[82] States have a legitimate interest in the finality of criminal judgments not being compromised by federal habeas proceedings.[83] The external factor requirement also serves states' interests by requiring a state only to litigate and defend against errors imputed to that State.[84] Recognizing that the cost to finality of judgments is one of the greatest associated with federal habeas review,[85] this underlying concern has been thought to be one of the driving forces behind the Courts limiting state prisoners' access to federal habeas review.[86] The Supreme Court has indicated, however, that federalism principles and finality interests alone will not lead a federal habeas court to compromise a prisoner's constitutional rights.[87]

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80. *Id.*

81. *Id.* at 730.

82. *See* Wainwright v. Skyes, 433 U.S. 72, 112 (1977) (Brennan, J., dissenting) ("The strict enforcement of procedural defaults . . . may be seen as a means of deterring any tendency on the part of the defense to slight the state forum, to deny state judges their due opportunity for playing a meaningful role in the evolving task of constitutional adjudication, or to *mock the needed finality of criminal trials*." (emphasis added)); *see also Coleman*, 501 U.S. at 746 (recognizing that the broadly applied cause-and-prejudice standard in *Skyes* "served strong state interests in the finality of its criminal litigation").

83. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1325 (2012) (Scalia J., dissenting) ("Criminal conviction[s] ought to be final before society has forgotten the crime that justifies it.").

84. *See* Murray v. Carrier, 477 U.S. 478, 487–88 (1986) (identifying many costs borne by the state in the federal habeas review process, and determining that the cost of post-conviction attorney error should not be one of them); *see also Martinez*, 132 S. Ct. at 1324 ("*Coleman* and *Carrier* set forth in clear terms when it is that attorney error constitutes an external factor: Attorney error by itself does not, because when an attorney acts (or fails to act) in furtherance of the litigation, he is acting as the petitioner's agent.").

85. *Coleman*, 501 U.S. at 748.

86. *See, e.g.*, Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 259 (1992) ("Although comity continues to be important in molding federal habeas, the imperative of finality—keeping criminal convictions in place—appears to be the real animating force behind the Court's habeas revolution.").

87. *See* Engle v. Isaac, 456 U.S. 107, 135 (1982) ("In appropriate cases [the principles of comity and finality] must yield to the imperative of correcting a fundamentally unjust incarceration."); *Coleman*, 501 U.S. at 773 (Blackmun, J., dissenting) ("The interest in finality, standing alone, cannot provide a sufficient reason for a federal habeas court to compromise its protection of constitutional rights."); *see also* Robertson, *supra* note 44, at 522, 525 (arguing that federal habeas statutes and deference to state judgments cripple federal review of state convictions, making the whole system less efficient, and that access to contingently funded attorneys in post-conviction proceedings would abate the flood of frivolous habeas petitions).

D. The Martinez *Exception*

In *Coleman v. Thompson*,[88] the Supreme Court emphasized the *Finley* rule that a prisoner has no constitutional right to counsel in post-conviction proceedings,[89] thus finding that any "error" from Coleman's post-conviction counsel could not constitute constitutionally ineffective assistance,[90] and Coleman had therefore failed to establish cause to excuse his defaulted claims.[91] The Court refrained from deciding and left open the issue of whether an exception to *Finley* existed "in those cases where state collateral review is the first place a prisoner can present a[n IATC claim challenging] his conviction."[92] Twenty-one years later, the Court re-visited this issue in *Martinez v. Ryan*.

1. Martinez v. Ryan

In *Martinez v. Ryan*, the Supreme Court considered whether the ineffectiveness of state post-conviction counsel could provide cause to excuse a defaulted IATC claim and allow federal merits review.[93] The petitioner, Luis Mariano Martinez, was convicted by an Arizona jury of two counts of sexual conduct with his eleven-year-old stepdaughter and sentenced to two consecutive life sentences.[94] While Martinez's direct appeal was pending, his newly court-appointed post-conviction counsel filed claims for post-conviction review.[95] Arizona law requires that claims of ineffective assistance of trial counsel be brought first in state collateral proceedings, not on direct review.[96] It was only in his second notice of

88. 501 U.S. 722 (1991).

89. *Id.* at 756; *see also* Pennsylvania v. Finley, 481 U.S. 551, 559 (1987) (holding that states are not required to provide counsel for prisoners seeking post-conviction relief).

90. *Coleman*, 501 U.S. at 754 (concluding Coleman's counsel could not have been constitutionally ineffective because "it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel"—and here there was no such right).

91. *Id.* at 757.

92. *Id.* at 755. At the time of Coleman's trial, Virginia required IATC claims to be raised in collateral review proceedings; however, the Court did not need to answer whether the exception existed because Coleman was not challenging the effectiveness of his state habeas counsel, but the effectiveness of his counsel during the appeal from that state habeas determination. *Id.* at 755–56. The Court was unwilling to assure effective assistance beyond the first appeal of a criminal conviction. *Id*.

93. 132 S. Ct. 1309, 1315 (2012).

94. *Id*. at 1313.

95. *Id.* at 1314. Martinez's initial post-conviction counsel made no claim that Martinez's trial counsel was ineffective. *Id*. In fact, Martinez's first post-conviction counsel testified later that she could find no colorable claims regarding the conduct of Martinez's trial counsel. *Id*.

96. ARIZ. REV. STAT. ANN. § 32.4 (2014); State *ex rel*. Thomas v. Rayes, 153 P.3d 1040, 1044 (Ariz. 2007) (holding "a defendant may bring ineffective assistance of counsel claims *only* in a Rule 32 post-conviction proceeding—not before trial, at trial, or on direct review").

post-conviction relief, and with the assistance of new counsel, that Martinez raised a claim of the ineffectiveness of counsel at trial.[97]

The state court denied Martinez's petition on procedural grounds, holding that Martinez should have raised the IATC claim in his first notice for post-conviction relief.[98] Martinez then filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona.[99] The district court denied relief on the IATC claim, reasoning that it had been procedurally defaulted and that ineffective state post-conviction representation could not excuse the default.[100] The United States Court of Appeals for the Ninth Circuit affirmed.[101]

The Supreme Court granted certiorari to address the question expressly reserved in *Coleman*—"whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding."[102] The Court considered the specifics of Arizona's procedural rules and determined that, because the initial-review collateral proceeding is the first proceeding in which a prisoner can raise a substantial IATC claim,[103] "the collateral proceeding is in many ways the equivalent of a prisoner's direct

97. *Martinez*, 132 S. Ct. at 1314. Represented by new counsel, "Martinez claimed his trial counsel had been ineffective for failing to challenge the prosecution's evidence." *Id*. At trial, both the prosecution and defense introduced videotaped interviews with the victim. *Id.* at 1313. In the videotape introduced by the defense, the victim denied any abuse. *Id*. The prosecution brought in an expert witness to explain the recantation and inconsistencies in the videos. *Id.* Martinez claimed that his trial counsel should have objected to the prosecution's explanation for the recantations and called his own expert witness in rebuttal. *Id.* at 1314. He also argued that his trial counsel was ineffective for not defending against the DNA evidence introduced by the prosecution. *Id*. For a discussion about the limitations of claims raised on successive petitions, see *supra* note 62.

98. *Martinez*, 132 S. Ct. at 1314. The Arizona Court of Appeals affirmed and the Arizona Supreme Court declined review. *Id.*

99. *Id.*

100. Martinez v. Schriro, No. CV 08-785-PHX-JAT, 2008 WL 5220909, at *16 (D. Ariz. Dec. 12, 2008), *rev'd sub nom.* Martinez v. Ryan, 132 S. Ct. 1309 (2012). The court ruled that "Arizona's preclusion rule was an adequate and independent state-law ground to bar federal review" and under the doctrine of procedural default, the federal court was prohibited from reaching the merits of Martinez's claims. *Martinez*, 132 S. Ct. at 1314–15.

101. Martinez v. Schriro, 623 F.3d 731, 743 (9th Cir. 2010), *rev'd sub nom.* Martinez v. Ryan, 132 S. Ct. 1309 (2012); *see also Martinez*, 132 S. Ct. at 1315 ("The Court of Appeals relied on general statements in *Coleman* that, absent a right to counsel in a collateral proceeding, an attorney's errors in the proceeding do not establish cause for procedural default.").

102. *Martinez*, 132 S. Ct. at 1315. The Court uses the term "initial-review collateral proceedings" to refer to "proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id*. ("*Coleman* had suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" (quoting Coleman v. Thompson, 501 U.S. 722, 755 (1991))). The *Martinez* Court, like the *Coleman* Court, refrained from deciding the case as a constitutional matter.

103. *See supra* note 96 and accompanying text.

appeal as to the ineffective-assistance claim."[104] The Court also inquired into the potential consequence to a prisoner's IATC claims if counsel's ineffectiveness in collateral proceedings would not excuse a procedurally defaulted claim. If an attorney erred in an initial-review collateral proceeding by failing to raise an IATC claim, then it is likely that no state court would ever hear such a claim.[105] Moreover, if such errors would not establish cause to excuse the procedural default, then no federal court could review the prisoner's claim.[106]

Evaluating IATC claims "within the context of this state procedural framework,"[107] the Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, 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.[108]

In other words, inadequate state post-conviction representation can excuse default of an IATC claim and permit a federal court to decide the claim on the merits. In establishing this exception to the general rule of *Coleman*, the Court clarified that to overcome the procedural default, the claim must nonetheless satisfy the prejudice prong of the cause-and-prejudice-test.[109]

In dissent, Justice Scalia, joined by Justice Thomas, criticized the majority for taking an unprecedented, activist approach toward the "invention of a new constitutional right" and for failing to see the big picture consequences of its decision.[110] Justice Scalia predicted that the

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

105. *Id.* at 1316. Martinez faced this same situation when trying to raise an IATC claim in his second notice of post-conviction relief—he had been prevented from raising the claim on direct review and then was prevented from raising it before a collateral state court. *Id.* at 1314.

106. *Id.* at 1316. The Court used this as a basis to reconsider its previous statement that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.'" *Id.* (quoting Maples v. Thomas, 132 S. Ct. 912, 922 (2012)). Moreover, it added that "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system"; and if a prisoner receives ineffective assistance of counsel at trial, and has no forum to bring that claim, then an exception must be made. *Id.* at 1317. The Court did not consider such an action to be beyond reach because "[t]he rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion." *Id.* at 1318.

107. *Id.* at 1318. The state procedural framework requires a prisoner to raise an IATC claim in an initial-review collateral proceeding. *Id.*

108. *Id.* at 1320.

109. *Id.* at 1318.

110. *Id.* at 1321 (Scalia, J., dissenting) (criticizing the majority's opinion because "no one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases").

holding would be expanded to states other than those that required IATC claims to be brought only on collateral review.[111] He also found it unlikely that the holding of the Court would remain limited to ineffective-assistance-of-trial-counsel cases.[112] Accordingly, Justice Scalia concluded that the majority vastly underestimated the consequences of its newly crafted exception.[113]

2. *Application of* Martinez *in Federal District and Appellate Courts*

In the months immediately following *Martinez*, states attempted to avoid the application of the Court's exception to *Coleman* in several ways. Some states attempted to avoid the *Martinez* exception by distinguishing their procedural framework and reasoning that it did not require a prisoner to raise an IATC claim in a collateral review proceeding.[114] This narrow reading of *Martinez* was shut down a year later when the Court decided *Trevino v. Thaler*.[115] Other states avoided *Martinez* by requiring the prisoner to have a procedurally defaulted IATC claim for the benefit of the *Martinez* exception to apply.[116]

First, some federal courts following *Martinez* declined to extend the exception to a procedurally defaulted IATC claim if the prisoner could have raised that claim on direct appeal.[117] In *Ibarra v. Thaler*,[118] for example,

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111. *Id.* at 1322 n.1. Justice Scalia predicted precisely the issue to be addressed in *Trevino*:

> Is there any relevant difference between cases in which the State *says* that certain claims can only be brought on collateral review and cases in which those claims *by their nature* can only be brought on collateral review, since they do not manifest themselves until the appellate process is complete?

Id.

112. *Id.* at 1321.

113. Justice Scalia also criticized the majority for "grossly underestimat[ing]" the frequency in which these claims would be raised by state prisoners. *Id*. at 1327.

114. *See, e.g.*, Parkhurst v. Wilson, 525 F. App'x 736, 738 (10th Cir. 2013) (declining to apply the *Martinez* exception to the Wyoming procedural framework because although "[f]rom a practical perspective, it appears [the Petitioner] was unable [to] raise his claim on direct appeal," he was not explicitly precluded from doing so).

115. *See infra* Part I.D.3.

116. *See, e.g.*, Hunton v. Sinclair, 732 F.3d 1124, 1126 (9th Cir. 2013) (declining to extend the *Martinez* exception to a procedurally defaulted *Brady* claim); Williams v. Mitchell, No. 1:09 CV 2246, 2012 WL 4505181, at *6 (N.D. Ohio Sept. 28, 2012) (declining to extend *Martinez* to "allow claims of ineffective assistance of post-conviction counsel to establish 'cause' for a 'default' of the factual development of an *Atkins* claim in state court").

117. *See, e.g.*, *Parkhurst*, 525 F. App'x at 738 (declining to extend the *Martinez* exception because Wyoming permitted IATC claims to be raised on direct appeal); Hodges v. Colson, 711 F.3d 589, 612 (6th Cir.) ("Tennessee's system does not implicate the same concerns as those that triggered the rule in *Martinez* because in Tennessee a collateral proceeding is not 'the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial.'"), *amended and superseded*, 727 F.3d 517 (6th Cir. 2013); Dansby v. Norris, 682 F.3d 711, 729 (8th Cir.

the United States Court of Appeals for the Fifth Circuit decided that *Martinez* did not apply to habeas petitioners in Texas because Texas did not have a formal rule assigning IATC claims to post-conviction review proceedings.[119] In dissent, Judge Graves suggested that the relevant consideration in applying the *Martinez* exception is not what the state procedural rules say, or do not say, but rather the place of the habeas court in the procedural framework.[120] This approach is the basis of *Trevino v. Thaler*[121] (overruling the Fifth Circuit's position in *Ibarra*) and federal habeas courts in subsequent decisions.[122]

Second, other federal courts have read *Martinez* to apply only to claims of trial counsel's ineffectiveness. Courts have held that *Martinez* does not extend to ineffective assistance claims emerging from post-conviction appeals[123] or to other procedurally defaulted claims.[124] In *Hunton v. Sinclair*,[125] the United States Court of Appeals for the Ninth Circuit held that *Martinez* does not extend to excuse a prisoner's

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2012) (declining to extend the *Martinez* exception because Arkansas permitted IATC claims to be raised on direct appeal), *vacated sub nom.* Dansby v. Hobbs, 133 S. Ct. 2767 (2013) (mem). *Contra* Echavarria v. Baker, No. 3:98-CV-00202-MMD, 2013 WL 1181951, at *16 (D. Nev. Mar. 20, 2013) (determining that Petitioner's procedurally defaulted IATC claims fell under the *Martinez* exception despite Nevada procedure allowing IATC claims to be raised on direct appeal because that particular petitioner's claims could not have been raised at that time).

118. 687 F.3d 222 (5th Cir. 2012), *abrogated by* Trevino v. Thaler, 133 S. Ct. 1911 (2013).

119. *Id.* at 227 ("In short, Texas procedures do not mandate that ineffectiveness claims be heard in the first instance in habeas proceedings, and they do not by law deprive Texas defendants of counsel-and court-driven guidance in pursuing ineffectiveness claims.").

120. *Id.* at 227–28 (Graves, J., dissenting). Here, the Texas habeas court would be the first court to review the merits of Ibarra's IATC claim. *Id.* at 229. Therefore, according to Judge Graves, the "equitable ruling" of *Martinez* was no less controlling simply because the petitioner could (theoretically, if not practically) have raised the claim on direct appeal. *Id.*

121. Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (holding that the *Martinez* exception applies to states where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal").

122. *See, e.g.*, Sasser v. Hobbs, 735 F.3d 833, 853 (8th Cir. 2013) (recognizing that the Arkansas procedure for raising an IATC claim on direct appeal was not sufficient in light of *Trevino*); Rodriguez v. Adams, No. 12-15485, 2013 WL 6052696, at *2 (9th Cir. Nov. 18, 2013) (remanding in light of *Trevino* because "California's 'state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal'" (quoting *Trevino*, 133 S. Ct. at 1921)).

123. McCall v. Wengler, No. 1:12-CV-00439-EJL, 2013 WL 6858313, at *4 (D. Idaho Dec. 30, 2013) (declining to extend *Martinez* because *Martinez* does not apply to ineffectiveness of post-conviction appellate counsel); Wilkinson v. Timme, No. 11-CV-00454-REB, 2012 WL 1884518, at *2 (D. Colo. May 23, 2012) (same).

124. *See, e.g.*, Hunton v. Sinclair, 732 F.3d 1124, 1126 (9th Cir. 2013) (declining to extend the *Martinez* exception to a procedurally defaulted *Brady* claim).

125. 732 F.3d 1124 (9th Cir. 2013).

procedurally defaulted *Brady* claim.[126] Although the Court limited the *Martinez* exception to "claims of ineffective assistance of trial counsel,"[127] some lower federal courts have not applied the exception with such restraint. One court has held that *Martinez* applies to establish cause to excuse a procedurally defaulted claim of ineffective assistance of appellate counsel.[128] Another has indicated that it might be receptive to expanding *Martinez* to other types of claims (rejecting the approach taken by the Ninth Circuit in *Hunton*).[129]

3. Trevino v. Thaler

Petitioner Carlos Trevino was convicted in Texas for the murder of Linda Salinas and was sentenced to death.[130] On direct appeal, the Texas Court of Criminal Appeals affirmed Trevino's conviction and sentence.[131] While his direct appeal was pending, Trevino filed an application for state habeas corpus relief;[132] of the forty-six claims he asserted for habeas relief, sixteen were IATC claims.[133] The trial court denied relief, and the Texas Court of Criminal Appeals affirmed.[134]

Trevino then raised a new IATC claim in his second state habeas petition.[135] Pursuant to the Texas writ-abuse statute, the Texas Court of Criminal Appeals dismissed Trevino's subsequent application because he

126. *Id.* at 1126–27.

127. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012).

128. Nguyen v. Curry, 736 F.3d 1287, 1296 (9th Cir. 2013) (extending the *Martinez* exception to establish cause to excuse a procedurally defaulted claim of ineffective assistance of appellate counsel).

129. In *Reed v. Stephens*, 739 F.3d 753, 781 (5th Cir. 2014), the court dismissed the prisoner's procedurally defaulted *Brady* claim. Although the court acknowledged the Ninth Circuit's decision in *Hunton*, the Fifth Circuit denied habeas relief because the prisoner had "insufficiently briefed his contention that *Martinez* should apply to his *Brady* claims." *Id.* at 782. This decision perhaps leaves room for a future prisoner to sufficiently plead *Martinez* to establish cause for a procedurally defaulted *Brady* claim in the Fifth Circuit.

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

131. Trevino v. Thaler, 678 F. Supp. 2d 445, 453–54 (W.D. Tex. 2009), *vacated*, 133 S. Ct. 1911 (2013). Of the nineteen claims Trevino brought on appeal, not one asserted that Trevino's trial counsel had been constitutionally ineffective. *Id.* at 453 n.27.

132. *Id*. at 454.

133. *Id*. at 454 n.28.

134. *Id*. at 454.

135. *Id*. at 455. After his first application for relief was denied, Trevino sought habeas relief in federal court. *Id*. at 454–55. The district court, however, stayed proceedings to allow Trevino to bring several new and unexhausted claims in state court. *Id*. at 455. In his second state habeas corpus application, Trevino asserted, for the first time, that "his trial counsel rendered ineffective assistance by failing to adequately investigate, develop, and present available mitigating evidence during the punishment phase of [his] capital trial." *Id.*

had not raised that IATC claim in his initial state habeas proceeding.[136] The district court declined to consider the merits of the procedurally defaulted IATC claim when raised in a federal habeas petition,[137] and the Fifth Circuit affirmed.[138]

The Supreme Court granted certiorari to determine whether the *Martinez* exception applies in Texas, where state law permits a criminal defendant to raise an IATC claim in both a direct appeal and an initial collateral review proceeding.[139] The Supreme Court held that the procedural default of an IATC claim will not bar a federal habeas court from hearing that claim when the state procedural framework renders it "highly unlikely" that a defendant will have a "meaningful opportunity" to raise such a claim on direct appeal.[140] In so holding, the Court decided that it was the actual operation of a state's procedural framework, and not strictly the wording of the procedural rules, that was relevant to whether a federal habeas court may excuse a procedurally defaulted IATC claim.[141]

Although the Court had said previously that the *Martinez* exception applies in states that, as a matter of law, require an IATC claim to be raised in an initial-review collateral proceeding, the *Trevino* Court held that the absence of such an express requirement in Texas procedural rules should not prohibit the application of the *Martinez* exception.[142] First, the Court recognized that the practical effect of the state's appellate procedure made it "'virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim' on direct review."[143] The

136. *Id.* at 455. The court added: "Petitioner's failure to comply with the Texas writ-abuse statute constitutes an independent and adequate ground for dismissal of a claim for federal habeas relief." *Id*. at 477. The dismissal was based on abuse of the writ grounds under TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5 (West 2011). Trevino v. Thaler, 449 F. App'x 415, 426, 429–30 (5th Cir. 2011), *vacated*, 133 S. Ct. 1911 (2013).

137. *Trevino*, 678 F. Supp. 2d at 472. The district court determined that there would be no "fundamental miscarriage of justice" resulting from its denial to hear the claim and that that the allegedly deficient performance of Trevino's first state habeas corpus counsel was not sufficient "cause" to excuse the procedural default under the cause-and-prejudice standard. *Id.* at 468, 471.

138. *Trevino*, 449 F. App'x at 416.

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

140. *Id.* at 1921. For a discussion on why it is almost always the case that a prisoner will not have a meaningful opportunity to raise an IATC claim on direct appeal, see *supra* text accompanying notes 30, 37.

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

142. *Id*. at 1915, 1918 ("Unlike Arizona, Texas does not expressly require the defendant to raise a claim of ineffective assistance of trial counsel in an initial collateral review proceeding. Rather Texas law on its face appears to permit (but not require) the defendant to raise the claim on direct appeal." (emphasis removed)).

143. *Id*. at 1918 (alteration in original) (quoting Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)). The Texas Court of Criminal Appeals considered the availability of both venues in the past and, in light of the often inadequate evidentiary record and time constraints for raising an IATC on direct appeal, the highest criminal court in Texas concluded that a habeas

Court went on to highlight that, "were *Martinez* not to apply, the Texas procedural system would create significant unfairness."[144] Thus, the Court concluded that a state that denies prisoners the ability to raise an IATC claim on direct appeal, and a state that grants permission but denies a meaningful opportunity to do so, is a "distinction without a difference."[145] The Court held that *Martinez* does apply and, thus, may constitute cause to excuse a procedurally defaulted IATC claim for defendants in states of both categories.[146]

In dissent, Chief Justice Roberts, joined by Justice Alito, criticized the majority for unraveling the narrow exception in *Martinez*.[147] Chief Justice Roberts argued that the *Martinez* application in states where the procedural framework makes it highly unlikely that a defendant will have a meaningful opportunity to raise an IATC claim on direct appeal invited "state-by-state litigation" to sort out the new limits of the rule.[148] According to the dissent, states can never be sure whether their procedures give a prisoner a "sufficiently meaningful opportunity," thereby foreclosing federal habeas review—this degree of uncertainty frustrates states interests in finality and comity.[149]

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writ brought in state collateral proceedings is ordinarily "essential to gathering the facts necessary to adequately evaluate such claims." *Ex parte* Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

144. *Trevino*, 133 S. Ct. at 1919. Post-conviction attorney error in an initial-review collateral proceeding will constitute cause to excuse a procedurally defaulted IATC claim—to hold otherwise would be to "deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." *Id.* at 1921.

145. *Id.* at 1921.

146. *Id*. The Court, in holding that the *Martinez* exception does apply, held:

> [W]here, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies . . . .

Id. The Court vacated and remanded the case to the Fifth Circuit for further proceedings to allow Trevino to establish that he was prejudiced by his post-conviction counsel's ineffectiveness and that his initial state habeas attorney was in fact ineffective. *Id.*

147. *Id*. at 1921, 1923 (Roberts, C.J., dissenting). While joining the majority in *Martinez*, Chief Justice Roberts disagreed with the expansion of, what he believed should be, the narrow exception to *Coleman*. *Id*. at 1923.

148. *Id*. By taking the "starch out of" *Martinez*'s once narrow application, Chief Justice Roberts was concerned with the malleability of the rule, questioning how the state procedural frameworks are to be assessed and how much of a chance, and what kind of chance, a prisoner must be given in the direct-appeal process. *Id*.

149. *Id*. at 1923–24 ("[E]ven in cases where federal courts ultimately decide that the habeas petitioner cannot establish cause under the new standard, the years of procedural wrangling it takes to reach that decision will themselves undermine the finality of sentences necessary to effective criminal justice . . . . [T]hat approach is inconsistent with *Coleman*, *Martinez* itself, and the principles of equitable discretion and comity at the heart of both . . . .").

Justice Scalia, joined again by Justice Thomas, dissented for precisely the same reasons elaborated in the dissent in *Martinez v. Ryan*.[150]

II. ANALYSIS

This Part argues that, in light of the purposes animated in *Martinez* and *Trevino*, the rationale for the equitable exception to *Coleman* applies with equal, if not greater, strength to a case in which an inmate procedurally defaults a *Brady* claim because of inadequate state post-conviction representation. Part II.A discusses the implications of the distinction between the equitable exception the *Martinez* Court created and the constitutional claim that it could have created. Part II.B compares the similarities between IATC and *Brady* claims. Although a few federal courts have declined to extend *Martinez* to other types of claims,[151] Part II.C argues that the rationale the Court employed in creating the *Martinez* exception can, and should, be applied to *Brady* claims as well.

A. The Court's Holding in Martinez *Created an Equitable Exception, Not a New Constitutional Right to Post-Conviction Representation*

Martinez and *Trevino* did not create a constitutional right to adequate state post-conviction representation. In holding that inadequate assistance of post-conviction counsel may excuse the procedural default of an IATC claim, the Court exercised its equitable power to modify the habeas remedy.[152] It created an exception to the generally applicable rule from *Coleman*, in which it held that failures of state post-conviction representation could not excuse procedural default. The Court believed the equitable exception necessary to "ensure that proper consideration was given to a substantial claim."[153] In considering the effect on a procedurally defaulted IATC claim resulting from post-conviction counsel's

150. *Id.* at 1924 (Scalia, J., dissenting); *see supra* notes 110–113 and accompanying text.

151. *See supra* Part I.D.2.

152. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012). The rules to establish cause to excuse a procedural default "reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default." *Id.* at 1318; *see also* Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473, 485 (2013) ("The Court was careful to point out that its opinion did not recognize a free-standing constitutional right to the appointment of counsel in state postconviction proceedings. Rather, it established an equitable doctrine for overcoming procedural default under certain circumstances.").

153. *Martinez*, 132 S. Ct. at 1318.

ineffectiveness, the Court stressed the importance of having at least one court review a prisoner's constitutional claims.[154]

The Court's distinction between an equitable and a constitutional holding has significant implications for subsequent application of the exception. In creating this equitable exception, the Court declared that "[t]he rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion."[155] By tying this exception to the underlying IATC claim, the Court expressed an interest in protecting the right to effective assistance of trial counsel against ineffective assistance at later post-conviction stages.[156] If the Court had created a constitutional right to post-conviction counsel, ineffectiveness of that counsel could require habeas relief.[157]

Instead, states may choose between appointing counsel or not asserting a procedural default and defending the trial counsel's representation on federal habeas review.[158] On one hand, *Martinez* gives states an incentive to provide more effective counsel in post-conviction proceedings to avoid spending time and money defending the trial counsel's adequacy years after the fact.[159] On the other hand, *Martinez* may encourage states to provide better opportunities for prisoners to raise federal post-conviction claims in state court.[160] State courts may simply afford an opportunity to litigate the merits of the defaulted IATC claim in its own courts.[161]

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154. *Id.* at 1316; *see also* Ty Alper, *Toward A Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 851 (2013) (arguing that *Martinez* is "less about the right to counsel in postconviction proceedings and more about the right to raise a claim of ineffective assistance of counsel"); Mary Dewey, Martinez v. Ryan: *A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U. L. REV. 269, 282 (2012) ("Although never explicitly stated, the idea that prisoners should have at least one full and fair opportunity to litigate claims is a resounding theme throughout the majority opinion.").

155. *Martinez*, 132 S. Ct. at 1318.

156. *Id.* at 1317.

157. *Id.* at 1319 ("A constitutional ruling would provide defendants a freestanding constitutional claim to raise [and] it would require the appointment of counsel in initial-review collateral proceedings . . . .").

158. *Id.* at 1319–20.

159. Primus, *supra* note 30, at 2616; *see also* Alper, *supra* note 154, at 869 (considering *Martinez* to "require" states to appoint post-conviction counsel only "to the extent that states want to use procedural default to avoid merits review in federal court").

160. *See* Primus, *supra* note 30, at 2617 (recognizing that instead of appointing post-conviction counsel, states might be encouraged to "provide defendants with a realistic chance to contend that their Sixth Amendment rights were violated").

161. It has also been suggested that "[t]he more likely it is that the federal habeas corpus court will reach and decide the merits of any federal questions, the less likely that the state courts will rely on procedural technicalities" and this dynamic may lead to a relaxation of the effect of a procedural default at the state level. Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1353 (1961).

Even after *Martinez* and *Trevino*, prisoners may not assert a standalone claim of ineffective assistance of post-conviction counsel as a constitutional error.[162] Moreover, inmates must still satisfy the prejudice prong of the cause-and-prejudice test.[163] Finally, states can respond to a prisoner's federal habeas petition by asserting that the claim is insubstantial.[164] Accordingly, federal habeas courts need only consider the post-conviction representation at the initial phase when it affects the presentation of a substantial IATC claim.

This equitable/constitutional distinction allows the Court to recognize attorney error as cause for other procedurally defaulted habeas claims without having to go through the constitutional analysis of whether counsel is required for that purpose. The equitable *Martinez* exception should be applicable to other significant due process claims exhibiting many of the same procedural limitations, challenges, and constitutional protections.[165]

B. The Martinez *Exception May Be Extended Due to the Nature of* Brady *Claims*

In *Brady v. Maryland*, the Supreme Court held that the prosecution's suppression of material evidence favorable to the defendant violated his due process rights.[166] An underlying theme in *Brady*, and its progeny,[167]

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162. *Martinez*, 132 S. Ct. at 1319; *see also* Johnson v. Superintendent, No. 3:12-CV-443, 2013 WL 1176227, at *5 (N.D. Ind. Mar. 19, 2013) (holding that *Martinez* does not allow a petitioner to assert ineffective assistance of post-conviction counsel as a free-standing claim).

163. *Martinez*, 132 S. Ct. at 1319; *see also, e.g.*, Khan v. Gordon, No. 11–7465, 2013 WL 4957479, at *19 (E.D. Pa. Sept. 12, 2013) (rejecting petitioner's procedurally defaulted IATC claim without a hearing and finding no prejudice); United States v. Gorham-Bey, Nos. CR 7-442, CV 12-366, 2012 WL 3155652, at *7 (W.D. Pa. Aug. 2, 2012) (same).

164. *Martinez*, 132 S. Ct. at 1319. When a prisoner claims that ineffectiveness of collateral counsel caused the procedural default of the IATC claim, "a State may answer that the [IATC] claim is insubstantial, i.e., it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards." *Id*.

165. Justice Scalia imagined the equitable exception being expanded further to encompass other kinds of habeas claims. *Id.* at 1321 (Scalia, J., dissenting) (questioning whether anyone "really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases"); *see also* Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 591, 596 (2013) (asserting that "the equitable rationale of *Martinez* should apply to a number of claims other than ineffective assistance of trial counsel").

166. 373 U.S. 83, 87 (1963). *Brady* and its progeny have established three components essential to a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

167. *See Strickler*, 527 U.S. at 281 (expanding the prosecutors "duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police"); United States v. Agurs, 427 U.S. 97, 110 (1986) (expanding the disclosure obligations of

involves the interest in avoiding unfair trials for the accused and preserving the truth-finding function of the adversarial process.[168] Because *Brady* claims are, like IATC claims, defined by information *outside* the record,[169] they are usually capable of being raised for the first time only on collateral review.[170]

Three primary considerations justify extending *Martinez* to excuse a defaulted *Brady* claim, forfeited because of ineffectiveness of post-conviction counsel: (1) the practical necessity that *Brady* claims be litigated for the first time on collateral review;[171] (2) the equitable interest in justice and the due process interest in providing fair trials for the accused;[172] and (3) the absence of countervailing state interests.[173]

1. Both Brady *and IATC Claims Are Best Suited for Collateral Review*

In *Martinez*, the Court determined that because an initial-review collateral proceeding is the first opportunity a prisoner has to raise an IATC claim, then that proceeding is "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."[174] The Court also recognized that attorney error on a direct appeal may provide cause to excuse a procedural default.[175] In *Trevino*, the Court applied the *Martinez*

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the prosecution to include evidence "highly probative of innocence" even in the absence of a defendant's request for such evidence); United States v. Bagley, 473 U.S. 667, 682 (1985) (identifying that prejudice had ensued when there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"); Giglio v. United States, 405 U.S. 150, 154 (1972) (expanding the definition of exculpatory material to include impeaching evidence).

168. *Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair . . . ."); *see also Bagley*, 473 U.S. at 675 (identifying the purpose of the *Brady* rule as "not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur").

169. By definition, a *Brady* claim involves material not in the trial record because a defendant is unlikely to have knowledge of what the prosecution withheld from the trial record until discovery or further investigation during the collateral review process. *See* Millemann, *supra* note 39, at 485 (recognizing that a *Brady* claim is often based on evidence outside the trial record).

170. *See supra* text accompanying notes 37–39; *see also* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 727 n.226 (2007) (noting that *Brady* claims are often raised in collateral review proceedings); Millemann, *supra* note 39, at 505–06 ("Original capital post-conviction proceedings often provide the only available remedy for the violations of capital fair trial rights that can be least tolerated: intentional or at least reckless misconduct by prosecutors and the plainest breaches of the responsibilities of an advocate by defense counsel.").

171. *See infra* Part II.B.1.

172. *See infra* Part II.B.2.

173. *See infra* Part II.B.3.

174. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

175. *Id.*

exception because the state procedural system did not provide "defendants a meaningful opportunity to present [an IATC claim] on direct appeal."[176] States that provide prisoners only the technical opportunity to present an IATC on direct appeal may still fall under the *Martinez* exception because defendants are unlikely to ever have a meaningful opportunity to develop a sufficient IATC claim based on evidence from the trial record.[177]

Similar to IATC claims, usually *Brady* claims must be raised on collateral review.[178] In most instances, the evidence the state failed to disclose is not discovered until after the conclusion of the trial.[179] Because of such timing, *Brady* content cannot be viably asserted on direct review of the conviction and will almost always be litigated in collateral review proceedings.[180]

In many ways, collateral review proceedings are the equivalent of a prisoner's direct appeal as to the *Brady* claim.[181] The Court's reasoning in *Martinez*—that effective post-conviction counsel is essential to protecting rights not cognizable on direct appeal—should, therefore, apply to *Brady* claims as well.[182] If collateral review is the only process through which a prisoner can invoke his due process rights to a fair trial, then there must be adequate procedures in place to ensure that those rights are protected.[183]

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

177. *See supra* notes 120–122 and accompanying text; *see also Ex parte* Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (finding the direct appeal process often inadequate to raise an IATC claim because "[t]he very ineffectiveness claimed may prevent the record from containing the information necessary to substantiate such a claim").

178. *See supra* text accompanying notes 37–39.

179. *See* Millemann, *supra* note 39, at 479 (noting cases in which the capital post-conviction attorneys discovered "nonrecord facts that established prejudicial misconduct by the states").

180. *See* Givelber, *supra* note 40, at 1404 ("These flaws are unlikely to be exposed even by a competent defense lawyer at trial . . . because they relate to information never revealed to or discovered by the defendant . . . ."). For example, when Trevino sought federal habeas relief, he raised a *Brady* claim in addition to an IATC claim. Trevino v. Thaler 678 F. Supp. 2d 445, 457–58 (W.D. Tex. 2009), *vacated*, 133 S. Ct. 1911 (2013). There were several statements made by another witness in the case that were allegedly withheld by the prosecution. *Id*. Although the claims were dismissed on materiality grounds, the claim could not have arisen on direct review because it was not until Trevino's federal habeas counsel conducted additional investigation that the statements were discovered. *Id*. at 458.

181. *See* Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2501–02 (2013) ("Read broadly, then, *Martinez* recognizes the importance of competent postconviction counsel as a means of protecting any rights that are not readily cognizable on direct appeal.").

182. *See id*. (anticipating that *Martinez* will be extended to excuse other procedurally defaulted claims because the Court's "equitable concerns relating to the opportunity for one full and fair opportunity to litigate constitutional claims, either in state or federal court, would apply with equal force to claims such as *Brady* or juror misconduct that could not be raised on direct appeal").

183. *See* Givelber, *supra* note 40, at 1404. Following *Trevino*, it should not be relevant that collateral review is explicitly the only place to raise the underlying procedurally defaulted claim. While there are no explicit state rules regulating when and how a prisoner is to raise a *Brady*

2. *Similar Equitable Interests Exist When* Brady *and IATC Claims Are Raised*

It is no coincidence that IATC claims and *Brady* claims are two of the claims raised most often on collateral review.[184] These claims embody guarantees so central to a prisoner's right to a fair trial that, if a prisoner is denied a meaningful opportunity to raise them, a serious violation of due process may persist without any remedy.[185] The equitable holding in *Martinez* was intended to ensure some meaningful forum to enforce the right to effective assistance of counsel at trial, a "bedrock principle in our justice system."[186] Similar bedrock principles are at issue when a prisoner has procedurally defaulted a *Brady* claim because of a lawyer's ineffectiveness.[187]

No matter how competent trial counsel may be, a defendant will be deprived of the constitutional right to a fair trial if the prosecution withholds exculpatory evidence.[188] While effective assistance of counsel promotes an "adversarial determination of guilt,"[189] the adversarial process is no longer adversarial if the state withheld exculpatory information from the defense.

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claim, for all practical purposes, collateral review is the only proceeding available. The lack of explicit guidelines in state procedure should not weaken *Martinez*'s application to *Brady* claims.

184. *See* Findley, *supra* note 19, at 600.

185. *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 422–23 (2010) ("The purpose of the *Brady* rule is to ensure that the defendant receives a fair trial in which all relevant evidence of guilt and innocence is presented to enable the fact-finder to reach a fair and just verdict."); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1403 (1987) ("[T]he *Brady* doctrine's overriding purpose is to ensure that the prosecutor's suppression of favorable evidence in its possession does not deny a defendant who goes to trail a fair trial.").

186. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

187. *See* Richard J. Oparil, *Making the Defendant's Case: How Much Assistance Must the Prosecutor Provide?*, 23 AM. CRIM. L. REV. 447, 449 (1986) (explaining that when a prosecutor withholds exculpatory evidence favorable to the accused in violation of *Brady v. Maryland*, he violates the due process rights of the defendant); William Scherman, John Shepard & Jason Fleischer, *The New FERC Enforcement: Due Process Issues in the Post-Epact 2005 Enforcement Cases*, 31 ENERGY L.J. 55, 67 (2010) (arguing that a "bedrock principle[] of due process" requires the prosecution to provide a defendant with evidence that implicates him).

188. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *see also* United States v. Bagley, 473 U.S. 667, 675 (1985) (recognizing that the purpose of the holding in *Brady* was to provide the defendant a fair trial).

189. *See* Givelber, *supra* note 40, at 1404 (recognizing that there must be some process to determine whether counsel was effective so as to ensure that "an adversarial determination of guilt indeed occurred").

In a way, *Brady* claims are less readily discoverable than IATC claims.[190] In an IATC claim, the prisoner is focusing on the performance of trial counsel. In a *Brady* claim, however, any state actor can violate *Brady*—and the suppressed information may be less obvious.[191] Therefore, when a prisoner does become aware that there was material evidence not disclosed to his defense during trial, and post-conviction counsel fails to raise that *Brady* claim, then the unfortunate fact that the prisoner's post-conviction counsel was ineffective and the claim ended up procedurally defaulted should not deny the prisoner federal habeas review. If that post-conviction counsel's ineffectiveness fails to constitute cause to excuse the procedural default, then that prisoner finds himself in the same dilemma that the *Martinez* Court was concerned about with regard to IATC claims: no state court and no federal court would be able to review the merits of the prisoner's claim.[192]

Both *Martinez* and *Trevino* focused on whether the prisoner had a meaningful opportunity to raise an IATC claim, rather than on any constitutional right to post-conviction counsel.[193] When faced with this issue in the future, the Supreme Court should likewise be concerned with whether a prisoner had a meaningful opportunity to raise an issue of prosecutorial misconduct and suppression of exculpatory evidence before at least one court, state or federal.[194]

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190. *See* United States v. Olsen, 737 F.3d 625 (9th Cir. 2013) ("Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice."); Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 306–07 (2010) ("[L]ack of compliance with the *Brady* rule will often go undetected, and it is fair to assume that most *Brady* violations go undiscovered."); Samuel R. Wiseman, *Brady, Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 454 (2012) (recognizing that *Brady* violations are so difficult to discover because "the only one with proof of the violation is often the violator. As a result, many are never revealed.").

191. *See* Robert Hochman, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1692, 1697 (1996) (identifying cases that hold *Brady* to apply to nonprosecutors); Oparil, *supra* note 187, at 448 (identifying other cases expanding *Brady* to impose a strict duty to preserve evidence upon the prosecution and law enforcement agencies).

192. *See supra* notes 105–106 and accompanying text.

193. *See* Alper, *supra* note 154, at 871–72 (noting that the comparison in *Martinez* of the collateral proceeding to a prisoner's direct appeal with regard to the IATC claim indicated the intention of the Court to provide prisoners with at least one court to review a meritorious claim).

194. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1370, 1385 (2011) (Ginsburg, J., dissenting) (discussing the importance of judicial attention to *Brady* violations, stating that because "the absence of the withheld evidence may result in the conviction of an innocent defendant, it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light").

3. The Interests in Federalism and Finality Are Minimal When Brady *Claims Are Raised in Federal Habeas Review*

While federalism principles and state interests in finality have long been considerations in limiting federal habeas review of state convictions,[195] these interests historically have been treated as controlling only after a prisoner has had a fair opportunity to litigate a claim in state court.[196] When these interests are invoked to justify denying a prisoner an opportunity to litigate a federal habeas claim, such justification "presumes a constitutional conviction and sentence."[197] Both ineffective assistance of counsel—counsel falling below *Strickland*'s standard of reasonableness—and the failure to disclose exculpatory evidence—in violation of *Brady*—may be sources of an unconstitutional conviction or sentence.[198]

Brady imposes a special duty on the prosecutor to disclose exculpatory evidence, but it reaches other state agents as well.[199] The state has no duty to provide prisoners post-conviction counsel; however, it does have a duty to "investigate, preserve, and disclose favorable information located in the prosecutor's files, as well as information in the possession of any member of the prosecution team."[200] Because fairness in a state's criminal process is in the state's interest as a whole,[201] a state's interest in finality is minimal when the state is the bad actor depriving the prisoner of due process.[202] It

195. *See supra* Part I.C.

196. *See* Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("Federalism . . . has no inherent normative value: It does not . . . blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."); Fay v. Noia, 372 U.S. 391, 424 (1963) ("[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.").

197. *See* Millemann, *supra* note 39, at 502 (recognizing that a state's strong interest in finality is nullified when a prisoner has been unconstitutionally convicted or sentenced).

198. *See supra* text accompanying notes 36–41.

199. Hochman, *supra* note 191, at 1692, 1697.

200. Jones, *supra* note 185, at 423. This duty only arises when the prosecution knows that the evidence exits and is aware of its exculpatory nature. United States v. Agurs, 427 U.S. 97, 107 (1976); *see also* Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1213 (2000) (explaining that the "*Brady* Rule" protects the constitutional right of a criminal defendant to have disclosed to him all "exculpatory evidence that is material to guilt or punishment"); Reiss, *supra* note 185, at 1412 ("If, however, the prosecutor actually does not have knowledge of the exculpatory information in her possession, a duty of disclosure does not arise.").

201. *See* Hochman, *supra* note 191, at 1692 ("Anyone who plays a part in bringing the power of the state to bear on the individual in the form of punishment must share the responsibility to uncover the truth that comes with that power.").

202. *See* Dewey, *supra* note 154, at 282 ("The *Martinez* decision affirms that promoting finality for state convictions is an important goal but recognizes that finality interests do not insulate unfair state process from federal review.").

seems counterintuitive for a state to argue that a federal court is barred from considering a procedurally defaulted *Brady* claim because of post-conviction counsel error. The purpose of the external factor requirement to establish cause to overcome a procedural default—requiring a state only to litigate and defend against errors imputed to that state[203]—should not allow a state to exclude the errors of its agents from federal habeas review.

Allowing a state to avoid federal merits review of a prisoner's substantial *Brady* claim because the prisoner's post-conviction counsel was ineffective does not further any interest in finality or federalism. A state does not have an interest in finalizing unlawful or unconstitutional convictions.[204] In addition, the *Coleman* Court's concern that a federal habeas court "ignores the State's legitimate reasons for holding the prisoner"[205] when it reviews a prisoner's procedurally defaulted claim is meritless when the state itself is the bad actor.[206] In balancing its established interests in federalism and finality with its decisions in *Martinez* and *Trevino*, the Court seemed to come out in favor of providing at least one forum to review the merits of a prisoner's substantial-yet-procedurally-defaulted IATC claim.[207] Thus, when a court must decide whether to afford a prisoner the opportunity to raise a meritorious, yet procedurally defaulted, *Brady* claim, or prioritize principles of federalism and finality, the prisoner's access to federal courts to raise meritorious claims should prevail.[208]

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203. *See supra* text accompanying note 84.

204. *See* Lonchar v. Thomas, 517 U.S. 314, 324 (1996) (assessing the "threat to the State's interests in 'finality'" to be greater when the federal courts accept petitions that "are less likely to lead to the discovery of unconstitutional punishments"); Gurwitch, *supra* note 190, at 309 (recognizing that all too frequently, the withholding of exculpatory evidence is a significant cause of wrongful convictions).

205. Coleman v. Thompson, 501 U.S. 722, 730 (1991).

206. *See, e.g.*, Freedman *supra* note 165, at 596 (questioning whether it was "equitable for a state to be able to evade federal review" of certain post-conviction claims, *Brady* claims included, simply "by contriving that the petitioner never has effective counsel to pursue them"); *see also* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 152 (2012) (recognizing a disconnect between the cause and prejudice analysis and *Brady* claims because "the inquiry into cause is not analogous to the inquiry about the underlying merits of a *Brady* claim. The cause inquiry focuses on . . . whether the defendant can show 'some objective factor external to the defense' to excuse the procedural default. *Brady*, on the other hand, focuses on exculpatory evidence possessed by the government.").

207. *See supra* text accompanying note 154.

208. In *McCleskey v. Zant*, the Court was confident that "[t]he cause and prejudice standard should curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process." 499 U.S. 467, 496 (1991). If *Martinez* were to allow post-conviction attorney error to constitute cause to excuse a procedurally defaulted *Brady* claim, the prejudice standard still is a safeguard against an influx of "abusive petitions." *See* Monroe v. Angelone, 323 F.3d 286, 316 (4th Cir. 2003) (recognizing that the "materiality requirement" in

C. The Actual Application of Martinez *to* Brady *Claims*

Despite the congruence of interests between IATC and *Brady* claims, the only court specifically to consider applying *Martinez* to *Brady* claims declined to extend the exception. In justifying the exception the *Martinez* Court created, Justice Kennedy wrote that "[a] prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel."[209] The Ninth Circuit in *Hunton* took this approach when it held that *Martinez* did not extend to a prisoner's procedurally defaulted *Brady* claim.[210]

Judge Fletcher's dissent asserted that the *Martinez* exception should apply to Hunton's *Brady* claim because of the many similarities between Hunton's *Brady* claim and the IATC claims that *Martinez* addressed.[211] More specifically, Hunton was prevented from raising his *Brady* claim on direct appeal and *Brady* claims, like IATC claims, "vindicate bedrock principles of our judicial system."[212] The *Martinez* Court focused on a prisoner's constitutionally guaranteed right to effective assistance of trial counsel; similarly, the *Brady* Court and its progeny placed *Brady* claims at the core of due process protection contemplated by the Fourteenth Amendment.[213] If the purpose of habeas is to protect a prisoner's fair trial

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Brady ensures that "*Brady* obligations do not become unduly burdensome, while recognizing the awesome power of the prosecutor in our criminal justice system.").

209. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012); *see also* Alper, *supra* note 154, at 872 ("This assertion places ineffectiveness claims on par with, if not more important than, other trial errors that would typically be raised by appellate counsel (to which all indigent defendants are constitutionally entitled).").

210. Hunton v. Sinclair, 732 F.3d 1124, 1126–27 (9th Cir. 2013). The Ninth Circuit criticized Hunton's argument as illogical. The court's approach is troubling because it made no inquiry whatsoever into the similarities between the underlying defaulted claims and why the *Martinez* exception should apply to *Brady* claims. If the court understood the major premise from *Martinez* to be that prisoners should have an opportunity to litigate a substantial due process claim despite ineffective post-conviction counsel, and because IATC claims represent an important due process right, then Martinez's ineffective post-conviction counsel did not bar federal habeas review of that claim. Now, *Martinez* may be more easily applied to *Brady* claims. As Part II.B illustrates, trial error—and the due process concerns the error implicates—is no less a significant concern when the issue is one of a *Brady* violation as compared to ineffective assistance of counsel. Therefore, given the major premise from *Martinez* and the Supreme Court's recognition that *Brady* claims protect important due process rights, Hunton's ineffective post-conviction counsel should not have barred federal habeas review of a substantial *Brady* claim..

211. *Id*. at 1129–30 (Fletcher J., dissenting).

212. *Id*. at 1130.

213. *See* Smith v. Cain, 132 S. Ct. 627, 630–31 (2012) (reversing the prisoner's conviction because the police files the prisoner obtained in state post-conviction proceedings contained potentially exculpatory evidence, enough so as to "undermine confidence" in the conviction); United States v. Bagley, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."); Giles v. Maryland, 386 U.S. 66, 96 (1967) (recognizing the ultimate responsibility of the state is "to provide a fair

rights that are not capable of assertion on direct appeal, then equitable interests in *Martinez* are no less implicated when a prisoner is denied any forum to raise a claim that the state had withheld material, exculpatory evidence regarding his defense.

Although the Ninth Circuit viewed its holding in *Hunton* as consistent with the Court's opinions in *Martinez* and *Trevino*, the court failed to appreciate the rationale and equitable notions underlying the *Martinez* exception.[214] The court reduced *Trevino* to a footnote and said that "[n]othing we decide here is affected by that addition."[215] It was the *Trevino* Court, however, that realized the application of the *Martinez* exception when a state denies "as a matter of procedural design and systematic operation," a prisoner a "meaningful opportunity" to raise an IATC claim on direct appeal.[216] Due to the very nature of a *Brady* claim, a prisoner will, as a matter of procedure and operation, be directed toward collateral review proceedings to adjudicate a *Brady* claim. In these proceedings the prisoner may be denied counsel, but the prisoner should not be denied a forum to raise a meritorious *Brady* claim—especially when the denial arises out of the prisoner's lack of, or ineffective, counsel. Despite the Court's adherence to the procedural default doctrine as a barrier in the path of a state prisoner seeking federal habeas relief, the result should not be a "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[217]

III. CONCLUSION

During trial, and on any direct appeal, a prisoner is guaranteed the assistance of counsel. A prisoner who chooses to pursue post-conviction claims in state habeas proceedings often does so *pro se*, or at the discretion of the state, with provided post-conviction counsel. In *Martinez v. Ryan*, and then in *Trevino v. Thaler*, the Supreme Court held that a prisoner's lack of, or ineffective, counsel in a post-conviction proceeding may excuse a default of a prisoner's IATC claim. When confronted with a *Brady* claim, however, the equitable remedy the *Martinez* Court applied to the harsh effects of the procedural default doctrine should apply to mitigate those

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trial under the Due Process Clause of the Fourteenth Amendment," and no state interest is served by the concealment of exculpatory evidence).

214. Furthermore, less than two months after the Ninth Circuit decided *Hunton*, in *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), the court in fact extended the *Martinez* exception to establish cause to excuse a procedurally defaulted claim of ineffective assistance of appellate counsel. *Id*. at 1297–98. Judge Fletcher, who dissented in *Hunton*, wrote the opinion for the panel in *Nguyen*. *Id*. at 1289.

215. *Hunton*, 732 F.3d at 1126 n.2 (majority opinion).

216. *See supra* notes 142–146 and accompanying text.

217. Coleman v. Thompson, 501 U.S. 722, 779 (1991) (Blackmun, J., dissenting).

same effects to a defaulted *Brady* claim. Even more than an IATC claim, a *Brady* claim is raised appropriately on collateral review and thus without the guarantee of counsel.[218] If *Martinez* is not applicable, then an error by a prisoner's post-conviction attorney may prevent any state or federal court from ever considering the merits of the prisoner's claim.

Although commentators have expressed doubt as to the deterrent effect federal habeas review has on prosecutorial conduct,[219] there is a sufficient amount of criticism surrounding the lack of consequences for *Brady* violators.[220] Ideally, federal habeas review of a *Brady* claim would encourage better prosecutorial conduct; however, that is not the ultimate purpose of federal habeas review.[221] The purpose of federal habeas review is to guarantee that a prisoner's conviction is not unlawful and that due process rights have not been compromised. If a prisoner's post-conviction counsel's ineffectiveness results in no state court reviewing the merits of a substantial *Brady* claim, then the denial of *Martinez* to the claim frustrates the Court's interest in providing prisoners at least one forum to raise a substantial due-process claim (especially one not able to be raised on direct appeal, with the assistance of counsel).

By adhering to an "equitable" exception, however, the *Martinez-Trevino* duo may do nothing, or very little for the *pro se* habeas

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218. *See supra* text accompanying notes 38–41; *see also* Findley, *supra* note 19, at 615 (acknowledging that because *Brady* claims are almost never part of the direct appeal process, appellate counsel "has neither the capacity, institutional obligation, nor incentive to find and raise claims related to newly discovered *Brady* material during the direct appeal").

219. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 810 (2009) (recognizing that habeas review is not an effective deterrence of constitutional errors); Jones, *supra* note 185, at 420 (recognizing that "when *Brady* violations are discovered—even when the violations are intentional and blatant—trial judges focus on curing any harm suffered by the defendant but fail to take punitive measures against the offending prosecutor to deter future *Brady* violations"). *But cf.* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 900 (1995) ("Whether or not reversal of a conviction should be "counted" as a sanction for misconduct, reversal affects the prosecutor's behavior.").

220. *See, e.g.*, Brian T. Kohn, Brady *Behind Bars: The Prosecutor's Disclosure Obligations Regarding DNA in the Post-Conviction Arena*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 35, 58 (2003) ("[S]anctions such as suspension and disbarment, that should deter prosecutors from committing such violations are rarely enforced and largely ineffective."); Gurwitch, *supra* note 190, at 318 (commenting that "[d]iscipline is too rare and too mild to have any deterrent effect" on *Brady* violations); Kurcias, *supra* note 200, at 1215 ("While the Supreme Court requires prosecutors to disclose certain evidence to the defense, consequences for withholding such evidence do not exist in the criminal justice system.").

221. Brady v. Maryland, 373 U.S. 83, 87 (1963) (asserting that punishment or the misdeeds of the prosecutor was not the policy behind its opinion); *see also* Gurwitch, *supra* note 190, at 307 (identifying the "paramount interest" of the *Brady* Court was "the protection of an accused individual's right to a fair trial").

petitioner.[222] To bring a substantial claim, a prisoner likely will need an attorney to assist in investigation and litigation.[223] Absent a constitutional right to counsel in post-conviction proceedings, the likelihood that a prisoner will be able to raise a substantial IATC or *Brady* claim is greatly reduced.[224] The application of the equitable exception to *Brady* may force states into additional litigation; however, if the assorted litigated claims are meritorious, the additional burden on the states is no match for the interest in constitutional and just criminal proceedings, convictions, and sentences.

222. *See* Alper, *supra* note 154, at 869 ("Most pro se prisoners are unlikely to be able to investigate and then present, in federal court, a claim of ineffective assistance of trial counsel that survives the initial merits review *Martinez* prescribes; . . . ineffectiveness claims almost always require the kind of extra-record investigation and development that can only be accomplished by collateral counsel and resources for investigation."); Reitz, *supra* note 161, at 1351 ("Even if the door to federal habeas corpus is open, there is no guarantee that the state prisoner, likely compelled to proceed without the assistance of counsel, can even get his petition heard by the federal judge.").

223. *See supra* note 222.

224. *See* Alper, note 154, at 868–70; *see also* Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2451 (2013) (noting that *Martinez* is "unlikely to increase the provision of counsel and hearings in those state postconviction cases that are filed").