MARTINEZ V. RYAN: A SHIFT TOWARD BROADENING ACCESS TO FEDERAL HABEAS CORPUS

ABSTRACT

Prisoners seeking habeas corpus relief face numerous barriers imposed by the courts and Congress that prevent federal review of state court convictions. In *Martinez v. Ryan*, the Supreme Court took a step toward broadening access to federal habeas review. Although prisoners generally may not assert claims in federal habeas proceedings that they failed to raise in state proceedings, the *Martinez* Court ruled that prisoners may assert ineffective-assistance-of-trial-counsel claims in federal court when failure to raise such claims in state proceedings was caused by ineffective assistance of counsel in those proceedings.

This Comment argues that *Martinez* marks a shift away from the previous trend of limiting federal habeas review and signals a new emphasis on ensuring that prisoners receive at least one full and fair adjudication of claims. However, the narrow holding does not ensure that prisoners will receive adequate representation in collateral proceedings or have a fair opportunity to prevail on their claims in federal court. The Court declined to guarantee a right to counsel in collateral proceedings, meaning that prisoners without effective counsel will still face significant challenges in vindicating their constitutional rights in federal habeas review. Additionally, some lower courts' narrow interpretations of the *Martinez* holding indicate that the decision may have little impact beyond ineffective-assistance-of-trial-counsel claims. *Martinez* represents a significant step toward ensuring that prisoners receive a full and fair review of constitutional claims, but the Court did not go far enough in easing the substantial barriers to accessing habeas corpus relief.

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INTRODUCTION

Federal habeas corpus allows state prisoners to seek relief in federal court on the grounds that they were convicted or sentenced "in violation of the Constitution or laws or treaties of the United States."[1] In recent decades, the courts and Congress have placed significant restrictions on state prisoners' ability to access federal habeas review.[2] Failure to comply with state procedural rules in postconviction proceedings results in "procedural default," which precludes prisoners from raising defaulted claims in federal court.[3] Prisoners do not have a constitutional right to counsel in postconviction proceedings,[4] and procedural default is frequently the result of inadequate counsel in those proceedings.[5] In *Martinez v. Ryan*,[6] the Supreme Court declined to extend the constitutional right to counsel to prisoners in postconviction proceedings,[7] but ruled that ineffective assistance of counsel in those proceedings may constitute cause to excuse procedural default in limited circumstances.[8]

1. 28 U.S.C. § 2254(a) (2006).

2. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C. §§ 2244, 2253–2255, 2261–2266 (2006)). *See generally* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 265–66 (2006) (discussing the Supreme Court's "regime of systematic judicial limitations on federal habeas corpus" from the 1970s to the 1990s).

3. Coleman v. Thompson, 501 U.S. 722, 729–30 (1991); Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977). *See generally* RANDY HERTZ & JAMES S. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.1 (6th ed. 2011) (discussing procedural default doctrine).

4. *Coleman*, 501 U.S. at 752 ("There is no constitutional right to an attorney in state postconviction proceedings." (citing Pennsylvania v. Finley, 481 U.S. 551 (1987))).

5. Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel Has Endangered Access to the Writ of Habeas Corpus and What the Supreme Court Can Do in* Maples *and* Martinez *to Restore It*, 45 CREIGHTON L. REV. 185, 186 (2011).

6. 132 S. Ct. 1309 (2012).

7. *Id.* at 1315 ("[T]he Court of Appeals in this case addressed . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. . . . This is not the case, however, to resolve [that question].").

8. *Id.* ("This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

This Comment argues that although *Martinez* signals a landmark shift toward broadening access to federal habeas review based on the idea that prisoners should receive at least one full and fair review of constitutional claims, the limited holding does not ensure that prisoners will be adequately represented by counsel or have a fair chance to prevail on their claims in federal court. Part I of this Comment examines the rules that limit state prisoners' ability to litigate constitutional claims in federal habeas court and then discusses ineffective-assistance-of-counsel claims and Supreme Court precedent on the right to counsel in postconviction proceedings. Part II summarizes the factual background, procedural history, and majority and dissenting opinions in *Martinez*. Part III examines the policy interests and legal reasoning behind the *Martinez* decision and assesses the implications of providing a new avenue to overcome procedural default.

I. BACKGROUND

The courts and Congress have erected numerous barriers to federal review of state court convictions.[9] This Part first examines the limitations imposed by the exhaustion requirement and the doctrine of procedural default. Second, it explores how concerns about federalism and promoting the finality of state court convictions have driven these restrictions on federal habeas review. Third, the Part examines how ineffective-assistance-of-counsel claims provide a narrow avenue for prisoners to access federal habeas review. Fourth, the Part outlines the Supreme Court's decision in *Coleman v. Thompson*[10], which firmly established that the Constitutional right to counsel does not extend to habeas proceedings.[11]

A. Limiting Access to Federal Habeas Corpus

Federal habeas corpus allows state prisoners to petition for relief on the grounds that they were convicted or sentenced "in violation of the Constitution or laws or treaties of the United States."[12] The Supreme Court's 1953 ruling in *Brown v. Allen*[13] established that state prisoners with federal constitutional claims may petition for habeas relief in federal courts, even if those claims have been heard by state courts.[14] In a series of decisions that began in the 1970s, however, the Supreme Court has placed significant restrictions on state prisoners' ability to access federal

9. *See generally* Blume, *supra* note 2, at 265–70 (discussing the Supreme Court's "regime of systematic judicial limitations on federal habeas corpus" from the 1970s to the 1990s).

10. 501 U.S. 722 (1991).

11. *Id.* at 752–53.

12. 28 U.S.C. § 2254(a) (2006).

13. 344 U.S. 443 (1953).

14. *See id.* at 484–86; Mundy, *supra* note 5, at 195–96 ("Through its [*Brown*] ruling, the Court opened the Writ to state prisoners who possessed federal constitutional claims, notwithstanding state adjudication of those claims.").

habeas review.[15] Prisoners must exhaust all state-court avenues for post-conviction relief before petitioning in federal court.[16] When a petition includes multiple claims, the "total exhaustion" rule adopted by the Court in 1982 requires that the entire petition be dismissed if it contains even one unexhausted claim.[17] Additionally, a prisoner's failure to comply with state procedural rules for asserting a constitutional claim in state postconviction proceedings results in "procedural default," meaning that federal habeas courts are precluded from reviewing the claim.[18] Congress codified these rules and enhanced other restrictions on federal habeas review in the centerpiece of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[19]

The doctrine of procedural default is rooted in a federal common law rule that prohibits review of state decisions based on "adequate and independent state grounds."[20] A state procedural rule is adequate if it is regularly and fairly applied,[21] and it is independent if it is not so interwoven with federal law that applying it requires a determination of a federal law question.[22] Federal courts must determine whether a state procedural rule is adequate and independent before dismissing a claim as procedur-

15. *See, e.g.*, Keeney v. Tamayo-Reyes, 504 U.S. 1, 1 (1992) (adopting a cause-and-prejudice standard to prisoner's failure to develop facts in state court); McCleskey v. Zant, 499 U.S. 467, 470 (1991) (restricting federal courts' ability to review subsequent habeas petitions); Teague v. Lane, 489 U.S. 288, 316 (1989) (prohibiting federal courts from retroactively applying new rules of criminal procedure to grant habeas relief); Rose v. Lundy, 455 U.S. 509, 520–21 (1982) (adopting a "total exhaustion" rule requiring federal courts to dismiss petitions containing both exhausted and unexhausted claims); Sumner v. Mata, 449 U.S. 539, 539 (1981) (holding that presumption of correctness applies to state appellate courts' factual findings); Wainwright v. Sykes, 433 U.S. 72, 72 (1977) (requiring petitioners to show cause and prejudice for procedural default); Stone v. Powell, 428 U.S. 465, 481–82 (1976) (precluding federal review of Fourth Amendment claims when state courts offered a full and fair opportunity to litigate the claims). *See generally* Blume, *supra* note 2, at 265–70 (discussing the Supreme Court's "regime of systematic judicial limitations on federal habeas corpus" from the 1970s to the 1990s).

16. *Ex parte* Royall, 117 U.S. 241, 246–47 (1886). *See generally* HERTZ & LIEBMAN, *supra* note 3, § 23.1 (discussing the exhaustion requirement).

17. *See Rose*, 455 U.S. at 522. *See generally* HERTZ & LIEBMAN, *supra* note 3, § 23.5 (discussing petitions containing both exhausted and unexhausted claims).

18. *See* Coleman v. Thompson, 501 U.S. 722, 729–30 (1991); *Wainwright*, 433 U.S. at 86–87. *See generally* HERTZ & LIEBMAN, *supra* note 3 (discussing the procedural default doctrine).

19. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C. §§ 2244, 2253–2255, 2261–2266 (2006)).

20. *See* HERTZ & LIEBMAN, *supra* note 3, (discussing the "adequate and independent state procedural grounds" doctrine).

21. *See, e.g.*, *Coleman*, 501 U.S. at 729. *See generally* HERTZ & LIEBMAN, *supra* note 3, § 26.2[d][i] (discussing the "adequacy" requirement).

22. *See generally* HERTZ & LIEBMAN, *supra* note 3, § 26.2[d][ii] ("[S]tate law cannot be said entirely to underpin the state court decision . . . if the answer to the state law question depends upon the answer to some federal law question.").

ally defaulted,[23] but often give substantial deference to states in this area.[24]

To overcome procedural default, a petitioner must either show good cause for failure to comply with state procedural rules and resulting prejudice, or show that dismissal of the claim would result in a "miscarriage of justice."[25] The standard for proving miscarriage of justice is notoriously difficult to meet and limited to cases where the prisoner is "actually innocent."[26] Thus, most prisoners who fail to properly raise constitutional claims in state court must show cause and prejudice to excuse the procedural default in order to have their claims heard in federal court.[27] Pursuant to *Murray v. Carrier*,[28] cause requires a showing that an "objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[29] Historically, the Court has found cause to overcome a default when a constitutional claim is so new that its legal basis was not available at the time of the state proceeding,[30] when factual basis for the claim was not reasonably discoverable at the time of the state proceeding,[31] when state courts or officials hindered compliance

23. *See, e.g.*, *Coleman*, 501 U.S. at 729 ("This 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.").

24. Mundy, *supra* note 5, at 198 ("In reviewing challenges to the adequacy of state procedural rules, the United States Supreme Court affords considerable deference to states as to both the substance and application of rules. Even a rule applied with 'seeming inconsistencies' by state court can serve as an adequate and independent state ground. As a result of such broad judicial discretion, a state procedural rule may be both 'firmly established' and 'regularly followed' even if its application permits consideration of a federal claim 'in some but not other' cases. Further, the language of a state rule need not be exacting to be deemed 'adequate.'" (citations omitted)).

25. *Coleman*, 501 U.S. at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

26. *See* Schlup v. Delo, 513 U.S. 298, 327 (1995) ("The *Carrier* standard requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.' To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986))); *id.* at 321 ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence.").

27. *See* Mundy, *supra* note 5, at 199–200.

28. 477 U.S. 478 (1986).

29. *Id.* at 479.

30. *See* Reed v. Ross, 468 U.S. 1, 16 (1984) ("[W]e hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.").

31. Amadeo v. Zant, 486 U.S. 214, 222 (1988) ("If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default . . . .").

with the procedural rule,[32] or when the default was caused by ineffective assistance of counsel at a proceeding in which the prisoner had a constitutional right to counsel.[33] The exhaustion requirement, the doctrine of procedural default, and the difficulty of showing cause to excuse procedural default have all limited prisoners' ability to access federal habeas review.

B. Federalism and Finality

Two related policy concerns have provided the principal justification for limiting federal habeas review: federalism and finality.[34] Habeas corpus raises concerns about federalism because it involves a federal court overturning state criminal convictions.[35] As a result, the Supreme Court has demonstrated a preference for deferring to state-court judgments on constitutional issues in state criminal cases.[36] AEDPA codified the idea that state courts, not federal courts, should be the primary adjudicators of constitutional challenges to state convictions.[37]

The Court has also emphasized the goal of promoting the finality of state convictions.[38] Finality is necessary, proponents argue, to conserve judicial resources and to avoid routinely second-guessing the rulings of state judges.[39] It ensures that cases will not be reviewed long after evidence is lost and memories have faded, and allows courts to deliver a conclusive sense of justice to victims.[40] Concerns about federalism and finality have driven the Court and Congress to create an increasing number of restrictions on the scope of federal review of state convictions.[41]

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32. Banks v. Dretke, 540 U.S. 668, 671 (2004) ("[A] petitioner shows cause when the reason for the failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence.").

33. *See* Coleman v. Thompson, 501 U.S. 722, 754 (1991) ("Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails.").

34. *See* Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2335–39 (2007) (discussing how policy concerns about federalism and finality have influenced federal habeas law).

35. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 443–44 (1963).

36. Mundy, *supra* note 5, at 196 ("[S]ubsequent court rulings show increased deference to state courts in resolving constitutional conflicts in criminal cases.").

37. 28 U.S.C. § 2254(d) (2006) (mandating deference to state court rulings unless "contrary to" Supreme Court precedent or "based on an unreasonable determination of the facts").

38. *See, e.g.*, *Coleman*, 501 U.S. at 750 ("We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.").

39. *See, e.g.*, Bator, *supra* note 35, at 451 ("I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.").

40. *See* Pettys, *supra* note 34, at 2336–37 (citing Bator, *supra* note 35, at 452).

41. *See* Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 428 (2011) (discussing how concerns about finality have influenced restriction on federal habeas corpus).

C. Ineffective-Assistance-of-Counsel Claims and Right to Counsel in Collateral Proceedings

The most commonly asserted claim in federal habeas petitions is ineffective assistance of counsel.[42] The prevalence of this claim may be a result of the restrictions put on federal habeas petitions because ineffective assistance of counsel can provide cause to excuse procedural default of claims.[43] The Court held in *Carrier* that an attorney's failure to raise a claim may only constitute cause if the error is so "egregious" as to constitute ineffective assistance of counsel.[44] Thus, to avoid procedural default, a prisoner must show that the attorney's performance fell below the standard guaranteed by the Sixth Amendment.[45]

The Supreme Court has repeatedly held that the right to effective counsel ends at direct appeal and that prisoners do not have a constitutional right to counsel in collateral challenges to their convictions.[46] Collateral review encompasses both federal habeas corpus review and state postconviction review because these proceedings are outside the trial and direct appeals process.[47] The Court has reasoned that counsel is not necessary in collateral proceedings because pro se petitioners have access to the trial and direct-appeal records, and collateral review amounts to a duplicative review of claims already raised on direct appeal with the assistance of counsel.[48]

D. Coleman v. Thompson

In *Coleman v. Thompson*, the Supreme Court addressed the issue of whether procedural default in state collateral proceedings due to attorney error precludes federal habeas review of a claim.[49] Petitioner Roger Coleman was convicted of murder in Virginia and sentenced to death.[50] On collateral review, a state court considered and rejected Coleman's

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42. *See* VICTOR E. FLANGO, NAT'L CTR. FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 45–47 (1994), *available at* http://www.ncsconline.org/WC/Publications/KIS_StaFedHabCorpStFedCts.pdf (showing that 41% of state habeas petitions and 45% of federal habeas petitions raise the claim of ineffective assistance of counsel); NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 28 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (showing that 81% of habeas petitions in capital cases and 50.4% of those in noncapital cases raised the claim of ineffective assistance of counsel).

43. Zimpleman, *supra* note 41, at 446–47.

44. *See* Murray v. Carrier, 477 U.S. 478, 496 (1986).

45. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."); *see also* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing standard for effective assistance of counsel).

46. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings." (citing Murray v. Giarratano, 492 U.S. 1 (1989))); Ross v. Moffitt, 417 U.S. 600, 610, 615 (1974) (holding that there is no right to postconviction counsel under due process or equal protection).

47. *See* Zimpleman, *supra* note 41, at 426.

48. *See Ross*, 417 U.S. at 614–16.

49. *See Coleman*, 501 U.S. at 728–29.

50. *Id.* at 726–27.

claim of ineffective assistance of trial counsel.[51] Coleman's postconviction attorneys appealed the decision but filed the notice of appeal one day late.[52] The state court dismissed the appeal, reasoning that the late filing constituted procedural default.[53] Coleman then petitioned for habeas relief in federal court, raising the claim of ineffective assistance of trial counsel.[54]

The Court ruled that procedural default of a constitutional claim in state court bars federal habeas review of that claim unless the petitioner can show cause to excuse the default and resulting prejudice.[55] This holding overruled the previous rule from *Fay v. Noia*[56] that failure to comply with state procedural rules does not preclude a federal habeas court from hearing a constitutional claim.[57] The majority opinion emphasized "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them."[58]

The *Coleman* Court also held that attorney error in state collateral proceedings does not constitute cause to excuse procedural default because there is no constitutional right to counsel in collateral proceedings.[59] Thus, Coleman's attorneys' day-late filing of the notice of appeal in state court meant that federal courts were forced to dismiss Coleman's ineffective-assistance-of-counsel claim.[60] With no further opportunity for a review of his constitutional claims, Coleman was ultimately executed in "the following year."[61]

II. *MARTINEZ V. RYAN*

A. Facts

Luiz Mariano Martinez was convicted in Arizona of sexual conduct with an eleven-year-old child and sentenced to two terms of life imprisonment.[62] In Arizona, prisoners may not raise a claim of ineffective as-

51. *Id.* at 727.
52. *See id.*
53. *See id.* at 727–28.
54. *See id.* at 728.
55. *Id.* at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").
56. 372 U.S. 391 (1963).
57. *Id.* at 426–27 ("[F]ederal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.").
58. *Coleman*, 501 U.S. at 750.
59. *Id.* at 752–53.
60. *Id.* at 757.
61. *See* Pettys, *supra* note 34, at 2313.
62. Martinez v. Ryan, 132 S. Ct. 1309, 1313 (2012).

sistance of trial counsel on direct appeal but must instead raise the claim in state collateral proceedings.[63] If the claim is not raised in the first collateral proceeding, it is waived and cannot be raised in later proceedings.[64] Martinez's postconviction attorney began state collateral proceedings but did not raise a claim of ineffective assistance of counsel.[65] Although the court gave Martinez forty-five days to file a pro se petition, Martinez alleged his attorney never notified him of the collateral proceedings and did not advise him that he would forfeit the claim if he did not file a pro se petition.[66] Martinez did not respond to the deadline, and the state trial court dismissed the collateral action.[67]

Represented by new counsel, Martinez began a second state collateral proceeding seeking to claim ineffective assistance of trial counsel.[68] The state court dismissed his petition because he failed to raise the claim in the first state collateral proceeding.[69]

B. Procedural History

With the assistance of his new attorneys, Martinez filed a habeas petition in federal district court and again raised the claim of ineffective assistance of trial counsel.[70] Martinez argued that he had cause to excuse the procedural default of that claim because his attorney in the first state collateral proceeding was also ineffective.[71] The federal district court denied Martinez's habeas petition, reasoning that Martinez had not shown cause because, under *Coleman*, an attorney's errors during collateral proceedings do not constitute cause to excuse procedural default.[72] The Ninth Circuit affirmed, adding that there is no constitutional right to effective counsel in collateral proceedings.[73] The Supreme Court granted certiorari on the issue of whether a prisoner has a constitutional right to effective assistance of counsel in the first collateral proceeding when that

63. State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).
64. *See* ARIZ. R. CRIM. P. 32.2.
65. *Martinez*, 132 S. Ct. at 1314.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 1313.
71. *Id.* at 1314–15 ("He could overcome this hurdle to federal review, Martinez argued, because he had cause for the default: His first postconviction counsel was ineffective in failing to raise any claims in the first notice of postconviction relief and in failing to notify Martinez of her actions.").
72. *Id.* at 1315 (citing Coleman v. Thompson, 501 U.S. 722, 753–54 (1991)).
73. *Id.* ("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 a procedural default. Expanding on the District Court's opinion, the Court of Appeals, citing *Coleman*, noted the general rule that there is no constitutional right to counsel in collateral proceedings." (citing Martinez v. Schriro, 623 F.3d 731, 736 (9th Cir. 2010))).

proceeding provides the first opportunity to raise a claim of ineffective assistance of trial counsel.[74]

C. Majority Opinion

In a 7–2 opinion authored by Justice Kennedy, the Supreme Court held that procedural default would not prevent a federal court from hearing the merits of Martinez's habeas petition if his first collateral review attorney was ineffective.[75] The Court avoided answering the constitutional question of whether a prisoner has a right to effective counsel on collateral review.[76] Instead, the Court narrowly framed the issue as whether an attorney's errors in an "initial-review collateral proceeding" could qualify as cause to excuse a procedural default of an ineffective-assistance-of-counsel claim.[77] Justice Kennedy used the term "initial-review collateral proceeding" to refer to state "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."[78] The Court held that when a state requires ineffective-assistance claims to be raised in collateral proceedings instead of on direct appeal, "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."[79]

The *Martinez* Court framed this holding as a narrow qualification of the general rule from *Coleman* that prisoners have no right to effective counsel in collateral proceedings.[80] The Court emphasized the distinct nature of initial-review collateral proceedings.[81] Unlike other collateral proceedings in which an attorney's error merely precludes further review of claims that a court has already addressed, an attorney's error in initial-review collateral proceedings means "that no state court at any level will

74. *Id.* at 1326 (Scalia, J., dissenting) ("We granted certiorari on, and the parties addressed their arguments to, the following question: 'Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.'" (quoting Petition for Writ of Certiorari, *Martinez*, 132 S. Ct. 1309 (No. 10-1001))).

75. *Id.* at 1320 (majority opinion) ("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.").

76. *Id.* at 1315.

77. *Id.* at 1313 ("While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.").

78. *Id.* at 1315.

79. *Id.* at 1320.

80. *Id.* at 1315 ("This opinion qualifies *Coleman* by recognizing a narrow exception . . . .").

81. *Id.* at 1316.

hear the prisoner's claim."[82] The Court characterized initial-review collateral proceedings as "the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim" and noted that an attorney's error on direct appeal may be cause to excuse procedural default.[83]

The Court used the importance of initial-review collateral proceedings to distinguish *Martinez* from *Coleman*.[84] In *Coleman*, the postconviction attorney error was a failure to file a timely appeal on a claim that had already been heard in the first collateral proceeding.[85] In *Martinez*, the alleged attorney error was a failure to raise the claim in the first collateral proceeding.[86] Unlike the petitioner in *Coleman*, Martinez's claim was never heard at any level.[87]

The Court also emphasized the particular significance of ineffective-assistance claims to the adversarial system, stating that "[t]he right to effective assistance of counsel at trial is a bedrock principle in our justice system."[88] Proving an ineffective-assistance claim "often require[s] investigative work and an understanding of trial strategy," which presents practical difficulties for prisoners who do not have an effective postconviction attorney.[89] When such claims cannot be raised on direct appeal where prisoners have a right to effective counsel, prisoners are significantly hindered in their ability to assert their constitutional right to effective counsel at trial.[90]

The Court predicted that allowing federal courts to hear the merits of this type of habeas claim would not place significant strain on state resources.[91] The Court noted that many states already appoint counsel for ineffective-assistance claims, and procedural default on those claims can still be enforced when postconviction attorneys perform adequately.[92] States that choose not to appoint counsel in initial-review collateral pro-

82. *Id.*

83. *Id.* at 1317.

84. *Id.* at 1316 ("*Coleman*, however, did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default. The alleged failure of counsel in *Coleman* was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner's claims had been addressed by the state habeas trial court. As *Coleman* recognized, this marks a key difference between initial-review collateral proceedings and other kinds of collateral proceedings. When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." (citation omitted)).

85. Coleman v. Thompson, 501 U.S. 722, 727–28 (1991).

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

87. *See id.* at 1316.

88. *Id.* at 1317.

89. *Id.*

90. *Id.* at 1318 ("By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims.").

91. *Id.* at 1319.

92. *Id.* ("It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceedings.").

ceedings may defend against ineffective-assistance claims on the merits in federal court.[93]

According to Justice Kennedy, the holding would have a limited impact on habeas jurisprudence.[94] It did not contradict *Coleman*, the Court reasoned, because *Coleman* did not involve an initial-review collateral proceeding and had never been applied to this type of situation.[95] The *Coleman* rule would still control in all circumstances other than initial-review collateral proceedings that provide the first opportunity to raise an ineffective-assistance claim.[96] The Court emphasized that the holding did not establish a constitutional right to counsel in collateral proceedings.[97] Rather, it was merely an equitable judgment "that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim."[98] In these particular circumstances, a prisoner has cause to excuse a procedural default so that federal courts may hear the merits of the claim.[99]

D. Dissenting Opinion

In his dissent joined by Justice Thomas, Justice Scalia accused the majority of contradicting habeas precedent and violating principles of federalism and finality.[100] Justice Scalia observed that the Court's holding ignored the "external-factor requirement" of cause for procedural default.[101] He reasoned that habeas precedent firmly established that attorney error is not an external factor unless the prisoner has a constitutional right to effective counsel.[102] Because there is no constitutional right to effective counsel in collateral proceedings, attorney error is not an external factor and thus cannot constitute cause to excuse procedural

93. *Id.* at 1320 ("[A] State [may] elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings.").

94. *Id.* at 1319–20.

95. *Id.* at 1319 ("*Coleman* itself did not involve an occasion when an attorney erred in an initial-review collateral proceeding with respect to a claim of ineffective trial counsel; and in the 20 years since *Coleman* was decided, we have not held *Coleman* applies in circumstances like this one.").

96. *Id.* at 1320 ("The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial . . . ." (citations omitted)).

97. *Id.* at 1319.

98. *Id.* at 1318.

99. *Id.* at 1320 ("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.").

100. *Id.* at 1327 (Scalia, J., dissenting).

101. *Id.* at 1324.

102. *Id.*

default.[103] He also suggested that the holding was incompatible with a number of habeas cases that rejected any right to counsel on collateral review, including in circumstances where collateral proceedings presented the first opportunity to raise certain claims.[104]

Justice Scalia suggested that the Court's holding would have "precisely the same" consequences as finding a constitutional right to effective counsel in collateral proceedings.[105] He predicted that the holding would force states to appoint counsel in collateral proceedings because, although states could still legally choose not to appoint counsel, the practical consequences of that choice would be litigating the merits of every ineffective-assistance claim in federal court.[106] Even states that did appoint collateral counsel would be forced to defend the effectiveness of that counsel in federal court.[107] Because procedural default would no longer automatically keep claims out of federal court, states would have to defend criminal convictions through "years-long federal retrial."[108] Justice Scalia also predicted that the future implications of the holding would be broad because it would be difficult to limit the new rule to ineffective-assistance claims.[109] He criticized the Court's holding for imposing significant costs on states and preventing states from achieving finality in criminal convictions.[110]

III. ANALYSIS

Martinez v. Ryan marks a landmark shift toward easing the procedural barriers that prevent prisoners from accessing federal habeas review. The *Martinez* holding represents a departure from the previous trend in habeas decisions restricting federal review of state convictions and signals a new emphasis on ensuring a full and fair adjudication of constitutional claims. However, the Court's refusal to recognize a consti-

103. *Id.* at 1325.

104. *Id.* at 1326 ("In *Pennsylvania v. Finley* . . . we stated *unequivocally* that prisoners do not 'have a constitutional right to counsel when mounting collateral attacks upon their convictions.' . . . [I]n announcing a *categorical* rule in *Finley*, and then reaffirming it in *Giarratano*, the Court knew full well that a collateral proceeding may present the first opportunity for a prisoner to raise a constitutional claim." (citations omitted) (quoting Murray v. Giarratano, 492 U.S. 1, 10 (1989); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987))).

105. *Id.* at 1321.

106. *Id.* at 1322 ("[W]hoever advises the State would himself be guilty of ineffective assistance if he did not counsel the appointment of state-collateral-review counsel in *all* cases—lest the failure to raise that claim in the state proceedings be excused and the State be propelled into federal habeas review of the adequacy of trial-court representation that occurred many years ago. Which is to say that the Court's pretended avoidance of requiring States to appoint collateral-review counsel is a sham.").

107. *Id.* at 1322–23.

108. *Id.* at 1323.

109. *Id.* at 1321 ("[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised . . . .").

110. *Id.* at 1327.

tutional right to effective counsel in collateral proceedings and lower courts' efforts to limit the application of *Martinez* mean that petitioners will still face significant challenges in asserting their constitutional rights in federal court.

A. A Shift Away from Federalism and Finality Toward a Full and Fair Adjudication of Claims

Although the Court began its legal analysis by affirming that concerns about federalism and finality guide habeas jurisprudence,[111] *Martinez* is a significant departure from previous decisions[112] that relied on these policy interests to restrict federal habeas review. Federalism and finality provided the principal justification for restrictive procedural default rules—exemplified by *Coleman* and AEDPA—that kept federal courts from reaching the merits of most habeas petitions.[113] The *Martinez* decision affirms that promoting finality for state convictions is an important goal but recognizes that finality interests do not insulate unfair state processes from federal review. As previous scholarship has recognized, in the absence of a fundamentally fair state postconviction process, federal habeas review must proceed unencumbered and de novo.[114]

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.[115] This theme reflects the proceduralist model of habeas review endorsed by commentators like Professor Justin Marceau.[116] The proceduralist model emphasizes that access to federal habeas review should depend on whether state procedures provided a full and fair review of claims.[117] The right to a full and fair op-

111. *Id.* at 1316 (majority opinion) ("Federal habeas courts . . . 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.").

112. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them."); Wainwright v. Sykes, 433 U.S. 72, 88 (1977) ("A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation.").

113. *See* Pettys, *supra* note 34; Zimpleman, *supra* note 41, at 438.

114. *See, e.g.*, Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 1–2 (2010) [hereinafter Marceau, *Don't Forget Due Process*] ("Where the aggregate of available state proceedings fail to provide a meaningful corrective process such that federal constitutional issues are not 'fully and fairly' adjudicated, it is necessary for the federal courts to review the federal claims de novo."); Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 TUL. L. REV. 385, 441 (2007) ("[T]he text, structure, and purpose of § 2254(d)(2) and (e)(1) compel the conclusion that state findings still must comport with minimum standards of procedural regularity . . . .").

115. *See Martinez*, 132 S. Ct. at 1318 ("Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.").

116. *See, e.g.*, Marceau, *Don't Forget Due Process*, *supra* note 114, at 7–9.

117. *See id.*

portunity to litigate constitutional claims comes from the constitutional right to due process.[118] In his discussion of the origins of the "full and fair" right, Professor Marceau has noted that even Professor Paul Bator, a leading proponent of limiting federal habeas review, "concluded that it is not an exaggeration to say that 'the essence of . . . due process [is] to furnish a criminal defendant with a full and fair opportunity' to litigate constitutional claims concerning the validity of his detention or sentence."[119] When state procedures fail to provide a full and fair adjudication of constitutional claims, due process requires that prisoners have access to a full and fair review of claims in federal habeas court.[120]

The petitioner in *Martinez* faced a situation analogous to other examples of state procedural unfairness that habeas scholars have argued should permit unrestricted federal habeas review. For example, Professor LaFave has reasoned that "federal habeas relief should be available with respect to a [constitutional] claim if the state court by some stratagem or procedural device unfairly prevented the petitioner from presenting argument on legal issues."[121] Similarly, proceedings are not full and fair if prisoners are not allowed to develop facts necessary to prove their claims.[122] When unfair state processes prevent prisoners from litigating constitutional claims, it seems procedurally unfair to force prisoners to forfeit claims.[123] Forcing a prisoner to forfeit a claim that was procedurally defaulted because of his attorney's mistakes in an initial-review collateral proceeding raises similar concerns about due process. Given the complex nature of ineffective-assistance claims, the Court in *Martinez* recognized that "[t]o present a claim of ineffective assistance at trial in accordance with the State's procedures, . . . a prisoner likely needs an effective attorney."[124] The *Martinez* Court concluded that ineffective assistance of counsel at an initial-review collateral proceeding likely deprives the prisoner of "fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."[125]

118. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); *see* Marceau, *Don't Forget Due Process*, *supra* note 114, at 18 ("[D]ue process mandates that every prisoner receive at least one full and fair review of his constitutional claims, either through direct or collateral proceedings, and either in state or federal court." (citing Wright v. West, 505 U.S. 277, 298–99 (1992) (O'Connor, J., concurring))).

119. Marceau, *Don't Forget Due Process*, *supra* note 114, at 7–8 (quoting Bator, *supra* note 35, at 456).

120. *Id.* at 7.

121. 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(g), at 497–98 (4th ed. 2004).

122. *See* Marceau, *Don't Forget Due Process*, *supra* note 114, at 34–36 (discussing deficiencies in fact-finding procedures as a violation of due process).

123. *See id.* at 34 ("[W]hen the state process is guided by procedures, formal or informal, that render the process inhospitable to basic fairness, due process requires uninhibited federal review.").

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

125. *Id.*

In this context, the Court's decision to allow ineffective assistance of initial-review collateral counsel to qualify as cause to overcome procedural default seems compelled by due process. The Court recognized that ineffective counsel on collateral review will likely deprive prisoners of a meaningful opportunity to have their claims reviewed on the merits.[126] Thus, without effective postconviction counsel, state collateral proceedings do not offer prisoners the full and fair adjudication of constitutional claims required by due process. When ineffective assistance of postconviction counsel prevents a state court from reaching the merits of a claim, federal habeas review presents the only opportunity for prisoners to have their claims heard. The Court held that, under these circumstances, ineffective assistance of collateral counsel qualifies as cause for procedural default, allowing prisoners an opportunity to litigate claims in federal habeas court. This avenue for overcoming procedural default is meant to guarantee that prisoners receive at least one full and fair review of their constitutional claims, either in state postconviction proceedings or on federal habeas review.

The *Martinez* Court's focus on giving prisoners a meaningful opportunity to litigate constitutional claims is a landmark development in habeas law. The habeas remedy has been so eviscerated in recent decades that it has become extremely difficult to bring a successful petition in federal court, even for prisoners with meritorious claims.[127] In *Martinez*, the Court finally took a step toward balancing the interest in finality with allowing prisoners with meritorious constitutional claims to have their day in court.

B. A Missed Opportunity to Guarantee the Right to Counsel on Collateral Review

Although *Martinez* expanded prisoners' access to federal habeas review, the Supreme Court avoided deciding the issue of whether prisoners have a constitutional right to counsel in collateral proceedings.[128] In doing so, the Court missed an opportunity to extend the constitutional right to counsel to all proceedings that present the first opportunity to raise important constitutional claims.

The Court's own reasoning points to the absurdity of differentiating between collateral review and direct appeal in circumstances where collateral review presents the first opportunity to raise a claim. *Martinez* rejects the flawed assumptions that the Supreme Court has previously relied upon to deny prisoners the right to counsel in postconviction pro-

126. *Id.* at 1316 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim.").

127. *See* KING ET AL., *supra* note 42, at 52 (showing that only 0.35% of federal habeas petitions in non-capital cases resulted in a grant of relief for any claim).

128. *Martinez*, 132 S. Ct. at 1313.

ceedings. [129] The *Martinez* Court recognized that the trial and direct-appeal records provide little assistance to pro se petitioners asserting a claim for the first time in collateral proceedings.[130] The Court acknowledged that when collateral proceedings provide the first opportunity to raise a claim, an initial collateral review is more like a direct appeal than a duplicative review of claims.[131]

Given the similarities between initial-review collateral proceedings and direct appeal, it makes little sense to continue to deny prisoners the right to counsel on collateral review. The need for postconviction counsel is especially pressing when the claim at issue is ineffective assistance of trial counsel. The *Martinez* Court admitted that "[t]o present a claim of ineffective assistance at trial in accordance with the State's procedures, . . . a prisoner likely needs an effective attorney."[132] When a prisoner's only chance to assert a vital constitutional claim depends on access to an effective attorney, it is difficult not to conclude that basic notions of "fairness and equality" require a right to counsel to initial-review collateral proceedings.[133]

C. Anomalies Created by Avoiding the Constitutional Question

To avoid ruling on the constitutional issue, the Court opted instead to create an avenue for prisoners to overcome procedural default.[134] The Court's decision to expand cause for procedural default instead of finding a constitutional right to collateral counsel raises several unresolved questions.

First, as the dissent noted, the majority opinion does not explain how the holding is consistent with the "external factor" requirement for cause.[135] *Carrier* and *Coleman* established that an attorney's error is not a factor external to the defense and thus cannot constitute cause for procedural default unless there is a constitutional right to effective coun-

129. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 614–15 (1974) ("[R]espondent . . . received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. . . . We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.").

130. *See Martinez*, 132 S. Ct. at 1317 (citing Halbert v. Michigan, 454 U.S. 605, 617 (2005)).

131. *Id.*

132. *Id.*

133. *See Ross v. Moffitt*, 417 U.S. at 621 (Douglas, J., dissenting) ("The right to seek discretionary review is a substantial one, and one where a lawyer can be of significant assistance to an indigent defendant. It was correctly perceived below that the 'same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals.'" (quoting Moffit v. Ross, 483 F.2d 650, 655 (4th Cir. 1973))).

134. *See Martinez*, 132 S. Ct. at 1315.

135. *Id.* at 1324 (Scalia, J., dissenting).

sel.[136] To justify the creation of an exception to the general rule from *Coleman*, the Court focused on the special importance of ineffective-assistance-of-counsel claims.[137] But the significance of the claim fails to explain how an attorney's error in collateral proceedings can constitute a "factor external to the defense"[138] when a prisoner has no constitutional right to an attorney. The majority opinion did not even mention the external factor requirement, much less attempt to resolve the questions raised by Justice Scalia in the dissenting opinion. *Martinez* leaves the future of the external factor requirement uncertain. It is unclear whether the external factor requirement will continue to be an obstacle to overcoming procedural default as it was *Carrier* and *Coleman*, or whether it will be ignored in the future as it was in *Martinez*.

Martinez also creates a potential anomaly for prisoners whose claims have been denied on the merits in state court. When a prisoner fails to raise an ineffective-assistance-of-trial-counsel claim due to ineffective counsel at an initial-review collateral proceeding, *Martinez* allows the prisoner to litigate the claim in federal court.[139] However, it is unclear what effect *Martinez* will have when a prisoner's postconviction counsel raises the claim but litigates it poorly. In such circumstances, the claim has technically been exhausted instead of procedurally defaulted. Unlike the situation in *Martinez* where a claim was not raised at all, when postconviction counsel raises the claim but does so in an ineffective manner, it is unclear whether the prisoner will be entitled to relief. It fails logic to treat less favorably prisoners whose lawyers act deficiently in litigating a claim than prisoners whose lawyers fail entirely to raise a claim.

This problem is potentially amplified by the Court's recent decision in *Cullen v. Pinholster*.[140] Federal habeas review of ineffective-assistance-of-counsel claims is now limited to the record available to the state court that ruled on the merits of the claims.[141] When a postconviction attorney's incompetence causes the claim to be denied on the merits in state court, the prisoner will be unable to develop new facts in support of the claim in federal court because of *Pinholster*. Thus, *Martinez* may

136. Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." (citations omitted)); Murray v. Carrier, 477 U.S. 478, 488 (1986) ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we 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." (citation omitted)).

137. *See Martinez*, 132 S. Ct. at 1320.

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

139. *Martinez*, 132 S. Ct. at 1320.

140. 131 S. Ct. 1388 (2011).

141. *Id.* at 1398.

provide an opportunity for relief to prisoners who never raise claims at all but not for prisoners whose claims are denied due to ineffective post-conviction counsel.

D. Will Martinez *Force States to Appoint Collateral Counsel?*

In its discussion of the advantages of expanding cause for procedural default instead of recognizing a constitutional right to collateral review counsel, the *Martinez* Court emphasized that its decision would not force states to appoint collateral counsel. Instead, states could choose "between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings."[142] But the dissent predicted that the Court's holding in *Martinez* would have the same practical effect on states as finding a constitutional right to counsel on collateral review.[143] Justice Scalia reasoned that, faced with the prospect of litigating ineffective-assistance claims on the merits in federal court, states will choose to appoint counsel in collateral-review proceedings.[144]

If the dissent is correct, then this is a positive step toward ensuring broader access to counsel for prisoners with constitutional claims. However, Justice Scalia's prediction ignores the difficulty of presenting a habeas petition and prevailing on the merits in federal court.[145] Litigating habeas claims in federal court will certainly be more costly for states than the pre-*Martinez* option of winning a quick summary victory by asserting procedural default. But given the uphill battle that prisoners face in prevailing on their claims, states might decide that it is more cost-effective to win a relatively easy victory on the merits in federal court than to appoint counsel in every state initial-review collateral proceeding. The practical barriers to filing a successful habeas petition mean that states will likely still be able to avoid appointing counsel for prisoners in collateral proceedings, knowing that pro se prisoners will have little chance of petitioning successfully in federal court.

State courts in Delaware and Kentucky interpreting *Martinez* have confirmed in unpublished opinions that prisoners still do not have a right

142. *Martinez*, 132 S. Ct. at 1319–20.

143. *Id.* at 1321–22 (Scalia, J., dissenting) ("Moreover, even if today's holding could (against all logic) be restricted to ineffective-assistance-of-trial-counsel claims, it would have essentially the same practical consequences as a holding that collateral-review counsel is constitutionally required.").

144. *See id.* at 1322 ("[W]hoever advises the State would himself be guilty of ineffective assistance if he did not counsel the appointment of state-collateral-review counsel in *all* cases—lest the failure to raise that claim in the state proceedings be excused and the State be propelled into federal habeas review of the adequacy of trial-court representation that occurred many years ago. Which is to say that the Court's pretended avoidance of requiring States to appoint collateral-review counsel is a sham." (footnote omitted)).

145. *See* KING ET AL., *supra* note 42, at 52 (showing that only 0.35% of federal habeas petitions in non-capital cases resulted in a grant of relief for any claim).

to counsel on collateral review in those states.[146] Even though there is no constitutional right to counsel in collateral proceedings, it remains to be seen whether states will decide to appoint counsel, as Justice Scalia predicted, in order to assert procedural default for federal habeas claims.

Because *Martinez* does not guarantee prisoners the right to counsel in initial-review collateral proceedings, the Court's holding does not go far enough in ensuring that prisoners with meritorious claims will prevail on those claims. Prisoners who had no counsel in collateral proceedings will no longer have their claims dismissed due to procedural default, but they have little chance of succeeding on the merits without the assistance of counsel. As the Court recognized, proving an ineffective-assistance-of-counsel claim presents special difficulties for pro se petitioners.[147] It requires "investigative work,"[148] which is virtually impossible for petitioners to accomplish from prison, and "an understanding of trial strategy,"[149] a subject that is beyond the reach of many petitioners.[150] Although the *Martinez* decision may lead to fewer petitions being dismissed for procedural default, the likelihood of ultimate success will remain small for pro se petitioners raising claims of ineffective assistance of trial counsel.[151] Because prisoners still have no right to counsel in collateral proceedings, *Martinez* is inadequate to ensure that prisoners with meritorious ineffective-assistance claims will have a real chance to prevail on the merits in court.

E. Applying Martinez *to Other Types of Claims*

Another unresolved question is whether *Martinez*'s expansion of cause will be applied to claims other than ineffective assistance of trial counsel. According to the Court, the *Martinez* holding is limited to prisoners asserting a claim of ineffective assistance of trial counsel.[152] But the dissent suggested that the holding will not remain limited to ineffective-assistance claims because they are no different in principle from

146. State v. Finn, No. 0801037592, 2012 WL 2905101, at *2 (Del. Super. Ct. July 17, 2012) ("*Martinez* does not change Delaware's longstanding rule that defendants are not entitled postconviction relief counsel."); Denny v. Commonwealth, No. 2011-CA-001232-MR, 2012 WL 2604599, at *3 (Ky. Ct. App. July 6, 2012) ("Although we find the logic . . . from the United States Supreme Court's decision in *Martinez* persuasive, the Kentucky Supreme Court has specified that there is no right to the effective assistance of counsel in post-conviction proceedings in Kentucky, and we are bound by that decision.").

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

148. *Id.*

149. *Id.*

150. *See* Mundy, *supra* note 5, at 212.

151. *See* KING ET AL., *supra* note 42, at 52 (reporting that in a random sample of 2,384 federal habeas petitions in non-capital cases, only 7 resulted in a grant of relief, and only 1 of these grants was based on an ineffective-assistance-of-trial-counsel claim).

152. *Martinez*, 132 S. Ct. at 1320.

claims based on prosecutorial misconduct, exculpatory evidence, or impeachment of prosecutorial witnesses.[153]

Courts accord special significance to the role of attorneys in the adversarial system,[154] and the *Martinez* majority emphasized the particular importance of ineffective-assistance-of-counsel claims to justify creating a narrow exception to *Coleman*.[155] However, courts also accord great importance to the fairness of the adversarial fight.[156] *Brady* claims, which involve allegations of prosecutorial misconduct in withholding exculpatory evidence from the defense, may be just as central to protecting the fairness of the justice system.[157] Whether *Martinez* remains limited may depend on whether courts decide that ineffective assistance of counsel constitutes a more heinous violation of a defendant's rights than a cheating prosecutor.

On the other hand, it may not matter whether, as Justice Scalia suggested, ineffective assistance of counsel is indistinguishable in principle from other important claims. Although the *Martinez* rule could logically be expanded to other claims, courts inclined to limit habeas relief will likely take the *Martinez* opinion at face value in order to deny relief on other types of claims. In *Ibarra v. Thaler*,[158] a recent Fifth Circuit case, the petitioner argued that *Martinez* should be applied to excuse his default of two claims in addition to his ineffective-assistance-of-counsel claim.[159] The Fifth Circuit summarily denied relief for these two claims, stating that "*Martinez*, by its terms, applies only to ineffective-assistance-of-trial-counsel claims."[160] Similarly, a federal district court in Washington decided that *Martinez* cannot be applied to *Brady* claims.[161]

153. *Id.* at 1321 (Scalia, J., dissenting) ("[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of 'newly discovered' prosecutorial misconduct, . . . claims based on 'newly discovered' exculpatory evidence or 'newly discovered' impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel." (citation omitted)).

154. *See* Zimpleman, *supra* note 41, at 449–52 (discussing how ineffective assistance of counsel functions as a "safety valve" to overcome procedural default).

155. *See Martinez*, 132 S. Ct. at 1317 ("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. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system.").

156. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."); *see also* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 643 (2002).

157. *See* Sundby, *supra* note 156 ("*Brady* is often heralded as the Supreme Court case that granted the criminally accused a constitutional right to discovery. Like the other members of the [Warren Court] pantheon, the *Brady* Court announced its holding with a strong tone of moral authority.").

158. 687 F.3d 222 (5th Cir. 2012).

159. *Id.* at 224.

160. *Id.*

161. Hunton v. Sinclair, No. CV-06-0054-FVS, 2012 WL 1409608, at *1 (E.D. Wash. Apr. 23, 2012).

Several other district courts have interpreted *Martinez* as limited to ineffective-assistance-of-counsel claims.[162] If courts continue to read *Martinez* narrowly and follow the letter of the majority opinion, *Martinez* will do nothing to lower the barriers that prevent prisoners from raising other types of procedurally defaulted claims in federal court.

F. Lower Courts' Efforts to Distinguish Martinez

Some courts have also limited the application of *Martinez* by narrowly interpreting the definition of "initial-review collateral proceeding."[163] The Fifth Circuit in *Ibarra* ruled that *Martinez* did not apply because under Texas rules, an ineffective-assistance-of-counsel claim can be raised at trial on a motion for a new trial and also on direct appeal.[164] Because Texas, unlike Arizona, does not require that the ineffective-assistance-of-counsel claim be raised only on collateral appeal, the *Ibarra* court ruled that the collateral proceeding did not constitute the first opportunity to raise the claim as required by *Martinez*.[165] Similarly, a federal district court in California held that *Martinez* did not apply because California prisoners are required to bring ineffective-assistance-of-counsel claims on collateral appeal only when matters outside the trial record must be considered; otherwise, they may raise the claim on direct appeal.[166] Other courts have ruled that *Martinez* does not apply in Arkansas, Alabama, and Tennessee because those states allow prisoners to raise ineffective-assistance claims on direct appeal.[167]

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162. *See* Felix v. Cate, No. CV 11-7713-JHN (RNB), 2012 WL 2874398, at *10 (C.D. Cal. May 8, 2012) ("[T]he narrow exception to *Coleman* recognized in *Martinez* applies only to defaulted ineffective assistance of trial counsel claims."); Dunn v. Norman, No. 4:11CV872 CDP, 2012 WL 1060128, at *5 n.2 (E.D. Mo. Mar. 29, 2012) (finding *Martinez* inapplicable to procedurally defaulted claim of insufficient evidence at trial because it is "not a claim that trial counsel was ineffective").

163. *See* Dansby v. Norris, 682 F.3d 711, 728–29 (8th Cir. 2012); *Ibarra*, 687 F.3d at 224; Arthur v. Thomas, No. 2:01-CV-0983-LSC, 2012 WL 2357919, at *8–9 (N.D. Ala. June 20, 2012); *Felix*, 2012 WL 2874398, at *9–10; Leberry v. Howerton, No. 3:10-00624, 2012 WL 2999775, at *1–2 (M.D. Tenn. July 23, 2012).

164. *Ibarra*, 687 F.3d at 227 ("Ibarra is not entitled to the benefit of *Martinez* for his ineffectiveness claims, as Texas procedures entitled him to review through counselled motions for new trial and direct appeal.").

165. *Id.*

166. *Felix*, 2012 WL 2874398, at *10 ("[U]nlike Arizona, California does not have a procedural rule requiring that all ineffective assistance of trial counsel claims be raised by way of a collateral attack in a writ of habeas corpus, and not on direct appeal. Rather, it is only when the determination of an ineffective assistance of trial counsel claim necessitates consideration of matters outside the record on appeal (e.g., the existence or nonexistence of a tactical basis for trial counsel's course of conduct) that California requires the claim to be raised on habeas corpus.").

167. *Dansby*, 682 F.3d at 729 ("*Martinez* does not apply here, because Arkansas does not bar a defendant from raising claims of ineffective assistance of trial counsel on direct appeal."); *Arthur*, 2012 WL 2357919, at *9 ("The second major difference between Arthur's situation and that of the petitioner in Martinez is that Arthur *could have* obtained a review of his ineffective-assistance-of-trial-counsel claims with the aid of counsel different from his trial counsel in his direct appeal, as well as in his first collateral challenge."); *Leberry*, 2012 WL 2999775, at *1 ("*Martinez* is not applicable to this case. . . . [I]n Tennessee, 'there is no prohibition against litigation of ineffective counsel claims on direct appeal, as opposed to collateral proceedings.'" (quoting State v. Monroe, No. E2011-00315-CCA-R3-CD, 2012 WL 2367401, at *4 (Tenn. Crim. App. June 22, 2012))).

These courts ruled *Martinez* inapplicable because state rules do not bar prisoners from raising ineffective-assistance claims on direct appeal, but the courts did not consider the feasibility of raising those claims on direct appeal. In *Hearn v. Thaler*,[168] the petitioner argued that the Fifth Circuit's decision in *Ibarra* rendering *Martinez* inapplicable in Texas should not apply to claims that rely on facts outside the trial record.[169] The petitioner, who was sentenced to death, noted that in capital cases "it is not practicable for the defendant to develop the evidence to support ineffective assistance of counsel claims through a motion for new trial," and without factual development these claims "will not receive meaningful review in the direct appeal."[170] Under these circumstances, the petitioner argued that his first collateral proceeding was an initial-review collateral proceeding as defined by *Martinez* because it presented the first practical opportunity for a capital defendant to raise an ineffective-assistance-of-counsel claim.[171] The court rejected this argument and interpreted *Ibarra* as binding precedent that *Martinez* does not apply in Texas under any circumstances.[172]

These lower-court decisions suggest that *Martinez* will have limited applicability in states that allow prisoners to raise ineffective-assistance claims in motions for new trial or on direct appeal, despite the reality that collateral proceedings often present the first feasible opportunity to raise such claims. This limited application of *Martinez* is inconsistent with the *Martinez* Court's emphasis on ensuring that every prisoner gets one full and fair opportunity to litigate ineffective-assistance claims—a point articulated powerfully by the dissent in *Ibarra*.[173] The dissent noted that collateral proceedings are the "preferred and encouraged" venue for raising ineffective-assistance claims in Texas[174] and that "there clearly are instances where a collateral proceeding will be the 'first occasion' to legitimately raise a claim of ineffective assistance of trial counsel in Texas."[175] Although prisoners may technically be allowed to raise ineffective-assistance-of-trial-counsel claims in a motion for new trial or on direct appeal, these methods will rarely represent a fundamentally fair opportunity to vindicate those claims.[176] The *Martinez* Court noted that the "[a]bbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective-

168. No. 3:12-CV-2140-D, 2012 WL 2715653 (N.D. Tex. July 9, 2012).

169. *Id.* at *4.

170. *Id.* ("[Hearn] argued that the only opportunity to include evidence that is not already in the trial record is by a motion for new trial that must be filed within 30 days of judgment, usually by trial counsel and before the record is transcribed.").

171. *See id.*

172. *Id.* at *3–4.

173. Ibarra v. Thaler, 687 F.3d 222, 228–29 (5th Cir. 2012) (Graves, J., concurring in part and dissenting in part).

174. *Id.* at 229.

175. *Id.*

176. *See id.* at 228–31.

assistance claim."[177] The *Ibarra* dissent concluded that "it is not equitable to find that [the prisoner] has defaulted on a claim of ineffective assistance of counsel because his claimed ineffective counsel did not prematurely raise said claim when clearly not practicable."[178]

When state procedures make collateral proceedings the only feasible place to raise an ineffective-assistance claim, it seems unfair to enforce a procedural default simply because the prisoner was technically allowed to raise the claim on direct appeal. Due process requires at least one full and fair opportunity to litigate constitutional claims.[179] If state procedures do not offer a meaningful opportunity to do so, whether on direct appeal or in collateral proceedings, *Martinez* allows federal habeas courts to excuse a prisoner's procedural default. *Ibarra* and other decisions are wrong to limit *Martinez*'s applicability without considering whether state procedures actually afford prisoners a full and fair opportunity to have their claims heard on the merits. These decisions contravene the Court's purpose in *Martinez* of giving every prisoner a meaningful opportunity to litigate ineffective-assistance-of-counsel claims.

G. The Future of Coleman

Two decades after *Coleman* established that an attorney's mistakes in collateral proceedings do not qualify as cause to overcome procedural default, the *Martinez* Court shifted course to carve out a "narrow exception" to this rule.[180] It remains to be seen to what extent *Martinez* will limit the reach and impact of *Coleman* in the future.

Despite the majority's insistence that *Martinez* constitutes a narrow exception instead of a reversal, the decision represents a dramatic shift in the Court's habeas jurisprudence. To explain how *Martinez* was consistent with *Coleman*, the Court found it necessary to create an entirely new distinction that had never previously existed in habeas jurisprudence—the "initial-review collateral proceeding."[181] This distinction meant that attorney error in postconviction proceedings led to strikingly different outcomes in the two cases. In *Coleman*, a prisoner facing execution was barred from federal habeas review because of his attorney's error in collateral proceedings.[182] In *Martinez*, the attorney's error on

177. Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012).

178. *Ibarra*, 687 F.3d at 229.

179. *See, e.g.*, Marceau, *Don't Forget Due Process*, *supra* note 114, at 18 ("[D]ue process mandates that every prisoner have at least one full and fair review of his constitutional claims, either through direct or collateral proceedings, and either in state or federal court." (citing Wright v. West, 505 U.S. 277, 298–99 (1992) (O'Connor, J., concurring))).

180. *See Martinez*, 132 S. Ct. at 1315.

181. *Id.* ("*Coleman v. Thompson* left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. These proceedings can be called, for purposes of this opinion, 'initial-review collateral proceedings.'" (citation omitted)).

182. *See supra* Part I.D.

collateral review provided an opportunity for the prisoner to raise the claim in federal habeas court.[183] Whereas *Coleman* focused on the importance of finality, *Martinez* focused on "ensur[ing] that proper consideration [be] given to a substantial claim."[184] From the Court's emphasis on providing a full and fair review on the merits rather than on prioritizing finality, it might seem that *Martinez* has ushered in a new era of broader federal habeas review.

Nevertheless, the *Coleman* rule, that an attorney's mistake on appeal from an initial-review collateral proceeding does not constitute cause for procedural default, still stands. Several federal court decisions since *Martinez* have made clear that *Coleman*, not *Martinez*, governs procedurally defaulted claims caused by attorney error beyond the initial-review collateral proceeding.[185] The Eighth Circuit held in *Arnold v. Dormire*[186] that *Martinez* did not apply when, like *Coleman*, the petitioner's claims were litigated in the initial-review collateral proceeding but not preserved on appeal.[187] The *Arnold* court reasoned that "unlike Martinez, Arnold has already had his day in court; deprivation of a second day does not constitute cause."[188] Federal district courts in Colorado and Arizona have made similar rulings.[189]

These decisions provide support for the Court's assurance that "[t]he rule of *Coleman* governs in all but the limited circumstances" recognized in *Martinez*.[190] The decisions demonstrate that although *Martinez* represents a significant shift in the Court's habeas jurisprudence, its application is constrained to a narrow class of proceedings. Unfortunately, the *Coleman* rule will still prevent many prisoners with defaulted claims from accessing federal habeas review.

CONCLUSION

After decades of tightening restrictions on federal habeas review, the Supreme Court in *Martinez v. Ryan* finally took a step toward broad-

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

184. *Id.* at 1318.

185. Arnold v. Dormire, 675 F.3d 1082, 1087 (8th Cir. 2012); Cook v. Ryan, No. CV-97-00146-PHX-RCB, 2012 WL 2798789, at *8 (D. Ariz. July 9, 2012); Wilkinson v. Timme, No. 11-CV-00454-REB, 2012 WL 1884518, at *3 (D. Colo. May 23, 2012).

186. 675 F.3d 1082 (8th Cir. 2012).

187. *Id.* at 1087.

188. *Id.*

189. *Cook*, 2012 WL 2798789, at *8 ("Under the plain language of *Martinez*, post-conviction counsel's failure to appeal the state court's denial of the ineffectiveness claims cannot constitute cause for the procedural default because the *Martinez* exception does not extend to attorney errors 'beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial.'" (quoting *Martinez*, 132 S. Ct. at 1320)); *Wilkinson*, 2012 WL 1884518, at *3 ("With respect to all of Mr. Wilkinson's ineffective assistance of counsel claims, the Supreme Court held in a case prior to *Martinez* that an attorney's errors on appeal from an initial-review collateral proceeding do not qualify as cause for a procedural default." (citing Coleman v. Thompson, 501 U.S. 722, 757 (1991))).

190. *Martinez*, 132 S. Ct. at 1320.

ening access to federal habeas corpus. *Martinez* represents a shift away from federalism and finality, the policy concerns that historically served to close the courthouse doors to habeas petitioners. The holding provides an avenue for habeas petitioners with inadequate counsel in a collateral proceeding to overcome procedural default and have their claims heard in federal court. The Court affirmed the importance of ensuring that prisoners receive at least one full and fair review of inadequate-assistance-of-trial-counsel claims and proved willing to open an avenue for federal habeas review of those claims in limited circumstances.[191]

If the *Martinez* holding allows more petitioners with meritorious constitutional claims to have their day in court, then *Martinez* represents a victory for constitutional rights. But although *Martinez* marks a landmark shift toward easing procedural barriers that keep prisoners from accessing federal habeas review, the Supreme Court missed an opportunity to guarantee that prisoners with vital constitutional claims will be represented by counsel in collateral proceedings. Lower court decisions narrowly interpreting *Martinez* have already demonstrated the limitations of the Court's equitable ruling.[192] Although *Martinez* represents a significant step toward ensuring that prisoners receive a full and fair review of constitutional claims, prisoners without effective counsel still face significant challenges in vindicating their constitutional rights in federal habeas review.

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191. *Id.* at 1318–20.

192. *See, e.g.*, Ibarra v. Thaler, 687 F.3d 222, 227 (5th Cir. 2012) (holding *Martinez* inapplicable because Texas allows prisoners to raise ineffective assistance claims in a motion for new trial and on direct appeal); Hunton v. Sinclair, No. CV-06-0054-FVS, 2012 WL 1409608, at *1 (E.D. Wash. Apr. 23, 2012) (holding that *Martinez* applies only to ineffective assistance of trial counsel claims and not to *Brady* claims); State v. Finn, No. 0801037592, 2012 WL 2905101, at *2 (Del. Super. Ct. July 17, 2012) ("*Martinez* does not change Delaware's longstanding rule that defendants are not entitled postconviction relief counsel.").

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