No. 19-___

In the Supreme Court of the United States

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Petitioner,

v.

VINCENT D. WHITE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The procedural-default doctrine bars federal courts from awarding habeas relief for claims "that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). Federal courts may excuse a procedural default only if the petitioner "can establish 'cause' to excuse the procedural default *and* demonstrate that he suffered actual prejudice from the alleged error." *Id.* (emphasis added). In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court held that petitioners can, in narrow circumstances, establish "cause" by showing that the absence or ineffective performance of state-postconviction counsel caused them to procedurally default an ineffective-assistance-of-trial-counsel claim that had "some merit." *Id.* at 14.

This case presents the following question: If a petitioner defaults an ineffective-assistance-of-trial-counsel claim with "some merit," does *Martinez v. Ryan* allow a federal court to excuse the procedural default without requiring any further showing of prejudice?

LIST OF PARTIES

The petitioner is Donnie Morgan, the Warden of the Ross Correctional Institution.

The respondent is Vincent D. White, Jr.

LIST OF RELATED CASES

1. *Ohio v. White*, No. 12CR-4418 (Ct. of Common Pleas, Franklin County, Ohio) (judgment entered January 27, 2014)
2. *Ohio v. White*, No. 14AP-160 (Ohio Ct. App., 10th Dist.) (decision issued December 22, 2015)
3. *Ohio v. White*, No. 2016-184 (Ohio) (jurisdiction declined May 4, 2016)
4. *White v. Warden*, No. 2:17-cv-325 (S.D. Ohio) (March 12, 2018)
5. *Ohio v. White*, No. 18AP-158 (Ohio Ct. App., 10th Dist.) (judgment entered April 4, 2018)
6. *White v. Warden*, No. 18-3277 (6th Cir. 2019) (judgment entered October 8, 2019)

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INTRODUCTION

This case presents a question that at least six different circuits have answered in at least three different ways. The question involves the interaction of the procedural-default doctrine and this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). The procedural-default doctrine, for its part, generally prohibits habeas courts from entertaining claims "that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). If a habeas petitioner wishes to have his default excused, he must show "'cause' to excuse the procedural default and demonstrate that he suffered actual prejudice" from the constitutional error he alleges. *Id.* *Martinez*, for its part, held that petitioners can, in narrow circumstances, establish "cause" by showing that the absence or ineffective performance of state-postconviction counsel caused them to procedurally default an ineffective-assistance-of-trial-counsel claim that had "some merit." *Martinez*, 566 U.S. at 14; *Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

Here is the problem: *Martinez* addresses only the "cause" component of the cause-and-prejudice test. It says nothing (expressly, anyway) about the "actual prejudice" requirement. Nonetheless, some courts have held that a petitioner who shows that his claim has "some merit" under *Martinez* need not make any further showing of prejudice to have his default excused. That is the rule in the Third and Seventh Circuits. *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017); *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 939 (3d Cir. 2019). And it is the rule that the Sixth Circuit adopted in its decision below. Pet.App.15a. That rule effectively eliminates the

cause-and-prejudice test's actual-prejudice requirement.

In contrast, the Fifth, Ninth, and Eleventh Circuits all require some additional showing of prejudice. They do not, however, agree on what that showing entails. The Eleventh Circuit applies the actual-prejudice prong of the cause-and-prejudice test even in *Martinez* cases. *See Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957–58 (11th Cir. 2016). The Ninth Circuit's test turns on the presence or absence of state-postconviction counsel: petitioners who had state-postconviction counsel must show actual prejudice, while petitioners who lacked state-postconviction counsel need not. *See Ramirez v. Ryan*, 937 F.3d. 1230, 1241 (9th Cir. 2019); *Rodney v. Filson*, 916 F.3d 1254, 1260 n.2 (9th Cir. 2019). As for the Fifth Circuit, it is inconsistent. In some cases, the court's approach resembles that of the Eleventh Circuit, while in other cases it resembles that of the Ninth Circuit. *Compare Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014) *with Wessinger v. Vannoy*, 864 F.3d 387, 391 (5th Cir. 2017).

Most circuit splits on issues of federal law deserve this Court's attention. That is especially so in the habeas context. When a federal court awards habeas relief, it "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (internal quotation omitted). Because *Martinez* expanded the opportunities for disrupting state convictions, the Court should make sure the circuits apply it faithfully.

In sum, this case squarely presents an important federal question on which the circuits are divided. The Court should grant *certiorari*.

OPINIONS BELOW

The Sixth Circuit's opinion below is published at *White v. Warden*, 940 F.3d 270 (6th Cir. 2019), and reproduced at Pet.App.1a.

The Sixth Circuit's order denying rehearing and rehearing *en banc* is reproduced at Pet.App.127a, and available online at *White v. Warden*, 2019 U.S. App. LEXIS 34633 (6th Cir., Nov. 20, 2019).

The District Court's decision denying habeas relief is reproduced at Pet.App.18a, and available online at *White v. Warden*, 2018 U.S. Dist. LEXIS 39635 (S.D. Ohio, Mar. 12, 2018).

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its panel decision on October 8, 2019, and denied the Warden's petition for *en banc* review on November 20, 2019. This petition timely invokes the Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT

1. In July 2012, two men barged into a house on 17th Avenue in Columbus, Ohio. They shot four people, killing two of them. The two survivors identified Vincent White—the respondent here—as one of the two shooters. Pet.App.86a–87a.

About a month later, a grand jury indicted White, charging him "with one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of possessing a firearm while under disability." Pet.App.86a. White pleaded not guilty and went to trial, represented by an experienced attorney named Javier Armengau.

At trial, White "admitted that he was at the house and shot some of the people there."

Pet.App.87a. But he claimed he acted in self-defense. On his telling, he went to the home to buy drugs and began shooting only when the four victims forced him to kneel and tried to rob him at gunpoint. Pet.App.87a

This story never made much sense. For one thing, one witness testified that White had previously disclosed his plan to rob the house. Pet.App.86a–87a. In addition, "[f]orensic evidence regarding the direction and angles from which some of the victims were shot tended to contradict White's version of the events." Pet.App.87a. For example: "White and the other shooter each fired at least six times and the four victims did not return fire"; one of the victims "was shot as if he were getting up from a seated position" while another "was shot in the back shoulder"; and neither of the "two guns … used in the shooting" were "in the possession of the house occupants." Pet.App.87a.

The jury convicted White on all counts. And, after holding a sentencing hearing, the trial court sentenced White to life without the possibility of parole.

2. White appealed his sentence. He retained a new attorney to assist him in doing so. White claims that, at this point, he learned for the first time that Javier Armengau was under indictment for serious crimes while representing White at trial. Pet.App.3a–4a. The same prosecutor's office that had indicted White indicted Armengau, too. This, White said, created a conflict of interest and thus denied him his Sixth Amendment right to counsel. Pet.App.90a.

The state appellate court held that White could not properly raise this issue on direct appeal. The

court explained that the record contained "no evidence or information whatsoever about Armengau's particular situation." Pet.App.91a. Nor did the record contain any information "indicating White was unaware of Armengau's situation" at trial. Pet.App.91a. Given the absence of this information, the court concluded that the issue should have been raised in a postconviction proceeding after developing the facts. "A direct appeal, where the record is limited and where the record contains no mention of any of the relevant facts at issue, is not the vehicle to make such an argument." Pet.App.91a; *accord* Pet.App.108a–09a ¶32 (Bruner, J., concurring in part and dissenting in part) (agreeing with the majority's analysis of the ineffective-assistance issue).

White sought review in the Supreme Court of Ohio, but the court declined to take his case. Pet.App.84a.

3. By the time the Ohio Court of Appeals issued its decision, the deadline for seeking state-postconviction relief had already expired. White had not filed a protective petition or otherwise tried to initiate state-postconviction proceedings.

White did eventually file a petition for postconviction relief in the state trial court. Not surprisingly, the trial court denied the petition as untimely. Pet.App.82a. White compounded his timeliness problem by failing to timely appeal the trial court's dismissal. Not surprisingly, the appellate court rejected the untimely appeal of White's untimely postconviction petition. Pet.App.81a. White never sought review in the Supreme Court of Ohio.

4. To understand what happened in federal court, it is necessary to pause for a moment and say some-

thing about the procedural-default doctrine. That doctrine bars federal courts from awarding habeas relief for claims "that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). For example, if a petitioner fails to timely raise a claim in state court, and if the state court refuses to hear the claim on that basis, the claim is procedurally defaulted.

Federal courts may excuse a procedural default only if the petitioner "can establish 'cause' to excuse the procedural default and demonstrate that he suffered actual prejudice from the alleged error." *Id.* "To establish 'cause,'" a petitioner "must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Id.* at 2065 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Because the conduct of one's lawyer is *usually* attributed to his client, the poor performance of a lawyer *usually* does not constitute "cause" sufficient to excuse a procedural default.

But there is a narrow exception to this rule. In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court recognized that the general rule disadvantages petitioners convicted in States that forbid defendants from raising ineffective-assistance-of-*trial*-counsel claims on direct appeal. In those States, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 11. As a result, a petitioner convicted in one of these States, if he defaults such a claim because he lacks effective state-postconviction counsel, might be barred from ever obtaining an adjudication of his claim, no matter how meritorious it might be.

To avoid this, the Court carved out a narrow exception available to such petitioners. These parties may establish "cause" to excuse a default by establishing that they had:

(1) an ineffective-assistance-of-trial-counsel claim that was "substantial," in the sense of having "some merit"; and

(2) either no counsel during state-postconviction proceedings, or counsel that "was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668."

Martinez, 566 U.S. at 14. Soon after announcing its decision in *Martinez*, the Court expanded the opinion's scope in *Trevino v. Thaler*, 569 U.S. 413, 423 (2013). *Martinez* initially applied only to petitioners convicted in States where it is *impossible* to raise an ineffective-assistance claim on direct appeal. *Trevino* expanded the exception so that it now applies to petitioners convicted in States whose "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." *Id.* at 429 (emphasis added). Thus, after *Trevino*, the *Martinez* exception applies to petitioners who could have raised, but would have had too hard a time raising, an ineffective-assistance claim on direct appeal.

Martinez and *Trevino*, by their express terms, pertain only to the "cause" component of the cause-and-prejudice test—neither opinion purports to modify the "prejudice" component. As will become clear later, however, some courts read *Martinez* and *Trevino* to implicitly modify, or altogether eliminate, the

"prejudice" component of the cause-and-prejudice test. In these courts, a petitioner who satisfies the *Martinez* test is entitled to have his default forgiven.

5. Now return to White's federal proceedings. After the District Court denied him relief on the merits, he appealed to the Sixth Circuit. And after the parties filed their briefs, the Sixth Circuit appointed counsel for White and ordered both sides to submit supplemental briefs. The court asked for more briefing "on the merits of the underlying conflict-of-interest-of-trial-counsel claim." Order, Doc. 23-2. The court also requested "supplemental briefing on what, if any, effect *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), have on the resolution of the instant petition, including the possibility of supplementing the record." *Id.*

White's supplemental brief addressed *Martinez* and *Trevino* primarily in a footnote in the summary of argument. That footnote said, in relevant part:

> any failure by [White's] attorneys to preserve [his] federal rights in Ohio's courts constitutes sufficient cause to excuse the procedural default on habeas review. *Cf.*, *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012); *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911 (2013).

Supp. Br., Doc. 31, at 8–9, n.3 (6th Cir.). White's brief also asserted, with a citation to *Martinez*, that his "trial attorney's and appellate counsel's failure to complete or supplement the record on appeal, or to file a timely State post-conviction petition, constitute[d] a Sixth Amendment violation sufficient to permit federal habeas review." *Id.* at 18. The brief did not otherwise address *Martinez* or *Trevino*—it

said nothing else about the relevance of *Martinez* and *Trevino* to this case, and it never addressed their relation to the procedural-default doctrine or their impact on the cause-and-prejudice test.

In response, the Warden argued that White procedurally defaulted the ineffective-assistance-of-trial-counsel claim because he never properly raised it in state court. Supp. Br., Doc. 34, at 33–34, n.4 (6th Cir.). In addition, the Warden argued that the narrow *Martinez* exception did not excuse the default. Supp. Br., Doc. 34, at 34 & n.5. Again, that exception applies only in cases where state law did not allow the petitioner to raise the ineffective-assistance-of-trial-counsel claim until state-postconviction proceedings. *Trevino*, 569 U.S. at 423. And, as the Sixth Circuit had previously recognized, Ohio's "bifurcated review process" *does* allow petitioners to press ineffective-assistance-of-trial-counsel claims on direct review. Supp. Br., Doc. 34, at 34 & n.5 (citing *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013)). Therefore, the Warden argued, the *Martinez* exception was "not applicable." *Id.*, at 34 n.5.

The Sixth Circuit vacated and remanded. It agreed with the Warden that White procedurally defaulted his claim by failing to properly raise it in state-court proceedings. Pet.App.8a–9a. But the court determined that White's procedural default could be excused under the narrow *Martinez* exception. *Martinez*, the Sixth Circuit reasoned, applied to White's case because Ohio law effectively barred White from raising his ineffective-assistance-of-trial-counsel claim on direct appeal. Pet.App.11a–15a. And White satisfied *Martinez*'s requirements: (1) he had an ineffective-assistance-of-trial-counsel claim that was "substantial" in the sense of being "not

without 'any merit'"; and (2) he "was without counsel during his state collateral proceedings." Pet.App.10a–11a (internal quotation omitted).

As noted above, petitioners who can make the *Martinez* showing establish "cause" to excuse a procedural default. Federal courts will excuse a procedural default only if the petitioner "can establish 'cause' to excuse the procedural default *and* demonstrate that he suffered actual prejudice from the alleged error." *Davila*, 137 S. Ct. at 2062 (emphasis added). But the Sixth Circuit did not conduct an actual-prejudice inquiry. Instead, it concluded that White was entitled to have his procedural default forgiven simply by establishing "cause" under *Martinez*. In so holding, the Court relied on a Third Circuit decision and a now-rejected portion of a plurality opinion from the *en banc* Ninth Circuit. Both opinions state that a petitioner who satisfies *Martinez*'s "some merit" showing is not required to make any other showing of prejudice to have his default forgiven. Pet.App.15a (citing *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (*en banc*) (plurality); *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 940 (3d Cir. 2019)).

After holding that White was entitled to have his procedural default forgiven, the Sixth Circuit remanded the case to the District Court, with instructions to review *de novo* the merits of White's ineffective-assistance claim.

6. The Warden petitioned for *en banc* review, arguing that habeas petitioners who satisfy *Martinez* must prove actual prejudice to have their procedural defaults forgiven. The Sixth Circuit denied the Warden's *en banc* petition on November 20, 2019. Its or-

der stated that the original panel concluded "that the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet.App.127a. The Warden, after obtaining a stay of the mandate, timely filed this petition for a writ of *certiorari*.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to resolve a multi-dimensional circuit split concerning *Martinez v. Ryan*, 566 U.S. 1 (2012). The issue is important. It affects the ease with which habeas courts can intrude on state sovereignty by upending state convictions based on legal errors never presented to a state court. And the question is more important today than it was the day this Court decided *Martinez* because of *Trevino v. Thaler*, 569 U.S. 413 (2013). That case drastically (and indeterminately) expanded the number of States whose laws may give rise to *Martinez* claims. While *Martinez* itself created an exception applicable only to petitioners convicted in States that *prohibit* raising ineffective-assistance claims on direct appeal, *Trevino* expanded the exception to cover petitioners convicted in States whose laws make it *difficult* to raise an ineffective-assistance claim on direct appeal.

In sum, this case presents a clean vehicle for resolving a circuit split on an issue that greatly affects the States. This Court should grant review.

I. The circuits are split regarding whether and how the actual-prejudice requirement applies in *Martinez* cases.

If a petitioner defaults an ineffective-assistance-of-trial-counsel claim with "some merit," does *Mar-*

tinez v. Ryan allow a federal court to excuse the procedural default without requiring any further showing of prejudice? The circuits have answered this question in various, inconsistent ways. This Court should grant *certiorari* to restore uniformity to the law.

A. *Martinez* creates a narrow exception to the procedural-default doctrine.

This case involves two general rules and two narrow exceptions to those rules.

The first general rule is that federal courts cannot award habeas relief to petitioners based on procedurally defaulted claims. In other words, they cannot generally award habeas relief based on legal theories "that a state court refused to hear based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017).

The exception to this first rule is the "cause and prejudice" exception. Under that exception, federal courts may entertain procedurally defaulted claims *if* the petitioner "can establish 'cause' to excuse the procedural default and demonstrate that he suffered actual prejudice from the alleged error." *Id.* "[C]ause under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). To show "prejudice," the petitioner must prove more than "a *possibility* of prejudice"; he must show that the alleged errors "worked to his *actual* and substantial disadvantage." *United States v. Frady*, 456 U.S. 152, 170 (1982).

The second general rule is that inadequate performance of state-postconviction counsel is not "cause" for procedural-default purposes. *Davila*, 137 S. Ct. at 2062. In other words, if a habeas petitioner procedurally defaults a claim by failing to timely raise it in his state-postconviction proceedings, he cannot generally avoid default by invoking postconviction counsel's performance, no matter how bad it might have been. *Id.* This general rule follows from the principle that "cause," in the procedural-default context, must be an "objective factor external to the defense" that caused the default. *Id.* at 2065 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner." *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). The actions of postconviction counsel, however, are *not* external to the defense; under "well-settled principles of agency law," any ineffectiveness on the part of state-postconviction counsel is imputed to the petitioner. *Coleman*, 501 U.S. at 753–54.

There is a "narrow" exception to this second general rule. *Martinez*, 566 U.S. at 9; *accord Trevino*, 569 U.S. 413. Under this Court's decisions in *Martinez* and *Trevino*, a petitioner who was effectively prohibited by state law from raising an ineffective-assistance-of-*trial* counsel claim on direct appeal, and who procedurally defaulted the claim by failing to properly raise it in state-postconviction proceedings, can establish "cause" to excuse that default by showing that he:

(1) had an ineffective-assistance-of-trial-counsel claim that was "substantial," in the sense of having "some merit," and

(2) either no counsel during state-postconviction proceedings, or counsel that "was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668."

Martinez, 566 U.S. at 14; *accord Trevino*, 569 U.S. at 423. The first of these prongs, at least, is easily satisfied. Unless the underlying claim "does not have any merit or … is wholly without factual support," courts will deem it "substantial." *Martinez*, 566 U.S. at 16. Many courts analogize this to the easily-met standard for securing a certificate of appealability in a habeas case. *See, e.g.*, *Ramirez v. Ryan*, 937 F.3d 1230, 1241 (9th Cir. 2019); *Hittson v. GDCP Warden*, 759 F.3d 1210, 1269 (11th Cir. 2014); *Cox v. Horn*, 757 F.3d 113, 119 (3d Cir. 2014).

Martinez created this narrow exception to fix a perceived inequity for petitioners convicted in States that forbid defendants from raising ineffective-assistance-of-*trial*-counsel claims on direct appeal. In those States, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Martinez*, 566 U.S. at 11. And defendants "are generally ill equipped to represent themselves" in these *de facto* appeals, "because they do not have a brief from counsel or an opinion of the court addressing their claim of error." *Id.* (internal quotation omitted). As a result, convicted criminals who have no postconviction counsel, or who receive inadequate assistance from postconviction counsel, are at a heightened risk of procedurally defaulting their ineffective-assistance-of-*trial*-counsel claims. If they do indeed procedurally default the claim, then there is a good chance no court will ever address the claim, no matter how meritorious it might be. The narrow *Martinez* excep-

tion ensures that petitioners can establish "cause" based on the absence or ineffective performance of state-postconviction counsel.

B. The circuits are split regarding whether a petitioner who defaults a claim with "some merit" must show any further prejudice to have his default excused.

Martinez purports to modify *only* the "cause" component of the cause-and-prejudice test. It "does not address—let alone modify—the standard's prejudice prong." *Detrich v. Ryan*, 740 F.3d 1237, 1260 (9th Cir. 2013) (*en banc*) (Nguyen, J., concurring in judgment). Nonetheless, the circuits are split regarding whether a petitioner who satisfies *Martinez*'s "some merit" requirement must make any additional showing of prejudice before having his procedural default excused.

1. The Fifth, Ninth, and Eleventh Circuits always or usually (depending on the circuit) require *Martinez* petitioners to show actual prejudice over and above the "some merit" requirement.

In at least three circuits—the Fifth, Ninth, and Eleventh Circuits—a petitioner seeking to excuse a procedural default under *Martinez* must show prejudice over and above *Martinez*'s "some merit" requirement. But these circuits disagree among themselves regarding what that further showing entails and how it relates to the cause-and-prejudice standard.

Eleventh Circuit. In the Eleventh Circuit, a petitioner who satisfies *Martinez*—a petitioner with a "substantial" ineffective-assistance-of-trial-counsel claim that he defaulted because he had either no counsel or ineffective counsel during state-postconviction proceedings—establishes *only* "cause." *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957–58 (11th Cir. 2016). To have his default excused, the petitioner must additionally satisfy the prejudice component of the cause-and-prejudice test: "In order to establish prejudice to excuse a default, the petitioner must show 'that there is at least a reasonable probability that the result of the proceeding would have been different' absent the constitutional violation." *Id.* at 957 (citation omitted). Thus, the court in *Raleigh* rejected the petitioner's *Martinez* claim after concluding that the petitioner "was not prejudiced by his collateral counsel's failure to raise" the underlying ineffective-assistance-of-*trial*-counsel claim. *Id.* at 958; *cf. Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 689–91 (11th Cir. 2017).

Other courts and judges have embraced the same approach, though not in binding opinions. In dicta, the Eighth Circuit once explained: "Under the *Martinez* rule, state collateral counsel's ineffectiveness in failing to raise a viable claim of ineffective assistance by trial counsel can serve as cause to overcome the procedural default. If the habeas claimant *can also show prejudice*, the procedural default may be excused …" *United States v. Lee*, 792 F.3d 1021, 1024 (8th Cir. 2015) (citation omitted). And in an opinion concurring in the result of the *en banc* Ninth Circuit, Judge Nguyen explained that *Martinez* did "not address—let alone modify—the [cause-and-prejudice] standard's prejudice prong."

Detrich, 740 F.3d at 1260 (Nguyen, J., concurring in the result). "Rather, the Supreme Court created a 'narrow exception' to 'modify the unqualified statement … that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as *cause* to excuse a procedural default." *Id*. at 1261 (quoting *Martinez*, 132 S. Ct. at 1315). This means that petitioners who satisfy *Martinez* must separately prove actual prejudice. *Id*. at 1261–62.

This approach contradicts the Sixth Circuit's decision below, which excused White's procedural default without requiring him to show actual prejudice.

Ninth Circuit. In the Ninth Circuit, *Martinez* applies differently depending on whether the petitioner had state-postconviction counsel. Petitioners seeking to invoke *Martinez* based on the *ineffective* performance of postconviction counsel must demonstrate "a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Ramirez*, 937 F.3d. at 1241 (quoting *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014)). In contrast, petitioners who *lacked* state-postconviction counsel need not make any showing of prejudice beyond *Martinez*'s "some merit" requirement. *See Rodney v. Filson*, 916 F.3d 1254, 1260 n.2 (9th Cir. 2019). This rule derives from the Ninth Circuit's unique interpretation of *Martinez* and *Trevino*—an interpretation that takes some unpacking.

Begin by considering again *Martinez*'s elements.

(1) the petitioner must point to an ineffective-assistance-of-trial-counsel claim that was "substantial," in the sense of having "some merit"; and

(2) the petitioner must demonstrate that he had either no counsel during state-postconviction proceedings, or counsel that "was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668."

Martinez, 566 U.S. at 14; *accord Trevino*, 569 U.S. at 423.

According to the Ninth Circuit, the first of these requirements suffices to establish "'prejudice' for purpose of the … cause and prejudice' analysis in the *Martinez* context." *Clabourne*, 745 F.3d at 377; *accord Ramirez*, 937 F.3d at 1241. Thus, if a habeas petitioner in the Ninth Circuit shows that his underlying ineffective-assistance-of-*trial* counsel claim has "some merit"—if the claim is neither without "any merit" nor "wholly without factual support"—he has satisfied the prejudice component of the cause-and-prejudice test. *Ramirez*, 937 F.3d at 1241 (quoting *Martinez*, 566 U.S. at 14–16).

The Ninth Circuit has determined that this reduced prejudice showing follows from *Martinez* itself. If petitioners may have their procedural defaults excused only upon a showing of actual prejudice, the argument goes, then *Martinez*'s some-merit requirement would be superfluous. *See Detrich*, 740 F.3d at 1245–46 (*en banc*) (plurality op.). Judge Nguyen, in the opinion discussed above, exposed the flaw in this logic. She explained that retaining the actual-prejudice standard *would not* make the "some merit" decision superfluous. To the contrary, the "some merit" requirement would serve to efficiently structure the cause-and-prejudice test: "Only if" the petitioner's "claim is substantial and *Martinez*'s other cause requirements are met must the federal court

perform" the "more searching prejudice inquiry." *Id.* at 1261 (Nguyen, J., concurring in judgment).

Notwithstanding its watering down of the prejudice component of the cause-and-prejudice test, the Ninth Circuit still requires most petitioners to prove actual prejudice in order to have a procedural default excused under *Martinez*. Why? Because *Martinez* incorporates the ineffective-assistance standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and *Strickland* contains an actual-prejudice requirement of its own. Again, *Martinez* applies in cases where state-postconviction counsel "was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668." *Martinez*, 566 U.S. at 14. And to prove ineffectiveness under *Strickland v. Washington*, the aggrieved party must show that his attorney performed deficiently *and* that he was prejudiced by the deficient performance. *See Strickland*, 466 U.S. at 687. Translated to the *Martinez* context, this means that petitioners seeking to excuse a procedural default based on state-postconviction counsel's ineffectiveness "must demonstrate … 'that *both*'": "(a) postconviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the postconviction proceedings would have been different." *Ramirez*, 937 F.3d. at 1241 (quoting *Clabourne*, 745 F.3d at 377).

By incorporating both prongs of *Strickland* into the "cause" component of the cause-and-prejudice test, the Ninth Circuit bakes an actual-prejudice showing into the "cause" component of the cause-and-prejudice test. This might suggest that the Ninth Circuit's approach to the "prejudice" component is irrelevant. After all, what difference does it

make whether the Ninth Circuit considers actual prejudice as part of the "cause" or "prejudice" component of the cause-and-prejudice test?

In most cases, the difference is strictly formal. But the difference matters in *Martinez* cases resting on the *absence*, rather than the *ineffectiveness*, of state-postconviction counsel. Again, those seeking to invoke the *Martinez* exception can do so based on state-postconviction counsel's ineffectiveness. But they can also do so by showing that they had "no counsel … during" state-postconviction proceedings. *Trevino*, 569 U.S. at 423 (quotation marks omitted). Of course, *Strickland* has no bearing on this latter class of petitioners—petitioners who had *no* state-postconviction counsel cannot, and need not, show that their state-postconviction attorney "was ineffective under the standards of *Strickland*." *Martinez*, 566 U.S. at 14. Accordingly, in the Ninth Circuit, that narrow class of petitioners is not required to show prejudice under *Strickland* and thus not required to show any "prejudice over and above" *Martinez*'s "some merit" showing. *Rodney*, 916 F.3d at 1260 n.2.

The Fifth Circuit. The Fifth Circuit requires petitioners to prove prejudice in addition to the "some merit" showing. But the court's approach to evaluating prejudice varies across cases. In *some* cases, the court's approach resembles that of the Eleventh Circuit. In *Canales v. Stephens*, for example, the court explained that a petitioner seeking to have his default excused had to first "prove prejudice as a result of his trial counsel's deficient performance," even though he had already shown that his claim had "some merit." 765 F.3d 551, 571 (5th Cir. 2014).

In other cases, the Fifth Circuit applies a framework that looks more like the Ninth Circuit's. Take, for example, *Wessinger v. Vannoy*, 864 F.3d 387 (2017), and *Newbury v. Stephens*, 756 F.3d 850 (5th Cir. 2014) (*per curiam*). In those cases, the court assessed actual prejudice as part of the *Strickland* analysis baked into *Martinez* itself. Each case thus required the petitioner to show "'a reasonable probability that he would have been granted state habeas relief' if not for counsel's deficiency." *Wessinger*, 864 F.3d at 391 (quoting *Newbury*, 756 F.3d at 871–72). Insofar as the Fifth Circuit requires an actual-prejudice showing only in *Martinez* cases where the petitioner had state-postconviction counsel, that circuit, like the Ninth, would require no showing of actual prejudice in cases where the petitioner had no counsel during state-postconviction proceedings.

2. The Third, Sixth, and Seventh Circuits hold that *Martinez* eliminated any prejudice requirement.

In the Third, Sixth, and Seventh Circuits, a petitioner who shows that his ineffective-assistance-of-trial-counsel claim has "some merit" can have his default excused under *Martinez* without any additional showing of prejudice. *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017); *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 939 (3d Cir. 2019); Pet.App.15a.

Each of these circuits interprets *Martinez* and *Trevino* as effectively eliminating the "prejudice" component of the cause-and-prejudice test. These circuits will excuse a habeas petitioner's procedural default if he can make two showings. *First*, he must

show that his underlying ineffective-assistance-of-trial-counsel claim has "some merit." *Brown*, 847 F.3d at 513, 514–15; *accord* Pet.App.10a, 15a; *Workman*, 915 F.3d at 941. *Second*, the petitioner must show that he had no counsel during state-postconviction proceedings, or that state-postconviction counsel rendered "deficient performance" under *Strickland*'s "first prong." *Brown*, 847 F.3d at 513, 514–15; *accord* Pet.App.11a. Any petitioner who makes these two showings is entitled to have his procedural default excused—he need not prove "actual prejudice."

This approach effectively reads the prejudice component out of the cause-and-prejudice test. Whereas most habeas petitioners in the Third, Sixth, and Seventh Circuits must show actual prejudice to have their procedural defaults excused, petitioners seeking to have their defaults excused under *Martinez* do not.

* * *

Whatever *Martinez* requires, it should require the same thing in every circuit in the country. That is not the state of the law today. The Court should grant *certiorari* to resolve the split.

II. This is a good vehicle for addressing the question presented.

This case is an appropriate vehicle for addressing the question presented. There are a few reasons why.

First, the case cleanly poses the question presented because the Sixth Circuit did not address actual prejudice *at all*. If it had, there would be a risk that the actual-prejudice finding might moot the question

whether petitioners must prove actual prejudice in the first place. Since the Sixth Circuit did not address actual prejudice, that risk does not arise here—though it might arise in future cases about the same circuit split.

Second, White had no state-postconviction counsel. Pet.App.11a. As a result, this case presents all of the circuit split's aspects. To see why, recall that there are at least three ways of thinking about the interaction between *Martinez* and actual prejudice. Under the first approach, *Martinez* petitioners must show prejudice over and above the "some merit" showing to meet the cause-and-prejudice standard's prejudice prong. That is the rule in the Eleventh Circuit and also (perhaps) in the Fifth and Eighth Circuits. Under the second approach, petitioners must show actual prejudice in the course of showing that postconviction counsel was ineffective. That approach, adopted by the Ninth Circuit (and perhaps the Fifth), means that *Martinez* petitioners must show prejudice beyond the some-merit showing *if and only if* they were represented by postconviction counsel; petitioners who represented themselves in state-postconviction proceedings can have their defaults forgiven without showing actual prejudice. Under the third approach, the "some merit" requirement in *Martinez* establishes all the prejudice that is required. That is the rule in the Third, Sixth, and Seventh Circuits.

Because White had no state-postconviction counsel, all three of these options are on the table. The Court could reverse the Sixth Circuit for failing to require a showing of actual prejudice. It could affirm the Sixth Circuit on the ground that the "some merit" showing satisfies the cause-and-prejudice standard's

actual-prejudice requirement. Or the Court could affirm on the ground that White, because he represented himself *pro se* in his state-postconviction proceedings, was not required to show actual prejudice.

Finally, this case presents no procedural barriers that would keep the Court from addressing the circuit split. In his response to the Warden's *en banc* petition, White suggested that the Warden waived any argument about the application of *Martinez* by "failing to mention" the case in his supplemental briefing. Petr's *en banc* BIO, Doc.41, 3, 7–9 (6th Cir.). More precisely, White argued that the Warden showed a lack of "professional respect," and engaged in "contemptuous" conduct, by failing to "mention" *Martinez* at the supplemental-brief stage. *Id.* But the Warden *did* address *Martinez* in his supplemental briefing. Specifically, the Warden argued that the narrow *Martinez* exception was unavailable to Ohio petitioners because Ohio allows defendants to raise ineffective-assistance claims on direct review. *See above* 9–10.

True, the Warden's supplemental briefing never addressed whether petitioners who make the *Martinez* showing are entitled to have their procedural defaults excused without regard to whether they can establish actual prejudice. But the Warden can hardly be faulted for that. Neither White nor the Sixth Circuit's supplemental briefing order raised the issue. Indeed, White himself, in the brief to which the Warden was responding, addressed *Martinez* and *Trevino* only twice: first in a "cf." citation buried in a footnote, and second in a sentence suggesting that White's trial and direct-appeal lawyers violated the Sixth Amendment by failing to "file a timely State post-conviction petition." *See above* 9–

10. White never argued that *Martinez* or *Trevino* eliminated the actual-prejudice component of the cause-and-prejudice test. Once the Sixth Circuit reached the issue *sua sponte* in its opinion, the Warden filed a rehearing petition arguing that White had to show actual prejudice to have his procedural default excused. The Court's order denying *en banc* review stated that the panel "fully considered" this issue "upon the original submission and decision of the case." Pet.App.127a.

Regardless, any waiver would be irrelevant in this Court. This Court is "free to address" any issue "addressed by the court below," without regard to whether the parties raised the issue in the lower court. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *accord Va. Bankshares v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). Since the Sixth Circuit "passed on the issue presented" when it awarded White relief without requiring any showing of actual prejudice, the question whether habeas petitioners must make such a showing is fairly presented for this Court's review. *Va. Bankshares*, 501 U.S. at 1099 n.8.

III. The question whether and how the actual-prejudice requirement applies in *Martinez* cases is exceptionally important.

Habeas relief is available only rarely. Rightly so. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (internal quotation omitted). It also "disturbs the State's significant interest in repose for concluded litigation, denies society the right to pun-

ish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* (internal quotation omitted).

The procedural-default doctrine accords with these principles. "That doctrine, like the federal habeas statute generally, is designed to ameliorate the injuries to state sovereignty that federal habeas review necessarily inflicts by giving state courts the first opportunity to address challenges to convictions in state court, thereby 'promoting comity, finality, and federalism.'" *Davila*, 137 S. C.t at 2070 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011)). The doctrine stands for the modest proposition that federal courts should not upend state convictions based on alleged constitutional violations that the habeas petitioner failed to properly raise in state court.

Martinez forms an exception to this sovereignty-protecting doctrine. And the exception invades sovereignty to a greater degree today than it did on the day *Martinez* was decided. The reason is *Trevino*, which made *Martinez* applicable even to petitioners convicted in States where it is possible, though difficult, to raise an ineffective-assistance claim on direct appeal. *Trevino*, 569 U.S. at 429. Because of *Trevino*, the *Martinez* exception applies to many more petitioners today than it did on the day it was decided. *Trevino*, 569 U.S. at 433 (Roberts, C.J., dissenting). That makes the scope of the sovereignty-invading exception all the more important.

The issue is more important still because many circuits are misapplying *Martinez*. First, the approaches adopted by the Third, Sixth, Seventh, and Ninth Circuits (at least) ignore the fact that *Martinez*

modifies only the "cause" component of the cause-and-prejudice standard. *Martinez* "does not address—let alone modify—the standard's prejudice prong." *Detrich*, 740 F.3d at 1260 (Nguyen, J., concurring in judgment). Yet each of these circuits read *Martinez* to eliminate the actual-prejudice requirement.

In addition, the Third, Sixth, and Seventh Circuits are applying *Martinez* in a manner that contradicts this Court's characterization of *Martinez* as a "narrow exception" to the procedural-default doctrine. 566 U.S. at 9. If petitioners need not make any showing of prejudice beyond identifying an ineffective-assistance-of-counsel claim that is not *entirely* meritless, the exception is "broad," not "narrow."

Finally, there is the Ninth Circuit's approach, which allows petitioners who represented themselves *pro se* in state-postconviction proceedings to have their defaults excused without a showing of actual prejudice. That contradicts *Martinez*'s insistence that it was not requiring States to appoint counsel for state-postconviction proceedings. *Id.* at 16. If the Ninth Circuit's rule is right, States that funnel ineffective-assistance claims to postconviction proceedings will face strong pressure to appoint state-postconviction counsel. If they fail to do so, then every petitioner who declines to retain his own state-postconviction lawyer will be entitled to have his default forgiven upon satisfying the easy-to-meet "some merit" requirement. Thus, every State subject to *Martinez* that fails to appoint state-postconviction counsel risks having its convictions reviewed *de novo* in federal court.

At the very least, there is a significant probability that many courts are misapplying *Martinez* by improperly broadening its narrow exception. That makes review especially appropriate. Any expansion of "the narrow exception announced in *Martinez* [] unduly aggravate[s] the 'special costs on our federal system' that federal habeas review already imposes." *Davila*, 137 S. Ct. at 2070 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). But even if the circuits that read *Martinez* to eliminate the actual-prejudice requirement were correct, it would be important to say so definitively. The law ought to apply uniformly throughout the country.

CONCLUSION

The Court should grant the petition for *certiorari*.

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