No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Michael Boykin — PETITIONER
(Your Name)

VS.

Mark Inch, Sec. Fla. Dep't Corr. — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Florida Fifth District Court of Appeal

_____

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

Michael Boykin
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Michael Boykin, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 0	$ 0	$ 0	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Incarcerated since 2005			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Incarcerated since 2005			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
	$	$
	$	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description NONE
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: _____	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: _____	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

i have been incarcerated for over 15 years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 14, , 20 20

Michael Boykin
(Signature)

No. _____

In The

Supreme Court of the United States

MICHAEL BOYKIN,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
United States Court of Appeals,
Eleventh Circuit
No. 18-13713

PETITION FOR WRIT OF CERTIORARI

GRAY R. PROCTOR
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Richmond, VA 23219
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Attorney for Petitioner

QUESTION PRESENTED

1. Whether the circuit court erred by denying a certificate of appealability for an ineffective assistance claim because the omitted evidence was inadmissible hearsay, where the statement would not have been offered for its truth?

2. Whether courts can invoke the "cumulative evidence" doctrine to find no prejudice where the evidence, although tending to prove the same proposition as other items of evidence, nevertheless creates a reasonable probability of a different result?

3. Whether, for the purposes of 28 U.S.C. § 2254(e)(2), a petitioner culpably fails to develop the record of his substantive and procedural claims when he argues that postconviction counsel rendered ineffective assistance, pursuant to *Martinez v. Ryan*?

Additionally, this case depends on the standard for determining whether *Martinez v. Ryan* applies, which this Court may consider in *Warden, Ross Correctional Inst. v. White*, No. 19-1023. This petition should not dismissed before *White* is decided.

LIST OF PARTIES

All parties appear in the caption.

LIST OF PROCEEDINGS BELOW

State Trial Court:

State of Florida v. Michael Boykin, No. 2005-CF-3330-O/B

Conviction: October 10, 2006

Denial of Postconviction Motion (Rule 3.850): January 1, 2013

Motion to Correct Illegal Sentence/Jail Credit: Filed May 5, 2008; Granted May 22, 2015

State Appellate Courts:

Direct Appeal (Affirmed): Boykin v. State, 5D06-4380, 974 So. 2d 1080 (Feb. 19, 2008).

Petition Alleging Ineffective Assistance of Appellate Counsel (Denied): Boykin v. State, 5D10-0690 (July 14, 2010).

Appeal of Denial of Rule 3.850 Petition (Affirmed): Boykin v. State, 5D13-0770 (Oct. 8, 2014)

Federal Courts:

Boykin v. Secretary, 6:16-cv-883 (M.D. Fla. Pet. Denied Aug. 7, 2018)

Boykin v. Secretary, 18-13713 (11th Cir. COA Denied Dec. 9, 2019)

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The order denying a certificate of appealability is unpublished, and reproduced at pages 8-15 of the Appendix. The order dismissing the federal habeas petition is unpublished, and reproduced at pages 39-49 of the Appendix.

Because Mr. Boykin's federal habeas claims were not raised in the state court, state postconviction proceedings are omitted from the appendix. The opinion affirming the denial of his state postconviction motion is available at Boykin v. State, 123 So. 3d 579 (Fla. 5th DCA 2013). The trial court's order is unpublished.

JURISDICTION

Mr. Boykin seeks review of the decision of the United States Court of Appeals for the Eleventh Judicial Circuit, denying a motion for a certificate of appealability. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2253(c) provides in relevant part that:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(e) provides in relevant part that:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A)the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Sixth Amendment provides in relevant part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Florida statutes provide the following definition of hearsay:

> **(1)** The following definitions apply under this chapter:
>
> **(a)** A "statement" is:
>
> **1.** An oral or written assertion; or
>
> **2.** Nonverbal conduct of a person if it is intended by the person as an assertion.
>
> **(b)** A "declarant" is a person who makes a statement.
>
> **(c)** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Fla. Stat. § 90.801

STATEMENT OF THE CASE

In his Section 2254 petition, Petitioner Michael Boykin raises five claims of ineffective assistance of trial counsel. None of these claims were raised in his counselled state motion for postconviction relief. Therefore, Mr. Boykin's claims are all procedurally defaulted unless postconviction counsel rendered ineffective assistance by failing to raise those claims. *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court held that Mr. Boykin's underlying claims were not "substantial" for the purposes of *Martinez*, and the Eleventh Circuit Court of Appeals denied his motion for a certificate of appealability.

Mr. Boykin was convicted of the first-degree murder of Trumain Lee. Claims 1-4 on federal habeas review relate to trial counsel's failure to investigate, cross-examine, and produce a witness to rebut the only direct evidence of Mr. Boykin's guilt: testimony by Robert Walyus, the roommate of his co-defendant Luis Batiz. Claim 5 raises counsel's failure to introduce out-of-court statements by Batiz indicating that Trumain Lee's brother was a vicious killer, and that Batiz feared retaliation for disrespecting Trumain. The district court did not permit Mr. Boykin to expand the record, engage in discovery, or hold an evidentiary hearing.

I. Trial, conviction, and direct appeal.

Central to this case are four friends who attended a holiday party at student apartments near the University of Central Florida ("UCF"). The host, Ashley Albritton, lived at the Pegasus Connection Complex, and hosted a string of parties over the 2004-05 winter break. Her friends Shannon Aurand and Luis Batiz lived (separately) at an adjacent complex, Addison Place. The fourth friend, eighteen-year-old Michael Boykin, lived in Pegasus Connection with his childhood friend Terrence Banks.

Testimony from Ashley, Shannon, and Michael Boykin are in general agreement on the following events. The four expected to close out the night together, as they'd done before, and Mr. Boykin would stay with one of them. The party wound down, but an unwanted guest remained: sixteen-year-old newcomer Trumain Lee, who'd met Shannon Aurand through Terrence Banks and arrived with him. Trumain was romantically interested in Shannon. Shannon and Mr. Lee had bought cocaine from Luis Batiz and shared it earlier that night. Shannon, however, decided she did not know Trumain well enough to let him stay with her. Ashley had Batiz ask Trumain to leave, and Batiz, Boykin, and

Trumain left together around 4 a.m. Batiz and Mr. Boykin returned to Ashley's a few hours later. Shannon saw a cut on Mr. Boykin's hand after he came back, while Ashley noticed that he was clenching his fist.

The physical evidence leaves no real doubt that Trumain Lee was stabbed to death, in the early hours of December 31, 2004, at the apartment of Luis Batiz. Trumain's body was recovered from nearby Lake Harney a few days later.

The only direct evidence of Mr. Boykin's involvement came through the testimony of Batiz's roommate, Jonathan Walyus. Walyus claimed he awoke to find Batiz and Mr. Boykin in the bedroom, speaking in low voices. He kept his eyes closed and, eavesdropping, heard Mr. Boykin say that he had to kill someone. He listened as Mr. Boykin left the apartment, and while Batiz asked Trumain whether Mr. Boykin had any reason to be angry with him. According to Walyus, when Mr. Boykin returned, he heard Trumain Lee saying that he "thought we were cool" and pleading to talk, and Batiz replying that "I'm sorry, this is out of my control, I'd love to talk, you've done something to Mike and I can't help you." He heard punching sounds and a faint scream.

Walyus claimed that, after the killing, he heard Michael wash his hands and tell Batiz he'd be right back. Batiz scrubbed with bleach until Mr. Boykin returned, at which point they left the apartment, and Walyus heard car doors close and a car speed off. Walyus arose from bed and found blood on the couch and on the carpet near the front door, along with a few drops in the bathroom. According to Walyus, they returned forty-five minutes to an hour later, as he lay in bed pretending to sleep until it was time to leave for work. (D.E. 14-3, at 21-33).

The jury would not hear that Walyus, a convicted sex offender, was violating his residency restrictions and the terms of Batiz's lease by living with him. Similarly, the jury never learned that Walyus was also an epileptic who took a memory-impairing drug called Dilantin to control his symptoms.

Beyond that, there were a few items of circumstantial evidence linking Batiz to the murder. Cell phone records would place Batiz in the Lake Harney area at 6:40 a.m. on December 31, 2004. Shoe prints at the scene matched a pair found at his apartment (size 10 shoes, not Mr. Boykin's size 12). Shannon Aurand testified that although he did not disclose any details, Batiz discussed killing and told her "I've done stuff

like this before and they'll probably never catch me." (D.E. 14-3, at 9). Batiz had scratches on his back and shoulders, which he would attribute to sex with his girlfriend. And after the investigation became common knowledge, the four friends agreed to tell the police that neither Boykin nor Batiz ever left the apartment. They would persist in this story during the investigation for a time, and Shannon would be arrested for perjury after police verified that she'd lied about buying cocaine from another individual rather than Batiz.

As for Mr. Boykin, he had the cut on his pinky finger, and a DNA test pointed to Mr. Boykin as the source of a spot of blood near the door outside of Batiz's apartment. However, the State's DNA test could not be confirmed by an independent lab, because "most of the sample had been consumed and there was no DNA left for" the lab to analyze. (D.E. 14-4, at 65). Several other drops of blood found in the hallway and on the sidewalk were too degraded to reveal anything other than the sex (male) of the person. (D.E. 14-3, at 130-31, 166).

During his interviews with investigators, Batiz described Trumain Lee's brother as "some kind of some hard-core fucking kills everybody who gets in his brother's way type of deal or shit." (Motion to Expand

Record, D.E. 16-1, at 101). Trumain "thought that I was disrespecting him because I told him he had to leave." (*Id.* at 80). Also during the investigation, police interviewed Donald Gordon, who identified Luis Batiz (who he knew as "Lucifer") as a major drug dealer who had once threatened to cut off Walyus's finger for stealing cocaine from him. He also witnessed Trumain Lee obtain drugs with a person Mr. Lee introduced as his brother. (D.E. 16-4).

Mr. Boykin testified on his own behalf at trial. He explained that Batiz had actually locked Trumain Lee out at the end of the night; Mr. Boykin had let him back in, apologized for the rudeness, and asked Batiz whether Mr. Lee could stay with him that night since Mr. Lee was stranded and his phone had run out its batteries. The three left for the building that Batiz and Terrence Banks lived in. Mr. Boykin cut his hand crossing the fence between complexes; other witnesses would state that this was not an uncommon occurrence.

After Mr. Boykin got no response from knocking on the door at Terrence Banks's apartment, he bummed a cigarette from Robert Walyus before letting himself into Shannon Aurand's apartment around 4:00 a.m. He woke around 8 a.m., and ran into Batiz in the parking lot on his

way to Batiz's apartment. They went back to Ashley's place instead. After they learned that police were investigating Trumain's death, Luis Batiz asked him and the others to tell police that they'd never left Ashley's apartment that night. To make sure that Batiz would not get in trouble for a crime he'd not committed, Mr. Boykin agreed after Batiz promised him that he'd had nothing to do with the killing.

Mr. Boykin had seen Batiz fight Walyus several times, accusing Walyus of stealing cocaine from him.

The jury convicted Mr. Boykin of first-degree murder, and the state imposed the mandatory life sentence. His conviction and sentence were affirmed *per curiam* without opinion. Batiz would be convicted as an accessory after the fact in a separate trial, and sentenced to thirty years.

II. State Postconviction Review.

Mr. Boykin raised six claims of ineffective assistance of trial counsel in a counselled state motion for postconviction review, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. Counsel argued:

> 1) Robert Walyus gave improper lay opinion testimony;
>
> 2) That a detective gave improper lay opinion testimony on the depth of the cut on Mr. Boykin's pinky finger;
>
> 3) That trial counsel gave an insufficient *Brady* objection when Ashley Albritton testified at trial that either Batiz or Mr. Boykin stated they'd used bleach to clean a bloodstain from Mr. Boykin's finger;
>
> 4) That trial counsel should not have stipulated to the admission of cell phone records without presenting the custodian;
>
> 5) That trial counsel's motion for judgment of acquittal was insufficient; and,
>
> 6) That trial counsel rendered ineffective assistance by failing to request that jury selection be transcribed for appeal.

(D.E. 14, at 7; Appx. K, at 212-252).

The trial court denied the Rule 3.850 motion in a seven-page order, which was affirmed on appeal in an unreasoned *per curiam* order.

III. Federal Habeas Review.

In his federal habeas petition, Mr. Boykin raised only claims that had not been pressed in his state postconviction motion. He argued that trial counsel rendered ineffective assistance by:

> 1) Failing to elicit that Walyus took Dilantin, a memory-impairing medication, for his epilepsy;
>
> 2) Failing to elicit, except as evidence of bad character, that Walyus was a convicted sex offender living off-lease with co-defendant Batiz at UCF apartments;
>
> 3) Failing to elicit evidence of a voicemail message that Mr. Walyus left for co-defendant Batiz's girlfriend Brittany Shoucair;
>
> 4) Failing to call Donald Gordon as a witness; and,
>
> 5) Failing to introduce an out-of-court statement by Batiz indicating he feared the victim's brother and that the victim felt disrespected by Batiz the night of the party.

Additionally, Mr. Boykin argued in Claim 6 that the cumulative effect of these errors warranted relief. (D.E. 4).

Mr. Boykin acknowledged that his claims had not been brought in state court, but argued that they were not procedurally defaulted pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012) because postconviction

counsel rendered ineffective assistance by failing to raise the claims in state court.

In support of his claims, Mr. Boykin asked the district court to expand the record to include five documents: transcripts of police interviews with Luiz Batiz, Robert Walyus, and Robert Gordon, as well as a transcript Robert Walyus's testimony at Batiz's trial and documents relating to Mr. Batiz's eviction. (D.E. 16). The district court denied the motion to expand the record as premature, but promised that if "the Court determines that the record should be expanded, the parties will be notified." (D.E. 20).

In his reply to the supplemental response to the petition, Mr. Boykin explained that, with respect to Claim 1, he would present evidence of Robert Walyus's medication use the night of Trumain Lee's killing:

> If the Court permits expansion of the record and use of process to secure testimony, a more detailed picture should emerge. For what it's worth, Mr. Walyus was visited at his place of incarceration in Brevard County. After consulting with his attorney, he reneged on an agreement to provide a sworn statement the following day. Should the Court permit expansion of the record, evidence of this will be presented. Mr. Walyus has been released from that period of imprisonment, but

> appears to have been re-arrested in Orange County pursuant to a 2012 warrant for sex offenses. He is currently registered at an address in Orange County.

(App. 51).

The district court denied the petition without permitting any factual development. (App. 39; D.E. 28). The court held without explanation that Mr. Boykin "failed to demonstrate that any of his claims are substantial." In the alternative the Court found that each of the claims failed on the merits; puzzlingly, the district court claimed that Mr. Boykin did not meet his burden to show that the state court decision on each claim was unreasonable. (App. 40-41 (stating that Mr. Boykin's claims were adjudicated on the merits in state court); App. 46-48 (applying Section 2254(d) deference to each claim)). The district court denied a certificate of appealability. The district court did not acknowledge the erroneous standard of review when it was pointed out in the motion to alter or amend the judgment. (App. 31-38).

The Eleventh Circuit Court of Appeals also denied Mr. Boykin a certificate of appealability. With respect to Claim 1, the court found that "Mr. Walyus testified at trial that he was not taking any medication on the night of the murder, so his later use of Dilantin does not establish

deficient performance by Mr. Boykin's trial counsel." (App. 12). Additionally, he could not show prejudice, because "counsel vigorously cross-examined Mr. Walyus's memory of the night of the incident." (App. 12). Claim 2 was rejected because evidence that Walyus was a convicted sex offender would have prejudicial, and additionally because it was cumulative of what the jury was told: that Walyus had a felony conviction, and that Luis Batiz had given him a place to live when he needed one. (App. 12-13). Similarly, the voicemails Mr. Boykin argued counsel should have raised in Claim 3 were cumulative; although they "might have bolstered Mr. Boykin's theory that Mr. Walyus was intimidated into testifying against Boykin, Walyus testified at trial that he was afraid of Mr. Batiz," and trial counsel had "argued that Mr. Walyus's fear of Mr. Batiz influenced his trial testimony. (App. 13).

No COA issued for Claim 4 because, Donald Gordon's statement to police that "Mr. Batiz threatened to cut off Mr. Walyus's finger" was not supported by an affidavit. (App. 14). Moreover, because Mr. Walyus already admitted at trial that he was afraid of Batiz, this evidence was cumulative and therefore its omission was not prejudicial. (App. 14). As for Claim 5, the Eleventh Circuit concluded that Mr. Batiz's statement –

that Trumain's brother was a murderer who killed anyone who got in Trumain's way – would have been inadmissible hearsay. (App. 14). With no deficient performance, there was no prejudice to aggregate for Claim 6, and Mr. Boykin's motion for a COA was dismissed as to all claims.

Mr. Boykin asks the Court to exercise certiorari review, vacate the order of the Eleventh Circuit, and remand with instructions to grant a COA.

REASONS FOR GRANTING PETITION

Although "'this Court is not equipped to correct every perceived error coming from the lower federal courts,'" the Court's attention is warranted here to preserve the appearance of impartiality, correct the "clear misapprehension" of the Court's precedents, and give guidance on a question the Court has left open. *Tolan v. Cotton*, 572 U.S. 650, 659-60 (2014) (citations omitted). In the context of denial of a COA, Mr. Boykin need not show that he will succeed on the merits. Instead, he need only show that the district court's procedural and merits rulings are debatable, such that the appeal "deserve[s] encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003).

I. The Court should grant certiorari because the circuit court erred in holding that a statement by Mr. Boykin's co-defendant was inadmissible hearsay.

The Circuit Court erred in concluding that Mr. Batiz's out-of-court statements would have been inadmissible hearsay.

In Florida, as in the federal system, an out of court statement is not hearsay unless it is "offered in evidence to prove the truth of the matter asserted." § 90.801, Fla. Stat.; *see, e.g., Powell v. State*, 908 So. 2d 1185, 1187 (Fla. 2d DCA 2005) ("An out-of-court statement is not hearsay if it has been offered for a purpose other than proving the truth of its contents."). Because it does not matter whether Trumain really felt disrespected or really was related to a murderous gangster, Batiz's statements were not hearsay. They are probative of what Batiz believed, which is relevant to motive, which is relevant to whether Mr. Batiz killed Trumain instead. *Foster v. State*, 778 So. 2d 906, 914-15 (Fla. 2000); *Dixon v. State*, 107 So. 3d 527, 533 (Fla. 4th DCA 2013)

And Trumain's statements to Batiz could have been admitted pursuant to well-recognized exceptions for statements demonstrating their effect on Batiz or his state of mind. *Pitts v. State*, 227 So. 3d 674, 678 (Fla. Ct. App. 2017); *Selver v. State*, 568 So. 2d 1331, 1334 (Fla. Ct.

App. 1990). Showing Batiz's motive to make Trumain disappear could reasonably have led to a different result here, and the circuit court erred by denying a COA on the ground that Batiz's statements to police were inadmissible hearsay.

"[A] number of judges have suggested that unpublished opinions are breeding grounds for abuse." David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1667, 1684 (2005). Here, both the district court and the court of appeals have flatly stated without explanation that a statement would have been hearsay, refusing to engage with repeated arguments to the contrary. The Court should exercise review here to remind lower courts of their duty to correct errors as they appear.

II. The Court should grant certiorari to clarify that evidence is not "cumulative" for the purpose of determining prejudice, even when it bears on the same issue as other evidence, when it would nevertheless create a reasonable probability of a different result.

The circuit court below found that Mr. Boykin's claims regarding impeachment of Robert Walyus were merely cumulative of other evidence and cross-examination presented at trial. Thus, evidence regarding his epilepsy medication was cumulative because he was cross examined regarding his memory of the night in question, and state that he did not take "any drugs" the night of the murder. (App. 12). Evidence that Walyus was subject to sex offender registration requirements that made renting an apartment impossible was cumulative because the jury was informed that Mr. Walyus had a felony conviction and "was also informed that Mr. Batiz gave him a place to live." (App. 12-13). Mr. Walyus's own recorded statements to Batiz's girlfriend – that she should delete the message, that he was afraid, that he was in "a tight spot" and would "do whatever you had to do because you admitted that you had to save yourself," but not to worry because Batiz did not do it –was cumulative because, "[a]lthough the voicemail evidence might have bolstered Mr. Boykin's theory that Mr. Walyus was intimidated into testifying against

Boykin, Walyus testified at trial he was afraid of Mr. Batiz." (App. 13; *see* D.E. 16-3, at 19-20 (Walyus's testimony at trial of Batiz)). Donald Gordon's testimony that Batiz threatened to cut off Walyus's finger for stealing cocaine could was cumulative "because Mr. Walyus's trial testimony already indicated he feared Mr. Batiz." (App. 14).

"Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value." *People v. Mattson*, 789 P.2d 983, 1014 (Cal. 1990). Considering, for example, Walyus's testimony that he was afraid of Batiz versus testimony that Batiz actually threatened to cut off his finger, "the facts may tend to prove the same proposition, and yet be so *dissimilar in kind* as to afford no pretense for saying they are cumulative." *Hodnett v. Danville*, 146 S.E. 281, 283 (Va. 1929). "[T]o be truly cumulative, the evidence must be of the 'same kind tending to prove the same point.'" *United States v. Ackerly*, 395 F. Supp. 3d 160, 167 n.8 (D. Mass. 2019) (citation omitted); *see, e.g. State v. MacArthur,* 644 A.2d 68, 69 (N.H. 1994) (although videotape covered same subject matter, it was "unrivaled with respect to details of the crimes" and therefore not "truly cumulative"); *Davis v. Bos. E. R. Co.*, 126 N.E. 841, 845 (Mass. 1920).

And even cumulative testimony can produce a "reasonable probability of a different result upon another trial." *State v. Compiano*, 154 N.W.2d 845, 851 (Iowa 1967). The Court should grant certiorari to clarify that evidence characterized as "cumulative" because other evidence bears on the same point, if presented at trial, might nevertheless be admissible and lead to "a reasonable probability of a different result" under *Strickland*.

Additionally, 'doubled-edged sword' evidence like Mr. Walyus's recorded statement presents a recurring problem common. Two Justices have recently recognized that this issue needs attention by their statements regarding denial of petitions in an Eleventh Circuit case. In *Peede v. Jones*, 138 S. Ct. 2360 (2018), Justice Sotomayor, joined by Justice Ginsburg, criticized the Eleventh Circuit's "blanket rule foreclosing a showing of prejudice because the new evidence is double edged," and contended that it "flatly contradicts this Court's precedent." Id. at 2361. Unlike *Peede*, in this case there is no state court decision to which AEDPA deference applies, making it a good vehicle to consider the issue. 138 S. Ct. at 2361. The Court has here an opportunity to exercise *de novo* review over the issue addressed in the *Peede* concurrence.

III. The Court should grant certiorari to clarify the correct application of 28 U.S.C. § 2254(e) when counsel fails to raise a substantial claim on state postconviction review.

As one district court recently lamented, there exists no controlling authority in some circuits "as to whether a petitioner who requests an evidentiary hearing on *Martinez* cause and prejudice must meet § 2254(e)'s requirements." *Miller v. Genovese*, No. 1:15-cv-01281, 2019 WL 4724304, 2019 U.S. Dist. LEXIS 165366, at *27 (W.D. Tenn. Sep. 26, 2019); *see, e.g., Terry v. Stirling*, No. 4:12-cv-1798-RMG-TER, 2019 WL 4723926, 2019 U.S. Dist. LEXIS 165625, at *61 n.14 (D.S.C. Jan. 31, 2019) (discussing lack of "any binding authority on that exact issue").

"Whether the ineffectiveness of post-conviction relief counsel provided cause to excuse procedural default is separate from the question of whether an ineffective-assistance-of-trial-counsel claim would prevail on the merits."[1] *Workman v. Superintendent Albion SCI*, 915 F.3d 928,

[1] In *Warden, Ross Correctional Institution v. White*, No. 19-1023, the petitioner sought review of "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?" On April 29, 2020, the Court requested a response to the petition for writ

940 (3d Cir. 2019) (citing *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013); *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017)); *see also Norman v. Stephens*, 817 F.3d 226, 234-35 (5th Cir. 2016) (outlining distinction between two contexts). The Eleventh Circuit has distinguished the two through statutory interpretation. It reasons that Section 2254(e) does not apply does not apply because *Martinez v. Ryan* claims are procedural, not substantial. It has decided that "the term 'claim' [in section 2254(e)(2)] appears to refer to the substantive claim for relief upon which the petition for habeas corpus is based" rather than the issue of cause and prejudice for procedural default." *Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1232 (11th Cir. 2014) (alteration in original) (quoting *Sibley v. Culliver*, 377 F.3d 1196, 1207 n.9 (11th Cir. 2004)).

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of certiorari. Mr. Boykin's case should not be decided until the Court resolves *White*, because a change to the Eleventh Circuit's petitioner-unfriendly standard should result in at least a GVR in Mr. Boykin's case. *See Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957–58 (11th Cir. 2016) (requiring the petitioner to show actual prejudice, not merely that the defaulted claim was "substantial.").

The Eleventh Circuit has reached the right result, but for the wrong reason. A *Martinez v. Ryan* argument is inextricably bound up with the merits of the underlying claim of ineffective assistance, which must be evaluated and judged to be "substantial." 566 U.S. at 3. Instead, the problem should be approached through the lens of culpable "fail[ure]" to develop the factual basis of a claim through a lack of diligence. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Because ineffective assistance of postconviction counsel cannot be raised until federal habeas, the lack of factual basis in the record can never be caused by a culpable failure.

This concept of failure should extend to the merits of the underlying claim as well. This Court has stated in the past that, when the factual basis of a claim is not developed, "Attorney negligence [] is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied." *Holland v. Jackson*, 542 U.S. 649, 653 (2004). The Court should clarify that after *Martinez v. Ryan*, ineffective assistance of postconviction counsel precludes any finding that a petitioner culpably "failed" to develop the factual basis.

Petitioners whose claims are properly exhausted must surmount stringent legal burdens to develop the factual bases of their claims on

federal habeas review. Section §2254(e) of Title 28 sets a formidable barrier for petitioners who have "failed to develop the factual basis of a claim in State court" face difficult barriers to an evidentiary hearing in federal court. These petitioners must have evidence "sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2254(e)(2)(B). If they can prove their innocence, they can have their day in court, but only if they also have either " a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;" or else, "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A).

But Section 2254(e) applies only to petitioners guilty of failure. A petitioner "fails" to develop the factual basis of a claim only through "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). After *Martinez*, while there is still no constitutional right to effective assistance, ineffective assistance of postconviction counsel is

nevertheless considered "an objective factor external to the defense" that can constitute cause for failure to properly exhaust a claim. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Where, as here, no "failure" exists, the pre-*AEDPA* common law governs. *Townsend v. Sain* requires an evidentiary hearing when any of the six following criteria are present:

> …. If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. 293, 313 (1963); *see Jefferson v. Upton*, 130 S. Ct. 2217, 2220-21 (2010) (applying *Townsend* where AEDPA did not apply to habeas petition filed before its enactment). As "the merits of the factual dispute[s]" raised on federal habeas review were not resolved at "a full and fair hearing" that "adequately developed" the material facts, Mr. Boykin makes the necessary showing for a hearing on the merits of his substantive claims.

Claims of ineffective assistance of counsel, including ineffective postconviction counsel, "'often depend on evidence outside of the record." *Sigmon v. Stirling*, No. 18-7, 2020 U.S. App. LEXIS 11752, at *28 (4th Cir. Apr. 14, 2020). Accordingly, "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him." *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013).

In announcing the correct standard, the Court can correct the error below. Mr. Boykin has met the proper evidentiary standard with respect to Claim 1. The record is still undeveloped on whether Mr. Walyus was taking Dilantin at the time of the murder. Mr. Boykin's trial counsel did not cross-examine Mr. Walyus about his epilepsy medication at all, even though the prosecutor told the Court that "Mr. Walyus suffers from seizures and is taking Dilantin. . . . It he becomes upset – it may cause him to have a seizure, that if he needs a break he needs to tell us." (D.E. 14-3, at 13). Walyus's testimony at Mr. Batiz's trial does not answer the question, either, although he indicates that his medication causes memory problems. (D.E. 16-3, at 4). It is not Mr. Boykin's fault that the

record was never developed on this point, and as he explained in his reply, "Mr. Walyus has declined to voluntarily discuss his testimony." (D.E. 30, at 3). He should have an evidentiary to determine whether his claims are substantial for the purposes of the *Martinez* exception to procedural default of unexhausted claims.

He has similarly satisfied his burden for Claim 4, regarding Donald Gordon's prospective testimony at trial. Mr. Gordon's statements were made during a police investigation. This is a far cry from "mere speculation" as to the content of a witness's testimony. (D.E. 28, at 8 (quoting *Streeter v. United States*, 335 F. App'x 859, 864 (11th Cir. 2009))). Rather than denying the claim, the court should have permitted Mr. Boykin to expand the record, conduct discovery, and elicit sworn testimony from Mr. Gordon at a hearing.

CONCLUSION

Mr. Boykin's federal habeas petition was not fairly evaluated in the district court, which applied Section 2254(d) deference even though there was no lower court decision to which it could defer. The lower courts repeatedly and without explanation wrongly applied Florida's hearsay exception. Additionally, the lower courts used the "cumulative" characterization to dispose of Mr. Boykin's claims of unpresented evidence, without ever acknowledging that the evidence trial counsel should have presented was different in both power and kind. Finally, the Eleventh Circuit's standard for granting an evidentiary hearing on whether *Martinez* applies is based on faulty reasoning that should be corrected to clarify the standard for both procedural default hearings and hearings on the merits.

Respectfully Submitted,

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