No. 20-1009

IN THE

Supreme Court of the United States

DAVID SHINN, *et al.*,
Petitioners,

v.

DAVID MARTINEZ RAMIREZ and BARRY LEE JONES,
Respondents.

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

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA") respectfully submits this brief as amicus curiae in support of Respondents.

The ABA is the largest association of attorneys and legal professionals in the world. Its members come from all fifty States, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, State, and federal governments, as well as judges, legislators, law professors, law students, and

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

associates in related fields.[2] Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of American legal services by "[p]romot[ing] competence, ethical conduct and professionalism."[3] In particular, the ABA has long been committed to the provision of competent and effective counsel in criminal and related proceedings.

The ABA has been an authority on the issue of representation in capital cases, specifically, for decades.[4] Similarly, for decades, the ABA has developed nationally implemented models that form the basis for the existing systems that effectively regulate attorney conduct. These professional standards of conduct and enforcement systems guard against and sanction the type of misconduct the State hypothesizes about in this case. Specifically, in 1989, the ABA House of Delegates adopted Resolution 122, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"), which were designed to "amplify previously adopted [ABA] positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel." ABA Guide-

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the preparation of this brief, or in the adoption or endorsement of the positions in it.

[3] ABA Mission and Association Goals, ABA, https://bit.ly/3hFZiGX (visited Sept. 7, 2021).

[4] The ABA formed the Death Penalty Representation Project in 1986, developed the Criminal Justice Standards for the Defense Function ("ABA Criminal Justice Standards"), and created an ABA policy dating back to 1979 calling for the appointment of post-conviction counsel in capital cases.

lines, intro. cmt. (1989).[5] The Guidelines were the result of an in-depth process for ascertaining the prevailing practices for capital defense across the country. In February 2003, the ABA approved revisions to the ABA Guidelines to update and expand upon the obligations of lawyers in death penalty jurisdictions to ensure due process of law and justice. The ABA Guidelines reflect longstanding norms of capital defense practice based on a consensus about the essential elements of effective representation of clients facing capital punishment.[6] The ABA Guidelines have been utilized in hundreds of cases by state and federal courts, including this Court, as guides by which to measure reasonable counsel performance.[7]

The ABA has also published Standards for Criminal Justice ("ABA Standards"), which are among the ABA's most prominent efforts to improve the quality of the criminal justice system. Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, and developed and refined over the last forty

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[5] ABA Guidelines, https://bit.ly/2Z4MB1P (visited Sept. 7, 2021).

[6] *See, e.g.*, *Hamblin* v. *Mitchell*, 354 F.3d 482 (6th Cir. 2003) ("[T]he [ABA] standards merely represent a codification of longstanding, commonsense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland.* They are the same type of longstanding norms referred to in *Strickland* in 1984 as 'prevailing professional norms' … .").

[7] *Rompilla* v. *Beard*, 545 U.S. 374 (2005); *Florida* v. *Nixon*, 543 U.S. 175 (2004); *Wiggins* v. *Smith*, 539 U.S. 510 (2003); *see also* ABA Death Penalty Representation Project, *List of Cases Citing to the ABA Guidelines*, https://bit.ly/3AqW1m7 (visited Sept. 8, 2021).

years, the ABA Standards represent a collection of "best practices" based on the consensus views of a broad array of professionals involved in the criminal justice system.[8] The ABA Standards embody the consistent recognition by ABA task forces of prosecutors, defenders and others in the criminal justice field that defendants must have effective assistance of counsel during the first proceeding in which a defendant may bring an ineffective assistance of counsel claim ("IATC"), regardless of whether that proceeding is direct appeal or state post-conviction review. While the ABA Standards are not binding, they have been recognized by this Court as "valuable measures of the prevailing professional norms of effective representation." *Padilla* v. *Kentucky*, 559 U.S. 356, 366-367 (2010); *see also Strickland* v. *Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable"). Indeed, this Court has repeatedly looked to the ABA Standards as a guide

[8] The ABA Standards are developed through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA. Before they become official ABA policy, they must be approved by vote of the ABA House of Delegates ("HOD"). The HOD is composed of more than 550 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Standards are divided into volumes according to topical area and have been amended over the years by the same process. A complete set of the Standards and a history of their development is available at https://bit.ly/3kjFGtH; *see also* Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. J. 10, 14-15 (Winter 2009) (describing the process by which ABA Standards are developed and promulgated).

when drawing conclusions about the effectiveness of an attorney's representation.[9]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Martinez* v. *Ryan*, 566 U.S. 1 (2012), this Court recognized that to fulfill the promise of effective trial counsel prescribed in the Sixth Amendment, federal courts may forgive procedural default in state court by ineffective state post-conviction counsel so that the federal court can—for the first time—review the underlying claim of ineffective assistance of trial counsel. Without the narrow pathway that *Martinez* provides for state prisoners to avoid procedural default, prisoners seeking relief in federal courts on claims of ineffective assistance of trial counsel who also received ineffective representation in state post-conviction proceedings would lack even a single opportunity to meaningfully vindicate the bedrock right to effective representation at trial. Access to an evidentiary hearing on a 28 U.S.C. § 2254 motion is critical to marshal and present evidence to meet the *Martinez* criteria. Without access to an evidentiary hearing in federal court, prisoners are

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[9] *See, e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) ("Counsel's conduct … fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as guides to determining what is reasonable." (quotation marks omitted)); *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005) (stating that the ABA's Standards for Criminal Justice "describe[] the obligation [of defense counsel] in terms no one could misunderstand"); *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000) (citing the ABA Standards for Criminal Justice in determining that trial counsel did not properly fulfill their obligation to investigate defendant's background); *McCoy* v. *Court of Appeals of Wis., Dist. 1*, 486 U.S. 429, 436 n.8 (1988) (citing to the ABA Standards for Criminal Justice and to an Informal Opinion by the ABA Standing Committee on Ethics and Professional Responsibility).

no better off than they were in state court, with no meaningful opportunity to present their ineffective assistance claims.

The State contends that *Martinez* encourages prisoners and their lawyers to sidestep state court by withholding ineffective assistance of counsel claims during trial or state habeas proceedings, only to raise them for the first time during federal habeas review. The State offers no evidence to support this proposition, and the ABA is not aware of any either. Additionally, this gambit would likely subject the lawyer to professional discipline and other appropriate sanctions, in part because lawyers have an ethical obligation to act competently in their representation of a client, and competent lawyers raise all possible claims at the earliest possible juncture and protect claims against waiver and default. In the event of any attorney misconduct, the correct solution is not to limit the equitable remedy provided by *Martinez*, but to rely on the existing lawyer disciplinary system that protects against and sanctions violations of applicable rules of professional conduct. In any event, this Court does not interpret statutes to diminish remedies available to prisoners because of concern by a party about hypothetical gamesmanship in which the prisoner's lawyer might engage.

ARGUMENT

I. AN EVIDENTIARY HEARING IS NECESSARY TO FULLY VINDICATE THE RIGHT TO COUNSEL

In a long line of cases that includes *Powell* v. *Alabama*, 287 U.S. 45 (1932), *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court has recognized a Sixth Amendment right to counsel that is necessary to protect the funda-

mental right to a fair trial. *Gideon* recognized the "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U.S. 335, 344 (1963). And in *Strickland* v. *Washington*, the Court further explained that "the right to counsel is the right to the effective assistance of counsel" because ineffective assistance of counsel may "so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. 668, 686 (1984). This Court emphasized that the effectiveness inquiry is necessarily a context and fact specific one, instructing courts to consider "all the circumstances" and to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case." *Id.* at 690.

In *Martinez* v. *Ryan*, this Court reiterated that "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system." 566 U.S. 1, 8-14 (2012). It is "the foundation of our adversary system," for "[d]efense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Id.* at 12. To vindicate that right, counsel must "preserve[] claims to be considered on appeal … and in federal habeas proceedings." *Id.* This Court recognized that a state prisoner, whose first opportunity to raise an ineffectiveness of trial counsel argument is in state post-conviction proceedings, can avoid procedural default under 28 U.S.C. § 2254 if he can show ineffectiveness of post-conviction counsel. *Id.* at 8-14; *see Trevino* v. *Thaler*, 569 U.S. 413, 428 (2013) (extending *Martinez* to apply where state law effectively, though not formally, denies most defendants a meaningful opportunity to present ineffec-

tive assistance of counsel claims on direct appeal); *see also Buck* v. *Davis*, 137 S. Ct. 759, 771 (2017). *Martinez* provides a narrow—but critical—pathway for prisoners whose Sixth Amendment rights were violated at trial and whose state post-conviction lawyers failed to raise that claim due to a constitutionally ineffective lack of skill, resources, or gross negligence.

As *Martinez* and its progeny make clear, a defendant should be provided "a meaningful opportunity to present a claim of ineffective assistance of counsel." *Trevino*, 569 U.S. at 428. That is because "[t]he idea of an entitlement to one untainted opportunity to make one's case is deeply embedded in our law." *Purkey* v. *United States*, 964 F.3d 603, 617 (7th Cir.), *cert. denied*, 141 S. Ct. 196 (2020). The Court has emphasized the importance of ensuring that a defendant have a bona fide "one and only appeal," including where that opportunity for review comes for the first time in a state collateral proceeding. *Coleman* v. *Thompson*, 501 U.S. 722, 756 (1991) ("[W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (quoting *Douglas* v. *California*, 372 U.S. 353, 357 (1963)). *Martinez* itself relied on this principle, noting that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." 566 U.S. at 10. The Court found that the outcome in such a case were the procedural default to apply—that "no court will review the prisoner's claims"—would be inequitable. *Id.* at 11, 14.

Ensuring one meaningful opportunity to bring claims of ineffective assistance of counsel is critical because Sixth Amendment violations are discovered with some frequency. Of particular concern, reversible error

occurs in a meaningful percentage of state death penalty cases. A 2014 Department of Justice study found that the conviction or sentence was overturned at some stage of review in approximately 31.5 percent of death-penalty cases, where the sentence was imposed in the United States between 1973 and 2013.[10] That figure does not include reversals based on invalidation of the State's capital-punishment statute. *Id.* In the same study published by the Department of Justice in 2020, it was reported that just under 9% of all state prisoners whose death sentences were removed in 2018 (the last year of data reported in the study) had obtained a complete reversal of their capital conviction and sentence from an appeals or higher court.[11] Prisoners require an opportunity to develop and supplement a record with effective assistance of counsel. *Martinez* provides a narrow but meaningful pathway to relief for this subset of prisoners whose ineffective assistance of trial counsel claims are never considered in state court due to ineffective assistance of counsel in their state collateral proceeding. Arizona, for example, had "17 *Martinez* remands from the Ninth Circuit to reconsider ineffective-assistance claims previously dismissed on procedural

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[10] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2013 – Statistical Tables* 19, tbl. 16 (Dec. 19, 2014), https://bit.ly/3tSHZr9. In Arizona, the reversal rate in capital cases, including reversals based on invalidation of the capital-punishment was 120 out of 307 (39%). *See id.* at 20, tbl. 17. For state-specific studies, see, *e.g.*, Baumgartner & Lyman, *Louisiana Death-Sentenced Cases and Their Reversals, 1976-2015*, 7 J. of Race, Gender, & Poverty 58, 67-68 (2016); Baumgartner, *Rates of Reversals in the North Carolina Death Penalty*, U. N.C. Chapel Hill (Mar. 22, 2010).

[11] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2018 – Statistical Tables* 16, tbl. 10 (Sept. 2020), https://bit.ly/2XHdyIu.

grounds" between 2012 and 2017.[12] This number shows that the remedy recognized in *Martinez* is hardly overwhelming the courts with allegedly defaulted state-law claims being pressed on habeas, but that it is nonetheless necessary to correct for rare circumstances where a petitioner's counsel on state collateral proceeding is ineffective in failing to raise an ineffective assistance of trial counsel claim.

Numerous cases prove the wisdom of *Martinez* in ensuring a fair system of habeas review and the opportunity for an evidentiary hearing. To take just one: In 2015, the Northern District of Florida granted Kevin J. Sullivan's habeas petition upon a finding that his trial counsel was constitutionally ineffective by advising him to reject a plea deal and concede guilt on possession charges, and by defending his case at trial based on the legally impermissible defense of voluntary intoxication, which had been abolished five years prior. *See Sullivan* v. *Jones*, No. 12-CV-250, 2015 WL 4756190, at *1, *21 (N.D. Fla. Aug. 11, 2015), *aff'd*, 837 F.3d 1195 (11th Cir. 2016).[13] In large part, this decision turned on whether

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[12] *See* Arizona et al. Amicus Br. 2, *Ayestas* v. *Davis*, No. 16-6795 (U.S. Aug. 8, 2017), 2017 WL 3575763.

[13] The court also found ineffective assistance of counsel during petitioner's state collateral review proceeding based on that attorney's testimony at the evidentiary hearing. *Id.* at *10-16. That lawyer testified that he was not aware Mr. Sullivan had been offered a plea deal prior to trial and that he had never asked Mr. Sullivan or the state attorney whether there had been a plea offer. *Id.* at *10, *14. Indeed, he could not recall ever meeting with Mr. Sullivan or speaking with him on the phone for any reason. *Id.* at *14. The court appropriately found that this failure to investigate amounted to constitutionally deficient representation. *Id.* at *16. Thus, the court found that Mr. Sullivan had established cause under *Martinez* for his failure to raise his ineffective assistance of trial counsel claim in his state collateral review proceeding. *Id.*

Mr. Sullivan or his attorney were, in fact, aware that the defense had been abolished prior to trial. *Id.* at *21. In finding to the contrary, the court relied extensively on the testimony elicited from Mr. Sullivan and his trial attorney at an evidentiary hearing. *See id.* at *16-22. The court also relied on testimony at the evidentiary hearing regarding the rejected plea deal itself, noting that it was less than half the length of the 30-year sentence Mr. Sullivan received following trial. *Id.* at *2, *15-17, *21. Absent the evidentiary hearing the court required to adequately assess his claims—Mr. Sullivan would never have been able to raise the plain inadequacy of his trial counsel's advice, nor been able to challenge the additional years added to his sentence as a result of his reliance on that advice.

As *Sullivan* demonstrates, access to an evidentiary hearing on a § 2254 motion is critical to marshal and present evidence. Without access to an evidentiary hearing in federal court, prisoners are no better off than they were in state court with no opportunity to present their potentially meritorious ineffective assistance claims. "Claims of ineffective assistance" in particular "often require investigative work" to develop facts that may not appear in the record or in the files of ineffective prior attorneys. *Martinez*, 566 U.S. at 11. Indeed, "the inherent nature of most ineffective assistance of trial counsel claims means that the trial court record will often fail to contain the information necessary to substantiate the claim." *Trevino*, 569 U.S. at 424 (quotation marks omitted). Accordingly, "[a] claim without any evidence to support it might as well be no claim at all." *Gallow* v. *Cooper*, 570 U.S. 933, 933 (2013) (Breyer, J., respecting the denial of the petition for writ of certiorari").

It follows that, in pursuing the limited procedural-default exception this Court identified in *Martinez* and *Trevino*—which is available only where, inter alia, "'there was no counsel'" in state habeas "'or counsel in that proceeding was ineffective,'" *Trevino*, 569 U.S. at 429 (quoting *Martinez*, 566 U.S. at 17)—federal habeas counsel must investigate to identify "the information necessary to substantiate the claim" not effectively pursued below, *id.* at 424 (quotation marks omitted). Indeed, "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state [collateral review] counsel's ineffectiveness had been in state [collateral] proceedings, where the same ineffective counsel represented him." *Detrich* v. *Ryan*, 740 F.3d 1237, 1246-1247 (9th Cir. 2013) (en banc) (plurality opinion); *see also, e.g.*, *McBride* v. *Glunt*, No. 17-CV-5374, 2020 WL 1953658, at *4 (E.D. Pa. Apr. 23, 2020) (evidentiary hearing necessary to determine whether trial counsel may have had strategic reason for declining to object to defective reasonable doubt jury instruction); *Carpenter* v. *Davis*, No. 02-CV-1145, 2017 WL 2021415, at *1, *3 (N.D. Tex. May 12, 2017) (evidentiary hearing required where petitioner raising *Martinez* had no previous opportunity to claim ineffective assistance of trial counsel who failed to "investigate and present," *inter alia*, "evidence that [another person] actually murdered the victim"); *Sullivan*, 2015 WL 4756190, at *10-22.

An adequate investigation by federal habeas counsel is especially critical where, as here, petitioner's claim is that his prior counsel conducted an inadequate, unreasonably narrow investigation. *See, e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510, 534, 538 (2003) (counsel's inadequate investigation did not reflect reasonable professional judgment and prejudiced the defendant at sen-

tencing); *see also* ABA Guidelines, Guideline 1.1 cmt. at 933 (2003) ("Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case."). In many such cases, fact development will be necessary to allow prisoners to raise constitutional claims for the first time.

II. *MARTINEZ* DOES NOT ENCOURAGE PRISONERS AND THEIR COUNSEL TO WITHHOLD CLAIMS AND EVIDENCE UNTIL FEDERAL HABEAS PROCEEDINGS

The State contends (at 37) that *Martinez* "encourag[es] prisoners to sidestep state court" by withholding ineffective assistance of counsel claims during trial or state habeas proceedings, only to raise them for the first time during federal habeas review. The State offers no evidence to support this proposition. Further, the State ignores that the consequences of this gambit would not be relief for the habeas petitioner, but instead would likely subject the lawyer to probable professional discipline, including risk of their livelihood through suspension, as well as other sanction. Moreover, it would be anathema to the Sixth Amendment's guarantees and to our justice system to diminish the remedy available to prisoners because of unsupported concern by the State about hypothetical gamesmanship in which his lawyer might engage.

First, and of note, the State fails to identify a single case in which an attorney made the purposeful, high-risk decision to not bring a claim in state court, gambling that the lawyer for the client in the federal habeas proceeding would be able to get the claim before the federal court through the *Martinez* gateway. Instead, the State's position depends on a partial dissent from the Ninth Circuit, *see* Br. 37 (citing *Dickens* v. *Ryan*,

740 F.3d 1302, 1328 (9th Cir. 2014) (Callahan, J., dissenting in part)), and a training document created by a single attorney in 2008, before *Martinez* was even decided, which in no way advises attorneys to withhold a claim in state court until federal habeas proceedings, *see id.* By contrast, the ABA Guidelines, which are "a feature at every defense-training seminar," advise repeatedly and emphatically that claims should be raised and evidence presented at the earliest possible opportunity.[14] The ABA—which represents lawyers with experience in federal habeas proceedings and capital punishment litigation—is not aware of evidence that this type of unethical attorney misconduct arises either. Thus, a critical premise of the State's argument—that this Court should intervene to prevent attorneys from intentionally and unethically sidestepping state court—is a solution in search of a problem.

The State's unfounded concern that attorneys will intentionally withhold claims in state court also ignores the fact that lawyers are constrained by professional conduct rules and standards and are subject to discipline for violations of the rules of conduct adopted in the jurisdiction(s) in which they are admitted and/or authorized to practice. As this Court explained in *Strickland*, defense lawyers are obligated by their clients' Sixth Amendment rights to provide effective assistance of counsel. *See* 466 U.S. at 685. A lawyer owes the client a duty of objectively reasonable performance, and "[p]revailing norms of practice as reflected in American Bar Association standards and the like … are guides to determining what is reasonable." *Id.* at 688-689.

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[14] Maher, *Improving State Capital Counsel Systems Through Use of the ABA Guidelines*, 42 Hofstra L. Rev. 419, 422 (2013).

If a post-conviction lawyer representing a client in the state proceeding were to make the purposeful, high-risk decision to not bring a claim in state court, that lawyer acts outside the ABA's Model Rules of Professional Conduct, the ABA Standards for Criminal Justice, and the ABA's Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases. For example, ABA Model Rule of Professional Conduct 1.1[15] requires "[a] lawyer … [to] provide competent representation to a client,"[16] and the ABA Standards prescribe the "duty of candor toward the court and others."[17] Any attorney who intentionally withholds an ineffective assistance of counsel claim in state court likely violates both of these foundational directives. Additionally, the ABA Standards state that as soon as counsel becomes aware "after appropriate investigation and legal research" that prior defense counsel did not provide effective assistance, "new counsel should not hesitate to seek relief for the client."[18] Thus, an attorney representing a capital prisoner in his or her post-conviction appeals must raise claims fully and forcefully at the earliest practicable moment.

A critical role of any post-conviction lawyer is to protect a client's claims against waiver and default.

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[15] Every jurisdiction has adopted a version of Model Rule of Professional Conduct 1.1. Thus, the duty of competence is ubiquitous.

[16] *Id.* at R. 1.1 (2020) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[17] ABA, Criminal Justice Standards, Standard 4-1.3 (4th ed. 2017).

[18] *Id.* at Standard 4-9.6.

Under the State's theory, post-conviction attorneys will not merely fail to protect against waiver and default but wish these outcomes for their clients. But the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases contain a "duty to assert legal claims" that requires counsel to consider all legal claims potentially available and protect the client against waiver, default, or forfeiture.[19] The same Guidelines include the "duties of post-conviction counsel," which call on post-conviction lawyers to "litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation" and "make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review."[20] The Guidelines' accompanying commentary further warns against the danger of procedural default and the duty to raise claims in a manner that preserves the issue, providing that "trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review."[21] A scheme to deliberately withhold a claim in state proceedings in the hopes of having the claim heard in federal court would directly conflict with this authority.

But even if attorney misconduct arises, the correct solution is not to limit the equitable remedy provided by *Martinez*. Rather, the existing lawyer disciplinary system that protects against and sanctions violations of

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[19] ABA Guidelines, Guideline 10.8. (2003).

[20] *Id.* at Guideline 10.15.1.

[21] *Id.* at Guideline 10.8, cmt. at 1030.

applicable rules of professional conduct provides the appropriate remedy for any unethical acts by the lawyer. *See Application of Griffiths*, 413 U.S. 717, 726-727 (1973) ("[O]nce admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts. In addition to discipline for unprofessional conduct, the range of postadmission sanctions extends from judgments for contempt to criminal prosecutions and disbarment."). The discipline system in the U.S. is professionalized and well-equipped to handle such matters if and when they arise. The ABA's Model Rules for Lawyer Disciplinary Enforcement describe the sanctions available for attorney misconduct. They include, among other things, disbarment, suspension, probation, reprimand, admonition, restitution to persons financially injured, and disgorgement of all or part of the lawyer's or law firm's fee.[22] Because systems are already in place, a limitation on the equitable remedy of *Martinez* is not needed to control attorney behavior.

Second, the notion that this Court would interpret a statute based on an unfounded, far-reaching, and illogical assumption about how bad actors *might* behave is foreign to our legal system. All lawyers, as officers of the court, are presumed to act ethically, including defense counsel and prosecutors. *See Ex parte Garland*, 71 U.S. 333, 378 (1866) ("[Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character … . In this court the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, in regarded as sufficient evidence

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[22] ABA Model Rules for Lawyer Disciplinary Enforcement R. 10 (2020).

of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair."); *see also United States* v. *Cronic*, 466 U.S. 648, 656 n.19 (1984) ("[T]he Sixth Amendment does not require that counsel do what is impossible or unethical."). Consistent with this presumption of good faith and faithful execution of a lawyer's duties, the Court should not interpret a statute to resolve hypothetical concerns such as those posited here by the State.

It would be particularly ironic to do so here. The point of *Martinez* and *Trevino* is that a prisoner should be spared the consequences of his ineffective trial and state post-conviction counsel's performance. Constraining the remedies of a prisoner who meets the rigorous requirements of *Martinez* on the assumption that his federal habeas counsel might also engage in misconduct is perverse; it leaves the prisoner no better off than he was in state court and deprives him of even one opportunity to meaningfully contest his guilt in federal court.

Third, strategically, it would be indefensible to withhold potentially meritorious claims or helpful evidence at trial or in state post-conviction proceedings, on the distant hope of possibly reviving the claims under *Martinez*. The *Martinez* pathway towards excusing a procedural default—by *Martinez's* own terms—is nothing more than a "narrow exception." *Martinez*, 566 U.S. at 9. *Martinez* only applies to "the default of a single claim—ineffective assistance of trial counsel—in a single context." *Davila* v. *Davis*, 137 S. Ct. 2058, 2062 (2017).

In short, "the *Martinez* test is not a simple one."[23] To access relief under *Martinez*, a petitioner must establish four elements concerning his or her defaulted claim: (1) the claim of ineffective assistance of trial counsel is "substantial"[24]; (2) the state post-conviction counsel was ineffective or there was no post-conviction counsel; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the ineffective assistance of trial counsel claim; and (4) state law requires that the claim be raised in an initial-review collateral proceeding. *See Trevino*, 569 U.S. at 414; *Martinez*, 566 U.S. at 13-18. There are many tripwires to obtaining access, such that "if a petitioner's claim was filed in federal court beyond the statute of limitations or in a successive petition, was defaulted on direct or collateral appeal rather than at the initial collateral proceeding, or was raised by a petitioner who never sought state postconviction relief or declined representation when he did, the *Martinez* gateway to merits review remains closed."[25] Exacerbating this difficulty is the fact that "many states have attempted to construe

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[23] Ellis, *A Tale of Three Prejudices: Restructuring the* "Martinez *Gateway*", 90 Wash. L. Rev. 405, 407 (2015).

[24] The first requirement is particularly difficult to satisfy because it requires a successful showing of ineffective assistance of trial counsel under this Court's well-established standard from *Strickland*—deficient performance and prejudice. 466 U.S. at 687-696. *Strickland*'s demanding standard is notoriously difficult to win. *See Padilla* v. *Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task."); *see also* Blume & Johnson, Gideon *Exceptionalism?*, 122 Yale L.J. 2126, 2138-2139 (2013) (describing *Strickland* as "a formidable obstacle to defendants alleging that they were deprived of their Sixth Amendment right to the effective assistance of counsel").

[25] King, *Enforcing Effective Assistance After* Martinez, 122 Yale L.J. 2428, 2432-2433 (2013).

Martinez in ways that limit their postconviction obligations."[26] "In sum, a petitioner must prove two ineffective assistance of counsel claims and be subject to a procedural system comparable to the one described in *Trevino* [and *Martinez*]" rendering "relief under *Trevino* [and *Martinez*] … both difficult and unlikely."[27]

Because the *Martinez* gateway is so difficult to access, no lawyer could be said to make a reasoned strategic decision by withholding evidence in the hopes that they will be able to avail themselves of *Martinez*. As noted above, competent lawyers raise all possible claims at the earliest possible juncture, given the overwhelming risk—and the drastic consequences—of procedural default. The incremental likelihood of getting through the gateway cannot, in any circumstance, outweigh the value of early claim presentation, which preserves the claim for federal habeas review. The unethical gamesmanship hypothesized by the State requires illogical assumptions about risk-reward incentives, where an attorney must risk his license and his client's life, and the reward is a merits review in federal habeas, which has proven to be "no magic bullet."[28] No reasonable attorney would make this calculation with little

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[26] Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 Yale L.J. 2604, 2618 (2013).

[27] Law, Trevino v. Thaler: *Falling Short of Meaningful Federal Habeas Corpus Reform*, 105 J. Crim. L. & Criminology 499, 520-521 (2015).

[28] King, 122 Yale L.J. at 2433.

to gain and everything to lose. Indeed, in this context, "fortune disfavors the bold."[29]

Finally, even if, as the State incorrectly suggests, the decision to withhold a claim in state court to raise it for the first time in federal habeas could be considered strategic, such a decision would not qualify as ineffective assistance of counsel under *Strickland's* first prong (deficient performance) and thus would not amount to cause to excuse the default. In federal habeas proceedings, courts will not entertain claims that were procedurally defaulted, but procedural defaults can be excused by a showing of "cause and prejudice." *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977). The cause and prejudice necessary to overcome a procedural default is satisfied by ineffective assistance of trial counsel. *See Martinez*, 566 U.S. at 17. Therefore, even if this Court were to indulge the State's suggestion that an attorney's decision to withhold a claim in state court in favor of waiting to raise it in federal court amounts to constitutionally reasonable performance under the first prong of *Strickland*, then procedural default would not be excused, and the prisoner would not have the opportunity to later raise the ineffective assistance of counsel claim in a federal habeas proceeding. Thus, if, as the State argues, withholding a claim or evidence in state court is a strategic decision by counsel, then the hypothetical gamesmanship scenario the State fears will never arise in the first instance.

The State's unfounded view of the practice of law runs wholly contrary to longstanding professional ethics rules. This Court proceeds from an assumption of

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[29] Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. Rev. 1319, 1354 (2020) (analyzing stays in capital punishment litigation).

good faith about lawyers and their clients, and should continue to do so here.

CONCLUSION

The Court should affirm the Ninth Circuit's decision below.

Respectfully submitted.

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