No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD BERNARD MOORE,
Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections, MICHAEL STEPHAN, Warden of Broad River Correctional Institution,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER W. ADAMS
THE LAW OFFICES OF CHRISTOPHER W. ADAMS, P.C.
102 Broad Street, Suite C
Charleston, SC 29401
(843) 577-2153

LINDSEY S. VANN
Counsel of Record
HANNAH L. FREEDMAN
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044

JOHN H. BLUME
CORNELL LAW SCHOOL
159 Hughes Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Petitioner

****CAPITAL CASE****

QUESTION PRESENTED

In *Cullen v. Pinholster*, this Court acknowledged, without resolving, that in some cases questions will arise as to "where to draw the line between new [habeas] claims and claims adjudicated on the merits" in state court. 563 U.S. 170, 186 n.10 (2011). At that time, lower federal courts were drawing the line based on the long-standing fair presentation doctrine: where a claim for relief was not fairly presented, *both* in law and fact, the claim was not adjudicated on the merits in the state courts and was (typically) procedurally defaulted. However, in the wake of *Martinez v. Ryan*, 563 U.S. 232 (2011), confusion has emerged among the lower courts on how to apply the fair presentation doctrine in cases, such as Moore's, where state post-conviction counsel raised a legal claim but offered no evidentiary support for it, and federal habeas counsel then pursued the same legal theory but offered the missing evidentiary support. At least two members of this Court have recognized the salience of this issue, observing that "[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) (statement of Breyer, J., joined by Sotomayor, J., respecting the denial of the petition for writ of certiorari). This case squarely presents this question and the lower federal courts need this Court's guidance as to whether, for *Martinez* purposes, a claim raised in state collateral proceedings but not supported by competent evidence is a different claim from one raised on federal habeas with substantial factual support.

The question presented is:

> In determining whether a claim has been fairly presented to, and "adjudicated on the merits" by, the state courts for § 2254(d) purposes, must a federal habeas court examine and compare not only the legal theory but also the factual support presented first in state court and then in federal court?

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

STATUTES **Page(s)**

OTHER **Page(s)**

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Bernard Moore, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-22a) is reported at 952 F.3d 174. The district court opinion (App. 24a-51a) is unreported but available at 2018 WL 1430959. The state court order denying post-conviction relief (App. 52a-152a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2020, and a timely petition for rehearing was denied on March 31, 2020 (App. 23a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Section 2254(b) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(b), provides:

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF THE CASE

This capital case arises from a shootout between store clerk James Mahoney and Richard Moore, in which Mahoney initially possessed both guns and both men were shot. The questions at trial were how the shootout happened and how only Mahoney died. The prosecution's case rested on testimony from a partially blind store patron who painted Moore as the aggressor. Moore, on the other hand, repeatedly told his attorneys that he acted in self-defense when Mahoney pulled a gun on him, and although Moore's explanation was plausible and consistent with the evidence, trial counsel did almost nothing to present it to the jury. In state post-conviction relief (PCR) proceedings, Moore's counsel recognized that trial counsel were ineffective for failing to test the state's case but failed to introduce any admissible evidence to counter the patron's testimony and as a result, the state court explicitly rejected the claim for want of evidentiary support. Then, in federal habeas, the courts below applied a new, vague, and fact-blind standard for fair presentation to confine habeas review to the barren state court record and refused consideration of new evidence supporting Moore's account of the shooting.

I. TRIAL COUNSEL'S FAILURE TO MEANINGFULLY CONTEST THE STATE'S THEORY OF THE CRIME

The State's theory of the crime was a familiar one, likely to appeal to the all-white jury selected to determine Moore's fate. Prosecutors told the jury that Moore, who is Black, entered Nikki's Speedy Mart in Spartanburg County in September of 1999 intending to rob it to get money to buy crack cocaine, shot at store patron Terry Hadden, and then shot and killed night clerk James Mahoney (both white). But, as

Moore consistently told his attorneys (and as the evidence presented in federal court confirmed), the State's version of what happened inside the store was wrong.

Moore told his trial attorneys that he stopped at Nikki's only to purchase beer and cigarettes. J.A. 3704-05.[1] He entered without a weapon,[2] picked up a few cans of beer, brought them to the sales counter, and asked Mahoney for a pack of cigarettes. J.A. 3705-06. Moore was 11 or 12 cents short and asked Mahoney if he could use the change from the penny holder on the counter. J.A. 3707-08. Mahoney refused. J.A. 3707. When Moore reminded Mahoney that he often put change in the container, Mahoney told Moore he needed to get out of the store. J.A. 3708. Moore asked what he meant, and Mahoney said, "get your black ass out of my store." J.A. 3708. Moore said he was not going anywhere, and Mahoney returned, "[O]h, you will leave," reached behind the counter, and pulled out a pistol. J.A. 3709. Moore explained that when he saw the weapon, he "automatically responded" and "reached for it." J.A. 3709. He and Mahoney "struggled over that . . . pistol, and it fired." J.A. 3709.

---

[1] "J.A." citations refer to the Joint Appendix filed in *Moore v. Stirling*, No. 18-4 (4th Cir. Oct. 22, 2018) (Docket Nos. 18-1 through 18-8). Though Moore did not testify at trial, he testified during his state PCR hearing and trial counsel agreed Moore had repeatedly told them the same version of events prior to trial. *See* J.A. 3891–92, 4079–80.

[2] Keith Fowler, the husband of the owner of Nikki's, testified at trial that he owned two guns he kept on the employee side of the counter in the store and Mahoney also kept his own personal gun in the waistband of his pants while working. J.A. 2773-74. Two of these guns were the guns involved in the shootout. The state presented testimony at trial about a "meat cleaver" found in the store that Fowler did not recognize and a pocketknife found in Moore's truck upon his arrest. J.A. 2737, 2778-79. However, no evidence connects this knife found in the store to Moore—it was never sent for fingerprint analysis—and there is no evidence that Moore brought the pocketknife into the store.

Moore wrestled the gun away from Mahoney who "immediately reached behind his back and pulled" out another gun and shot Moore through the arm and chest. J.A. 3710. Moore then sought cover behind a pillar and, acting in what he believed to be self-defense, fired "blindly" "around the pillar" toward Mahoney. J.A. 3712-13. Moore was adamant that he did not shoot at Hadden and that he did not fire any shots from the employee side of the counter. J.A. 3711, 3713. He admitted that after the shooting stopped, he went behind the counter, saw Mahoney on the floor, and took a bag of money before leaving the store. J.A. 3714.

But that is not the version the jury heard. With no video footage of what occurred at the store, J.A. 2757-58, the state relied mainly on the testimony of store patron Terry Hadden who, by his own admission, had "zero" vision in his right eye. J.A. 2620. Hadden testified he arrived at Nikki's around midnight and lingered at the store's video poker machines. J.A. 2623-24, 2626-27. Hadden had his back to the sales counter but looked up when Moore entered the store around 3 or 3:15 a.m. and then resumed his poker game when Moore walked to the beverage cooler. J.A. 2630. Hadden told the jury he did not hear anything else until he heard Mahoney say, "What the hell do you think you are doing?" at which point he turned around and saw Moore with one of his hands over both of Mahoney's hands. J.A. 2631-32.[3] According to Hadden, Moore turned and pointed a gun at him, told him not to move, and fired. J.A. 2633. Hadden testified that "the first shot [he] heard" was the one fired at him,

[3] Hadden admitted at trial that in his initial statement to the police, taken the same day as the shooting, he did not tell the "officer about Mr. Moore holding James [Mahoney's] hands down." J.A. 2650.

and he heard other shots but did not see what happened because he "play[ed] dead" until Moore left the building. J.A. 2633-36. Hadden, who was not injured, checked on Mahoney and called 911. J.A. 2637.[4]

The State called two witnesses to testify about the crime scene: (1) Paul Dorman, who processed the evidence for the Spartanburg Sheriff's Department, described his collection of the evidence and documentation of the scene and told the jury where he had located the guns, shell casings, fired bullets, bullet jackets, and bullet strikes, J.A. 2703-17; and (2) Kenneth Whitler, an "expert in firearms," testified about which gun recovered in the investigation could have fired which bullets and shell casings. J.A. 2846-58. Neither witness was asked or qualified to give opinions about whether the crime scene evidence supported or contradicted Hadden's (or Moore's) description of how events unfolded—Dorman was not qualified as an expert and Whitler was qualified only to testify about firearms, not crime scene analysis.

The only witness Moore's trial counsel called in the guilt phase was Stephen Denton, an investigator for the Spartanburg County Sheriff's Department, who confirmed which items he sent from the store to be examined for fingerprints, that there was no video recording of the shooting, and that he spoke with several witnesses during his investigation (without recounting what they told him). J.A. 2949-52. Trial

[4] The State's other guilt phase evidence included testimony from George Gibson, a friend of Moore's, who testified that Moore came to his house earlier in the day asking to purchase crack on credit and returned after the shooting, at which point Gibson saw Moore was bleeding and told him to go to the hospital. J.A. 2673-75.

counsel did not call any witnesses to support Moore's description of what happened, to help the jury determine who fired which shots from where, or to contradict Hadden's testimony. They also did not call Moore to testify, and the trial judge denied trial counsel's request for a voluntary manslaughter jury charge. J.A. 2958-64. The jury found Moore guilty of murder, armed robbery, assault with intent to kill (Hadden), and possession of a firearm during the commission of a violent crime. J.A. 3033.

After a penalty phase in which trial counsel called only two mitigation witnesses who knew nothing about Moore's upbringing or family history, the jury recommended a sentence of death, which the trial judge imposed. J.A. 3193-94. The South Carolina Supreme Court affirmed. *State v. Moore*, 593 S.E.2d 608 (S.C. 2004).

II. THE STATE COURTS REJECTED PCR COUNSEL'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATION FOR LACK OF ADMISSIBLE EVIDENCE

In South Carolina capital PCR proceedings, a condemned person's pleadings are expected to put the State on notice of the basis for the claims alleged, but the details and evidence supporting the prisoner's claims are generally not presented until an evidentiary hearing is convened.[5] Consistent with the pleading stage of this practice, Moore's PCR counsel alleged that trial counsel were ineffective for failing to "properly and adequately investigate and prepare to confront and rebut the State's alleged physical evidence" and for failing "to present [their] own expert or evidence

[5] In capital PCR cases in South Carolina, the court is required to convene an evidentiary hearing "on the merits of the application." S.C. Code Ann. § 17-27-160(C). Funding is generally available for investigative and expert assistance.

to rebut or explain such physical evidence." App. 62a. PCR counsel provided few additional details, making the vague assertion that trial counsel's failures "denied [Moore] an opportunity to show to the jury he acted in self-defense." App. 62a. They did not set forth what expert testimony could or should have been presented, alleging only that a crime scene analyst "could have provided testimony concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene analysis." App. 62a-63a. PCR counsel offered no more particularized factual or legal support for this claim to the PCR court or opposing counsel prior to the hearing.

Then, at the hearing on the merits mandated by state law, PCR counsel failed to present testimony from a competent, qualified expert. The PCR court found: "Moore did not meet his burden of proof on this issue because he did not call a crime scene expert of his own at PCR to testify to how counsel was ineffective in failing to call a crime-scene expert." App. 77a. PCR counsel only called Paul Dorman—the sheriff's office crime scene technician who testified at trial—on this issue, and the state court ruled that the claim failed as a matter of law due to a failure to "establish deficient performance of prejudice in this regard." App. 77a. The court specifically found Dorman was not qualified to offer an opinion about the crime scene because he was not an expert in crime scene reconstruction or ballistics; rather he was a "crime scene technician . . . simply the person from the Sheriff's Office who was designated to film the crime-scene, photograph it, and recover all of the physical evidence found at the scene." App. 78a. Thus, the PCR court found that his opinion on "crime scene reconstruction or ballistics" did "not meet the standard of admissibility required for

admission of such evidence at a trial before a jury." App. 78-79a.[6] The South Carolina Supreme Court denied Moore's request for discretionary review. J.A. 4573.

III. THE FEDERAL COURTS REFUSED TO CONSIDER MOORE'S NEW EVIDENCE, HOLDING THE "HEART" OF MOORE'S CLAIM HAD BEEN PRESENTED TO AND ADJUDICATED ON THE MERITS BY THE STATE COURTS.

In federal court with new appointed counsel, Moore filed a petition for writ of habeas corpus that included a claim that trial counsel were ineffective in failing to challenge the state's physical evidence. Unlike state post-conviction counsel, however, federal habeas counsel actually supported this theory of ineffectiveness with probative, admissible evidence from two qualified crime scene experts capable of establishing a reasonable probability that, but for trial counsel's deficient performance, the outcome at trial would have been different.

a. Moore Presented New Evidence Consistent with Self-Defense.

Habeas counsel presented a declaration from crime scene analyst Robert Tressel,[7] J.A. 657-60, who performed a thorough review of the available information and concluded that, in his expert opinion, "the forensic evidence is consistent with Moore's testimony that he responded to the victim pulling a weapon on him and a shootout ensued but contradicts Hadden's testimony that Moore had possession of a gun before the first shot was fired and that Moore fired that shot at Hadden."

---

[6] The PCR court denied the remainder of Moore's PCR claims, which are not relevant here.

[7] Tressel is the Chief Criminal Investigator for the Cobb County District Attorney's Office in Georgia and a private forensic investigator; has investigated more than 600 homicides; has been qualified as an expert in death investigation, crime scene analysis, and blood spatter; and has testified as an expert in ten states, including South Carolina, and in federal court. J.A. 657.

J.A. 660. Additionally, habeas counsel presented a declaration from Donald Girndt, a former South Carolina State Law Enforcement Division Agent and private crime scene analyst. J.A. 672-73. Although Girndt had consulted with trial counsel, they failed to give him significant amounts of readily available, relevant material. J.A. 672. When habeas counsel provided Girndt with that information, Girndt concurred in Tressel's conclusion that the "forensic evidence is consistent with Moore's description." J.A. 672.[8] Together, these two expert witness declarations constituted the first competent, admissible evidence offered on Moore's behalf—at any stage of the proceedings—to rebut the State's trial narrative that he entered the store intending to commit a robbery, shot the clerk in cold blood, and tried to kill a witness.

b. The District Court Refused to Consider Moore's New Evidence.

Moore's legal support for his request for an evidentiary hearing on his habeas claim was straightforward. First, he acknowledged that this particular ineffective assistance of trial counsel claim was not fairly presented to the state PCR court because PCR counsel failed to offer any competent, admissible evidence to support it. Second, because PCR counsel's inadequate assistance deprived the state courts of an opportunity to rule on the merits of the claim presented in his federal petition, Moore sought an opportunity to present his evidence—the critical evidence state PCR counsel failed to present—in support of the federal petition. The new evidence, Moore

[8] Specifically, habeas counsel gave Girndt crime scene photos, reports from the crime scene technician and ballistics expert, and the autopsy report and photos. J.A. 672.

maintained, would establish that trial counsel *and* PCR counsel were ineffective and would therefore demonstrate cause and prejudice to overcome the procedural default. *See Martinez v. Ryan*, 566 U.S. 1 (2012).

Relying on dicta in a post-*Martinez* case from the Fourth Circuit, the district court held that the state court had adjudicated Moore's claim on the merits because "the heart of the claim" in state and federal court "remain[ed] the same." App. 38a-39a (quoting *Gray v. Zook*, 806 F.3d 783, 799 (4th Cir. 2015)). The court did not acknowledge the Circuit's pre-*Martinez* fair presentation standard, which made clear that "[t]he exhaustion doctrine is not satisfied where a federal habeas petitioner presents evidence which was not presented to the state court and which places his case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Wise v. Warden, Md. Pen.*, 839 F.2d 1030, 1033 (4th Cir. 1988) (internal quotation omitted). Instead, it denied Moore's request for a hearing, refused to consider the Tressell and Girndt declarations, and over Moore's objection, granted summary judgment to the State without addressing state PCR counsel's failure to present any admissible expert evidence in support of the claim. App. 51a. Looking only at the state court record, the district court adopted the Magistrate Judge's recommendation that Moore had failed to prove his trial counsel provided ineffective assistance.

c. The Court of Appeals Affirmed.

On appeal to the Fourth Circuit, Moore maintained that under longstanding Circuit and Supreme Court precedent, the district court erred in failing to consider the expert declarations and in denying an evidentiary hearing. The panel rejected

Moore's argument on the grounds that: (1) his trial counsel ineffectiveness claim had been "presented in substantially identical terms to the state court;" and (2) "the legal arguments" were also "substantially the same." App. 14a. In service of these determinations, the panel ignored the state PCR court's express determination that Dorman's opinions were inadmissible in their entirety because he was not qualified and instead mischaracterized the state court's ruling as having rested on a finding that Dorman was "not credible." *Compare* App. 16a-17a ("Moore's state PCR counsel supported the physical-evidence claim with testimony from a crime-scene technician, Paul Dorman. . . . The state PCR court determined that the testimony was not credible."); *with* App. 78a-79a (state court finding that "[Dorman] is not an expert in crime scene reconstruction or ballistics, and Moore did not qualify him as such at the PCR merit's [sic] hearing. . . . Mr. Dorman's testimony on this specific issue at PCR does not meet the standard of admissibility."). From there, the panel declared that Moore's new evidence "fail[ed] to change the heart of the claim." App. 17a. Thus, like the district court, the panel—without considering the content of the new declarations—concluded the new evidence did not "fundamentally alter the heart" of the ineffectiveness claim and, on that basis alone, refused to remand to the district court for an evidentiary hearing. App. 3a. A timely petition for rehearing was denied and this petition follows.

REASONS FOR GRANTING THE WRIT

An important question persists at the intersection of the fair presentation doctrine and 28 U.S.C. § 2254(d) after *Cullen v. Pinholster*, 563 U.S. 170 (2011), and *Martinez v. Ryan*, 566 U.S. 1 (2012). Although some courts have continued to apply

the settled pre-*Martinez* rules of fair presentation and procedural default, other courts have developed new rules, like the amorphous "heart of the claim" standard espoused by the Fourth Circuit, that effectively render *Martinez* meaningless in an important category of cases to which it should otherwise apply. This Court should grant certiorari to resolve confusion in the lower courts over how to distinguish claims that have been "adjudicated on the merits in state court proceedings" from those that were never "fairly presented" to a state court for a merits adjudication in the first place.

I. DESPITE WELL-SETTLED STANDARDS, SOME COURTS OF APPEALS HAVE DIVERGED FROM THIS COURT'S FAIR PRESENTATION DOCTRINE AS APPLIED TO HABEAS CLAIMS RAISED BUT NOT SUPPORTED BY EVIDENCE IN THE STATE COURTS.

a. Under this Court's Longstanding Precedent, a State Prisoner Must, to Avoid Procedural Default, Fairly Present *Both* the Controlling Legal Principles and the Supporting Facts Relevant to His Claim to the State Courts.

"It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus." *Picard v. Connor*, 404 U.S. 270, 275 (1971); *see also Ex parte Hawk*, 321 U.S. 114, 116-17 (1944) (per curiam) ("Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts . . . have

been exhausted.").[9] This "exhaustion-of-state remedies doctrine" furthers two important principles: (1) "federal-state comity;" and, (2) "an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Picard*, 404 U.S. at 275 (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (per curiam), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-71, *as recognized in Woodford v. Ngo*, 548 U.S. 81, 84 (2006)). "The principles of the [exhaustion] doctrine have been embodied in 28 U.S.C. § 2254, which was enacted by Congress to codify the existing habeas corpus practice." *Irvin v. Dowd*, 359 U.S. 394, 405 (1959).

A state prisoner has exhausted a federal claim only if that claim "has been fairly presented to the state courts." *Picard*, 404 U.S. at 275. Fair presentation requires "a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (quoting *Picard*, 404 U.S. at 276-77); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state

[9] Citing *Ex parte Abernathy*, 320 U.S. 219, 220 (1943) (per curiam); *Mooney v. Holohan*, 294 U.S. 103, 115 (1935); *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17 (1925); *Urquhart v. Brown*, 205 U.S. 179, 181 (1907); *Tinsley v. Anderson*, 171 U.S. 101, 104, 105 (1889). *See also Wainwright v. Sykes*, 433 U.S. 72, 80 (1977) ("This rule [from *Ex parte Royall*] has been followed in subsequent cases, *e.g.*, *Cook v. Hart*, 146 U.S. 183 (1892); *Whitten v. Tomlinson,* 160 U.S. 231 (1895); *Baker v. Grice*, 169 U.S. 284 (1898); *Mooney v. Holohan*, 294 U.S. 103 (1935), and has been incorporated into the language of § 2254.").

remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoner's federal rights." (internal citations and quotation marks omitted)).

Thus, a state prisoner does not satisfy fair presentation merely "by raising one claim in the state courts and another in the federal courts," and this Court has long "required a state prisoner to present the state courts with the same claim he urges upon the federal courts." *Picard*, 404 U.S. at 276.[10] Though "there are instances in which the ultimate question for disposition will be the same despite variations in the legal theory or factual allegations urged in its support," *id.* at 277 (internal citation and quotation marks omitted), where "presentation of additional facts to the [habeas] court" serves to "fundamentally alter the legal claim already considered by the state courts," a habeas petitioner has not satisfied the fair presentation or exhaustion requirements. *See Vasquez v. Hillary*, 474 U.S. 254, 258, 260 (1986); *see also* Hertz &

---

[10] *See also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) ("[E]ncouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance."), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218, *as recognized in Williams v. Taylor*, 529 U.S. 420, 433 (2000).

> One goal of the exhaustion requirement and the appellate chain of proceedings the requirement forges is to permit state adjudicative processes to develop and clarify federal claims. Those processes may transform the claim substantially, therefore, depending, for example, on (1) how the facts unfolded at a state court hearing, (2) how the parties portrayed those facts and structured their legal arguments in postpleading briefs in the state courts, and (3) how the state courts reported and analyzed the facts and law in their decisions.

2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 23.3(iii) (7th ed. 2016) (internal footnote omitted).

Liebman, *supra*, § 23.3(iii) ("Even if the petitioner raises precisely the same *legal* claims in state and federal proceedings, reliance in the two proceedings upon different *factual* grounds that 'fundamentally' alter the legal claim will foreclose a conclusion that the claim is exhausted."); 17B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4264.3 (3d ed. 2020) ("Exhaustion is not found if because of new factual allegations or new evidence the claim is substantially different from what the state court decided.").

The ramifications of the fair presentation determination are significant. Where a claim has not been fairly presented to a state court, and there is no longer a procedural mechanism allowing for state court review of the claim, the claim is procedurally defaulted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) ("[W]e ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts. . . . Because we answer this question 'no,' we conclude that [the petitioner] has procedurally defaulted his claims.").[11] Generally, federal courts "may not . . . entertain[]" a state prisoner's procedurally defaulted claims for relief without a showing of "cause" and "prejudice." *See, e.g.*, *Maples v. Thomas*, 565 U.S. 266, 280 (2012); *Coleman*, 501 U.S. at 750.

[11] This Court has consistently applied the doctrine of procedural default where a habeas petitioner failed to properly present a claim to the state courts and there is no remaining state court procedural mechanism for doing so. *E.g.*, *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *Castile v. Peoples*, 489 U.S. 346, 351 (1989); *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982); *Wainwright*, 433 U.S. at 87.

b. Lower Courts Developed Robust and Easily Applied Standards for Determining when Differences in the Evidence Presented to the State and Federal Courts Rendered a Claim Procedurally Defaulted.

Over decades of applying this Court's fair presentation principles, the federal courts of appeals established clear, consistently applied standards for determining when a claim raised in a federal habeas petition and supported by new evidence not provided to the state courts was the same claim or a "fundamentally altered" one. With slight variations, the lower courts determined that when new evidence *material* to a federal claim was presented to the federal courts for the first time, the claim was both fundamentally altered and procedurally defaulted because, under those conditions, state courts had not been given the opportunity to consider both controlling legal principles *and* facts. *See, e.g.*, *Wise v. Warden, Md. Pen.*, 839 F.2d 1030, 1034 (4th Cir. 1988) ("[W]hen critical evidence is presented for the first time to a federal habeas court, it cannot be said that the petitioner has 'fairly presented' to the state courts the 'substance' of his federal claims." (quoting *Anderson*, 459 U.S. at 6)); *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988) (per curiam) (explaining that a federal petitioner's habeas claims are not fairly presented where the "petitioner presents newly discovered evidence or other evidence not before the state courts such as to place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it" (quotation marks omitted)); *Sampson v. Love*, 782 F.2d 53, 55 (6th Cir. 1986) (same); *Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983) (per curiam) (same); *Jones v. Hess*, 681 F.2d 688, 694 (10th Cir. 1982) (same).

Implementing these standards, federal courts compared the evidence, both in "quantum and quality," that a state prisoner presented in state and federal court. *E.g.*, *Ferguson v. McKune*, No. 99-3214, 2000 WL 1133134, at *2 (10th Cir. Aug. 10, 2000) (citing *Demarest v. Price*, 130 F.3d 922, 933 (10th Cir. 1997). After engaging in the comparison, lower courts regularly refused to consider new evidence when it altered or strengthened—rather than merely supplemented—a claim, unless the petitioner could demonstrate cause and prejudice to overcome the procedural default or first returned to the state courts (in the rare circumstance when further state court proceedings were available). *See id.* For example:

- The Fourth Circuit refused to consider new evidence of an agreement between the prosecution and a state's witness where the petitioner made mere allegations of an agreement in the state courts, reasoning "[t]here is . . . a world of difference between conjecture and proof." *Wise*, 839 F.2d at 1034;[12] *see also Sampson*, 782 F.2d at 57 (Sixth Circuit refusing to consider new, direct proof of alleged vindictive sentencing, where the petitioner in state court "could only speculate" whether jurors knew of a prior conviction, because "[the new] evidence places [petitioner's] claim in a significantly different posture than that at the state level"); *Burgin v. Broglin*, 900 F.2d 990,

[12] *See also, e.g.*, *Moses v. Branker*, No. 06-8, 2007 WL 3083548, at *3 (4th Cir. Oct. 23, 2007) (refusing to consider new evidence of what a proper mitigation investigation would have uncovered); *Matthews v. Evatt*, 105 F.3d 907, 912, 916 (4th Cir. 1997) (refusing to consider new evidence that race influenced the decision to seek the death penalty), *abrogated on other grounds by Miller-El v. Dretke*, 545 U.S. 231 (2005).

995 (7th Cir. 1990) (citing *Wise* and *Sampson* and refusing to consider evidence of a conversation regarding a previously undisclosed plea agreement where the petitioner made only allegations of an undisclosed plea agreement in state court).

- The Fifth Circuit refused to consider new evidence in the form of affidavits from a mitigation witness and a detailed psychological report when the petitioner's ineffective assistance of counsel claim in the state court was supported only by conclusory affidavits from trial counsel suggesting there was abundant mitigation evidence not presented at trial. *Kunkle v. Dretke*, 352 F.3d 980, 987 (5th Cir. 2003). The Court explained, "[t]he claim would have been substantially different in the state court if [petitioner] had provided this evidentiary support rather than the conclusory affidavit of trial counsel." *id.* at 988;[13] *see also Demarest*, 130 F.3d at 938 (10th Cir. 1997) (refusing to consider expert blood spatter testimony presented to the federal courts when the petitioner's state court claim was supported only by a legal expert who opined that trial counsel should

[13] *See also, e.g.*, *Graham v. Johnson*, 94 F.3d 958, 969 (5th Cir. 1996) (per curiam) (refusing to consider new "significant evidentiary support" for claims of actual innocence and ineffective assistance of counsel); *Joyner v. King*, 786 F.2d 1317, 1320 (5th Cir. 1986) (refusing to consider evidence of what a co-defendant would have said had he not invoked a Fifth Amendment privilege in state proceedings); *Brown*, 701 F.2d at 495-96 (refusing to consider new affidavits from three people who observed petitioner's behavior while awaiting trial because they "added some substantiation to contentions which previously had no serious corroboration").

have consulted an independent blood spatter expert to evaluate and respond to the state's evidence because "the new evidence . . . transformed his claim from one involving only general allegations of failing to investigate and cross-examine and only a minimal showing of prejudice into one involving a concrete reference to a qualified expert who could have been produced at trial to rebut the scientific basis of the state's case.").[14]

- The Ninth Circuit refused to consider an affidavit, presented for the first time to the federal courts, providing evidence that police interrogators heard and ignored the petitioner's request for a lawyer because the affidavit "substantially improve[d] the evidentiary basis for [the petitioner's] right-to-counsel and voluntariness arguments, thereby presenting the very type of evidence which the state should consider in the first instance." *Aiken*, 841 F.2d at 883.[15]

---

[14] *See also*, *e.g.*, *Fairchild v. Workman*, 579 F.3d 1134, 1151-52 (10th Cir. 2009) (refusing to consider new evidence of brain damage); *Jones*, 681 F.2d at 694 (refusing to consider new evidence of the trial judge's communications with the prosecution in support of a judicial bias claim).

[15] On the other hand, where courts found new evidence merely supplemented the evidence presented to the state courts, the federal courts found the claims were not fundamentally altered and considered the new evidence in reviewing the petitioner's habeas claims—that is, before *Cullen v. Pinholster*, 563 U.S. 170 (2011). *See, e.g.*, *Winston v. Kelly*, 592 F.3d 535, 550, 553 (4th Cir. 2010) (finding an additional IQ score did not fundamentally alter a claim of intellectual disability where the petitioner presented three other IQ scores to the state courts); *Lewis v. Quarterman*, 541 F.3d 280, 285-86 (5th Cir. 2008) (finding an additional expert affidavit opining to a diagnosis of intellectual disability merely supplemented a state court claim relying on affidavits and testimony from mental health professionals with the same diagnosis); *Boyko v. Parke*, 259 F.3d 781, 789 (7th Cir. 2001) (finding a transcript

c. *Pinholster* and *Martinez* Modified the Law Regarding the Presentation of New Evidence in Federal Habeas.

Against the backdrop of these consistently applied standards for fair presentation and procedural default, a pair of this Court's cases modified the circumstances under which federal courts could consider evidence that had not been presented to a state court. First, *Pinholster* held that federal habeas courts reviewing claims adjudicated on the merits by state courts are limited to reviewing "the record that was before the state court." 563 U.S. at 181-82 (citing 28 U.S.C. § 2254(d)(1)). The Court found this decision was compelled by "'the broader context of the statute as a whole,' which demonstrates Congress' intent to channel prisoners' claims first to the state courts." *Id.* at 182 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Given the primacy of state court decision making, *Pinholster* recognized that "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id.* at 182-83. Although its holding confirmed that § 2254(d) cannot accommodate evidence beyond the state court record, *Pinholster* also made clear that where a petitioner produces additional evidence for the first time in federal court, its inclusion may render a claim "new" relative to the one "adjudicated on the merits" by the state court on different facts. *Id.* at 186 & n.10.

---

showing trial counsel knew the petitioner suffered from PTSD did not change the substance of his state court claim that trial counsel should have pursued self-defense and PTSD theories at trial).

Less than a year after *Pinholster*, *Martinez* addressed the equitable concern that the "bedrock principle" of the right to effective assistance of counsel could elude judicial review if not raised during initial-review collateral proceedings. 566 U.S. at 11-13. Recognizing that presentation of a claim of ineffective assistance at trial requires "an effective [collateral review] attorney," *Martinez* held that "where appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]," "a prisoner may establish cause for the default of an ineffective-assistance claim." *Id.* at 12, 14. To demonstrate cause under *Martinez*, therefore, a prisoner must show: (1) that appointed collateral counsel were ineffective under the standards of *Strickland*; and (2) "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one." *Id.* at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). Though neither *Pinholster* nor *Martinez* altered in any respect the well-settled standard for determining when a claim is procedurally defaulted due to failure to fairly present it to the state court, some lower courts deviated from those standards in determining when a claim is defaulted and subject to review under *Martinez.*

d. Confusion Emerged Among the Courts of Appeals Regarding the Application and Consequences of the Well-Established Fair Presentation Requirement.

In the wake of *Pinholster* and *Martinez*, the effect of "new" evidence on a prisoner's claim for habeas relief took on different significance. Where new evidence merely supplements a record that is otherwise sufficient to inform a state court merits decision, *Pinholster* prohibits federal habeas courts from considering the new evidence under 2254(d). But where new evidence does more than merely supplement

an adequate record—when it "fundamentally alters" it—then the claim is new and was not "adjudicated on the merits" in state court, and because it is procedurally defaulted, merits review may still be available under *Martinez*'s equitable exception.

Pinholster predicted this issue, but because that case did not require the Court to "draw the line between new claims and claims adjudicated on the merits," that question was left to the lower courts to work out in the first instance. 563 U.S. at 186 n.10. As this case demonstrates, it is now time for this Court's intervention. Despite clear guidance in the undisturbed, long-standing rules of fair presentation and procedural default, the Fourth Circuit panel below crafted its "heart of the claim" standard out of whole cloth. And while the panel characterized its new test as "simply a different way" of framing the fair presentation requirement, that is plainly incorrect as a general statement of law and as applied in Moore's case. App. 15a n.8. Instead of looking at the "quantum and quality" of evidence presented in the various forums to determine whether the material facts were fairly presented to the state courts, *see Ferguson*, No. 99-3214, 2000 WL 1133134, at *2, the "heart of the claim" formulation looks no further than the basic legal theories pled in state and federal court. Under this amorphous standard, which has no pedigree in habeas litigation, if the claims resemble each other, no amount or type of newly presented evidence can generate fundamental alteration sufficient to bring a federal claim within the purview of *Martinez*.[16]

[16] Similarly, the Eighth Circuit recently moved away from the requirement that factual support for a claim be first presented to the state courts and held that "[t]he weakness of support for the claims in [the state court] petition has no bearing on

This Court's recent decisions do not warrant (or command) the lower courts' move away from the established requirements of fair presentation. *C.f. Wilson v. Sellers*, 138 S. Ct. 1188, 1195 (2018) (explaining that *Harrington v. Richter*, 562 U.S. 86 (2011), did not disturb the long-established "look through" presumption where it "did not directly concern the issue"). Certiorari is appropriate to provide clarity on this question and prevent further deviation from (and inconsistent application of) the fair presentation doctrine. *See Gallow v. Cooper*, 570 U.S. 933 (2013) (Breyer, J. statement respecting the denial of certiorari) (noting the importance of this issue prior to any circuit court decisions directly addressing it).

---

whether the claims were actually presented" so long as the same "specific ineffective-assistance-at-trial allegations were presented." *Thomas v. Payne*, 960 F.3d 465, 473 (8th Cir. 2020).

Other circuits, however, appear to faithfully apply the fair presentation and procedural default standards since *Pinholster* and *Martinez*. *See, e.g.*, *Rogers v. Mays*, No. 19-5427, slip op. at 4 (6th Cir. May 18, 2020) (granting a certificate of appealability to consider whether, despite the state court ruling on the merits, the petitioner's trial counsel ineffective assistance claims were procedurally defaulted (and eligible for review under *Martinez*) because state post-conviction counsel "fail[ed] to submit any evidence in support of the claims"); *Clark v. Stephens*, 627 Fed. App'x 305, 308-09 (5th Cir. 2015) (granting a certificate of appealability where a habeas petitioner presented a claim "supported by substantially more evidence than the claim presented to the state habeas court" because "[i]f [the petitioner] is correct that his IATC claim is new, the result would be that [he] would now present a claim to the district court which would not have been adjudicated on the merits in state court; instead, the new claim would be one that had been procedurally defaulted"); *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (en banc) ("A claim has not been fairly presented in state court if new factual allegations either fundamentally alter the legal claim already considered by the state courts or place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." (citations omitted)).

II. MOORE'S CASE PROVIDES A GOOD VEHICLE FOR ADDRESSING CONFUSION SURROUNDING THE CONTINUED APPLICABILITY OF THE FAIR PRESENTATION DOCTRINE.

This case squarely presents the important question of whether, after *Pinholster* and *Martinez*, the fair presentation requirement that a habeas petitioner must first present the state courts with the factual support for his claim continues to apply, and if so, to reestablish the primacy of the fair presentation doctrine in the lower courts. The state court explicitly held Moore's claim failed because his PCR counsel failed to present the PCR court with any evidentiary support for the claim. *See* App. 77a ("Moore did not meet his burden of proof on this issue because he did not call a crime scene expert of his own at PCR to testify to how counsel was ineffective in failing to call a crime-scene expert. He failed to establish deficient performance or prejudice in this regard."). Accordingly, if this Court's fair presentation standard still requires presentation of both the legal principles and the factual basis for a claim, *Anderson*, 459 U.S. at 6, Moore's ineffective assistance of trial counsel claim was not fairly presented to the state courts.[17]

Certiorari in this case would, therefore, allow the Court address the specific issue recognized by Justice Breyer in the wake of *Martinez*: how federal courts should

[17] Because no admissible evidence was presented in support of Moore's claims, this is not a case that requires precise line-drawing to determine *how much* new evidence presented to the federal courts renders a claim "new" for procedural default purposes. The Court need not decide where the line falls because the lower courts have established standards for applying both the legal and factual requirements of the fair presentation doctrine. A holding by this Court that the fair presentation doctrine is unchanged by *Martinez* would allow the lower courts to conduct the necessary line-drawing based on their previously developed standards.

handle cases like Moore's where "state habeas counsel deficiently neglect[ed] to bring forward 'any admissible evidence' to support a substantial claim of ineffective assistance of trial counsel." *Gallow*, 570 U.S. at 933. Given the confusion that has developed among the lower courts on this very issue, certiorari is now appropriate for the Court to provide its much-needed guidance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LINDSEY S. VANN
Counsel of Record
HANNAH L. FREEDMAN
JUSTICE 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803) 765-1044

JOHN H. BLUME III
CORNELL LAW SCHOOL
159 Hughes Hall
Ithaca, NY 14853
(607) 255-1030

CHRISTOPHER W. ADAMS
THE LAW OFFICES OF CHRISTOPHER W. ADAMS, P.C.
102 Broad Street, Suite C
Charleston, SC 29401
(843) 577-2153

COUNSEL FOR PETITIONER

August 27, 2020.