No. 20-5570

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

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

Respondents' Brief in Opposition attempts to muddy the water by improperly referencing evidence offered in state post-conviction relief ("PCR") proceedings unrelated to the claim Moore raised in federal habeas. Rather than address Moore's substantive arguments, Respondents attempt to avoid the fact—made clear in the order that opposing counsel drafted for the PCR court—that Moore's state PCR claim of trial counsel ineffectiveness for failure to present expert testimony lost on the sole basis that PCR counsel offered no competent evidence to support the claim. Moore does not seek an extension of *Martinez v. Ryan*, 460 U.S. 1 (2012), but rather only asks that this Court make clear that the settled, long-standing principles of fair presentation (and thus procedural default) apply when the factual basis of the claim presented in federal court is materially different from the factual basis for the claim decided by the state court in PCR proceedings. Certiorari is appropriate in this case given the different approaches the circuits have taken when presented with claims fundamentally altered by new evidence in federal habeas corpus proceedings.

I. MOORE'S STATE PCR COUNSEL PROCEDURALLY DEFAULTED THEIR CLAIM THAT TRIAL COUNSEL WERE INEFFECTIVE FOR NOT CALLING A CRIME SCENE EXPERT.

A. PCR Counsel Failed to Present Admissible Evidence on the Only Theory of Trial Counsel's Ineffectiveness That Is Before This Court.

Respondents mischaracterize the state court record and the state court order by improperly aggregating various sub-claims and referencing evidence PCR counsel presented and the state court considered with respect to other assertions of trial counsel ineffectiveness. In state PCR proceedings, PCR counsel raised a broad claim

of ineffective assistance of counsel based on trial counsel's multiple failures related to the handling of the State's physical evidence presented during the guilt-or-innocence phase of the trial. *See* App. 62a–63a. After providing a description of the types of physical evidence that were presented at trial, the claim alleged:

> Had counsel hired appropriate forensic experts, including a forensic pathologist, who could have testified as to the single bullet having killed James Mahoney, rather than two as opined by the state, and a crime scene analyst, who could have provided testimony concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene analysis, there is a reasonable probability that the guilt and/or penalty phase would have had a different outcome.

App. 62a–63a.

The PCR court's order, drafted by counsel for Respondents and adopted with minimal alterations, considered these allegations as two separate theories of trial counsel's ineffectiveness: (1) trial counsel's failure to call a pathologist to testify that the victim was only shot once;[1] and, (2) trial counsel's failure to call a crime scene analyst concerning the origin of various items of physical evidence, such as shell casings and bullets, and general crime scene analysis.[2] *See* App. 74a–80a. In doing so, the PCR court treated the two theories as different claims of ineffective assistance of counsel at the guilt-or-innocence phase of the proceedings. The PCR court denied

[1] The State's pathologist testified at trial that the victim may have suffered "either one or two gunshot wounds." J.A. 2921.

[2] The section of the PCR order addressing ineffectiveness related to trial counsel's handling of the physical evidence was adopted from the proposed order drafted by counsel for Respondents without amendment.

the first claim after considering testimony from Dr. Sandra Conradi and trial counsel, concluding that Moore failed to prove deficient performance or prejudice based on trial counsel's failure to call a pathologist to testify. App. 75a–77a.

The PCR Court separately considered PCR counsel's assertion that trial counsel were ineffective in failing to present testimony from a crime scene analyst, finding: "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. The court explicitly held, based on the lack of evidence alone, "[Moore] failed to establish deficient performance and prejudice in this regard" and "[t]herefore, this ground must be dismissed with prejudice." App. 77a.

Consistent with the claim parameters set by the PCR court (and counsel for Respondents), in habeas proceedings Moore raised only the claim that trial counsel were ineffective for failing to present a crime scene expert and did not raise the claim related to a pathologist. Because different allegations of ineffectiveness are not interchangeable for procedural default purposes, only the evidence supporting the crime scene expert subclaim is relevant in these proceedings. *See Picard v. Connor*, 404 U.S. 270, 276 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."); *Flieger v. Delo*, 16 F.3d 878, 885 (8th Cir. 1994) ("Nor has a petitioner who presents to the state courts a broad claim of ineffectiveness as well as some specific ineffectiveness claims properly presented all conceivable specific variations for the purposes of federal

habeas review."). Thus, Respondents' co-mingling of claims it chose to disaggregate in state PCR proceedings does not change the bottom line; Moore's claim failed as a matter of law due to PCR counsel's failure to present any evidence supporting it.

B. PCR Counsel's Failure to Present Any Admissible Evidence on the Only Relevant Question of Trial Counsel's Ineffectiveness Procedurally Defaulted the Claim.

Applying ordinary rules of fair presentation, a lack of evidence supporting a claim in state court results in procedural default of the claim. *See Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (requiring a habeas petitioner to submit the "controlling legal principles" and the "facts bearing upon his constitutional" claim in order to satisfy the fair presentation requirement). If Moore's claim is procedurally defaulted, it is eligible for consideration under *Martinez*, which Respondents seek to avoid. *See* Br. of Fed. Cts. and Habeas Profs. as Amici Curiae in Supp. of Pet'r at 13 [hereinafter "Brief of Professors"] ("State respondents that had formerly [prior to *Martinez*] pushed for strict fair presentation rules that triggered procedural defaults suddenly preferred claims to be classified as having been 'adjudicated on the merits' in state court."). But Respondents cannot have it both ways and must abide by the ruling of the state court that Moore's specific claim of ineffectiveness failed for want of evidence. *C.f. Wilson v. Sellars*, 138 S. Ct. 1188, 1191–92 (2018) (requiring "the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state petitioner's federal claims") (internal quotation omitted).

Drawing on evidence presented in support of other theories of ineffectiveness, Respondents assert Moore presented three witnesses in support of his claims: (1) Moore himself, (2) Paul Dorman, and (3) Dr. Sandra Conradi. Br. in Opp. 25. But Moore's PCR testimony did not, and could not, provide evidence of trial counsel's ineffective assistance for failing to call a crime scene expert because Moore is not a crime scene expert. As the PCR court correctly recognized, proof of ineffective assistance of counsel for failing to call an expert requires evidence of what that expert would have testified to at trial. *See, e.g.*, *Demrest v. Price*, 130 F.3d 922, 937–38 (10th Cir. 1997) (finding a claim of ineffective assistance for failure to consult an independent expert about blood spatter evidence procedurally defaulted where post-conviction counsel failed to present evidence from an independent expert); *Bannister v. State*, 509 S.E.2d 807, 809 (S.C. 1998) (holding that in pressing a claim of ineffective assistance of counsel for failure to call a witness, the "PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing").[3] As discussed at length in Moore's petition for certiorari, Dorman was not a crime scene expert and, therefore, his testimony also did not provide evidentiary support for the claim that trial counsel should have called an expert. Finally, Dr. Conradi's testimony (as an expert in

[3] For the same reasons, trial counsel's testimony did not provide evidence supporting a claim that they were ineffective in failing to call a crime scene expert. *See Kunkle v. Dretke*, 352 F.3d 980, 987 (5th Cir. 2003) (finding a claim of ineffective assistance of trial counsel procedurally defaulted when it was supported in state court only by affidavits from trial counsel with conclusory suggestions that there was abundant mitigation evidence not presented at trial).

pathology, not crime scene analysis) was offered in support of the different claim that trial counsel should have called a pathologist to testify that the victim suffered only one gunshot wound, not in support of the crime scene expert claim. Respondents cannot now merge the testimony of three PCR witnesses to avoid the simple fact that Moore lost in state PCR because his attorneys raised "[a] claim without any evidence to support it," which "might as well be no claim at all." *See 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).[4]

II. MOORE DOES NOT REQUEST AN EXTENSION OF *MARTINEZ* BUT RATHER A FAIR APPLICATION OF THE RULES GOVERNING PROCEDURAL DEFAULT.

Respondents mischaracterize the state court record in an effort to portray Moore's petition as a request to expand the *Martinez* gateway to claims adjudicated on the merits. On the contrary, Moore's claim was presented without admissible evidence supporting it. Applying the well-settled principles of fair presentation and procedural default, which this Court has not indicated were altered by *Martinez,* the

[4] Ultimately, the fact-intensive analysis Respondents ask the Court to conduct would first require a trial court to consider the evidence Moore presented in federal habeas and to make factual findings based on that evidence. Because the lower courts here erroneously concluded that Moore's claim was not procedurally defaulted, no court has ever considered the content or credibility of the new evidence presented in federal habeas proceedings. In urging this Court to deny certiorari, Respondents advocate for the precise thing of which they accuse Moore: ignoring the primacy of state-court decisions in the federal habeas scheme. *E.g. Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (where no court below had considered the merits of the petitioner's *Martinez* claim, remanding to give the lower courts an opportunity to decide the proper venue—state or federal court—for assessing, "in the first instance," "the merits of [the petitioner's] ineffective-assistance-of-trial-counsel claim," "whether [his] claim of ineffective assistance of trial counsel is substantial," and "whether [his] initial state habeas attorney was ineffective").

issue is whether a claim that was raised in state post-conviction proceedings but not supported by competent evidence was fairly presented. If the answer is no, then the claim was procedurally defaulted and the claim was not adjudicated on the merits for purposes of 28 U.S.C. § 2254(d). *See* Br. for the Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae in Supp. of Pet'r at 9 ("Notably, *Martinez* also drew no distinction between the ineffectiveness of post-conviction counsel resulting in the failure to present a claim of ineffective assistance of trial counsel and the failure to marshal any factual support for such claims; in either case, the procedural default will be excused.").

The Fourth Circuit did not follow the established doctrines and found Moore's claim was not procedurally defaulted and, therefore, not eligible for review under *Martinez*.[5] This determination is contrary the standards other circuit courts continue to use. *See* Br. of Profs. at 11 ("[T]here was no confusion of the meaning of 'fair presentation' and 'adjudication on the merits' before *Martinez*. In every federal jurisdiction, federal courts observed the rule set forth in *Picard* and *Vasquez*: A federal court claim was not adjudicated on the merits in state court when it is not fairly presented there, and a federal court claim is not fairly presented if the comparable state court claim omitted substantial evidence. . . . [B]ut the Fourth

[5] Contrary to Respondents' assertion, the Fourth Circuit did abandon its well-settled fair presentation doctrine, which was consistent with this Court's requirement that a habeas petitioner first present the state courts with the factual basis for his claim. *See Wise v. Warden*, 839 F.2d 1030, 1034 (4th Cir. 1988) (finding a claim procedurally defaulted because the habeas petitioner failed to present the "critical evidence" supporting the claim to the state courts even though the nature of the claim was unchanged between the state and federal court proceedings).

Circuit now disagrees.").[6] Accordingly, this case presents an appropriate vehicle for this Court to determine the continued applicability of the fair presentation doctrine in federal habeas cases.

[6] Respondents assert the Fifth, Sixth, Eighth, and Eleventh Circuits "apply[] virtually identical reasoning" to the Fourth Circuit. Br. in Opp. 31–33. At most, the cases Respondents cite demonstrate the post-*Martinez* confusion over the application of the fair presentation and procedural default doctrines. However, Respondents incorrectly equate several cases with Moore's. For example, *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014); *Lambrix v. Sec'y*, 756 F.3d 1246 (11th Cir. 2014); and *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013), are all cases in which the petitioner had submitted substantial evidence in support of his claims in state court, distinguishing them from Moore's case. Additionally, Respondents ignore that the Fifth and Sixth Circuits issued opinions more recently acknowledging that a claim raised in state court can be procedurally defaulted when significant additional evidence is presented in federal court. *See, e.g.*, *Rogers v. Mays*, 814 Fed. App'x 984 (6th Cir. 2020); *Clark v. Stephens*, 627 Fed. App'x 305 (5th Cir. 2015).

CONCLUSION

For these additional reasons, this Court should grant certiorari.

Respectfully submitted,

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