NO. 20-975

In the
Supreme Court of the United States

FREDDIE OWENS,

Petitioner,

v.

BRYAN P. STIRLING, ET AL.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

ROBERT LEE
ELIZABETH PEIFFER
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
2421 Ivy Rd., Suite 301
Charlottesville, VA 22903
roblee@vcrrc.org
epeiffer@vcrrc.org

MICHAEL F. WILLIAMS
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
(202) 389-5000
mwilliams@kirkland.com

Counsel for Petitioner

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* Since the initial filing in this case in the Court of Appeals, Mr. Owens has been moved to the Broad River Correctional Institution in Columbia, South Carolina. According to the Director's Opposition, Mr. Owens currently is in the custody of Deputy Warden Lydell Chestnut at Broad River Correctional Institution Secure Facility. Those changes are incorporated here.

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REPLY BRIEF

Comes now Petitioner, Freddie Owens, and states the following in reply to Respondents' Brief in Opposition, filed February 22, 2021 (hereinafter "BIO"):

ARGUMENT

Respondents oppose relief by presenting a version of the case that is not accurate, and which attributes arguments to Mr. Owens that are not made in Mr. Owens's Petition for a Writ of Certiorari (hereinafter "Petition"). Where Respondents address application of *Martinez v. Ryan*, 566 U.S. 1 (2012), their Opposition highlights the confusion over the *Martinez* substantial claim standard, and supports the need for the Court to grant certiorari and clarify how the equitable exception of *Martinez* and its progeny should be applied by the lower courts.

Certiorari review is warranted to clarify confusion over the *Martinez* substantial claim standard, which the lower courts in Mr. Owens's case applied erroneously, thereby preventing him from vindicating his constitutional right to the effective assistance of trial counsel. The exception established in *Martinez* was designed to protect the right to effective assistance of counsel, a "bedrock principle in our justice system." *Martinez*, 566 U.S. at 12. The Court held that to excuse procedural default of an ineffective-assistance-of-trial-counsel claim, a petitioner must demonstrate that the claim is "substantial" and "has some merit." *Id.* at 14 (emphasis added). The Court cited to the minimal showing needed for a certificate of appealability (hereinafter "COA") to issue, *id.* (citing *Miller-El v.*

Cockrell, 537 U.S. 322, 336 (2003)), and described an "insubstantial" ineffective-assistance-of-counsel claim as one that "does not have any merit or [] it is wholly without factual support," *id.* at 16. Lower courts have shown confusion in interpreting and applying this standard, including confusion over how a substantial claim under *Martinez* relates to a substantial claim under *Miller-El*. *See* Pet. at 19–23. In Mr. Owens's case, the district court held that "the underlying ineffective assistance claim for this ground *fails on the merits* and [Mr.] Owens therefore cannot rely on *Martinez* to overcome the procedural default." App. 142 (emphasis added). The Fourth Circuit approved this merits analysis as proper under *Martinez*, App. 51–52, thereby requiring Mr. Owens to meet a significantly higher standard than that set by this Court. As a result, Mr. Owens's claim that he was sentenced to death by jurors unaware that he suffered from organic brain damage that affected his behavior has never received proper consideration by any court. Pet. at 3–4, 6.

I. THE COURT SHOULD CLARIFY THE PROPER STANDARD FOR DECIDING WHETHER A CLAIM IS "SUBSTANTIAL" UNDER *MARTINEZ*.

Respondents characterize Mr. Owens's Petition as a request to "grossly expand[] the scope of *Martinez*." BIO at 21; *see also id.* at 31 ("[T]his Court should not allow *Martinez* to be expanded in scope or practice."). That fundamentally misrepresents what Mr. Owens seeks. Mr. Owens asks the Court to clarify the appropriate standard federal courts are to use when determining whether a claim is substantial pursuant

to *Martinez* and the manner in which those courts can apply that decision—thereby correcting widespread confusion among lower courts, and to remand his case for further proceedings following the Court's guidance. Pet. at 34.

A. To Assess the Substantiality of a *Martinez* Claim, the Lower Courts Should Perform a Threshold Determination That is Not a Full Merits Analysis.

The Petition clearly sets out Mr. Owens's argument that confusion about the *Martinez* substantial claim standard and its application has led lower courts to force petitioners like Mr. Owens to meet an inappropriately high standard that frustrates the purpose of *Martinez* and prevents petitioners from receiving a first review of their ineffective-assistance-of-trial-counsel claims. *See, e.g.,* Pet. at 21 ("the Fourth Circuit [has] consistently imposed a higher burden [to show substantiality under *Martinez*], and found petitioners' claims insubstantial based on the Strickland standard."); *id.* at 23 ("the Fourth Circuit erred in reviewing the substantial quality of Mr. Owens's claim through an imbalanced assessment of its merits."); *id.* at 25 ("Similar to the Fifth Circuit's error in Buck, the Fourth Circuit in Mr. Owens's case relied upon full briefing and analysis. . . . and based on an imbalanced representation of the record . . . held Mr. Owens to a higher standard than *Martinez* permits."); *id.* at 26 (the court's conclusion that trial counsel "didn't perform deficiently" was "a decision on the merits of Mr. Owens's claim"); *id.* at 27 ("rather than determin[e] whether Mr. Owens's claim was substantial . . . the Fourth Circuit affirmed that [the

district court's] merits review was the correct analysis, improperly conflating a merits determination with the *Martinez* substantiality standard."); *id.* ("it is clear from the Fourth Circuit's detailed factual analysis that it decided Mr. Owens's claim on the merits instead of assessing whether it was a 'substantial claim'"); *id.* at 29 ("The Fourth Circuit repeatedly performed detailed analyses of the facts and evidence submitted in support of Mr. Owens's claim, rather than assessing whether the claim was substantial."); *see generally id.* at 27–33 (describing lower court's erroneous consideration of the record).

Rather than addressing these arguments, Respondents' Opposition attributes to Mr. Owens the argument that "because the Fourth Circuit granted a certificate to review his *Martinez* argument that he automatically met the required showing that his ineffective-assistance-of-counsel claim is substantial." BIO at 1. Respondents assert that Mr. Owens is "claim[ing] a technical entitlement to a reset of his federal habeas action," *id.*, that he is asking this Court either "to categorically expand" the scope of *Martinez*, "or categorically deny appeal on *Martinez* issues," *id.* , and that he "seeks an end-run" by attempting to use the "grant of appellate review as a basis for a hearing not otherwise warranted or allowed," *id.* at 24. Mr. Owens does not make these arguments. Instead, the question presented to the Court concerns the manner in which the lower courts apply the *Martinez* substantial claim standard, and how that standard relates to the determination that a petitioner has met the requirements to obtain a COA under 28 U.S.C. § 2253(c) and as described in *Miller-El. See, e.g.,* Pet. at 24 ("Although the Fourth Circuit claimed that it would

apply the appropriate standard when determining whether Mr. Owens had a substantial claim, App. 47–48, the court's descriptions of its reasoning and decision made clear that the analysis it actually performed was contrary to the standard set forth in *Martinez* and *Miller-El*."); *id.* at 25 ("the Fourth Circuit in Mr. Owens's case relied on upon full briefing and analysis and resolution of factual allegations and disputes presented in those briefs in order to find that Mr. Owens's claim was not debatable by jurists of reason."); *id.* at 31 ("Based on this record, it is clear that the Fourth Circuit was not applying the substantial claim standard required by *Martinez*—that Mr. Owens's claim had 'some merit,' was not 'wholly without factual support,' or was 'deserv[ing of] encouragement to proceed further.'").

Respondents do not dispute that there is confusion over the meaning of the *Martinez* substantial claim standard and its relation to the COA standard. In fact, Respondents' defense of the Fourth Circuit's "full review" approach, BIO at 26, only highlights the need for the Court to clarify the *Martinez* substantial claim standard and how that standard relates to the threshold standard of *Miller-El*. By contrasting a COA analysis that "is not a full review of the issue," *id.* at 24–25, with the "full review," *id.* at 26, performed by the lower court in Mr. Owens's case, Respondents mirror the confusion shown by lower courts over the meaning and application of the *Martinez* standard. *See* Pet. at 24–25.

Respondents accuse Mr. Owens of seeking to "circumvent" the State's "right to respond" to his

assertion that his claim should be considered on the merits under the exception established in *Martinez*. BIO at 25 (citing *Martinez*, 566 U.S. at 15–16). Mr. Owens did not dispute that the State has an opportunity to respond to a claim raised pursuant to the *Martinez* exception. However, in *Martinez* this Court laid out how a State could answer such a claim: "that the ineffective-assistance-of-trial-counsel claim is insubstantial, i.e., it does not have any merit or that it is wholly without factual support . . . .," *Martinez*, 566 U.S. at 16 (emphasis added). That is not the standard that the lower courts have applied to Mr. Owens's claim, which is the issue Mr. Owens asks this Court to address.

B. The Lower Courts Misapplied the Standard Set Out in *Martinez* When It Denied an Ineffective-Assistance-of-Trial-Counsel Claim by Deciding the Claim's Merits on an Imbalanced Consideration of the Record Rather than First Assessing Whether the Claim Was Substantial.

Respondents focus their Opposition on arguments not made in Mr. Owens's Petition, asserting that Mr. Owens claims he is "guarantee[d]" a hearing in federal court under *Martinez*, BIO at 21, 22, 24, that a hearing is "require[d]," *id.* at 23, or that there is a "presumption that an evidentiary hearing is necessary in all cases," *id.; see also id.* at 1 ("Owens concludes he must be afforded an evidentiary hearing in district court."); *id.* at 26 ("Owens is incorrect that only an evidentiary hearing is the only [sic] sufficient method to make a *Martinez* showing."). Because this is not the issue Mr. Owens asks this Court to consider, he does

not answer Respondents' irrelevant arguments in this Reply. However, because Mr. Owens raises a claim related to his sentencing proceeding, he notes that Respondents' argument that hearings to address claims that were alleged to have been defaulted by trial and collateral counsel are limited to claims challenging the petitioner's guilt, *id.* at 28–29, is incompatible with the Court's ruling in *Trevino v. Thaler*, 569 U.S. 413 (2013). In *Trevino*, the Court applied the exception under *Martinez* to claims "that *Trevino* had not received constitutionally effective counsel during the penalty phase of his [capital murder] trial[.]" *Id.* at 419. It acknowledged "the need to expand the trial court record" for this type of claim, *id.* at 428, and the importance of a "meaningful opportunity" to raise a claim of ineffective assistance of trial counsel, *id.* at 429.

Whether habeas petitioners like Mr. Owens are guaranteed evidentiary hearings pursuant to *Martinez* is not the issue before this Court. *See* Pet. at 34. While a hearing might be appropriate in the circumstances of Mr. Owens's case, and certainly was contemplated by the Court in *Martinez* as a means for resolving the merits of ineffective-assistance-of-trial-counsel claims, *Martinez*, 566 U.S. at 13 ("Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim."), Mr. Owens only asks the Court to remand his case for "further proceedings" after providing guidance about the *Martinez* substantial claim standard, Pet. at 34.

As described in Mr. Owens's Petition, in the context of a motion for summary judgment, the lower

courts conducted detailed analyses of the facts supporting Mr. Owens's claim and assessed the merits of his underlying ineffective-assistance-of-trial-counsel claim rather than determining simply whether the claim was substantial under *Martinez*. *See id.* at 27–31. Conducting a full merits review of the underlying claim on an incomplete record frustrates the purpose of *Martinez*. *See id.* at 32–33. At this point, the lower courts should only have determined whether the claim was a "substantial claim," with "some merit," *Martinez*, 566 U.S. at 14 (citing *Miller-El*, 537 U.S. 322), or "wholly without factual support," *id.* at 16. The impact of the misapplied standard is exacerbated here, where the lower courts entered summary judgment in favor of Respondents, while ignoring factual support offered by Mr. Owens and not accepting his evidence as true. *See* Pet. at 29–33. Applying the proper standard, and considering the evidence Mr. Owens proffered in support of his claim, it is clear that his claim meets the *Martinez* gateway substantial claim standard. *Cf.*, 537 U.S. at 337 ("[A] COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief."). Respondents, in fact, concede that the prejudice prong of Mr. Owens's underlying claim meets the *Martinez* substantial claim standard. BIO at 36 ("Could Strickland prejudice be shown? Perhaps.").

Respondents propose that this Court conduct the same kind of imbalanced, flawed analysis as the lower courts, underscoring the need for the Court to remand to the lower court with guidance on the *Martinez*

substantial claim standard. For example, Respondents assert that counsel's actions were the result of "well-informed counsel (and their experts) choosing a different direction. . . . [and] the state court record shows that trial counsel, and critically, trial counsel's experts, relied on the actual, full medical records that unquestionably debunk that theory." BIO at 3. However, counsel explicitly stated in their affidavits submitted in federal post-conviction proceedings that they were not well-informed and they did not make a strategic decision to fail to investigate or develop evidence using neuroimaging. *See* J.A. 3893 (Mr. Godfrey: "I was unfamiliar with this type of testing, had never used it before and was unsure how to present it to a jury in the mitigation stage of the trial. Neither my co-counsel nor I had a[] strategic plan not to use neuropsychiatric testing to investigate, develop and present mitigation evidence."); J.A. 3894 (Mr. Gibson: "as I had never used this sort of evidence before I did not employ it here. I was unsure, as this was my first capital case how to use it before a jury. Neither Bill Godfrey nor I had any strategic reason for not doing this.").

In addition, Dr. Brawley—the trial expert relied upon by Respondents, BIO at 33, and the lower courts, App. 53, 141, to justify counsel's failure to investigate and present the evidence of brain damage discovered during Mr. Owens's federal post-conviction proceedings—made clear in her affidavit submitted in federal post-conviction proceedings that she was not provided the full records regarding Mr. Owens, and was missing records that would have changed her analysis. She stated:

> *I was not provided any information at the time of my 2006 evaluation that Mr. Owens had suffered any seizures or had any symptoms consistent with a seizure disorder.* [] If I had been given information regarding previous seizure activity, this combined with my findings of temporal lobe deficits would have cause [sic] me to recommend a full neurological evaluation of Mr. Owens.

J.A. 4231 (emphasis added); *cf.* J.A. 2103 (trial counsel Mr. Gibson was assigned responsibility for presenting the mitigation case but did not read any of the voluminous social history or institutional records that were in Mr. Owens's case file).

Respondents' attempts to downplay the history of seizures documented in their own records from the South Carolina Department of Corrections do not alter critical facts in the record, and do not detract from Mr. Owens's argument that his claim is substantial and not "wholly without factual support," and summary judgment should not have been entered for the Respondents at this stage. Pet. at 29–30. The affidavit of Dr. Wood submitted in federal habeas proceedings described that she noted the history of seizures in Mr. Owens's South Carolina Department of Corrections records and her evaluation was informed by those records, J.A. 4190, 4204, and Dr. Brawley agreed that this information would have altered her evaluation, J.A. 4231. These opinions are supported by the evidence. As both experts expected, further evaluation did show Mr. Owens's brain damage. *See, e.g.,* J.A. 4182, 4202.

Respondents' speculation that post-conviction counsel also made a strategic decision not to investigate and pursue this evidence, BIO at 34, is similarly contradicted by counsel's own affidavits. *See* J.A. 3896 (Ms. Paavola: "It is common to have this battery of testing done as part of the investigation, development and presentation of evidence in the sentencing phase of a capital case. I had no strategic reason for failing to use this as another claim of ineffective assistance of counsel."); J.A. 3899 (Mr. Weyble: "Ms. Paavola and I did not raise a claim of ineffective assistance of trial counsel for failing to pursue neuroimaging of Mr. Owens for the purpose of determining whether he has brain damage. Such testing is commonly undertaken as part of the investigation, development and presentation of mitigating evidence in capital cases, and there was no strategic reason for foregoing pursuit and development of a claim for relief on that basis in this case.").

The erroneous and speculative interpretation of testimony by the lower courts in the light most favorable to Respondents cannot be relied upon to find Mr. Owens's claim insubstantial. For example, the Warden references trial counsel's testimony that they did not use Dr. Evans, who had testified in a previous sentencing, "based on credibility and reliability issues with his testing." BIO at 12, 33. However, it was inappropriate for the lower courts to speculate that this testimony also indicated a strategic decision to generally exclude all evidence about neuroimaging and brain damage, App. 55–56, 141–42, reject trial counsel's explicit affidavits to the contrary, and find that Mr. Owens's ineffective-assistance-of-trial-

counsel claim first raised in federal post-conviction proceedings was not a substantial claim under *Martinez*. As the Court recognized in *Martinez*, evidentiary development can be critical to an ineffective-assistance-of-trial-counsel claim. *See, e.g., Martinez*, 566 U.S. at 11–12, 13; *see also, e.g.*, *Trevino*, 569 U.S. at 425. Denying Mr. Owens's claim on the merits based on a strained interpretation of a record that did not directly address the claim at issue due to state post-conviction counsel's ineffectiveness, does not comply with the purpose of *Martinez*. The fact-specific analysis and credibility determinations advocated by Respondents support Mr. Owens's request for a remand for further proceedings.

CONCLUSION

For the reasons stated above and in Mr. Owens's Petition for Certiorari, the Court should grant certiorari.

Respectfully submitted,

ROBERT LEE
ELIZABETH PEIFFER
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
2421 Ivy Rd., Suite 301
Charlottesville, VA 22903
roblee@vcrrc.org
epeiffer@vcrrc.org

MICHAEL F. WILLIAMS
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
(202) 389-5000
mwilliams@kirkland.com

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