No. _____

IN THE

Supreme Court of the United States

PATRICK LEONARD MARTINEZ,

Petitioner,

v.

BOBBY LUMPKIN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is "virtually impossible" to prevail on a claim of ineffective assistance of trial counsel on direct appeal in Texas. *Trevino v. Thaler*, 569 U.S. 413, 417 (2013). The only alternative to the impossible appeal is the state's all-or-nothing postconviction application for habeas corpus. Most habeas applicants are indigent prisoners. These applicants have neither the right to an attorney nor a right to a hearing—nor even a right to their trial court record—and no realistic way to investigate their potential claims from behind bars.

The question presented is:

Do Texas procedures for postconviction habeas corpus violate the Sixth Amendment and deny indigent prisoners equal protection and due process of law by foreclosing to them any meaningful opportunity to litigate their ineffective assistance of counsel claims?

RELATED PROCEEDINGS

The proceedings directly related to this case are as follows:

- *Martinez v. Lumpkin*, No. 21-50427, United States Court of Appeals for the Fifth Circuit, February 2, 2023 (denying *pro se* application for certificate of appealability).

- *Martinez v. Lumpkin*, No. 3:20-cv-00250-FM, United States District Court for the Western District of Texas, April 29, 2021 (denying *pro se* petition for writ of habeas corpus).

- *Ex parte Martinez*, No. WR-90,751-01, Texas Court of Criminal Appeals, Aug. 9, 2020 (denying *pro se* state habeas application).

- *Martinez v. Texas*, No. 18-7075, United States Supreme Court, Feb. 19, 2019 (denying petition for certiorari).

- *Martinez v. State*, No. PD-0640-18, Texas Court of Criminal Appeals, Oct. 3, 2018 (refusing petition for discretionary review).

- *Martinez v. State*, No. 08–14–00242–CR, Texas Eighth Court of Appeals, May 23, 2018 (affirming conviction on direct appeal).

- *State v. Martinez*, No. 20130D04142, 171st District Court of El Paso County, Texas, Sep. 19, 2014 (denying motion for new trial after conviction).

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The federal district court's opinion and order (App. 4a) denying relief is unreported. The Fifth Circuit denied a certificate of appealability (App. 1a), also in an unreported order. The Texas Court of Criminal Appeals had previously denied habeas relief (App. 26a) in an unreported order.

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit denying petitioner's motion for a certificate of appealability was entered on February 2, 2023. App. 1a. On March 6, 2023, Justice Samuel Alito granted an extension of time to file the petition for certiorari until July 2, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of 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 defence." U.S. Const. amend. VI.

The Fourteenth Amendment of the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Section 2254(d) of Title 28 of the United States Code provides, in relevant part:

> 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or

> involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d).

Section 2254(e)(1) of Title 28 of the United States Code provides, in relevant part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C.A. § 2254(e)(1).

INTRODUCTION

Litigants need two things above all: a lawyer and a fair opportunity to be heard. These are deeply rooted principles of due process and the Sixth Amendment. Yet by design in Texas, nearly all indigent persons who bring ineffective assistance of counsel ("IAC") claims have neither—they cannot meaningfully raise the issue. The built-in obstacles to raising IAC claims have corrupted all levels of indigent defense practice in the state—from the trial stage, where ineffective assistance flourishes, through to postconviction habeas review, which usually amounts to no serious review at all. Petitioner is but one of countless indigent Texans who has been denied meaningful review by the state's procedures. The Court should grant his petition so that *for the first time* a fair tribunal may hear his claim.

The option of federal habeas review does not help most indigent, *pro se* litigants like Petitioner. This is so not only because the Antiterrorism and Effective Death

Penalty Act ("AEDPA") was "designed" to limit the possibility of federal relief in favor of state finality. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). It is also because lower courts are confused about how to apply deference under § 2254 to state court judgments. The longstanding confusion led this Court to grant certiorari before to settle the question of how § 2254(d)(2) relates to (e)(1)—yet the question remains unanswered. *Wood v. Allen*, 558 U.S. 290, 299 (2010). As a result, courts continue to apply these sections haphazardly and incorrectly, including the district court below. It is time the Court settled the question of deference under § 2254 by granting this petition.

Shinn v. Ramirez, 142 S. Ct. 1718 (2022), offers a final reason to grant this petition for certiorari. In short, *Ramirez* nullified the equitable relief that *Martinez v. Ryan*, 566 U.S. 1 (2012), created for federal applicants who had had no counsel—or who received ineffective assistance of counsel—during state post-conviction proceedings. Four members of the present Court—Chief Justice Roberts, and Justices Alito, Kagan, and Sotomayor—helped form the *Martinez* majority. Presumably, at least these four still believe that prisoners deserve some form of relief from state procedures that prevent them from effectively raising IAC claims. Granting this petition would allow the Court to provide that relief consistently with § 2254 and *Ramirez*.

STATEMENT OF THE CASE

Petitioner, Sergeant Patrick Martinez, was charged by the State of Texas with Continuous Sexual Abuse of a Child in 2013. This charge carries a minimum sentence

of 25 years and allows for no possibility of parole. TEX. PENAL CODE § 21.02(h); TEX. GOV'T CODE § 508.145(a)(2).

A. Factual Background

The complainant in the case against Petitioner is his step-daughter. App. 60a. Petitioner began dating her mother when the complainant was about 7-years-old. Petitioner and the mother moved in together, had a son, and got married.

The four of them—Petitioner, the mother, their son, and her daughter—had been living together for about four years when the complainant first alleged Petitioner sexually assaulted her. *Id.* at 60a-61a. The complainant said that Petitioner started touching her private parts when she was 11-years-old and that it continued "about every week" for the next year. *Id.*

Police confronted Petitioner about the allegations while he was picking up his son from school. He cooperated fully with officers, letting his son be taken by Child Protective Services and going to meet a detective at the police station. During the interrogation with the detective, Petitioner denied the allegations—he even accepted the detective's offer to take a polygraph test. *Id.* at 60a. Instead of administering the polygraph, the police arrested him.

B. Proceedings Below

1. Before trial, prosecutors offered Petitioner a plea deal of ten years deferred adjudication probation. *Id.* This plea deal remained available on the first day of trial: Michael Gibson (Petitioner's trial attorney), the prosecution, and the trial court discussed it just prior to jury selection. *Id.* at 66a-67a. Mr. Gibson stated, "my major

problem is the sex offender registration situation, and his (Petitioner's) take on it is, I'm might as well be in prison for 20 years than been a registered sex offender." At this point, both Mr. Gibson and Petitioner believed the latter would be eligible for parole (which makes sense given that the minimum sentence is greater than 20 years). The parties did not reach an agreement and proceeded to trial. The jury convicted Petitioner and sentenced him to 52 years in prison. *Id.* at 61a.

Immediately after sentencing, Mr. Gibson alerted the trial court that he had failed to inform his client before trial that he would not be eligible for parole if convicted. *Id.* In Gibson's opinion, his failure "may or may not have made a difference" in Petitioner's decision to reject the plea offer. St. Tr. 5: 37-38. Gibson then (a) filed a motion for new trial, arguing he had provided ineffective assistance of counsel by failing to advise Petitioner that he would be ineligible for parole ("the parole claim"); and (b) moved to withdraw as counsel, once again declaring his belief that Petitioner may have accepted the plea offer but for his own ineffective assistance. App. 41a.

2. The court appointed the public defender to represent Petitioner during the new trial hearing—to date, the only postconviction hearing in Petitioner's case. *Id.* at 69a-115a. Both Gibson and Petitioner testified.

Mr. Gibson testified that he had failed to advise Petitioner before trial that he would be ineligible for parole upon conviction of continuous sexual assault. *Id.* at 84a. Counsel stated that he never discussed with Petitioner the possibility of an "*Alford* plea"—meaning the defendant maintains his innocence and enters "some sort of a

plea of no contest or something like that," as Gibson understood it—because he did not think it was available in Texas. *Id.* at 86a.

Petitioner testified next. He confirmed that he had not known that he would be ineligible for parole if convicted. *Id.* at 100a-101a. He swore that he would have accepted the prosecution's ten-year deferred offer and pleaded guilty had he known that he would not be eligible for parole. *Id.* at 101a. Petitioner further testified that he had never heard of an "*Alford* plea" before the public defender brought it to his attention, *i.e.*, after his first motion for new trial alleging ineffective assistance of counsel. *Id.* Under cross-examination, Petitioner maintained his innocence but told the prosecutor that he "would have plead (sic) guilty in order to get a plea bargain." *Id.* at 102a.

During the hearing, the prosecution invented the idea that Petitioner would only have pleaded guilty under a special *Alford* or no contest plea. He argued, "That was never the offer, that was never going to be the offer and will—not going to happen." *Id.* at 88a. Even though Petitioner never asked to make a special plea during the hearing or in his motions for new trial—in fact, his testimony and pleadings consistently indicate that he would have taken the plea offer as made—later courts picked up on the prosecutor's argument to use it against Petitioner.

The trial court denied the motion for new trial at the end of the hearing without explanation. *Id.* at 113a.

3. Petitioner appealed to the Eighth Court of Appeals of Texas, again raising the parole claim. *Id.* 59a. Specifically, Petitioner contended trial counsel was

ineffective because his failure to correctly advise him about parole eligibility constituted deficient performance, and it prejudiced him because he would have accepted the plea offer but for the deficient performance.

When it analyzed the issue, the Eighth Court only examined the prejudice prong. *Id.* at 66a-67a. Its opinion acknowledged that Petitioner established a reasonable probability of prejudice during the new trial hearing:

> "One reasonable view of the record, per the testimony of Appellant and defense counsel, is counsel rendered ineffective assistance by failing to inform Appellant he would be ineligible for parole when he conveyed the State's offer of deferred adjudication, and Appellant would have accepted the offer if he had been so informed." *Id.* at 67a.

But this was not enough. Under the appellate court's standard, Petitioner had to not only establish a reasonable probability of prejudice to prevail, he also had to disprove *all other reasonable possibilities* that the record could support. What is more, he had to meet this burden with the appellate court presuming that the trial court "disbelieve(d) any" and all testimony he provided during the new trial hearing. *Id.* at 67a-68a. The court of appeals affirmed.

Petitioner sought review of the decision first at the Texas Court of Criminal Appeals and then at this Court, contending that the court of appeals' impossibly high standard was also unconstitutional. Both courts refused his petitions for review.

4. With the direct appeal over and his conviction officially "final," Petitioner began working on his state 11.07 writ of habeas corpus. Petitioner had no right to counsel for the writ and no money to hire an attorney. Behind bars, he also had no way to investigate any potential claims. Petitioner drafted and filed his 11.07 writ

"application" *pro se* and from prison. He raised five claims in all, including the parole claim for ineffective assistance of counsel. *Id.* at 31a.

Although the Texas Court of Criminal Appeals decides postconviction writs, the trial courts make findings of facts and recommendations for or against relief. Trial courts can hold hearings on writs, but the trial court in Petitioner's case did not hold a hearing. The State filed a response to Petitioner's claims along with proposed findings of facts and conclusions of law that recommended denying Petitioner relief.

The state-drafted findings highlight that Petitioner maintained his innocence before, during, and after trial. *Id.* at 42a. It gave this as one of three reasons it did not find credible his assertion that he would have pleaded guilty if not for his attorney's deficient performance. *Id.* at 44a. The other two reasons were: (a) Petitioner again proclaimed his innocence in his writ, and (b) Gibson's statement before jury selection—when he believed his client would be eligible for parole—that his client would rather take 20 years in prison than register as a sex offender.[1] *Id.*

The trial court adopted the state's findings and recommendation verbatim. *Id.* at 30a-58a. The Court of Criminal Appeals followed the recommendation of the trial court and denied Petitioner's claims "without written order." *Id.* at 26a.

5. After losing his state habeas application, Petitioner timely filed a § 2254 habeas petition in federal district court. He raised the same five claims as he had in the state application. *Id.* at 6a. Again, Petitioner had no attorney representing him,

[1] The findings misconstrue this statement, transforming it into: "trial counsel stated during the plea discussions that the applicant would not plead guilty to any offense that required him to register as a sex offender." App. 4a.

and the district court held no hearing. *Id*. at 6a, 28a (noting *pro se* status and denying hearing, respectively).

Regarding the parole claim, the district court explained that the "state trial court specifically determined that Petitioner had not suffered prejudice as a result of his counsel's failure to advise him of the unavailability of parole." *Id*. at 16a. Its order contains several of the state court's findings of facts on the prejudice prong, including: "applicant has failed to present credible evidence affirmatively demonstrating that he suffered prejudice as a result of any deficient performance;" the "record reflects that the State would have, in fact, withdrawn the plea offer if the applicant refused to admit his guilt;" and the state court "would not have accepted a plea bargain that allowed the applicant to plead guilty while at the same time professing his innocence." *Id*. at 17a.

The district court concluded Petitioner did not meet his burden under § 2254. *Id*. It first held Petitioner "fails to provide clear and convincing evidence which undermines the credibility determinations made by the state courts," applying § 2254(e)(1). It then invoked § 2254(d)(1) to declare Petitioner "fails to show the rejection by the state courts of his ineffective assistance of counsel claim—based on the record in his case—was unreasonable." The district court accordingly denied relief and did not issue a certificate of appealability. *Id*. at 28a.

The Fifth Circuit denied Petitioner's motion for a certificate of appealability without an opinion. *Id*. at 1a.

REASONS FOR GRANTING REVIEW

I. TEXAS PROVIDES NO CONSTITUTIONALLY ADEQUATE MEANS FOR INDIGENT PRISONERS TO RAISE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AT ANY STAGE OF LITIGATION

The status quo in Texas should not exist, much less be allowed to persist. The Texas system for raising IAC claims thwarts the protections established by this Court's decisions concerning the right to counsel, equal protection, and the due process right to be heard. The Court should grant this petition for certiorari to give indigent Texans a realistic opportunity to test their IAC claims.

A. Texas Habeas Procedures Violate Indigent Applicants' Sixth Amendment Right to Counsel and Denies Them Due Process and Equal Protection Under the Law

"The right to the effective assistance of counsel at trial is a bedrock principle in our justice system" and "the foundation of our adversary system." *Martinez*, 566 U.S. at 12. The tremendous importance of the right led *Martinez* to "protect" the ability of convicted persons to meaningfully raise IAC claims. *See id*. at 9. Although *Shinn* blunts the protection of *Martinez* by limiting a federal habeas applicant's ability to bring evidence, the latter's rationale remains intact: a state system should provide some meaningful forum for the litigation of IAC claims. *Shinn*, 1735-38 (declining to extend *Martinez*, not overruling it).

The processes a state adopts for testing IAC claims must satisfy the Constitution. *Cf. Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). On this point, Texas fails. For while prisoners can bring

claims of IAC on direct appeal and in habeas applications, at no point can indigent Texas prisoners hope to prevail. Again, the system is designed that way.

In the first place, it is "virtually impossible" to win an IAC claim on direct appeal in Texas. *Trevino v. Thaler*, 569 U.S. 413, 417 (2013). This leaves only the possibility of habeas—in Texas, a procedure that permits no appeal and (usually) no subsequent writ. Prisoners get just one shot to get it right.

In the face of these extraordinary stakes, the typical Texas habeas applicant will have no attorney, no record of her proceedings, and—imprisoned—no way to investigate potential IAC claims. This is so because Texas gives no right to habeas counsel, so most applications are filed *pro se*.[2] *See In re Garcia*, 486 S.W.3d 565, 566 (Tex. Crim. App. 2016) (KELLER, C.J., concurring) (asserting most remanded applications "by far" filed *pro se*). Texas does not give applicants the right to the trial record, either. Some applicants have a copy of the record from the appeal, but many of them waived the right to appeal or never had the right to appeal. *See Pacas v. State*, 612 S.W.3d 588, 599 (Tex. App.—Houston [1st Dist.] 2020) (GOODMAN, J., dissenting) (noting 95% of Texas felony convictions came from pleas, where there is no right to appeal). An applicant has no right to a hearing on her claims. Tex. Code Crim Proc. art. 11.07. Finally, the applicant must litigate her writ from behind bars with no realistic way to investigate and develop IAC claims.

Texas thus puts indigent applicants in a nearly impossible position when it comes to IAC claims. Indeed, the disparity between its procedures that force indigent

[2] A district court *may* appoint counsel to a habeas applicant in its discretion and the "interests of justice." TEX. CODE CRIM. PROC. Art. 1.051. In practice, courts very rarely appoint counsel.

habeas applicants to raise claims on their own from prison, on the one hand, and the procedural requirements this Court has articulated for constitutionally sound hearings, on the other hand, could hardly be greater. Specifically, Texas upsets three settled constitutional principles.

1. Litigants need lawyers. This Court has acknowledged time and again the fact that litigants need attorneys to effectively present their claims. *See, e.g., Halbert v. Michigan*, 545 U.S. 605, 620 (2005); *Douglas v. California*, 372 U.S. 353, 358 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). And in the particular context of IAC claims, the Court places special emphasis on the importance of attorneys to guide the investigation into potential claims. *Martinez* 566 U.S. at 11, 13. Indeed, the lack of an attorney at the first stage of state habeas proceedings entitled a petitioner with a new claim at the federal level to the *Martinez* exception to procedural default (at least it did until *Ramirez*). *Id.* at 13-14.

2. Procedures cannot discriminate based on financial status. In Texas, the few prisoners who can afford to do so raise their IAC claims with the assistance of an attorney, a record, and after performing an investigation. Indigent prisoners—the vast majority—may have none of those things. "There is no meaningful distinction between" denying the poor the chance to raise IAC claims during habeas and the Texas system that "effectively denies them" all the tools necessary for adequate review. *See Griffin*, 351 U.S. at 18. This "fencing out" of poor applicants from meaningful habeas review violates due process and equal protection. *See Halbert*, 545 U.S. at 611.

3. Due process entails the right to be heard. *See Holt v. Virginia*, 381 U.S. 131, 136 (1965). But for the reasons described above, most prisoners in Texas cannot effectively raise IAC claims. *See Martinez*, 566 U.S. at 11-12 (noting IAC claims "often require" investigation); *Evitts*, 469 U.S. at 393-94 (observing that "services of a lawyer will for virtually every layman be necessary" to raise "suitable" claim); *Griffin*, 351 U.S. at 18-19 (vacating convictions where state made access to transcripts contingent on ability to pay for them). Their claims go unheard—at least in any meaningful sense.

The above constitutional "problems" flow directly from the built-in obstacles to raising ineffective assistance of counsel claims in Texas. The law governing state habeas claims, Code of Criminal Procedure Article 11.07, does not protect the rights of applicants by design. It is the Potemkin Village of postconviction procedures—but at this point, it should fool no one. Texas indigent habeas applicants urgently need a real opportunity to raise their claims.

B. The Systemic Barriers Facing Indigent Applicants Are a Critical Problem Tainting Every Stage of Criminal Practice in Texas

Indigent defense is a very big deal in Texas: Each year, hundreds of thousands of indigent criminal cases are filed there. *See* Neena Satija, *How judicial conflicts of interest are denying poor Texans their right to an effective lawyer*, The Texas Tribune (Aug. 19, 2019) (reporting 474,000 indigent cases filed in one year).[3] Although prisoners file no more than a few thousand IAC claims on average each year, the

[3] Available at https://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense/.

consequences of the state's IAC procedures reach many more cases and far beyond trial. *Annual Statistical Report for the Texas Judiciary*, p. 56 (Fiscal Year 2021).[4] The taint is pervasive.

Contamination at the trial level is substantial and probably the most harmful, but it is necessarily difficult to precisely quantify. The fact remains that it would beggar reason *not* to expect a system without recourse for ineffective assistance of counsel to generate anything but less effective representation overall. A poor defense is not only a predictable byproduct of Texas habeas procedures but, more importantly, a painful reality for the defendants caught within it.

One can more easily identify the fallout in appeals. For example, Texas appellate attorneys often raise IAC claims on direct appeal despite them being "virtually impossible" to win. *See, e.g., Nicholson v. State*, 577 S.W.3d 559 (Tex. App.—Houston [14th Dist.] 2019) (overruling IAC claims raised on direct appeal). Attorneys raise these impossible claims, for one, because their indigent clients will have no meaningful opportunity to raise them later. Two, the attorneys can at least give voice to their clients' anger over the ways their trial attorneys failed them. Finally, bad lawyering at the trial stage (along with Texas's strict preservation requirements) often leaves appellate attorneys with little else to argue.

The pernicious influence on all levels of defense practice of the inability to raise ineffective assistance of counsel claims is so serious that it even drives policy at public defender offices. The appellate unit of the Harris County Public Defender expanded

[4] Available at https://www.txcourts.gov/media/1454127/fy-21-annual-statistical-report-final.pdf

to create a "new trial team" primarily to litigate IAC claims before the habeas stage.[5] Years later, the office created an additional postconviction habeas unit to solicit applications from prisoners, accepting for representation those inmates with the most viable claims.

Public defender offices have very limited resources. The fact that Harris County's devotes so much of its resources to litigating IAC claims speaks to this reality: the inability to meaningfully raise IAC claims corrupts the entirety of the indigent defense system in Texas. The impact of this Court granting review would likewise reach far beyond this case.

II. THE COURT CAN SETTLE IMPORTANT AND RECURRING ISSUES IN HABEAS LITIGATION WITH THIS CASE

The potential impact of this case transcends Texas borders. By granting the petition, the Court can settle recurring issues of national importance, namely: (1) how to protect the ability of prisoners to raise IAC claims at the state level; and (2) how lower courts should apply deference to state judgments during § 2254 litigation.

A. "Prisoners with a Potentially Legitimate Claim of Ineffective Assistance of Trial Counsel" Need Protection After *Shinn v. Ramirez*

Ramirez negated the remedy in *Martinez*, but it did not overrule its reasoning—that the Court's action was "necessary" to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel." *Martinez*, 566 U.S. at 9. That principle is now without practice. The Court should intervene again to animate *Martinez*'s principle.

[5] Counsel for Petitioner has knowledge of the Harris County Public Defender Office's changes because he worked there before rejoining the El Paso County Public Defender earlier this year.

In short, *Martinez* sought to protect the ability of prisoners to raise "legitimate claims" of IAC in federal courts by creating an exception to the procedural default rule. *Martinez*, 566 U.S. at 9. *Martinez* made exception where a prisoner, during his first-stage habeas review, (a) did not have an attorney, or (b) received ineffective assistance of counsel. *Id.* at 13-14. If a petitioner could meet either condition, then a federal court could allow him to bring a new claim, *i.e.*, one that he did not present in state court. *Id*.

Ramirez later held that AEDPA does not allow habeas petitioners to present new evidence to support IAC claims in federal court, even when they can satisfy one of the *Martinez* conditions. *See Ramirez*, 142 S. Ct. at 1728. This limitation eviscerates the protection created by *Martinez*. *Id*. at 1740 (Sotomayor, J., dissenting).

For defendants and habeas applicants, *Ramirez* has a silver lining. For if blunting *Martinez* provokes this Court to restore protection by some *other* means to prisoners whose legitimate IAC claims will otherwise go unheard, then good riddance to it. Even before *Ramirez*, *Martinez*'s promise of possible relief was empty for indigent prisoners like Petitioner who are in the worst possible situation, *i.e.*, those with no right to an attorney in state proceedings. This is so because these prisoners must file the IAC claims themselves in both court systems—with extremely limited resources, no attorney or legal training, and no ability to investigate while under the gun of AEDPA's strict filing deadline. Like Petitioner, they typically file the same claims in both—exactly what one should expect. In other words, it was always

unreasonable to expect such a *pro se* prisoner to benefit from the *Martinez* rule, which was contingent on bringing a new, viable claim.

Perhaps the most obvious way to create post-*Ramirez* relief would come from answering the question that *Martinez* left open: whether, "as a constitutional matter," defendants have a right to counsel at initial-review collateral proceedings in state courts. *Martinez*, 566 U.S. at 9. For the reasons hinted at in *Martinez* (and for others), it makes sense for the Court to recognize such a right.

But the Court need not go so far. The Court could rule that where a state system precludes or virtually precludes IAC claims on direct appeal, then that system must provide an attorney—as well as the record and funds for essential investigation—to prisoners who would raise IAC claims in "initial-review collateral proceedings." *Id.* at 12 (explaining why protection extended to cases where "State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding"). This rule does not create a right to counsel in state habeas proceedings. It merely recognizes that prisoners cannot effectively litigate ineffective assistance of trial counsel claims on their own. The choice would ultimately be up to the states whether to allow appellate counsel to meaningfully litigate such claims or to provide habeas counsel to do so.

These are only two suggestions among several possibilities. Admittedly, the question of what the best post-*Ramirez* remedy would be is not easy to answer. But the Court is here to answer difficult and important questions—and this case presents a clean vehicle for it to do so.

B. The Circuits Are Conflicted and Confused Over the Application of Deference to State Court Factual Findings

This Court is well aware of the confusion among lower courts over the interplay between § 2254(d)(2) and § 2254(e)(1). The Court has repeatedly acknowledged the ambiguous relationship between the two sections. *See Brumfield v. Cain*, 576 U.S. 305 (2015); *Burt v. Titlow*, 571 U.S. 12, 18 (2013) ("We have not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1), and we need not do so here."); *Rice v. Collins*, 546 U.S. 333, 339 (2006) (passing on question of whether (e)(1) applied). It has even granted certiorari at least once to address it. *Wood v. Allen*, 558 U.S. 290, 299 (2010). Thus far, the Court has opted to leave the issue unresolved.

While the split has continued percolating among the circuits, confusion has persisted rather than dissipated. *See Hayes v. Sec'y, Florida Dep't of Corr.*, 10 F.4th 1203, 1223 (11th Cir. 2021) (NEWSOM, J., concurring) (noting, "the circuits remain split—or, like the district court here, confused—over the exact relationship between subsections (d)(2) and (e)(1)"). *See also* Bryan R. Means, *Federal Habeas Manual* § 3:82 (2021) (describing different approaches to relationship between (d)(2) and (e)(1)). The continued confusion means that the circuits will produce different results in similar cases. For example, if the district court below had followed the Ninth Circuit and reviewed the state court findings for "an unreasonable determination of the facts," then it would have granted Petitioner relief (see section III, *infra*). *Murray v. Schriro*, 745 F.3d 984, 1001 (9th Cir. 2014) (citing § 2254(d)(2)). The district court followed controlling Fifth Circuit precedent, however, and denied relief because

Petitioner did not disprove the state court's findings with "clear and convincing evidence." App. 17a (applying § 2254(e)(1)).

Location should not determine whether someone gets legal relief for their claims, especially considering that for some petitioners, this question of "statutory construction" will have "life-and-death ramifications." *Cave v. Sec'y for Dep't of Corr.*, 638 F.3d 739, 747 n.6 (11th Cir. 2011). As evidenced by the enduring nature of the confusion over § 2254(d)(2) and § 2254(e)(1), only this Court can resolve the conflict.

III. THE DECISION BELOW IS WRONG

The decisions by the courts below denying Petitioner relief—from the state trial court to the federal courts—cannot be reconciled with this Court's precedent. The errors made in both jurisdictions underscore the unconstitutional barriers to raising IAC claims in Texas as well as the need for guidance from this Court for § 2254 habeas review.

1. The only *Strickland* prong that has been at issue in this case is prejudice. The prosecutor at the new trial hearing said, "we all know that Mr. Gibson (in)correctly advised his client."[6] App. 108a. Texas law holds that incorrect parole advice satisfies the deficient performance prong. *Ex parte Moussazadeh*, 361 S.W.3d 684, 691-92 (Tex. Crim. App. 2012). The Eighth Court of Appeals only analyzed prejudice. During state habeas review, the state court's conclusions of law exclude the parole issue from its list of claims where Petitioner did not establish deficient

[6] The transcript says, "correctly," but this is error; that the prosecutor actually said, or meant, "incorrectly" cannot be more clear from the record. App. 107a-108a. Indeed, the fact of the incorrect advice is about the only point of agreement between the parties at the new trial hearing.

performance. App. 55a ¶3. And the federal district court exclusively examined prejudice for the parole claim. The sole question for the courts below, therefore, was whether Petitioner established a reasonable probability that he would have accepted the plea offer had his attorney correctly advised him that he would be ineligible for parole if convicted. *Lafler v. Cooper,* 566 U.S. 156, 174 (2012).

2. The record establishes a reasonable probability of prejudice. Petitioner testified that he would have accepted the state's 10-year deferred adjudication offer and pleaded guilty had his attorney correctly advised him, and his 52-year sentence without the possibility of parole was significantly worse than the offer. Under *Lafler v. Cooper*, which mirrors Petitioner's case in material respects, this establishes a reasonable probability of prejudice. *Id.* (citing with approval Sixth Circuit opinion explaining why petitioner's own statement established reasonable probability). Although all courts have denied Petitioner relief, it is notable that the court of appeals agreed that "one reasonable view" of the record is that Petitioner's "counsel rendered ineffective assistance of counsel" on the parole issue. App. 67a.

3. The state habeas court's findings defy the record and this Court's precedent. The most significant factual finding explains the court's rationale for rejecting Petitioner's credibility for his claim that he would have pleaded guilty:

> (a) the applicant testified at the new-trial hearing that he did not want to plead guilty to a crime he allegedly did not commit; (b) trial counsel stated during the plea discussions that the applicant would not plead guilty to any offense that required him to register as a sex offender; and (c) the applicant still denies, in his writ application, that he is guilty of the charged offense. App. 44a.

These reasons hold no water. As to the first, no one wants to plead guilty to a crime he did not commit, but this Court acknowledged long ago that it is a reality of

our criminal justice system. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). The court's third reason closely relates to the first and likewise fails: Innocent people have the right to effective assistance of counsel as much as the actually guilty. It would be fundamentally unfair to use Petitioner's affirmations of innocence to foreclose the possibility of relief on an IAC claim. As for the court's second reason, trial counsel did not say that Petitioner "would not plead guilty to any offense that required him to register as a sex offender." Moreover, neither counsel nor Petitioner knew during plea negotiations that Petitioner would not be eligible for parole if convicted. The statement counsel actually made—that Petitioner would rather take a 20 year sentence than register as a sex offender—during that period of ignorance cannot bear on what Petitioner would have accepted with the correct parole information. In short, it is unreasonable to use words counsel never uttered (much less Petitioner) to deny relief.

The habeas court made two other findings relevant under *Lafler*. In addition to establishing a reasonable probability that the petitioner would have accepted the plea offer but for counsel's deficient performance, *Lafler* requires a showing that the state would not have withdrawn the plea offer and that the court would have accepted it. *Lafler,* 566 U.S. at 164. The state court found, "The record reflects that the State would have, in fact, withdrawn the plea offer if the applicant refused to admit his guilt." App. 45a. It further found, "This Court would not have accepted a plea bargain that allowed the applicant to plead guilty while at the same time professing his innocence." *Id*.

These findings are red herrings. The discussion between defense counsel, the prosecution, and the court on morning of trial demonstrates that the court would have accepted the offer and that the offer was still available from the prosecution at the relevant time. Further, Petitioner never said he wanted an "*Alford* plea," or to plead no contest, or anything of the sort. He had never heard of an *Alford* plea until *after* he made the parole claim. *Id*. at 101a. Petitioner consistently avowed that he would have accepted the state's offer as it was made before trial and pleaded guilty. The state fabricated the *Alford* plea condition, *i.e*., that Petitioner conditioned his claim on the ability to take a plea deal without admitting guilt, out of whole cloth. It has no basis in the record.

Finally, the state court applied an unconstitutionally high standard to Petitioner's IAC claim. The court concluded Petitioner "failed his burden of showing that he was prejudiced as a result of any alleged deficient performance by trial counsel," relying on the state court decision *Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999). App. 55a. ¶4. *Thompson* holds that the proponent of an IAC claim has the burden of proving it by a preponderance of evidence. *Thompson,* 9 S.W.3d at 813. The court's application of the preponderance standard to Petitioner's claim is "contrary to this Court's clearly established precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

4. The federal district court erroneously denied relief, but it erred in the first place by giving deference to the state court's findings. Federal courts should not defer to state courts in some circumstances, even on habeas review. For example, in *Panetti*

(also from Texas) this Court found that the state had failed to provide certain procedures mandated under federal law. *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007). The failure to provide them "constituted an unreasonable application of clearly established law as determined by this Court" that justified its review of the § 2254(d) claim without deference to the state's decision. *Id*. Later in *Lafler*, the Court relied on *Panetti* to explain why it would decide the petitioner's § 2254 IAC claim *de novo*: the state court had failed to apply *Strickland*, rendering a judgment "contrary to clearly established federal law." *Lafler*, 566 U.S. at 173 (citing *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)). If a state judgment is "contrary to clearly established federal law," federal courts should not defer to it.

In Petitioner's case, the state habeas court applied *Strickland* incorrectly, requiring him to prove his claim by a preponderance of evidence. App. 55a. The decision is "contrary to this Court's clearly established precedent." *See Taylor*, 529 U.S. 405-06. Like the decisions in *Panetti* and *Lafler*, it deserved no deference from the district court.

Without deference, the federal district court would have granted relief. Petitioner provided the factual basis *Lafler* established for proving prejudice under *Strickland* for IAC claims based on foregone pleas. No reasonable court could view this record and not grant relief under *Lafler*: the two cases are too similar. For that reason, even under § 2254(d) deference, the federal district court should have granted Petitioner relief.

Under Fifth Circuit precedent, however, the district court applied § 2254(e)(1) to the state court's factual findings, including its finding that Petitioner's assertion that he would have taken the plea deal was not credible. Thus, he had to rebut the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Clear and convincing evidence is evidence that makes the factual contention "highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

Only under this standard could the court deny Petitioner's claim. Petitioner did not and could not overcome this standard because it is not practically possible to provide clear and convincing evidence of what a person would have done in the past with information he did not have at the time. *Lafler* reflects that fact by asking for no more than what could be realistically expected of a petitioner to show prejudice for a foregone plea—his testimony that he would have taken the offer if not for the deficient performance, and a more severe sentence than the plea offer. *Lafler*, 566 U.S. at 174. The consequence of applying (e)(1) in Petitioner's case was to allow the state trial court to shut down his claim completely—state to federal—with a single, insurmountable finding. The Court should not let this result stand nor permit it to recur in other cases. After all, AEDPA is meant to make obtaining federal habeas relief difficult, *Harrington v. Richter*, 562 U.S. 86, 102 (2011), not impossible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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