No. _____

In the
Supreme Court of the United States

FREDDIE OWENS,

Petitioner,

v.

BRYAN P. STIRLING, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; WILLIE DAVIS, WARD OF KIRKLAND CORRECTIONAL INSTITUTION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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A CAPITAL CASE

QUESTION PRESENTED

The Court of Appeals granted a Certificate of Appealability (COA) on Freddie Owens's constitutional claim that he was denied the effective assistance of trial counsel by counsel's failure to investigate, develop, and present evidence of structural and functional brain damage, based on a finding that the claim was substantial under 28 U.S.C. § 2253(c). The Court of Appeals then found the same claim *not* to be substantial when denying Mr. Owens a first opportunity to have the merits of his claim considered through the exception established in *Martinez v. Ryan*, 566 U.S. 1 (2012). This case presents the two following questions:

1. What is the standard to be used by federal courts of appeals for determining whether the underlying constitutional claim is "substantial" under *Martinez*, and how does it relate to the determination that a petitioner has met the requirements to obtain a COA, under 28 U.S.C. § 2253(c) and as described by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)?

2. Under the *Martinez* standard, is it proper for courts of appeals determining the substantial quality of the underlying constitutional claim to rely on an imbalanced consideration of the record, including ignoring evidence in the record in support of a petitioner's underlying constitutional claim—as happened in Mr. Owens's case?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED PROCEEDINGS

This case arise from the following proceedings:

Owens v. Stirling, 967 F.3d 396 (4th Cir. July 22, 2020) (affirming the district court's judgment)

Owens v. Stirling, No. 0:16-cv-02512-TLW, 2018 WL 2410641 (D.S.C. May 29, 2018) (order granting summary judgment)

State v. Owens, 664 S.E.2d 80 (S.C. 2008) (affirming death sentence).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Freddie Owens 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 August 18, 2020, order of the Court of Appeals for the Fourth Circuit denying rehearing is available at 2020 U.S. App. LEXIS 26213 (4th Cir. Aug. 18, 2020) and attached as Appendix B. The July 22, 2020, panel opinion of the Court of Appeals denying Mr. Owens's appeal is reported at *Owens v. Stirling*, 967 F.3d 396 (4th Cir. July 22, 2020) and attached as Appendix A. The May 29, 2018, Memorandum Opinion of the United States District Court for the District of South Carolina denying Mr. Owens's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is available at *Owens v. Stirling*, No. 0:16-cv-02512-TLW, 2018 WL 2410641 (D.S.C. May 29, 2018) and attached as Appendix C.

JURISDICTION

The Court of Appeals entered its judgment on July 22, 2020, denied rehearing on August 18, 2020, and issued its mandate on August 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

I. Introduction

Freddie Eugene Owens was sentenced to death by jurors unaware that he suffered from brain damage that affected his behavior. According to objective, scientific testing, "structural and functional imaging of Mr. Owens's brain converge to show abnormalities indicating brain damage." J.A. 4182.[1] The abnormalities are located, "in regions that are very important for regulating emotions and behavior." *Id.* As described in a Neurobehavioral Assessment, Mr. Owens's "damaged amygdala will misinterpret danger signals and when excited it will issue false alarms," and "his frontal lobe would be unable to exercise control" on emotional impulses. J.A. 4183.

Because Mr. Owens's trial counsel were unfamiliar with neuroimaging evidence and how to use this type of evidence, and did not investigate and provide critical information regarding Mr. Owens's medical history—including his history of seizures—to the neuropsychologist who evaluated Owens and testified at his trial, the objective evidence of Mr. Owens's significant impairment was never presented to jurors. In the absence of this evidence, the solicitor convinced jurors to sentence Mr. Owens to death because Mr. Owens made an "intentional and calculated choice to kill and his punishment should reflect the degree and the magnitude of that choice," J.A. 1706, and that "[h]e has no mental illness," J.A. 1708. Arguing for the death penalty, the solicitor

[1] Citations to "J.A." refer to the Joint Appendix filed in the Court of Appeals for the Fourth Circuit.

relied on the theme that the greater the extent of Mr. Owens's culpability, the more severe the punishment must be, and that Mr. Owens had to be held accountable for his "choices." *See, e.g.*, J.A. 1706–12.

II. Capital Trial Proceedings and Direct Appeals

Mr. Owens was convicted and sentenced to death in connection with the November 1, 1997, armed robbery of a convenience store and the fatal shooting of the store's clerk, Irene Graves. *State v. Owens*, 552 S.E.2d 745 (S.C. 2001). Mr. Owens was nineteen years old on November 1, 1997.

No forensic evidence connected Mr. Owens to the crime scene, and he denied participating in the crimes. *Id.* at 750. Video of the shooting shows two unidentifiable, masked assailants. *Id.* At trial, the government relied on testimony from Mr. Owens's co-defendants, former girlfriend, and investigating officers to implicate Mr. Owens. *Id.*

On direct appeal, the South Carolina Supreme Court affirmed Mr. Owens's conviction, but reversed his death sentence and remanded for resentencing. *Id.* at 760–61. After a bench sentencing proceeding, Mr. Owens again received a death sentence, which was again reversed by the South Carolina Supreme Court. *State v. Owens*, 607 S.E.2d 78 (S.C. 2004).

Everett William Godfrey and Kenneth Gibson were appointed in February 2006 to represent Mr. Owens at his capital re-sentencing proceeding, J.A. 2129–30, which was set to begin on October 2, 2006, J.A. 2152. Mr. Gibson and Mr. Godfrey did not first meet with Mr. Owens until June. J.A. 2096. At the end of August 2006, Mr. Godfrey made decisions about

whom to hire as part of the defense team. J.A. 2153–54. The team included forensic psychiatrist Dr. Schwartz-Watts, and Dr. Tora Brawley, a neuropsychologist. J.A. 2154–55. Counsel chose to use Dr. Brawley, rather than Dr. James Evans, a neuropsychologist who had testified at Mr. Owens's first re-sentencing proceeding in 2003, J.A. 76, because Dr. Evans, "sent the test out west, like to California," and counsel "didn't think that would play in front of a local jury." J.A. 2196. Counsel "did not want to give the jury a phantom issue of the defense trying to throw smoke and mirrors at them by having some West Coast doctor say something." J.A. 2197.

Dr. Schwartz-Watts asked that counsel seek a continuance to allow her time to receive and review Mr. Owens's records, and "to meet with your social worker, as I have no social history at all at this point." J.A. 2440. Counsel moved for a continuance on September 27, 2006, and the trial was rescheduled to November 6, 2006. J.A. 2417. Two weeks before the new trial date, Mr. Gibson and Mr. Godfrey decided that Mr. Gibson would take over responsibility for presenting the mitigation case, J.A. 2100, a task which previously had been assigned to Mr. Godfrey, J.A. 2081. Mr. Gibson had not read any of the voluminous social history or institutional records that were in the case file, and he did not read them after he agreed to take on that role. J.A. 2103.

The second re-sentencing was heard by a jury. *State v. Owens*, 664 S.E.2d 80, 81 (S.C. 2008). The defense's evidence included Dr. Schwartz-Watts's testimony about her evaluation of Mr. Owens, and Dr. Brawley's testimony based on her "very limited" work

in the case, J.A. 1580. As part of her evaluation, Dr. Brawley had reviewed the records provided to her by Mr. Owens's counsel. J.A. 1577, 4231. Dr. Thomas Cobb, a forensic psychiatrist employed by the South Carolina Department of Corrections, testified that he began treating Mr. Owens in prison in August 2005. Dr. Cobb testified about his treatment of Mr. Owens, J.A. 1595–96, and explained that he had not reviewed any of Mr. Owens's social history or criminal or correctional records, J.A. 1599–1602.

In closing, the government argued to jurors that Mr. Owens made an "intentional and calculated choice to kill and his punishment should reflect the degree and the magnitude of that choice," J.A. 1706, and that "[h]e has no mental illness," J.A. 1708. The government had presented evidence regarding the death of inmate Christopher Lee, who Mr. Owens had confessed to killing at the Greenville County Detention Center between the guilt and sentencing phases of his first trial, when Mr. Lee taunted Mr. Owens by claiming that Mr. Lee's cousin was on the jury that convicted Mr. Owens and would sentence him to death, *State v. Owens*, 552 S.E.2d at 754–55. Describing the killings of Ms. Graves and Mr. Lee, the government argued that Mr. Owens was "cold" and "unfeeling." J.A. 1709–10. The government told jurors, "[r]emember that [Mr. Owens] could have made something of himself. . . . but he chose another route. He chose a route to be a predator and he chose a route to be a killer." J.A. 1711. Defense counsel argued to jurors that Mr. Owens was "a ticking time bomb at that point [before Ms. Graves was killed] . . . . because of a psychological disorder that he can't control." J.A. 1719*; see also* J.A. 1718 ("That impulsivity is a thread

which goes throughout his entire life. . . . When I get an impulse to do something . . . . [t]here is a timer or some type of delay situation in my body that works, that keeps me from acting on everything that I just have a guttural animal instinct to do. That doesn't work normally in him."), 1720–21 ("But when you have a situation where you have a man, a human being, who has a psychological disorder that he cannot—that causes him to not be able to control his behavior . . . . What does it say about our society if we kill a man who can't control his actions?").

The jury returned a death verdict, which was affirmed by the South Carolina Supreme Court. *State v. Owens*, 664 S.E.2d at 80.

III. Mr. Owens's State and Federal Habeas Proceedings

Mr. Owens sought state post-conviction relief, which was denied after an evidentiary hearing. J.A. 3686. On July 20, 2016, Mr. Owens filed a second post-conviction petition in state court attempting to exhaust claims, J.A. 5740, and the court dismissed the untimely petition on April 10, 2017, J.A. 5741.

On September 8, 2016, Mr. Owens filed an amended petition for a writ of habeas corpus under 28 U.S.C. § 2241. Mr. Owens's petition included the claim that trial counsel were ineffective by failing to investigate, develop, and present evidence of structural and functional brain damage. This claim was not exhausted in state court, and Mr. Owens asked the court to consider the merits of his claim pursuant to the exception to procedural default established by *Martinez*. Mr. Owens requested an

evidentiary hearing regarding this unexhausted claim.

In 2016, Mr. Owens received a comprehensive neurobehavioral assessment by Dr. Ruben Gur. Neuroimaging revealed that "structural and functional imaging of Mr. Owens's brain converge to show abnormalities indicating brain damage" "in regions that are very important for regulating emotions and behavior." J.A. 4182. Dr. Gur explained Mr. Owens's patterns of brain activation as a situation "analogous to a car with weak brakes that are already engaged when it begins to race. The frontal lobe is unable to do its job and act as the brakes on the primitive emotional impulses emanating from [Mr. Owens's] amygdala when the limbic system reaches its activated stage . . . ." J.A. 4183. Mr. Owens's "damaged amygdala will misinterpret danger signals and when excited it will issue false alarms," and "his frontal lobe would be unable to exercise control" on emotional impulses. *Id.* The neuroimaging of Mr. Owens's brain showed: (1) frontal region abnormalities, which "would indicate diminished executive functions such as abstraction and mental flexibility, planning, moral judgment, and emotion regulation, moderating limbic arousal, and especially impulse control"; (2) dysfunction in several components of his emotion regulation system; (3) "white matter abnormalities [that] would interfere with efficient communication among brain regions"; (4) volume loss in Mr. Owens's temporal lobe, "portend[ing] memory deficits"; and (5) metabolic issues leading to deficits in integrating left and right hemispheres processing modes that would, "impair

speed of processing across all cognitive and affective domains." J.A. 4182–83.

Evaluation and testing by neuropsychologist Dr. Stacey Wood after the neuroimaging also showed that Mr. Owens has "significant brain impairment." J.A. 4200. Dr. Wood reviewed South Carolina Department of Corrections records indicating that Mr. Owens had a "history of seizures." J.A. 4190, 4202–04; *see also* App. 169–70. Those records listed "Hx. of seizures" among Mr. Owens's "active problems," and listed "chronic care clinic referrals" as "seizure." App. 169–70. Dr. Wood opined that seizure activity indicated brain injury, "most commonly focused in the temporal lobe region," and concluded that the neuroimaging and neuropsychological testing of Mr. Owens showed results "consistent with temporal lobe injury." J.A. 4202. On one measure of executive functioning and decision-making "sensitive to the angular cingulate and other frontal lobe regions that are not easily assessed by other tools," Mr. Owens scored at the first percentile, "severely impaired," showing "less ability to monitor and inhibit behavior." J.A. 4199.

Dr. Brawley submitted a sworn statement, explaining that she

> 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.

Mr. Godfrey and Mr. Gibson also submitted sworn affidavits during federal post-conviction proceedings. Mr. Gibson, the attorney ultimately tasked with presenting the mitigation case, admitted that although he knew of Mr. Owens's "many psychiatric difficulties," he had never used neuroimaging testing before and "was unsure, as this was [his] first capital case how to use it before a jury." J.A. 3894. Both attorneys stated that they did not pursue such testing prior to Mr. Owens's trial because they were unfamiliar with it and "unsure how to present it to a jury in the mitigation stage of the trial." J.A. 3893; *see also* J.A. 3894. They explicitly stated that they did not have a "strategic plan" not to use the testing to investigate, develop, and present mitigation evidence. J.A. 3893; *see also* J.A. 3894. Mr. Owens's post-conviction counsel also submitted sworn affidavits, recognizing "[i]t is common to have this battery of [neuroimaging] testing done as part of the investigation, development and presentation of evidence in the sentencing phase of a capital case," and they "had no strategic reason for failing to use this as another claim of ineffective assistance of trial counsel." J.A. 3896; *see also* J.A. 3899.

The government filed a return to Mr. Owens's amended petition and a second motion for summary judgment. The district court granted the motion for summary judgment. App. 58. Regarding this claim, the 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. Accordingly, he is

not entitled to relief . . . ." App. 142 (emphasis added). In the same order, the court denied Mr. Owens's request for an evidentiary hearing and for a certificate of appealability. App. 168.

Mr. Owens sought a certificate of appealability on this claim and two other claims from the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 2253(c)(1). The Fourth Circuit granted the certificate, "indicating that [Mr.] Owens had 'demonstrate[d] "a substantial showing of the denial of a constitutional right"' with respect to each claim." App. 18 (quoting *Miller-El*, 537 U.S. at 237 (quoting 28 U.S.C. § 2253(c)(1)).

The court held that, "despite implying the contrary conclusion when we granted the COA, we agree with the district court that [Mr.] Owens fails to demonstrate cause because his underlying claim is insubstantial." App. 42. The court addressed whether it had "'already determined that [Mr. Owens's] defaulted ineffective assistance of trial counsel claim is substantial under *Martinez*' by granting his COA with respect to it." App. 46 (quoting *Brown v. Brown*, 847 F.3d 502, 515 (7th Cir. 2017)). The court explained that the United States Court of Appeals for the Seventh Circuit had "sidestepped this issue in *Brown*, finding that *Martinez* didn't elucidate the nature of its substantiality standard and noting that other circuits have offered 'limited further guidance,'" App. 47 (citing *Brown*, 847 F.3d at 515; *Martinez*, 566 U.S. at 21 n.2 (Scalia, J., dissenting)), and that the other circuit to have identified this issue also declined to resolve it, *id.* (citing *Dansby v. Hobbs*, 766 F.3d 809, 840 n.4 (8th Cir. 2014)). The Seventh Circuit "opted to

'conduct a separate and deeper review of the record, beyond [its] grant of a [COA],'" *id.* (citing *Brown*, 847 F.3d at 515), and remanded the case for an evidentiary hearing on the merits of the defaulted ineffective assistance of counsel claim, *Brown*, 847 F.3d at 517.

The Fourth Circuit held that "the *Martinez* substantiality standard is identical to the one we implicitly resolved in his favor by granting the COA." App. 47; *see also* App. 48. However, the court found that the "apparent redundancy between the *Martinez* and § 2253(c)(1) substantiality standards" did not preclude the court "from reconsidering the merit of [Mr.] Owens's underlying claim at *this* stage of the case." App. 49. In its reasoning, the court explained that "practical realities required us to rule on the COA without the benefit of full briefing and oral argument, which prevented the relevant arguments from being fully presented to us." App. 50 (internal quotations omitted). The court continued, "[i]ndeed, we granted the COA based solely on [Mr.] Owens's opening brief, without the benefit of *any* briefing by the State (not to mention oral argument)." *Id.* (citing Local R. App. P. 22). The court held, "[w]e therefore view our duty under *Martinez* to consider the substantiality of the underlying claim, even after granting a COA, as affording us another (and fuller) opportunity to do so." App. 51. The court also cited two additional and recent cases in which it had "found . . . that an underlying *Strickland* claim was insubstantial under *Martinez* despite having granted a COA." App. 51 n.5 (citing *Sigmon v. Stirling*, 956 F.3d 183, 193, 199 (4th Cir. 2020); *Moore v. Stirling*, 952 F.3d 174, 181, 185–86 (4th Cir. 2020)).

After this fuller review of Mr. Owens's claim, the court held that "we are satisfied that the district court properly found that [Mr.] Owens's underlying claim—that Sentencing Counsel rendered ineffective assistance by failing to have him neuroimaged for evidence of structural and functional brain damage—is insubstantial." App. 51–52 (citing *Owens v. Stirling*, 2018 WL 2410641 at *33–35). The court concluded that Mr. Owens:

> fails to show that reasonable jurists could debate whether such a thorough investigation of his mental condition fell short of an objective standard of reasonableness. Not only did counsel take extensive measures to investigate [Mr.] Owens's behavioral cognition for mitigating evidence, their mental health experts reached conclusions that belied the need for comprehensive neuroimaging . . . . And much as [Mr.] Owens might disagree with those conclusions in retrospect, he provides no reason to believe that they were professionally unreasonable. . . . [or amounted] to incompetence under prevailing professional norms.

App. 53–54 (internal quotations omitted). The court found that it did not have to address whether Mr. Owens satisfied the prejudice prong of *Coleman v. Thompson*, 501 U.S. 722 (1991), App. 46 n.4, whether the underlying claim was substantial with respect to the prejudice prong of *Strickland*,[2] App. 56 n.6, or

[2] Although the lower court found it unnecessary to address whether Mr. Owens had demonstrated that the prejudice portion

whether Initial Post-conviction Counsel performed deficiently in failing to exhaust the underlying claim, *id.*

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of his claim was substantial, on remand he will establish the substantiality of both prongs of his *Strickland* claim. As this Court repeatedly has recognized, organic brain damage is persuasive mitigating evidence that goes directly to jurors' assessments of moral culpability. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 41 (2009) ("brain abnormality" is a factor "relevant to assessing a defendant's moral culpability") (citation omitted); *Sears v. Upton*, 561 U.S. 945, 949 (2010) ("Environmental factors aside, and more significantly, evidence produced during the state postconviction relief process also revealed that Sears suffered significant frontal lobe abnormalities.") (internal quotations omitted); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005). *Cf. Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002) (prohibiting execution of the intellectually disabled, in part "[b]ecause of their disabilities in areas of reasoning, judgment, and *control of their impulses*, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct") (emphasis added).

REASONS FOR GRANTING THE PETITION

I. The Manner in Which the Lower Court Applies the Substantiality Standard Is Contrary to *Martinez*, and Prevents Prisoners from Vindicating Their Constitutional Right to the Effective Assistance of Trial Counsel.

A. The Exception to Procedural Default Recognized in *Martinez* Applies to "Substantial" Claims of Ineffective Assistance at Trial, a Threshold Determination and Not Coextensive with Merits Analysis.

In *Martinez*, this Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17. The constitutional claims reviewed through *Martinez* are of "particular concern," 566 U.S. at 12, because they protect "'a bedrock principle in our justice system. . . . [i]ndeed, . . . the foundation for our adversary system,'" *Trevino v. Thaler*, 569 U.S. 413, 422 (2013) (quoting *Martinez*, 566 U.S. at 12). The purpose of the *Martinez* excuse to procedural default is to protect petitioners from the possibility that their constitutional claims are never reviewed on the merits. *Martinez*, 566 U.S. at 10, 11–13; *Trevino*, 569 U.S. at 422–23, 428; *cf. Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). "Allowing a federal habeas court to hear a claim of

ineffective assistance of trial counsel when an attorney's errors . . . caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel, or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Martinez*, 566 U.S. at 14.

To show a "substantial" ineffective-assistance-of-trial-counsel claim, a petitioner "must demonstrate that that the claim has *some* merit." *Id.* (emphasis added). In *Martinez*, this Court defined an "insubstantial" ineffective-assistance-of-trial-counsel claim as one which "does not have any merit or [] it is wholly without factual support." *Id.* at 16. This Court equated the *Martinez* substantial claim standard with the minimal showing needed for a certificate of appealability to issue. *Id.* at 14 (citing *Miller-El*, 537 U.S. 322). As the Court described in *Miller-El*, the COA standard requires a petitioner to "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" 537 U.S. at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). That standard "do[es] not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Id.* at 338. In fact, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

The COA inquiry "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). The burden upon a petitioner to meet the COA standard is lower than the "highly demanding" standard applied on the merits under *Strickland*, *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). That a petitioner has failed "to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." *Buck*, 137 S. Ct. at 774.

The "threshold inquiry" of *Miller-El* "does not require full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336. In *Buck*, this Court reviewed the State's argument about the Fifth Circuit's "thorough" consideration of COA applications, including briefing from both sides and oral argument, and noted that this thorough review "hurts rather than helps the State's case," and "whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry." *Buck*, 137 S. Ct. at 774.

B. Lower Courts Have Shown Confusion and Applied Different Methods and Standards in Determining Whether a Claim Is "Substantial," Forcing Petitioners to Meet a Standard Higher Than *Martinez* Requires in Order to Obtain a First Review of Claims of Ineffective Assistance of Trial Counsel.

The lower court noted in Mr. Owens's case that "[a] few of our sister circuits have remarked [on] an apparent incongruity lurking in the *Martinez*

standard." App. 45 (citing *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 938 (3d Cir. 2019); *Brown*, 847 F.3d at 513). As these circuits identified, "*Martinez* appears to require a state prisoner to *prevail* on the merits of his underlying claim merely 'to excuse the procedural default' and 'obtain consideration on the merits.'" *Id.* (citing *Workman*, 915 F.3d at 939). The lower court then claimed that it joined some of its sister circuits in rejecting the incongruous interpretation that *Martinez* would require a state prisoner to prevail on the merits of his underlying ineffective assistance of counsel claim in order to excuse procedural default and obtain review of the merits of the very same underlying claim. App. 45–46.

In Mr. Owens's case, the lower court found that to establish "cause" under *Martinez* to excuse the procedural bar to his underlying ineffective assistance of counsel claim, a petitioner must show: (1) that the underlying claim is substantial; and (2) that initial post-conviction counsel's failure to raise the claim was deficient under *Strickland*. App. 46. The lower court acknowledged there was an "apparent redundancy" in revisiting the question whether the underlying claim was substantial in the context of *Martinez*, when the court already was required to have found that the underlying claim was substantial in order to grant Mr. Owens a certificate of appealability on this issue. App. 49. But the court ruled that this redundancy did not "preclude [it] from reconsidering the merit of [Mr.] Owens's underlying claim at *this* stage of the case." *Id.* In coming to this conclusion, the Fourth Circuit recognized that other courts of appeals that have addressed the issue have struggled with identifying a

clear definition of "substantial" under *Martinez*, and formulating a process for revisiting earlier findings. App. 44–48. The court noted that the Seventh Circuit has found that *Martinez* did not "elucidate the nature of its substantiality standard," and that other circuits have offered "limited further guidance." App. 47 (quoting *Brown*, 847 F.3d at 515). The Seventh Circuit found the relationship between the "substantial" showing in *Martinez* and the COA showing in *Miller-El* was cloudy and linked only by "an ambiguous '*cf.*' signal" used by the Court in *Martinez* when referencing *Miller-El*. *Id.* (citing *Brown*, 847 F.3d at 515). The lack of clarity regarding the *Martinez* standard also was noted by two members of the *Martinez* Court: "The Court does not explain where this substantiality standard comes from, and how it differs from the normal rule that a prisoner must demonstrate actual prejudice to avoid the enforcement of a procedural default[.]" *Martinez*, 566 U.S. at 21 n.2 (Scalia, J., joined by Thomas, J., dissenting).

Despite this lack of clarity about the origin, meaning, and application of the substantial claim showing, the courts of appeals consistently cite it as a requirement of *Martinez*. *See* App. 46–48; *Hendricks v. Hall*, No. 19-6300, 2020 U.S. App. LEXIS 9227, at *8 (6th Cir. Mar. 24, 2020); *Wiese v. Nooth*, 761 F. App'x 758, 760 (9th Cir. 2019); *Ramirez v. Ryan*, 937 F.3d 1230, 1247 (9th Cir. 2019); *Ibarra v. Davis*, 738 F. App'x 814, 817 (5th Cir. 2018); *Porter v. Genovese*, 676 F. App'x 428, 431–32 (6th Cir. 2017); *Murray v. Schriro*, 745 F.3d 984, 1019 (9th Cir. 2014). However, although the *Martinez* Court drew its language from the standard used to determine whether to grant a COA, *Martinez*, 566 U.S. at 14 (citing *Miller-El*, 537

U.S. 322), the courts of appeals do not uniformly accept the equivalency of the showing applied in the *Martinez* context and the showing established in *Miller-El* for COA determinations.

The Eleventh Circuit has held that "[n]either *Martinez* nor *Trevino* elaborated on or applied [the substantial claim] standard, but we take the Court's reference to *Miller-El* to mean that it intended that lower courts apply the already-developed standard for issuing a COA." *Hittson v. GDCP Warden*, 759 F.3d 1210, 1269 (11th Cir. 2014). The Ninth Circuit described *Martinez* as "suggest[ing]" that its substantiality standard is "comparable" to the COA standard. *Runningeagle v. Ryan*, 825 F.3d 970, 983 n.14 (9th Cir. 2016) ("*Martinez* suggests, via a 'Cf.' citation to *Miller-El v. Cockrell*, 537 U.S. 322 (2003), that the substantiality standard is comparable to the standard for a certificate of appealability to issue under 28 U.S.C. § 2253(c)(2)."); *see also Ramirez*, 937 F.3d at 1241 (describing this Court as "cit[ing] the standard for issuing a certificate of appealability as analogous support for whether a claim is substantial" under *Martinez* (citing *Martinez*, 566 U.S. at 14)). However, the Fifth Circuit has contrasted the COA test with the *Martinez* test: "[t]his court's grant of a COA means only *that reasonable jurists could debate* whether [appellant's] claim was substantial, *Buck v. Davis*, 137 S. Ct. 759, 775 (2017); it does not mean that the court held [appellant's] claim itself to be substantial on the merits." *Ibarra v. Davis*, 786 F. App'x at 424 (parallel cite omitted). Thus, according to this interpretation, the substantial showing required

under *Martinez* is more demanding than required in granting a COA.[3]

Without clear guidance from this Court, courts of appeals like the Fourth Circuit in this case are separately and individually determining how to assess the substantiality of an underlying constitutional claim after having found the underlying claim to be substantial when granting a COA. As a result of the confusion of the lower courts in interpreting and/or applying the standard to excuse procedural default of a claim under *Martinez*, the lower courts—as in Mr. Owens's case—frustrate the purpose of *Martinez* by holding petitioners to a standard higher than that required by *Martinez* and preventing petitioners from receiving a first review of their ineffective-assistance-of-trial-counsel claims.

For example, the Fourth Circuit noted that in two recent cases, as in Mr. Owens's case, it had found *Strickland* claims insubstantial under *Martinez* despite having granted a COA. App. 51 n.5 (citing *Sigmon*, 956 F.3d at 193, 199; *Moore*, 952 F.3d at 181, 185–86). In neither case did the Fourth Circuit acknowledge the relation between the COA standard and the *Martinez* substantial claim standard. Instead, the Fourth Circuit consistently imposed a higher burden, and found petitioners' claims insubstantial based on the *Strickland* standard. For example, in *Moore*, the Fourth Circuit held:

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[3] Conversely, the Fifth Circuit also has found that the test for determining whether the underlying claim is substantial under *Martinez* is "equivalent to" the test for granting a COA. *See, e.g.*, *Crutsinger v. Davis*, 929 F.3d 259, 262 (5th Cir. 2019).

> And so the defendant's ineffective assistance claim must be substantial—that is, it must have "some merit" under the governing ineffective-assistance-of-counsel standards. *Martinez*, 566 U.S. at 14. Thus, Moore must show that trial counsel's performance was so deficient as to fall below an objective standard of reasonableness. And that deficiency must have prejudiced the defense in that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–96.

Moore, 952 F.3d at 185–86. In *Sigmon*, the Fourth Circuit similarly required the petitioner to prove the merits of his claim in order to show that claim was substantial. For example, the majority found that their opinion that the new evidence that Mr. Sigmon alleged trial counsel should have developed was cumulative justified their findings that his ineffective-assistance-of-trial-counsel claim was not substantial with regard to deficient performance and to prejudice. *Sigmon*, 956 F.3d at 198–201. However, Judge King dissented, debating this finding in detail:

> [i]n these circumstances, the answer to the question of whether a hearing on [Mr.] Sigmon's ineffective assistance claim is warranted should be an emphatic 'yes.' Contrary to the panel majority, [Mr.] Sigmon's new evidence is not cumulative of the trial evidence and otherwise insufficient to potentially entitle him to habeas relief, and

> thus the ineffective assistance claim is not facially insubstantial nor is it otherwise deficient under *Martinez*.

Id. at 212 (King, J., dissenting). Thus, in denying the claim, it is clear that the Fourth Circuit was not applying the standard set forth in *Miller-El*, that the petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (quoting *Slack*, 529 U.S. at 484). The Fourth Circuit has continued to misunderstand this Court's holding, and misapply the standard set forth in *Martinez*, in Mr. Owens's case.

C. The Fourth Circuit's Application of an Incorrect Standard Deprived Mr. Owens of an Opportunity to Have His Substantial Ineffective-Assistance-of-Trial-Counsel Claim Properly Considered.

The lower court in Mr. Owens's case was impacted by the lack of clear guidance on the nature of a determination of substantiality under *Martinez*. As a result, the Fourth Circuit erred in reviewing the substantial quality of Mr. Owens's claim through an imbalanced assessment of its merits. Initially, the Fourth Circuit held that "the *Martinez* substantiality standard is identical to the one we implicitly resolved in [Mr. Owens's] favor by granting the COA." App. 47; *see also* App. 48. However, the court then went on to a "fuller" consideration of the substantiality of Mr.

Owens's claim, App. 51, a practice the court acknowledged that it also had followed in applying *Martinez* in other recent death penalty cases, App. 51 n.5 (citing *Sigmon*, 956 F.3d at 193, 199; *Moore*, 952 F.3d at 181, 185–86).

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*. Similar to the misapplication this Court has found in other courts addressing threshold issues, the Fourth Circuit "phrased its determination in proper terms . . . but it reached that conclusion only after essentially deciding the case on the merits," *Buck*, 137 S. Ct. at 773.

First, the court described that it made its ruling based on a "full review," and explained that "practical realities required us to rule on the COA without the benefit of full briefing and oral argument, which prevented the relevant arguments from being fully presented to us." App. 50–51 (internal quotations omitted). The court justified its full review and reconsideration of whether Mr. Owens's claim had "some merit" under *Martinez*: "[i]ndeed, we granted the COA based solely on [Mr.] Owens's opening brief, without the benefit of *any* briefing by the State (not to mention oral argument)." App. 50 (citing Local R. App. P. 22). However, this Court found in *Buck* that the Fifth Circuit's thorough analysis of an application for a COA supported the petitioner's claim that the court had made an improper merits determination rather

than determining whether the claim was reasonably debatable, and "whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry." 137 S. Ct. at 774. Similar to the Fifth Circuit's error in *Buck*, the Fourth Circuit in Mr. Owens's case relied 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. The contrary result reached after the court's reconsideration, and based on an imbalanced representation of the record, demonstrates that during its fuller review, the Fourth Circuit held Mr. Owens to a standard higher than *Martinez* permits.

Second, the court's own findings demonstrate that the Fourth Circuit did not adhere to the proper standard in determining whether Mr. Owens's claim was substantial under *Martinez*. For example, the court held: "on this record, there is *no merit* to the claim that [counsel] were ineffective by not obtaining a comprehensive neuroimaging evaluation." App. 52 (emphasis added). It improperly faulted Mr. Owens for failing to provide evidence proving the merits of this claim. *Compare* App. 54 (holding that Mr. "Owens *falls short of establishing* that counsel missed any red flags" (emphasis added)), *with Buck*, 137 S. Ct. at 774 (holding that the question regarding the application for a COA was not whether Buck had "shown extraordinary circumstances" or "shown why [the circumstances] would justify relief from the judgment"—"[t]hose are ultimate merits determinations the panel should not have reached." (internal quotations omitted)). As the Fourth Circuit explained, "[b]ecause we *conclude that Sentencing*

Counsel didn't perform deficiently in failing to obtain comprehensive neuroimaging, we needn't address whether [Mr.] Owens's underlying claim is substantial with respect to the prejudice prong of *Strickland*." App. 56 n.6 (emphasis added). This was a decision on the merits of Mr. Owens's claim, rather than a determination that his claim was not substantial as required by *Martinez* to excuse the procedural default.

In affirming the district court's merits ruling, the Fourth Circuit further demonstrated that it did not follow this Court's holding in *Martinez*. The district court explicitly found that Mr. Owens could not overcome procedural default under *Martinez* because his claim failed on the merits, and did not even acknowledge in its opinion on this claim the lower "substantial claim" standard of *Martinez*. The district court held: "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. Accordingly, he is not entitled to relief . . . ." App. 142 (emphasis added). The Fourth Circuit held, "[u]pon reconsideration, we are satisfied that the district court properly found that [Mr.] Owens's underlying claim—that Sentencing Counsel rendered ineffective assistance by failing to have him neuroimaged for evidence of structural and functional brain damage—is insubstantial." App. 51–52 (citing *Owens v. Stirling*, 2018 WL 2410641 at *33–35); *see also* App. 56 ("We also hold that the district court properly denied [Mr.] Owens's defaulted *Strickland* claim as insubstantial under *Martinez*.").

The district court held that Mr. Owens could not establish the *Martinez* excuse for procedural default

based on the merits of his claim—rather than determining whether Mr. Owens's claim was substantial, and the Fourth Circuit affirmed that this merits review was the correct analysis, improperly conflating a merits determination with the *Martinez* substantiality standard. In fact, the Fourth Circuit actually described the district court as finding Mr. Owens's claim to be "insubstantial," App. 51, although the district only ruled on the merits of the claim. The Fourth Circuit's conflation required Mr. Owens to meet a standard much higher than the standard set forth in *Martinez*.

Finally, 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," one which reasonable jurists could debate, or "wholly without factual support." For example, the court held that counsel took "extensive measures" to investigate Mr. Owens's behavioral cognition, performed a reasonable investigation, and reasonably relied on their mental health experts' conclusions "that belied the need for comprehensive neuroimaging." App. 53. However, there was significant factual support in the record to the contrary, most notably the affidavits of counsel themselves and of testifying mental health expert, Dr. Brawley. As Dr. Brawley explained in her sworn statement, she was not provided any information at the time of her evaluation that Mr. Owens had suffered seizures or had any symptoms consistent with a seizure disorder. J.A. 4231. If she had been given this information, *see, e.g.*, App. 169-70; J.A. 4190; J.A. 4202–04, Dr. Brawley explained that "this combined with my findings of temporal lobe deficits

would have cause[d] me to recommend a full neurological evaluation of Mr. Owens," J.A. 4231. Her initial conclusion was the result of counsel's unreasonably limited investigation. *See, e.g.*, *Rompilla*, 545 U.S. at 392 (Although mental health experts who examined Rompilla prior to trial found "nothing helpful" to his case, "postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of 'red flags' pointing up a need to test further." (citations omitted)). In addition, trial counsel both submitted sworn affidavits that factually supported Mr. Owens's underlying claim. As Mr. Godfrey admitted: "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. 3893; *see also* J.A. 3894 (Mr. Gibson stated "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.").

At the time of Mr. Owens's trial, well-defined professional norms required investigation into reasonably available mitigating evidence, including a defendant's psychological history, mental status, and brain damage. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)); *Williams v. Stirling*, 914 F.3d 302, 313 (4th Cir. 2019) (Investigation is required into how a defendant's psychological history and mental

status could "explain or lessen the client's culpability for the underlying offense[] . . . ." (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.11(F)(2) (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1056 (2003)). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984). This Court has held that "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (citing *Williams v. Taylor,* 529 U.S. 362, 395 (2000); *Kimmelman*, 477 U.S. at 385). Although Mr. Owens's trial counsel explicitly admitted that their decisions were based on ignorance rather than an understanding of the facts and the law, and Dr. Brawley explained that she would have proceeded differently in her assessment and recommendations if provided critical information by trial counsel, the Fourth Circuit held that Mr. Owens had not met the *Martinez* substantial claim standard.

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. If the lower court properly had applied the *Martinez* standard, the court would have concluded that Mr. Owens's claim was one

which reasonable jurists could debate, and not "wholly without factual support." For example, the court found that counsel did not miss any red flags pointing to the need to obtain neuroimaging or otherwise further investigate for evidence of structural and functional brain damage, because his "reliance on his prescription for Depakote in this respect—the only red flag he identifies on appeal—is misplaced," App. 54. The court also found there was "no indication that Sentencing Counsel overlooked evidence of seizure activity." App. 55. However, Dr. Wood's evaluation described her review of Mr. Owens's South Carolina Department of Corrections medical records, *see* App. 169-70, and noted that her evaluation was informed by the "History of Seizures" noted in those records. J.A. 4190. *See also* J.A. 4204. Mr. Owens's history of seizures was a red flag, which experts Dr. Wood and Dr. Brawley connected to temporal lobe issues and opined would have led them to request further evaluation of Mr. Owens. *See* J.A. 4204, 4231. These expert opinions are confirmed by the evidence that further evaluation did—as the experts anticipated—indicate brain damage. *See, e.g.*, J.A. 4182, 4202.

The Fourth Circuit also concluded that counsel's decision not to call as a witness Dr. Evans, who testified at an earlier sentencing proceeding, "bears on the analysis," and "presents an additional reason why [Mr.] Owens's underlying claim is insubstantial," because counsel had "similar evidence" at their fingertips which they made a strategic decision not to use. App. 55–56. However, to reach this conclusion, the court had to ignore the sworn affidavits of trial counsel themselves, in which counsel explicitly stated that they did not make the strategic decision

attributed to them by the lower court. *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. Counsel testified in the state post-conviction review hearing that their decision not to use Dr. Evans at Mr. Owens's trial in fact centered on concerns about Dr. Evans, not neuroimaging testing generally. Counsel testified that Dr. Evans, "sent the test out west, like to California, and had a diagnosis of it. I didn't think that that would play in front of a local jury." J.A. 2196; *see also* J.A. 2197. When asked whether Dr. Evans's qEEG analysis was recognized in the neuropsychological community, Mr. Godfrey responded, "I did not go that far. I just decided I wasn't going to use Dr. Evans." J.A. 2197. The court's finding that counsel's decision not to use Dr. Evans was a wholesale rejection of neurological mitigation evidence, App. 55–56, is also contrary to the record; trial counsel made Mr. Owens's psychological disorder a central theme of their case and argument to jurors. *See* J.A. 1718–21; *see generally* J.A. 1713–26; *supra* Statement of the Case.

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."

An analysis of the merits of Mr. Owens's claim under *Strickland* was particularly inappropriate at this stage of Mr. Owens's case. The Fourth Circuit relied on the Warden's allegations to affirm the district court's decision to enter summary judgment in favor of the Warden. *See, e.g.*, App. 55–56, 166–68. These courts ignored much of the evidence proffered by Mr. Owens in support of his claim. In addition, the ineffective assistance of Mr. Owens's state post-conviction counsel prevented Mr. Owens from resolving the merits of the factual disputes related to his claim at a state hearing. *See Townsend v. Sain*, 372 U.S. 293, 313–14 (1963). Mr. Owens's request for a hearing and full opportunity to prove his allegations in federal court, J.A. 4586, was denied because the district court ruled that his claim was procedurally defaulted when Mr. Owens could not prove the merits of the claim,[4] J.A. 5793—rather than applying the "substantial claim" standard of *Martinez*.

In *Martinez*, this Court recognized the significance of evidentiary development to proving a claim of ineffective assistance of trial counsel, *Martinez*, 566 U.S. at 11–12, 14, but Mr. Owens's opportunity to develop evidence in support of his claim was truncated by the lower courts' application of an inappropriately demanding standard. Moreover, the

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[4] By denying Mr. Owens an evidentiary hearing and instead crediting an explanation contradicted by counsel's sworn statements, the district court also acted contrary to *Strickland's* requirement that courts consider "all the circumstances" when assessing an ineffective assistance of counsel claim, *Strickland*, 466 U.S. at 688.

district court accepted evidence proffered by the Director and ignored evidence supporting Mr. Owens's claim—such as sworn declarations submitted from trial counsel Mr. Gibson and Mr. Godfrey and defense trial expert Dr. Brawley—and without giving Mr. Owens the opportunity to confront the evidence against him or assert his supporting evidence. To conduct a full merits review on an incomplete record frustrated the stated intention of *Martinez* to avoid a situation in which a prisoner never receives a proper hearing on a claim involving such a "bedrock principle," 566 U.S. at 12, as the right to effective trial counsel. "Ineffective-assistance claims often depend on evidence outside the trial record," and determinations of the merits of such claims "without evidentiary hearings . . . may not be as effective as other proceedings for developing the factual basis for the claim." *Martinez*, 566 U.S. at 13 (citing *Massaro v. United States*, 538 U.S. 500, 505 (2003)). Unless a petitioner has "an opportunity fully to develop the factual predicate for the claim," *Massaro*, 538 U.S. at 504, "[e]ven meritorious claims would fail," *id.* at 506.

CONCLUSION

This Court should grant certiorari to state with greater clarity the definition of "substantial" in *Martinez*, the role the substantiality finding plays in determining cause and prejudice under *Martinez*, and the manner in which the federal courts of appeals can consistently apply this definition, and remand this case for further proceedings in light of this Court's guidance.

Respectfully submitted,

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