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Wrestling With Equality: Identifiable Trends as the Federal Courts Grapple With the Practical Significance of *Martinez v. Ryan & Trevino v. Thaler*

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WRESTLING WITH EQUITY: IDENTIFIABLE TRENDS AS THE FEDERAL COURTS GRAPPLE WITH THE PRACTICAL SIGNIFICANCE OF *MARTINEZ V. RYAN & TREVINO V. THALER*

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I. INTRODUCTION

For decades, the Supreme Court of the United States was clear that the quality of legal assistance a prisoner received during his or her state collateral-review proceedings was of no significance in federal habeas proceedings, even if effective assistance from counsel at trial and on direct appeal was constitutionally guaranteed.[1] If state *direct appeal* counsel failed to properly raise a compelling constitutional claim in direct appeal proceedings? Well, that claim was procedurally defaulted in federal habeas and barred from merits consideration absent an acceptable excuse or a showing that failing to review the claim would result in an innocent person being punished.[2] But, if appellate counsel's ineffective assistance was sufficiently alleged in state court, then that appellate-ineffectiveness could be used as a sufficient excuse, overcoming the default of the underlying claim and allowing the federal habeas court to review the underlying claim's constitutional merits.[3]

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1. Murray v. Carrier, 477 U.S. 478, 488-89 (1986).

2. Coleman v. Thompson, 501 U.S. 722, 749-50 (1991) (holding that *Wainwright* and its progeny apply in all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule); Wainwright v. Sykes, 433 U.S. 72, 88, 90-91 (1977) (applying procedural default rule in context of counsel's failure to make contemporaneous objections).

3. *See Murray*, 477 U.S. at 488-89.

What if, on the other hand, state *collateral-review* ("collateral-review" or "post-conviction" or "IRCP") counsel failed to properly raise a compelling constitutional claim in state collateral proceedings?[4] Too bad—the claim was procedurally defaulted in federal habeas, barred from merits consideration, and collateral-review counsel's ineffectiveness was irrelevant to overcoming the default.[5] Ineffective assistance of counsel ("IAC") in a state collateral-review proceeding could not suffice to overcome a procedural default, the Supreme Court held in *Coleman v. Thompson*,[6] because there is no constitutional right to an attorney in state collateral-review proceedings, and thus, no Sixth Amendment right to a *constitutionally effective* attorney in such proceedings.[7]

Such was the state of habeas corpus law for more than twenty years, including after Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[8] which was intended to severely restrict the power of the federal courts to review constitutional claims arising from state-court criminal proceedings.[9] AEDPA, especially as construed by the Roberts Court, tells criminal defendants that they have one bite at the apple to bring their federal constitutional claims into court—and that this bite should occur in state court.[10] State-court counsel's failure to develop and present to the state courts a prisoner's constitutional claims and the evidence in support of those claims will significantly hinder the prisoner's ability to receive a full merits review of his claims and evidence by the federal habeas courts.

In that post-AEDPA world, the legal irrelevance of state collateral-review counsel's effectiveness—or lack thereof—created a gaping inequity that cried out for the Court's intervention.[11] A state criminal defendant whose constitutional rights were violated at trial might have a

4. Different states have different terms for proceedings that fall within the definition of "collateral-review," meaning legal proceedings that attack a prisoner's conviction and/or sentence in a proceeding other than direct appeal. *See* Wall v. Kholi, 562 U.S. 545, 547 (2011). These state-specific terms are functional equivalents. For simplicity's sake, this article will employ the terms "collateral review," "post-conviction," and "IRCP" interchangeably.

5. *Coleman*, 501 U.S. at 752-53.

6. 501 U.S. 722 (1991).

7. *Id.* at 752-53.

8. Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2255).

9. *See* Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1227-28 (2012).

10. *See* Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 591, 597-98 (2013); Uhrig, *supra* note 9, at 1228.

11. *See* Uhrig, *surpa* note 9, at 1228.

remedy in federal habeas, even if the claim was defaulted in federal court, so long as the constitutional claim should have been raised on direct appeal and direct-appeal counsel was ineffective for failing to raise the claim; but, the same defendant would have no remedy at all if an equally compelling constitutional claim was defaulted because it should have been raised—but was not—in a state collateral-review proceeding.[12]

Against that backdrop, the Court has wrestled with the significance of state collateral-review counsel's ineffective assistance: first in *Martinez v. Ryan*,[13] and then again during the next term in *Trevino v. Thaler*.[14] The Court granted certiorari in *Martinez* to address whether a state prisoner has a constitutional right to effective assistance of post-conviction counsel.[15] But, the Court avoided that constitutional question in *Martinez*, and again in *Trevino*.[16] Instead, the Court used its supervisory power to create a new equitable rule carving out an exception to *Coleman*.[17] Under *Martinez* and *Trevino*, a procedural default can be excused when: (1) the underlying, defaulted claim is "substantial," which means it has "some merit" or would otherwise satisfy the Certificate of Appealability ("COA") standard established in *Miller-El v. Cockrell*;[18] (2) there was inadequate counsel—absence of court-appointed counsel or IAC—during the initial-review collateral proceeding; (3) "the state collateral-review proceeding was the 'initial' review proceeding as to the underlying, defaulted claim;" and (4) state law, as a matter of its structure, design, and operation, does not allow most defendants a meaningful opportunity to develop and present an IAC claim, or to receive a meaningful review of the merits of that IAC claim, on direct appeal.[19]

But now what? In the immediate wake of *Martinez* and *Trevino*, the most significant or common matters that arose were primarily procedural. For instance, does the equitable exception apply in a particular jurisdiction as a matter of law? Does it apply in a particular case? Was *Martinez* or *Trevino*, or both, solo or in conjunction with

12. *See id.* at 1238.
13. 132 S. Ct. 1309 (2012).
14. 133 S. Ct. 1911 (2013).
15. *Martinez*, 132 S. Ct. at 1313, 1315.
16. *Trevino*, 133 S. Ct. at 1921; *Martinez*, 132 S. Ct. at 1315, 1321.
17. *Trevino*, 133 S. Ct. at 1921; *Martinez*, 132 S. Ct. at 1315.
18. 537 U.S. 322 (2003).
19. *Trevino*, 133 S. Ct. at 1918; *Miller-El*, 537 U.S. at 335-36; *see Martinez*, 132 S. Ct. at 1318-19; *see also* Dickens v. Ryan, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc) (articulating the Supreme Court's holding from *Trevino* in a four-prong test).

other case-specific factors, a valid basis for reopening a final judgment or for reconsideration of a recent decision? Was *Martinez* a significant change in the law? Was *Trevino*? Must *Martinez/Trevino* arguments be exhausted in state court? Should "*Rhines* stays"[20] issue to allow exhaustion of newly viable claims? Do the principles articulated in *Martinez* and *Trevino* apply to allow federal review of claims that are procedurally barred from merits review not because they are defaulted, but rather because they were untimely filed?

But, as *Martinez* and *Trevino* move from infancy to relative adolescence, the more typical focus of deliberation has evolved, as well, moving from the procedural realm to substantive considerations. Stated in the most general, basic terms, *Martinez* and *Trevino*, read together, establish that a federal habeas petitioner may be able to overcome a procedural default and, thereby, obtain a merits adjudication of a constitutional claim in certain situations when the effectiveness—or absence—of state post-conviction counsel is implicated. Beyond that baseline notion, however, identifying the functional requirements established by *Martinez* and *Trevino* has been an exercise in headache-inducing analysis that would make Lewis Carroll, Franz Kafka, or Joseph Heller proud, as the lower courts wrestle with what exactly those cases say—and do not say—and what they mean.

This Article is an effort to identify particular trends in how the federal courts are substantively applying *Martinez* and *Trevino*,[21] and to help provide some analytical guidance to counsel representing habeas petitioners wrestling with thorny *Martinez/Trevino*-related matters.[22] In each Part to follow, this Article will identify a particular trending issue arising from *Martinez* and *Trevino*, and offer some explanation of how the lower federal courts are grappling with that issue.[23] Then, at the conclusion of each Part, I will endeavor to answer the inevitable question from habeas lawyers: "so now what?"[24]

Part II addresses what must be demonstrated to excuse a procedural default under *Martinez* and *Trevino*.[25] Part III contains a discussion of what "substantial" means in the *Martinez/Trevino* context, including

20. Rhines v. Weber, 544 U.S. 269, 291-94 (2005).

21. *See infra* Part II.A.

22. *See infra* Parts II–V. Capital cases are my primary focus here; non-capital cases present some of the same issues, but any substantive differences between capital and non-capital cases involving *Martinez* and *Trevino* are beyond the scope of this Article.

23. *See infra* Parts II–V.

24. *See infra* Parts II.B, III.B, IV.B, V.B.

25. See *infra* Part II.

how and why it matters.[26] Part IV analyzes matters related to assessing post-conviction counsel's performance as part of the *Martinez/Trevino* inquiry.[27] This includes consideration of which standards should be the appropriate measuring stick against which to assess post-conviction counsel's performance, as well as a discussion about the sources for identifying the appropriate professional norms.[28] And finally, Part V entails discussion about how to establish inadequate post-conviction counsel after counsel's deficient performance has been determined.[29]

II. WHAT MUST BE DEMONSTRATED TO EXCUSE A PROCEDURAL DEFAULT UNDER *MARTINEZ* AND *TREVINO*?

In *Martinez*, the Court explained that the rules for when a prisoner can "excuse a procedural default are elaborated in the exercise of the Court's discretion."[30] The Court then proceeded to announce the crux of its decision: when a prisoner must raise a trial-IAC claim in a collateral proceeding, the "prisoner *may establish cause for a default* of an ineffective-assistance claim in two circumstances," which collectively can be characterized as "inadequate counsel" in post-conviction.[31] Then the Court continued: "*To overcome the default, a prisoner must also demonstrate* that the underlying ineffective-assistance-of-trial-counsel ("IATC") claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."[32]

Then, in *Trevino*, the Court specifically enumerated a four-part analysis that, if satisfied, would thereby excuse a defendant's procedural default:

> (1) the claim of "[IATC]" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "[IATC] claim;" and (4) state law *requires* that an "[IATC claim] . . . be raised in an initial-review collateral proceeding."[33]

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26. *See infra* Part III.

27. *See infra* Part IV.

28. *See infra* Part IV.

29. *See infra* Part V.

30. Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012) (citing McCleskey v. Zant, 499 U.S. 467, 490 (1991)).

31. *Id.* (emphasis added).

32. *Martinez*, 132 S. Ct. at 1318-19 (emphasis added) (comparing *Miller-El v. Cockrell*, 537 U. S. 322 (2003), which describes the standards for COAs to issue).

33. Trevino v. Thaler, 133 S. Ct. 1911, 1918 (quoting *Martinez*, 132 S. Ct. at 1318-21). The

What does this mean, however? What is the result if a petitioner can establish each of the four *Martinez/Trevino* elements? Do any of the four elements have any analytical significance directly or by analogy (that is, do any of the factors, alone or in combination with others, necessarily equate to "cause" or "prejudice" under *Coleman*)? Does (and should) the traditional "cause and prejudice" inquiry even play a significant role in the *Martinez/Trevino* context?

A. What the Federal Courts Have Done

Thus far, the federal courts appear to be vexed by what standard to use for assessing *Martinez/Trevino* arguments. Courts in the Third, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits have wrestled with variations of the question of what must be done to overcome a default via *Martinez/Trevino*, and the results are inconsistent.[34]

1. The Majority Approach: Conflation of "Cause and Actual Prejudice" Assessments, or Modification of "Cause and Prejudice" in the *Martinez/Trevino* Context

Most of the courts have at least used language that suggests recognition that the ordinary *Coleman* "cause and actual prejudice" standard for overcoming a procedural default is not the applicable paradigm in the *Martinez/Trevino* context (that is, in the scenario in which the petitioner has defaulted-but-substantial claims due to inadequate IRCP counsel).[35] Some courts have expressly stated that the traditional *Coleman* "cause and actual prejudice" standard is inapplicable in the *Martinez/Trevino* context.[36] Satisfy the four *Martinez/Trevino* elements, these courts have reasoned, and the petitioner has excused the default.[37] Other courts have tried to shoehorn the "cause and prejudice" language into the *Martinez/Trevino* context by trying to label which of the four elements individually or collectively constitute "cause" and "prejudice."[38] This second approach, more than being meaningful substantively, may simply reflect federal jurists'

Court in *Trevino* then modified the fourth element to include jurisdictions where "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 1921.

34. *See infra* Part II.A.1.

35. *See, e.g.*, Glenn v. Wynder, 743 F.3d 402, 409-11 (3d Cir. 2013).

36. *See, e.g.*, Clabourne v. Ryan, 745 F.3d 362, 374-78 (9th Cir. 2014).

37. *See, e.g.*, *id.*

38. Tabler v. Stephens, 588 F. App'x 297, 305-06 (5th Cir. 2014).

hesitancy to depart from the well-worn and familiar labels used in habeas jurisprudence.[39] But whether they have done so explicitly or implicitly, courts in the Third, Fifth, Sixth, Ninth and Eleventh Circuits have articulated and/or applied an approach that melds the traditional "cause" inquiry and the traditional "actual prejudice" inquiry in the *Martinez/Trevino* context.[40] Regardless of the labels attributed to any particular showing, a prisoner can overcome a procedural default—thereby obtaining meaningful federal merits review of the otherwise defaulted claim—by satisfying each of the four *Martinez/Trevino* elements.[41]

This interpretation finds support in the text of both *Martinez* and *Trevino*. First, in *Martinez*, the Court seemingly blurred any distinction between "cause" and "prejudice" showings in the *Martinez* context:

> Where, under state law, claims of [IATC] 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*.[42]

In other words, the Court first announced the circumstances in which its newly announced equitable rule would apply—where claims must be raised in an IRCP, rather than on direct appeal—and then explained what a prisoner must show to overcome the ordinary bar on federal merits review of a procedurally defaulted claim—that the defaulted claim is substantial and the default was due to inadequate counsel during the

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39. Under this method, "cause" is often equated to showing inadequate IRCP counsel at the first opportunity to raise a constitutional claim—*Martinez/Trevino* elements (2) through (4), *see* Henness v. Bagley, 766 F.3d 550, 556-57 (6th Cir. 2014), and "prejudice" is shown by demonstrating the remaining first element of *Martinez/Trevino*—that is, by demonstrating the prisoner's defaulted claim is "substantial." *See Glenn*, 743 F.3d at 410-11.

Or, put differently, the substantiality inquiry in *Martinez/Trevino* element (1) has been used by some courts as a shorthand way to reference "actual prejudice" caused by inadequate IRCP counsel. If the defaulted claim is substantial, the reasoning goes, then the absence of any meaningful investigative opportunity, and any meaningful merits review of that substantial claim, subverts protection of "a bedrock principle in our justice system." Trevino v. Thaler, 133 S. Ct. 1911, 1917 (2013). And, when the right to effective counsel that lies at "the foundation of our adversary system," has been subverted, confidence in the verdict is undermined, thereby establishing the fundamental definition of *Strickland* prejudice. *See id.*

If, on the other hand, the claim is insubstantial, there is no harm done to the prisoner—thus no "prejudice"—if the federal court does not review the substantive merits of the defaulted claim. Confidence in the verdict is not undermined because the defaulted claim is without any merit. In that situation, the federal habeas court would have no equitable reason to excuse the default.

40. *Tabler*, 588 F. App'x at 305-07.

41. *Trevino*, 133 S. Ct. at 1918.

42. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) (emphases added).

IRCP.[43] Questions of which *Martinez/Trevino* element or elements constitute "cause," and which elements constitute "prejudice" are analytically unimportant, since the Court explicitly set out what a petitioner must do to overcome the default, eschewing any "cause" or "prejudice" labels in the process.[44]

This conflation of "cause" and "prejudice" in the *Martinez* context finds further support in *Trevino*'s language that characterized the *Martinez* holding as "allowing a federal habeas court to find 'cause,' *thereby excusing a defendant's procedural default*," if each of the four *Martinez/Trevino* elements are satisfied.[45] The Court's ultimate disposition of *Trevino* also supports the majority conflation approach. In *Trevino*, the lower courts had simply rejected the prisoner's *Martinez* arguments because *Martinez*'s equitable exception allegedly did not apply to Texas prisoners.[46] Thus, the lower courts had not assessed whether Trevino could demonstrate everything necessary to excuse the default.[47] After the Supreme Court held that the *Martinez* equitable exception does indeed apply in states like Texas, the Court expressly refrained from deciding which court—state or federal—should be given the first crack at adjudicating the merits of Trevino's defaulted IAC claim.[48] More significantly, the Court also explicitly refrained from deciding whether Trevino's trial-IAC claim was "substantial" or whether Trevino's IRCP counsel "was ineffective."[49] Or, stated differently, the Court expressly identified, but refrained from deciding, the factors necessary for Trevino to overcome the default via *Martinez*. Notably, there is no mention of an additional "prejudice" inquiry. The majority of federal courts have followed suit.[50]

a. Ninth Circuit

The Ninth Circuit has expressly spoken to this issue. In *Ha Van Nguyen v. Curry*, the court distinguished between what was necessary to overcome a procedural default in a *Martinez* context and what was necessary to show in an "ordinary" case in which a state procedural default may be excused only if the petitioner can demonstrate cause and

43. *Id.*
44. *See id.*
45. *Trevino*, 133 S. Ct. at 1918 (emphasis added).
46. *Id.* at 1916.
47. *Id.* at 1916-17.
48. *Id.* at 1921.
49. *Id.*
50. *See infra* Part II.A.1.a–f.

"actual prejudice" in accordance with *Coleman*.[51] The court explained that, in the *Martinez* context, showing cause and prejudice was subject to a "relaxed" standard.[52] The court then reasoned that the Supreme Court in *Martinez* created a four-part test for excusing a procedural default by virtue of inadequate IRCP counsel, and that in such a situation the procedural default "may be excused if there is 'cause' for the default."[53] The *Nguyen* court explained that "'[c]ause' under *Martinez* has a different meaning than under *Coleman*."[54] "Cause" is established, the court explained, when the four *Martinez* elements, as articulated and modified by *Trevino*, are met.[55]

In *Detrich v. Ryan*, which preceded *Nguyen*, the four-judge plurality explained the four elements enumerated in *Trevino* "are the only four requirements to overcome a procedural default under *Martinez*."[56] According to the plurality, "[u]nder the new *Martinez* rule, a procedural default by state [post-conviction relief ("PCR")] counsel in failing to raise trial-counsel IAC is excused if there is 'cause' for the default."[57] The plurality then used terminology that referenced the ordinary "cause and prejudice" inquiry, to reason that the first *Martinez* element, "that the prisoner show a 'substantial' underlying trial-counsel IAC claim, may be seen as the *Martinez* equivalent of the 'prejudice' requirement under the ordinary 'cause' and 'prejudice' rule from *Wainwright*."[58] The net result, regardless of the terminology used, was that a default could be excused if the four *Martinez/Trevino* elements were satisfied.[59]

In *Detrich*, the five-judge dissent agreed with that assessment, although in different terminology which more explicitly invoked the typical "cause and prejudice" requirement, explaining that

51. 736 F.3d 1287, 1292 (9th Cir. 2013).

52. *Id.* ("In *Martinez*, the Supreme Court relaxed the *Coleman* cause-and-prejudice standard for excuse from procedural default in a narrow category of cases."); *see also id.* (discussing the *Martinez* court's explanation that the Supreme Court's answer to the question of whether a federal habeas court may excuse a default when the claim was not properly presented in state court was that the default of such a claim "should be excused under a more lenient standard than cause and prejudice under *Coleman*").

53. *Id.* at 1293.

54. *Id.*

55. *Id.*

56. 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc) (plurality opinion).

57. *Id.* at 1244.

58. *Id.* at 1245; *see also* Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977) (discussing the "cause" and "prejudice" rule).

59. *Detrich*, 740 F.3d at 1244-45 (plurality opinion).

> [u]nder *Martinez*, a court may excuse the procedural default of an IAC claim in cases like this one if the petitioner establishes both (1) cause, by showing [inadequate IRCP counsel] . . . ; and (2) prejudice, by showing that the underlying claim of trial counsel's ineffectiveness is "substantial," meaning that it has "some merit."[60]

There also were five votes (and thus a majority) for the remand decision itself, which seemed to conflate any meaningful distinction between purported "cause" and "prejudice" elements in the *Martinez/Trevino* context.[61] Remand was

> to the district court under *Martinez* to determine, in the first instance, whether there is "cause" to excuse state PCR counsel's procedural default. If the district court finds that there was "cause," it should then address on the merits the substantial trial-counsel IAC claims that it previously held procedurally defaulted under pre-*Martinez* law.[62]

Accordingly, there were ten votes in *Detrich* for the proposition that regardless of the way things might be done in an ordinary procedural default analysis, a procedural default arising in the *Martinez/Trevino* context can be excused by showing inadequate counsel in the initial-review collateral proceedings as to the underlying, defaulted claim in question, and that the underlying, defaulted claim is "substantial."[63]

Then, a few months later, the en banc Ninth Circuit released its opinion in *Dickens v. Ryan*.[64] The eight judges in the *Dickens* majority followed the approach embraced by the plurality and dissent in *Detrich*, albeit with a slightly more conventional focus on the terminology.[65] The court explained that a "federal court's determination of whether a habeas petitioner has demonstrated cause and prejudice (so as to bring his case within *Martinez*'s judicially created exception to the judicially created procedural bar) is not the same as a hearing on a constitutional claim for habeas relief."[66] Thus, according to the court in *Dickens*:

> a petitioner, claiming that PCR counsel's ineffective assistance constituted "cause," may present evidence to demonstrate this point.

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60. *Id.* at 1265 (Graber, J., dissenting).

61. *Id.* at 1248 (plurality opinion); *id.* at 1262 (Graber, J., dissenting).

62. *Id.* at 1248 (plurality opinion); *see also id.* at 1262 (Watford, J., concurring in the judgment) (agreeing that the court "should grant petitioner's motion to remand the case to the district court, so that the district court can determine in the first instance *whether petitioner's procedural default may be excused* under *Martinez*" (emphasis added)).

63. *See supra* notes 60-62 and accompanying text.

64. 740 F.3d 1302 (9th Cir. 2014) (en banc).

65. *See id.* at 1321-22.

66. *Id.* at 1321.

> The petitioner is also entitled to present evidence to demonstrate that there is "prejudice," that is that petitioner's claim is "substantial" under *Martinez*. Therefore, a district court may take evidence to the extent necessary to determine whether the petitioner's claim of ineffective assistance of trial counsel is substantial under *Martinez*.[67]

In essence, the court used the terms "cause" and "cause and prejudice" as interchangeable concepts within the *Martinez/Trevino* context, and focused on the bottom line: if a petitioner could satisfy each of the four *Martinez/Trevino* elements, the default could be excused and a petitioner was to receive merits review of his otherwise-defaulted underlying claim.[68] Another Ninth Circuit panel reiterated the same approach in *Clabourne v. Ryan*, while more explicitly applying the "cause" and "prejudice" labels to different parts of the *Martinez/Trevino* analysis.[69]

The district court in *Weber v. Sinclair* provided an articulate application of the Ninth Circuit's approach.[70] The court explained that, under the *Martinez* exception to the general *Coleman* rule, a petitioner can establish cause for his procedural default by showing the four *Martinez* elements as modified by *Trevino*.[71] The court eventually concluded that demonstrating substantiality to satisfy *Martinez* element (1) suffices to demonstrate *Coleman* "prejudice."[72] And, because the petitioner had satisfied all four *Martinez* elements, the court found that "he has demonstrated *Coleman* 'cause and prejudice' to overcome the procedural default of his IAC claim."[73] Other courts in the Ninth Circuit have followed suit.[74]

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67. *Id.*

68. *Id.* at 1319-21.

69. 745 F.3d 362, 376-78 (9th Cir. 2014). As the *Clabourne* panel explained:

> To demonstrate cause and prejudice sufficient to excuse the procedural default, therefore, *Martinez* and *Detrich* require that Clabourne make two showings. First, to establish "cause," he must establish that his counsel in the state post[-]conviction proceeding was [inadequate] . . . . Second, to establish "prejudice," he must establish that his "underlying [IATC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."

Id. at 377 (citing Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012)). As explained in Part V below, *Clabourne*'s assessment of what must be shown to establish inadequate assistance of IRCP counsel in the form of IAC of IRCP counsel is incorrect. *See infra* Part V.A.1. But its articulation of the requirements necessary, in the main, to overcome a procedural default via *Martinez/Trevino* comports with *Martinez* and *Trevino*.

70. No. C08-1676RSL, 2014 U.S. Dist. LEXIS, at *16-29 (W.D. Wash. Apr. 28, 2014).

71. *Id.* at *16-29.

72. *Id.* at *16-25.

73. *Id.* at *25.

74. *See, e.g.*, Workman v. Blades, No. 1:08-cv-00052-EJL, 2014 U.S. Dist. LEXIS 136607, at *25-26 (D. Idaho Sept. 24, 2014) (explaining that a showing of additional Coleman actual prejudice is not required and that "*Coleman* 'actual prejudice' is met by a showing of substantiality of the

b. Eleventh Circuit

Following *Trevino*, the Eleventh Circuit appears to follow the conflation or modification approach. Most recently, in *Hamm v. Commissioner*, the Circuit Court explained that the *Martinez/Trevino* equitable rule:

> permits a prisoner to overcome default of a trial-counsel claim when that claim can be raised for the first time only in a collateral proceeding and 1) the state does not appoint counsel in that initial-review collateral proceeding or 2) appointed counsel in the initial-review proceeding was ineffective under the standards of Strickland. Additionally, a petitioner must "demonstrate that the underlying [IATC] claim is a substantial one," with "some merit."[75]

Hamm's articulation of the modification or conflation approach is consistent with circuit precedent.[76] District courts in the Eleventh Circuit

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merits of the underlying IAC claim (Prong 1 of the 'cause' test)"); Cavanaugh v. Ellis, No. 1:13-cv-00295-CWD, 2014 U.S. Dist. LEXIS 72852, at *19 (D. Idaho May 28, 2014) (suggesting, in dicta, that the "cause and prejudice analysis set forth in *Martinez*" is distinct from the "traditional *Coleman* cause and prejudice inquiry"); Benson v. Budge, No. 3:05-cv-0464-PMP-VPC, 2013 U.S. Dist. LEXIS 16831, at *6-22 (D. Nev. Feb. 7, 2013) (holding that "cause" was established because the petitioner had no counsel in his post-conviction proceedings, and "prejudice" was established because defaulted trial-IAC claims are substantial).

Also of note, the panel in *Sexton v. Cozner* seemed to contemplate a different standard, by interpreting *Martinez* to require courts to determine: (1) IAC of IRCP counsel; (2) whether the defaulted IAC claim is substantial; *and* (3) "whether there is prejudice." 679 F.3d 1150, 1157-59 (9th Cir. 2012) (citing Martinez v. Ryan, 132 S. Ct. 1309, 1321 (2012)). If so, however, the en banc rulings in *Detrich* and *Dickens* overruled *Sexton*. Thus, any district courts that have subsequently cited *Sexton* for support to require an explicit, additional "actual prejudice" requirement beyond meeting the four *Martinez/Trevino* factors, in order to excuse a default, are relying on bad law. *See, e.g.*, Grate v. McFadden, 4:13-215-JFA-TER, 2014 U.S. Dist. LEXIS 39094, at *5-8 (D.S.C. Mar. 25, 2014) (citing *Sexton* to conclude *Martinez/Trevino* requires three showings, beyond the third and fourth *Martinez* elements, including "whether there is prejudice").

75. Hamm v. Comm'r, Ala. Dep't of Corr., No. 13-14376, 2015 U.S. App. LEXIS 13490, at *25-26 (11th Cir. Aug. 3, 2015) (per curiam) (citing *Martinez*, 132 S. Ct. at 1318) (citation omitted).

76. *See* Hittson v. GDCP Warden, 759 F.3d 1210, 1262 (11th Cir. 2014) (rejecting petitioner's claims regardless of whether the *Martinez/Trevino* exception applies in Georgia, because petitioner "failed to establish either of the other two elements of the *Martinez* exception—that 'appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*'; or that 'the underlying ineffective-assistance-of-trial-counsel claim is a substantial one'").

Additionally, in *Lambrix v. Secretary, Florida Department of Corrections*, the Eleventh Circuit observed in a footnote that "the *Martinez* rule's equitable principle may relieve petitioners of the requirement of the *judicially-created* procedural default doctrine," but that *Martinez* did not change the requirements for filing a § 2254 habeas petition. 756 F.3d 1246, 1261 n.30 (11th Cir. 2014). This statement, along with the court's statement in an earlier footnote that the procedural default doctrine is a judge-made creation the rules for which can be elaborated in the Supreme Court's discretion, can be read as the Eleventh Circuit's acknowledgment that the ordinary *Coleman*

have likewise discussed what must be shown to overcome a procedural default specifically in the *Martinez/Trevino* context. At least one district court noted that the traditional analysis is different in such a context, explicitly referencing what the court deemed "the *Martinez* cause and prejudice standard."[77] Consistent with this view, but without bothering to use the terms "cause" or "actual prejudice," another district court in the Eleventh Circuit concluded that *Martinez* "contemplates a two[-]step process for resolving" whether a defaulted claim will be barred from federal merits review. According to the district court's order, a petitioner "must [first] demonstrate that his IAC claims have 'some merit,'" and then "[h]e must . . . demonstrate that [IRCP] counsel was ineffective in failing to raise those claims."[78]

These courts have explained that "cause" is shown by demonstrating three of the four showings ultimately enumerated in *Trevino* as the four *Martinez/Trevino* elements—that is, by showing the prisoner had inadequate counsel at the initial-review collateral proceeding where he was forced to raise the claim.[79] This articulation is a combination of *Martinez/Trevino* element (2) (inadequate post-conviction counsel); element (3) (the IRCP proceedings were the first opportunity for the claim to be raised); and element (4) (the claim could only have been raised in an IRCP, not on direct appeal).[80] These are "external" factors that "impeded or obstructed in complying with the State's established procedures" to prevent meaningful merits review of the claim at the first opportunity.[81] And, to excuse the default when the prisoner had inadequate counsel at the initial-review collateral proceeding where he was forced to raise the claim—that is, "if the 'cause' is of the type described in . . . *Martinez* . . . the reviewing court should consider whether the petitioner can demonstrate 'that the

"cause and actual prejudice" inquiry is different in the *Martinez/Trevino* context. *Id.* at 1260 n.27. But, the issues before the court in *Lambrix* did not involve whether the petitioner had, in fact, overcome a procedural default via *Martinez/Trevino* arguments, so any implicit statements regarding the standard for doing so are dicta.

77. James v. Culliver, No. CV-10-S-2929-S, 2014 U.S. Dist. LEXIS 139696, at *56-58 & n.39 (N.D. Ala. Sept. 30, 2014).

78. Order Granting Motion to Appoint Counsel at 6, Merck v. Sec'y, Dep't of Corr., 2014 WL 5473574 (M.D. Fla. Feb. 12, 2014) (No. 8:13-cv-1285-T-27MAP).

79. Ferguson v. Allen, No. 3:09-cv-0138-CLS-JEO, 2014 U.S. Dist. LEXIS 98518, at *36-38 (N.D. Ala. July 21, 2014).

80. *Id.* at *38; *see* Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013).

81. Martinez v. Ryan, 132 S. Ct. 1309, 1317-18 ("As *Coleman* recognized, an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default . . . .").

underlying [IATC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.'"[82]

c. Third Circuit

Courts in the Third Circuit have followed similar analytical paths, whether explicitly or implicitly conflating or modifying the traditional "cause and prejudice" inquiry.[83]

d. Sixth Circuit

The picture in the Sixth Circuit is still developing. The Circuit Court in *Leberry v. Howerton* seemed to follow the approach that conflates or modifies the traditional "cause and prejudice" doctrine in the *Martinez/Trevino* context.[84] The court explicitly concluded that petitioner Leberry had demonstrated sufficient cause to overcome his procedural default.[85] The court's decision can be read to say that Leberry demonstrated cause by satisfying *Martinez* elements (2) through (4), including demonstrating that he received inadequate IRCP counsel when his post-conviction counsel failed to raise the trial-IAC claims in state court.[86] But, the court continued:

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82. *Ferguson*, 2014 U.S. Dist. LEXIS 98518, at *39-40 (citing *Martinez*, 132 S. Ct. at 1318).

83. *E.g.*, Valentin-Morales v. Mooney, No. 2:13-cv-3271-WY, 2014 U.S. Dist. LEXIS 134266, at *20-21 (E.D. Pa. Sept. 24, 2014) ("Valentin-Morales's procedural default will be excused if he can show both that his [PCR] counsel was ineffective under *Strickland*, and that his claim that his trial counsel was ineffective under *Strickland* is a substantial one."); *see also In re* Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila., Nos. 13-3853/13-3854/13-3855/13-4070/13-4269/13-4325, 2015 U.S. App. LEXIS 9878, at *54 n.4 (3d Cir. June 12, 2015) (McKee, C.J., concurring) (explaining when procedural default can be excused under the *Coleman* rule); Huggins v. Kerestes, No. 12-3655, 2013 U.S. Dist. LEXIS 139170, at *8-9 (E.D. Pa. Sept. 27, 2013) ("cause" established by showing IAC of post-conviction counsel; "actual prejudice" established by showing underlying trial-IAC claim is substantial). The Third Circuit, in a recent opinion, said that procedural default is excused under the *Coleman* rule when a prisoner can demonstrate

> cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice," but that a "procedural default caused by state post-conviction counsel's mistake may also be excused if [the] agency relationship between the lawyer and client have been severed, . . . or (in more limited circumstances) if the state post-conviction counsel was unconstitutionally inadequate . . . .

Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila., 2015 U.S. App. LEXIS 9878, at *54 n.4.

84. 583 F. App'x 497, 499-500 (6th Cir. 2014).

85. *Id.* at 500.

86. *Id.*

> The second part of the procedural default analysis requires the court to determine whether Leberry was prejudiced. Because the district court did not determine whether prejudice exists, we remand this issue for the court to address whether there is "actual prejudice as a result of the alleged violation of federal law."[87]

The court concluded its opinion by clarifying that on remand "the district court should consider whether the particular IATC claims defaulted by Leberry are sufficiently substantial to overcome the default."[88] The court's use of "substantial" here, in conjunction with its instruction for the district court to assess "actual prejudice" on remand, suggests that: (1) the court was equating substantiality with "actual prejudice;" (2) the court was just applying labels to the four-part *Martinez/Trevino* analysis; and (3) the petitioner can overcome his default by satisfying each of the four *Martinez/Trevino* elements.

More recently in *Williams v. Mitchell*, the circuit court expounded: "As the Court explained in *Trevino . . . Martinez* held that procedural default can be excused for cause where" a petitioner can satisfy each of the four *Martinez/Trevino* elements.[89] In *Woolbright v. Crews*, the Sixth Circuit considered whether the *Martinez/Trevino* equitable exception applied to inmates in Kentucky.[90] First, the court confirmed the *Martinez* and *Trevino* mandate that a petitioner must be afforded at least one "truly meaningful opportunity to have [his] IATC claims fully and fairly adjudicated."[91] Then, after holding that Kentucky state law does *not* ensure a meaningful opportunity for a full and fair (meaningful) merits review of trial-IAC claims on direct appeal, the court remanded the case back to the district court for full reconsideration of the defaulted trial-IAC claims.[92] That reconsideration, the court, explained, "would first address whether [the prisoner could] demonstrate (1) the absence or ineffective assistance of his post-conviction counsel and (2) the 'substantial' nature of his underlying [trial-IAC] claims."[93] The court found that if Woolbright could "demonstrate these two elements and therefore establish cause to excuse his procedural default, the district court [should] then reconsider whether Woolbright [could] establish

87. *Id.* (quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

88. *Id.* at 502.

89. Nos. 03-3626/12-4269, 2015 U.S. App. LEXIS 11618, at *19-20 (6th Cir. July 7, 2015) (quoting Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013)). The court then concluded the petitioner's default could not be excused because he could not meet *Martinez/Trevino* element (3). *Id.* at *20-21.

90. No. 13-6115, 2015 U.S. App. LEXIS 11043, at *5-18 (6th Cir. June 29, 2015).

91. *Id.* at *18.

92. *Id.* at *22-23.

93. *Id.* at *23 (citing Sutton v. Carpenter, 745 F.3d 787, 795-96 (6th Cir. 2014)).

prejudice from the alleged [IATC]."[94] In other words, the court found *Martinez/Trevino* elements (3) and (4) satisfied when it held the equitable exception applied to the petitioner's claims, and left to the district court the task of determining whether elements (1) and (2) could be demonstrated following meaningful factual development. And, if so, then the district court should afford a full merits review to the underlying trial-IAC claim. This approach is consistent with the analysis employed by the *Leberry* and *Williams* panels.

Some of Ohio's district courts have taken a similar approach. In *Landrum v. Anderson*, the district court adopted the magistrate judge's recommendation to reopen the case under Rule 60(b)(6) of the Federal Rules of Civil Procedure, following *Martinez*,[95] and to rule on the merits of the defaulted claim.[96] The magistrate judge reasoned that "cause" was established by showing inadequate IRCP counsel, while "prejudice" was established by demonstrating substantiality.[97] The court in *Sheppard v. Robinson* recounted that the Supreme Court in *Martinez* "held for the first time that inadequate assistance of counsel during initial collateral review proceedings may establish *cause and prejudice* sufficient to excuse procedural default of a claim of [IATC]."[98] Other Ohio federal

94. *Id.*

95. No. 1:96-cv-641, 2012 U.S. Dist. LEXIS 171777, at *1-2 (S.D. Ohio Dec. 4, 2012) (adopting Landrum v. Anderson, No. 1:96 CV 641, 2012 U.S. Dist. LEXIS 118501, at *24-30 (S.D. Ohio Aug. 22, 2012)); *see also* FED. R. CIV. P. 60(b)(6) ("On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any . . . reason that justifies relief.").

96. Landrum v. Anderson, No. 1:96-cv-641, 2014 U.S. Dist. LEXIS 72640, at *1-3 (S.D. Ohio May 28, 2014) (adopting Landrum v. Anderson, No. 1:96-cv-641, 2013 U.S. Dist. LEXIS 138635, at *15-27 (S.D. Ohio Sept. 26, 2013)).

97. *See Landrum*, 2013 U.S. Dist. LEXIS 138635, at *9-15; *Landrum*, 2012 U.S. Dist. LEXIS 118501, at *7, *24.

98. No. 1:00-CV-493, 2013 U.S. Dist. LEXIS 5565, at *16 (S.D. Ohio Jan. 14, 2013) (emphasis added). But, then the *Sheppard* court seemed to veer off track. The court found the defaulted trial-IAC claim "substantial," and explained that substantiality was not the same as a finding on the merits. *Id.* at *38-39. The court then rejected the petitioner's *Martinez*-based argument by apparently finding that neither trial counsel nor IRCP counsel performed deficiently enough "for *Martinez* to provide a basis" for the Court to reverse its previous conclusion that the trial-IAC claim was procedurally defaulted. *Id.* at *39-43.

To the extent that the court's analysis blended the various factors together, that fits with an appropriate application of *Martinez* and *Trevino*. To the extent the court demanded something beyond a substantiality showing on the trial-IAC claim before the default could be overcome, however, that goes beyond what *Martinez* and *Trevino* required. The opaque nature of the *Sheppard* court's order may also be explained by: (1) the relative newness of *Martinez* at that time; or (2) that the case was before the court on a Rule 60(b)(6) motion to reopen rather than in an original review posture. The court granted a COA, and that appeal remains pending at present. Sheppard v. Bagley, No. 1:00-CV-493, 2013 U.S. Dist. LEXIS 47660, at *11 (S.D. Ohio Apr. 2, 2013).

The Sixth Circuit likewise prematurely assessed the merits of underlying, defaulted trial-

district courts have also suggested that satisfying the four-part *Martinez/Trevino* test is the full enquiry for whether a procedural default can be overcome, regardless of the nomenclature used.[99]

At least some of Tennessee's district courts have taken the same approach. In *Cone v. Colson*, the court granted an evidentiary hearing: to allow development of facts regarding IRCP counsel's performance; to establish IAC of post-conviction counsel as cause for the default of substantial trial-IAC claims; to present evidence in support of the substantial trial-IAC claims; and to show "prejudice" to overcome the default.[100] In other Tennessee district court cases, the courts recited a different standard in boilerplate parts of the respective opinions by purportedly requiring something beyond showing inadequate counsel during the initial-review collateral proceedings, and that the claim must be "substantial."[101] But the courts then backtracked, citing *Clabourne* for the proposition that "'actual prejudice,' for purposes of the *Coleman* analysis in the *Martinez* context, requires a showing that 'the underlying [IATC] claim is a substantial one.'"[102]

IAC claims to find the claims not substantial in *Henness v. Bagley*, 766 F.3d 550, 557-59 (6th Cir. 2014), and *McGuire v. Warden, Chillicothe Correctional Institution*, 738 F.3d 741, 752-58 (6th Cir. 2013). But *McGuire* and *Henness* were both decided under a Rule 60(b)(6) basis, in which the circuit court was assessing the relative substantiality in order to determine whether extraordinary circumstances were present, not simply whether a default should be excused. *Henness*, 766 F.3d at 557; *McGuire*, 738 F.3d at 758-59.

99. *See, e.g.*, Opinion & Order at 9-12, Hill v. Mitchell, 2012 U.S. Dist. LEXIS 95590 (S.D. Ohio Mar. 4, 2014) (No. 1:98-cv-452) (granting COA on whether procedural default ruling was correct, because "[w]hether Petitioner *can satisfy the four-part test* that the Supreme Court set forth in *Martinez* and *Trevino* is deserving of consideration on appeal" (emphasis added)).

100. 925 F. Supp. 2d 927, 1021 (W.D. Tenn. 2013) (granting in part and denying in part a renewed motion for evidentiary hearing).

101. Thorne v. Hollway, No. 3:14-cv-0695, 2014 U.S. Dist. LEXIS 125191, at *63-65 (M.D. Tenn. Sept. 8, 2014); Duncan v. Carpenter, No. 3:88-00992, 2014 U.S. Dist. LEXIS 110595, at *46-49 (M.D. Tenn. Aug. 11, 2014); Gunter v. Steward, No. 2:13-cv-00010, 2014 U.S. Dist. LEXIS 80822, at *34-36 (M.D. Tenn. June 13, 2014) (citations omitted); *see also* James v. Taylor, No. 3:11-0735, 2014 U.S. Dist. LEXIS 116113, at *20-24 (M.D. Tenn. Aug. 18, 2014).

102. Clabourne v. Ryan, 745 F.3d 362, 377 (9th Cir. 2012); *see* Sutton v. Carpenter, No. 3:07-CV-30-TAV-CCS, 2015 U.S. Dist. LEXIS 28312, at *5-6 (E.D. Tenn. Mar. 9, 2015); *see also* Duncan v. Carpenter, No. 3:88-00992, 2015 U.S. Dist. LEXIS 28009, at *116 (M.D. Tenn. Mar. 4, 2015) (noting that "[g]uidance to district courts about how to implement the rulings in *Martinez* and *Trevino* is sparse," and then relying on *Clabourne*'s statement to conclude that the "the *Coleman* prejudice prong in the *Martinez* context requires a showing that 'the underlying [IATC] claim is a substantial one, which is to say that the claim has some merit'"). In *Sutton v. Carpenter*, the federal district court stated:

> *Martinez* permits a petitioner to establish cause to excuse a procedural default of an ineffective assistance of trial counsel claim by showing that he received ineffective assistance by post-conviction counsel. . . . This holding, however, does not dispense with the "actual prejudice" requirement established by the Supreme Court in *Coleman*. . . . To successfully establish cause and prejudice under *Martinez* and *Trevino*, a petitioner must

A recent Sixth Circuit case reflects the confusion on this issue arising out of a number of Tennessee district court cases. In *Atkins v. Holloway*, issued just a few weeks after *Woolbright*, the court faced a similar factual scenario: the petitioner's trial-IAC claims were procedurally defaulted, and the district court had previously dismissed the claims as defaulted without excuse.[103] Like in *Woolbright*, the *Atkins* court remanded the trial-IAC claims for the district court to determine: "(1) whether state post-conviction counsel was ineffective . . . ; and (2) whether Atkins's claims of [IAC] were 'substantial' within the meaning of *Martinez*."[104] But the court then continued: "Questions (1) and (2) determine whether there is cause. The next question is (3) whether Atkins can demonstrate prejudice. Finally, . . . (4) if the district court concludes that Atkins establishes cause and prejudice as to any of his claims, the district court should evaluate such claims on the merits."[105]

The genesis of the court's four-part enumeration is unclear, since it does not track the four-part *Martinez/Trevino* test. And the court's distinction between its step (3) and step (4) is similarly unclear, since the court did not explain what it meant by its statement that Atkins must

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show a substantial underlying claim of ineffective assistance of trial counsel.

2015 U.S. Dist. LEXIS 28312, at *5-6. The next sentence in *Sutton* demonstrates the confusion that still remains, as the court quoted *Thorne* for the proposition that "a habeas petitioner must 'show that his [PCR] counsel was ineffective under *Strickland v. Washington*'" to establish that his claim is substantial. *Id.* at 6. Of course, showing that an underlying, defaulted claim is substantial is a different inquiry than showing that *post-conviction counsel* was ineffective. Furthermore, the court in *Sutton* erroneously required a petitioner, "[a]s part of showing a substantial claim of ineffective assistance of trial counsel," to "prove" the full merits of the defaulted claim. *Id.*

Note, also, that the court in *Gunter* similarly went off track by suggesting that the petitioner was required to prove the full merits of the defaulted claim in order to demonstrate substantiality and, therefore, "actual prejudice." *Gunter*, 2014 U.S. Dist. LEXIS 80822, at *37. The court "assum[ed] that the claim of ineffective assistance of post-conviction counsel 'has some merit,'" but found that "the petitioner cannot establish the actual-prejudice prong of the *Coleman* standard for overcoming procedural default. . . . That is, he cannot establish a substantial claim that trial counsel was ineffective . . . ." *Id.* at *41.

Additionally, in *James*, the court's treatment of *Martinez/Trevino* arguments was muddled at best. The court found the *Martinez* exception to *Coleman* was available, found the defaulted claim substantial, and then ordered an evidentiary hearing on the substantive merits of the defaulted trial-IAC claim. *See James*, 2014 U.S. Dist. LEXIS 116113, at *20-23. Following the hearing, the court concluded:

> Petitioner has shown prejudice due to his trial counsel's omission in failing to raise this lack of notice defense. For these same reasons, the Court concludes that Petitioner has demonstrated a substantial claim and the exceptional circumstances under *Martinez* to present this [IAC] claim. This claim entitles Petitioner to habeas relief for serving an invalid sentence . . . .

Id. at 35-36.

103. No. 12-6498, 2015 U.S. App. LEXIS 11730, at *7-15 (6th Cir. July 8, 2015).

104. *Id.* at *13-14.

105. *Id.*

"demonstrate prejudice" under its step (3). In any event, to the extent that *Atkins* conflicts with *Woolbright*'s articulation of the governing analysis in the Sixth Circuit, *Woolbright*—as a published opinion that predates *Atkins*—controls.[106]

e. Fifth Circuit

The proper analysis is still unclear in the Fifth Circuit, since there is arguably conflicting circuit authority. In *Crutsinger v. Stephens*, the court explained that a petitioner seeking to excuse a default via *Martinez* must "establish that his underlying IAC claim is 'substantial' and that his state habeas counsel was ineffective."[107] The court then rejected relief because it found the petitioner had "not met the first of [the] requirements for overcoming procedural default . . . that is, that it has 'some merit.'"[108] And, in *Newbury v. Stephens*, the Fifth Circuit recited the same standard for overcoming procedural default via *Martinez/Trevino*—that a petitioner must demonstrate that his state IRCP counsel was ineffective and that the underlying claim is substantial.[109] The court explained that "if a petitioner makes both of the showings required under *Martinez*," a federal court is allowed to consider the merits of the otherwise-defaulted claim.[110] In a recent decision, the Fifth Circuit in *Tabler v. Stephens* vacated in part its previous order which had denied a COA, and remanded to the district court for consideration of whether the petitioner "can establish cause for the procedural default" of his trial-IAC claim based on IAC of post-conviction counsel, "and, *if so, whether those claims merit relief.*"[111] The language of the *Tabler* court's remand instructions, like the court's language in *Newbury* and *Crutsinger*, and other recent Fifth Circuit

106. The *Atkins* court's confusing analysis is perhaps best explained by arguments advanced by Atkins's counsel; Atkins claimed that "by granting a COA, [the court had] already determined that Atkins's [trial-IAC] claims are 'substantial,' and therefore, [the court] should remand with direction for the district court to determine solely whether prejudice exists as to excuse his procedural default." Atkins, 2015 U.S. App. LEXIS 11730, at *14-15. Counsel erred in arguing that a further "prejudice" determination was even necessary under the approach adopted by the Sixth Circuit. If the underlying claims were substantial (*Martinez/Trevino* element (1)), and the equitable exception applied to the claim under *Martinez/Trevino* elements (3) and (4), then the only matter to be decided on remand should have been whether state IRCP counsel was inadequate (*Martinez/Trevino* element (2)).

107. 576 F. App'x 422, 430 (5th Cir. 2014).

108. *Id.*

109. 756 F.3d 850, 871-72 (5th Cir. 2014).

110. *Id.* at 872.

111. 591 F. App'x 281, 281 (5th Cir. 2015) (emphasis added).

cases, reflects an approach that conflates or modifies the traditional "cause and prejudice" inquiry for overcoming a procedural default.[112]

More recently, the district court in *Wessinger v. Cain* arguably applied the conflation or modification approach, when it explained what conditions "must be satisfied in order for [a] procedurally defaulted claim to be heard by [a] federal habeas court."[113] The court explained that IAC claims are "generally best suited for post-conviction proceedings" under Louisiana law, and that "*Martinez* sets forth *two more conditions* that must be satisfied"—inadequate state post-conviction counsel, and thatthe underlying claim is substantial.[114] At the end of its analysis finding the default excused, the *Wessinger* court found post-conviction counsel "was ineffective in pursuing a substantial [trial-IAC] claim," and then labeled those findings "cause" under *Coleman*.[115] Then, the court explained, it "next asks whether Petitioner can demonstrate 'actual prejudice' as a result of IRC's failure to exhaust

112. *See* Gonzalez v. Stephens, No. 14-70006, 2015 U.S. App. LEXIS 5832, at *10 (5th Cir. Apr. 10, 2015); Busby v. Stephens, No. 09-CV-160-O, 2015 U.S. Dist. LEXIS 29176, at *7-8 (N.D. Tex. Mar. 10, 2015) (citing *Martinez* and *Trevino*, and quoting Preyor v. Stephens, 537 F. App'x 412, 421 (5th Cir. 2013)); *see also* Wilkins v. Stephens, 560 F. App'x 299, 314-15 (5th Cir. 2014) (denying COA on defaulted claims because, "[e]ven assuming *arguendo* that state habeas counsel . . . was deficient for failing to bring the claims during state habeas proceedings, none of the underlying IATC claims are 'substantial' as required by *Martinez*"). In *Busby*, the Fifth Circuit furthered the proposition that:

> Under *Trevino*, a petitioner who procedurally defaults a complaint of ineffective assistance of trial counsel "must show that (1) his underlying claims of ineffective assistance of trial counsel are substantial, meaning that he must demonstrate that the claim[s] ha[ve] some merit, and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application."

Busby, 2015 U.S. Dist. LEXIS 29176, at *7-8 (quoting *Preyor*, 537 F. App'x at 421).

Notably, the *Tabler* court's first opinion also articulated a conflated or modified inquiry under which a default could be excused by showing that Tabler received inadequate assistance in state post-conviction, and that his defaulted claim is substantial. *See* Tabler v. Stephens, 588 F. App'x 297, 305-06 (5th Cir. 2014). The court in *Tabler* stated:

> To fall within the *Martinez* exception and avoid procedural default of any claim of ineffective assistance of trial counsel, Tabler must demonstrate (1) that his state habeas counsel were ineffective in an initial-review collateral proceeding, "where the claim should have been raised," and (2) "that the underlying [IATC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."

Id. at 305. The *Tabler* court denied the petitioner's claims for failing "to demonstrate the performance of his state habeas counsel and state trial counsel was constitutionally deficient," and stated further that "[e]ven if Tabler could show that his state habeas counsel were ineffective, he has not made a 'substantial showing' of his underlying claim of ineffective assistance of trial counsel required by *Martinez*." *Id.* at 305-06.

113. No. 04-637-JJB-SCR, 2015 U.S. Dist. LEXIS 97266, at *3-4 (M.D. La. July 27, 2015).

114. *Id.* (emphasis added).

115. *Id.* at *15.

the substantial underlying claim."[116] At first blush, the court's explanation might suggest something other than the conflation or modification approach. But the court's subsequent analysis of "actual prejudice" confirms that it applied that line of analysis: "With regard to the initial[-]review proceeding, it is clear that Mr. Gisleson's ineffectiveness in failing to conduct any mitigation investigation caused actual prejudice to Petitioner's habeas claim of ineffective assistance of trial counsel at the penalty phase."[117] It is impossible to separate this conclusory finding from the court's previous findings that state post-conviction counsel performed deficiently by failing to raise a substantial trial-IAC claim for failure to investigate and present compelling mitigation evidence in a capital trial.

f. Eighth Circuit

It appears that the Eighth Circuit, too, follows the majority conflation/modification analysis. In *Dansby v. Hobbs* (*Dansby II*), the court declared that "the equitable exception to procedural default" created in *Martinez* and *Trevino* applies to defaulted claims if the petitioner "meets the criteria established in *Martinez*."[118] The *Dansby II* court then channeled *Trevino*'s language to say that "[a] federal court is allowed to find 'cause,' *thereby excusing a habeas petitioner's procedural default* in Arkansas, where" the *Trevino* elements are satisfied.[119]

Other cases from the Eighth Circuit and district courts within that circuit likewise suggest, if not confirm, that the Eighth Circuit follows the majority conflation/modification approach. In *Sasser v. Hobbs* (*Sasser I*), the court explained that "*Trevino* creates a two-part question: (1) did [a petitioner]'s state post[-]conviction counsel fail to raise [the defaulted] claims, and (2) do these claims merit relief?"[120] The court's second question arguably hedges into the minority/outlier approach by seeming to require a petitioner to prove he would prevail on the merits

116. *Id.* (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

117. *Id.* at *15-16.

118. 766 F.3d 809, 833-34 (8th Cir. 2014). *Dansby II* came before the Eighth Circuit after its earlier opinion in *Dansby v. Norris*, 682 F.3d 711, 729 (8th Cir. 2012)—which held (pre-*Trevino*) that *Martinez* did not apply in Arkansas—was vacated and remanded by the Supreme Court in *Dansby v. Hobbs* (*Dansby I*), 133 S. Ct. 2767, 2767 (2013), in light of *Trevino*.

119. *Dansby II*, 766 F.3d at 834 (emphasis added) (citing Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013)). The *Dansby II* court compressed the four elements enumerated in *Trevino* into three elements, but the basic requirements remained the same. *See id.*

120. 735 F.3d 833, 853 (8th Cir. 2013).

of his underlying claims in order to excuse the default of those claims.[121] But, in *Sasser v. Hobbs* (*Sasser II*), the court further explained its thinking in an order denying the state's motion for panel rehearing, stating that the evidentiary hearing before the district court "will necessarily address the underlying merits of the [defaulted] claims because, unless post[-]conviction counsel's failure to raise a claim was prejudicial, the claim remains procedurally barred despite *Trevino*."[122]

The court did not clarify precisely how and when a substantiality inquiry plays a role in its distillation of *Trevino* into a "two-part" question.[123] But in light of the *Dansby II* court's articulation of the controlling standard, the *Sasser* court's use of the term "prejudicial" can be read as simply intending to reinforce the idea that the defaulted claims must be substantial before the default can be excused. Similarly, its instruction to "address the underlying merits" is best read as requiring the district court to consider evidence presented at a hearing to determine if the claims are at least substantial, not that the district court should *determine* the full-blown merits of the claims.[124] If the defaulted claims are substantial, the court suggests, then the failure to obtain any meaningful merits review of those fundamental, bedrock claims due to inadequate post-conviction counsel was prejudicial because the substantial prospect of ineffective assistance of trial counsel undermined any confidence in the reliability of the verdict.[125] In other words—the majority approach.[126]

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121. *See id.*

122. 743 F.3d 1151, 1151 (8th Cir. 2014). The court, in *Sasser II*, explained that their decision vacates the procedural default determination and remands for the district court to decide the two-part *Trevino* question in the first instance, after giving Sasser an opportunity to present evidence in support of his argument the four claims are no longer procedurally barred. This hearing will necessarily address the underlying merits of the four claims because, unless post[-]conviction counsel's failure to raise a claim was prejudicial, the claim remains procedurally barred despite *Trevino*.

Id.

123. Although the court made no mention of the substantiality question, it at least implicitly suggested that at least one of Sasser's trial-IAC claims was substantial by noting "Sasser's trial counsel called a witness whose testimony ('Sasser, in all probability, will always be a very dangerous man') could hardly have caused more self-inflicted damage to Sasser's mitigation case." *Sasser I*, 735 F.3d at 853 n.12.

124. *Sasser II*, 743 F.3d at 1151.

125. *See id.*

126. In any event, the *Sasser I* court's statements implicating the proper standard for excusing default under *Martinez/Trevino* were dicta, made only in the context of explaining its holding that the petitioner was entitled to meaningful evidentiary development of the *Martinez/Trevino* arguments on remand, and that part of such development was necessarily focused on the facts supporting the underlying, defaulted trial-IAC claim. *Id.*

District courts in the Eighth Circuit, before and after *Dansby II* and/or *Sasser I* and *Sasser II*, have used the same approach. For example, in one of the first substantive discussions of what *Martinez* requires, the district court in *Barnett v. Roper* considered a petitioner's Rule 59(e) motion for reconsideration on a Rule 60(b)(6) motion to reopen the final judgment in light of *Martinez*.[127] In the course of granting reconsideration, then granting reopening, and then finding the petitioner's default excused, the court concluded that the default was excused when post-conviction counsel failed to properly raise the trial-IAC claim, which barred a merits ruling in state court, and that the underlying trial-IAC claim was substantial.[128] The district court ultimately granted habeas relief following an evidentiary hearing on the merits of Barnett's trial-IAC claim.[129] In that order, the district court reiterated that, by finding inadequate state post-conviction counsel and finding that the defaulted claim was substantial, it had found the default excused.[130] The court again implied a conflation or modification approach by stating that their finding of state IRCP IAC "and its natural consequence (the evaluation of [the claim] on the merits), are consistent with and fulfills the purposes of the *Martinez* decision."[131]

Another judge in the same district arguably followed a conflation approach in *Stevenson v. Wallace*.[132] The court explained that "*Martinez* reiterated the general principle that '[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.'"[133] *Martinez*, the court explained, "added to the jurisprudence of the doctrine of procedural default that such cause can be established by showing that initial-review post-conviction counsel was ineffective . . . in not raising the defaulted claim."[134] The court proceeded to find deficient performance by post-

127. 941 F. Supp. 2d 1099, 1102, 1105 (E.D. Mo. 2013); *see also* FED. R. CIV. P. 59(e), 60(b)(6).

128. *Barnett*, 941 F. Supp. 2d at 1112-14.

129. Memorandum and Order at 188-89, Barnett v. Roper, 941 F. Supp. 2d 1099 (E.D. Mo. Aug. 18, 2015) (No. 4:03-cv-00614-ERW).

130. *Id.* at 157 (explaining that "the Court found the . . . claim was 'substantial,' and also determined Mr. Barnett's post-conviction counsel was ineffective under Strickland, meaning [the claim] fell under the 'second circumstances' enumerated by *Martinez*, 'which establishes cause for the default of an [IAC] claim where the appointed counsel in the initial[-]review collateral proceeding fails to properly raise the claim of ineffective assistance at trial'").

131. *Id.* at 167.

132. No. 4:10-cv-02055, 2014 U.S. Dist. LEXIS 103033, at *4-9 (E.D. Mo. July 29, 2014).

133. *Id.* at *4 (quoting Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012)) (alteration in the original).

134. *Id.* at *4-5.

conviction counsel for failing to raise a claim of trial-IAC (trial counsel failed to move to strike a biased juror).[135] The court explained that the record suggested the juror in question was, indeed, actually biased against the petitioner, in "a way that may establish a violation of Petitioner's constitutional right to the effective assistance of trial counsel."[136] The court ordered an evidentiary hearing on the merits of the "potentially-meritorious" claim.[137] It did not explicitly address the substantiality question or the "actual prejudice" question other than to note that, if it concluded following the hearing that trial counsel's performance was deficient in not moving to strike the biased juror, "the presumed prejudice in that context will satisfy the prejudice requirement to excuse the procedural default."[138]

2. The Minority/Outlier Approach: Enhancement Beyond What *Martinez/Trevino* Require

Although the majority of courts, thus far, have concluded that satisfying the four-part *Martinez/Trevino* test successfully excuses a procedural default, a few courts have implicitly or explicitly embraced an outlier approach. Under this outlier approach, a petitioner who can demonstrate all four enumerated *Martinez/Trevino* elements—including substantiality—has only demonstrated "cause," and *something more* must still be shown to establish "actual prejudice" from that cause, and, thereby, excuse the default.[139] Typically these courts have required a petitioner to prove that he or she would prevail on the merits of the defaulted claims *before* finding the default excused.[140]

Of course, careful readers will remember Judge Fletcher in *Detrich* explained that requiring a petitioner to prevail on the merits of his defaulted claim *before* the default can be excused under *Martinez/Trevino* would render the "substantiality" requirement in *Martinez* element (1) superfluous.[141] It would also be illogical, because it

135. *Id.* at *6-7.

136. *Id.* at *7.

137. *Id.* at *8-9.

138. *Id.* at *9. It is not entirely clear whether the *Stevenson* court was referring to prejudice from IRCP counsel's deficient performance, or prejudice from trial counsel's deficient performance, or some combination of both.

139. Canales v. Stephens, 765 F.3d 551, 567-68 (5th Cir. 2014).

140. *See, e.g., id.* at 568.

141. Detrich v. Ryan, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc) (plurality opinion).

would require a petitioner to prove he would win on the merits of his defaulted claim before the default could be excused—and, therefore, before he has ever been afforded any meaningful opportunity for factual development as required by *Trevino*. The error in that outlier approach is self-evident upon further examination, especially when *Trevino* specifies the procedural elements that must be afforded a petitioner *before* a meaningful review of the merits can be given.

The outlier approach is an enhanced standard, above and beyond what the four-element *Martinez/Trevino* test contemplates. It typically focuses on the *Martinez* Court's use of the term "cause" in its opinion without the accompanying term "prejudice."[142] In effect, this mechanical and rigid application of *Coleman*'s "cause and actual prejudice" standard erroneously forces a case presenting a *Martinez/Trevino* scenario into the *Coleman* framework, even though the Court in *Martinez* and *Trevino* was explicitly creating an equitable exception to *Coleman*'s requirements. It also ignores the distinction the Supreme Court made in *Martinez* regarding the difference between overcoming a default via a *Martinez/Trevino* argument and a full merits review of the defaulted claim.[143] In short, this outlier approach contravenes Supreme Court authority and should be rejected as such.

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142. At the tail end of the *Martinez* majority opinion, the Court recited what the lower court had—and had not—done. Martinez v. Ryan, 132 S. Ct. 1309, 1320-21 (2012). Specifically, the lower court concluded only that there was no constitutional right to effective post-conviction counsel, and, thus, "the attorney's errors in the initial-review collateral proceeding could not establish cause for the failure to comply with the State's rules." *Id.* at 1321. Consequently, the lower court "did not determine whether Martinez's attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice." *Id.* The court expressly noted that "[t]hese issues remain open for a decision on remand." *Id.* While at first blush these dicta sentences might appear to support the third option, that should not be so upon further review.

First, the sentences in question are, again, dicta—not the Court's holding. And second, the Court's recitation suggested a distinction between "*determinations*" of adequacy of IRCP counsel and of substantiality, on the one hand, and "the *question* of prejudice" on the other. *Id.* The "question" of prejudice for the court to consider on remand can be read literally: not only "was the prisoner prejudiced?" but, as an initial matter, *how should the court assess prejudice in this unique context*?

143. *Martinez*, 132 S. Ct. at 1320 (explaining that excusing a default via a *Martinez* argument of post-conviction-IAC "does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted"). The Court would not have included this explicit distinction if it was also holding that a petitioner was required to definitively prove he would prevail—obtain habeas relief—on the merits of his defaulted claim before the default could be excused.

Aside from some district courts in Tennessee,[144] and a district court in Pennsylvania,[145] the Fifth Circuit is the primary outlier, and even then, its own circuit law is internally inconsistent. On one hand, some courts—including panels of the Fifth Circuit—have applied the majority approach.[146] On the other hand, a few courts have required more than the four-part *Martinez/Trevino* showings before a petitioner can overcome a default.[147]

To understand the Fifth Circuit's muddled jurisprudence on this issue, it should be noted that the court's *Martinez* jurisprudence is unique in that it has generally considered *Martinez* issues in the course of rejecting a COA on the underlying claim(s).[148] Accordingly, that court frequently "looks through" the *Martinez* arguments to determine the underlying claims are meritless, therefore not substantial, and, as such, the default cannot be excused.[149] By requiring the petitioner to demonstrate that he would prevail on the ultimate merits of his defaulted claim(s) in order to prove his claims are substantial—before receiving a meaningful opportunity to investigate and expand the record that is, by definition, undeveloped—the Fifth Circuit flatly disregards *Trevino*'s holding and analysis that require meaningful opportunity for factual development that precedes a likewise-mandated meaningful merits review, even as the Fifth Circuit and its district courts purport to apply a two-part *Martinez* test.[150]

The primary outlier culprit in the Fifth Circuit is *Canales v. Stephens*.[151] The Fifth Circuit explained that a petitioner attempting to excuse a procedural default must establish both inadequate IRCP counsel and that the underlying claim is substantial.[152] So far, so good. But the court continued: "To excuse the procedural default fully,

144. *See supra* notes 95-97 and accompanying text. Note, however, that the *Duncan* court's approach, although still doctrinally problematic, was perhaps not quite as problematic in effect, since the petitioner in that case had been given a rather comprehensive evidentiary hearing as part of his second state post-conviction proceedings, and the federal habeas court had given the parties an opportunity to submit supplemental briefing on *Martinez*-specific issues. *See* Duncan v. Carpenter, No. 3:88-00992, 2015 U.S. Dist. LEXIS 28009, at *1-4, *119-29 (M.D. Tenn. Mar. 4, 2015).

145. Spann v. Shannon, No. 12-4007, 2013 U.S. Dist. LEXIS 105874, at *15-17 (E.D. Pa. July 29, 2013).

146. *See supra* notes 107-12 and accompanying text.

147. *See infra* notes 151-65 and accompanying text.

148. *See, e.g.*, Newbury v. Stephens, 756 F.3d 850, 852-53, 868-73 (5th Cir. 2014).

149. *See, e.g.*, *id.* at 868-74.

150. *See* Tabler v. Stephens, 588 F. App'x 297, 305-07 (5th Cir. 2014) (denying COA because, in part, "Tabler fails to demonstrate that the performance of his state habeas counsel *and state trial counsel* was constitutionally deficient" (emphasis added)).

151. 765 F.3d 551 (5th Cir. 2014).

152. *Id.* at 567-68.

Canales would *then* be required to *prove* that he suffered prejudice from the ineffective assistance of his *trial* counsel."[153] This statement suggests that a petitioner must prove the ultimate merits of his defaulted claim, as an extra "actual prejudice" element beyond the four-part *Martinez/Trevino* test, before the default can be "fully" excused.

Careful reading of *Canales* presents several takeaways from the panel's analysis: (1) there is a difference between "cause" and "actual prejudice" under *Martinez*; (2) "cause" to excuse a procedural default via *Martinez* is established by showing that state IRCP counsel performed deficiently—as distinguished from showing that state IRCP counsel was *ineffective*—and that a petitioner's defaulted claim is substantial; (3) before a federal habeas court may reject a petitioner's *Martinez/Trevino* arguments and dismiss a claim as procedurally defaulted, the federal habeas petitioner must be afforded a meaningful opportunity for factual development on the allegedly defaulted claim and his *Martinez/Trevino* arguments;[154] and (4) "prejudice" from state IRCP counsel's deficient performance for *Martinez* purposes is coextensive with "prejudice" from trial counsel's deficient performance—that is, if trial counsel's deficient performance is ultimately proven prejudicial after proper development of the evidentiary record, then the petitioner was ipso facto prejudiced by his state IRCP counsel's failure to raise the claim.[155]

In other words, *Canales* collapsed the questions of excusing a default and granting relief on the merits of the defaulted claim into one inquiry: if a petitioner can show he warrants habeas relief on his defaulted claim, then the default will be excused. Under the *Canales* panel's reading of *Martinez* and *Trevino*, a petitioner must show he would prevail on the merits of his defaulted claim in order to excuse the default and obtain the merits ruling to which he is entitled.[156] Failure to

153. *Id.* at 568 (emphasis added).

154. In *Canales*, the court rejected the State's argument that it should deny Canales the opportunity to have an evidentiary hearing if it remanded the case. *Id.* at 571 n.2. The court left the determination of whether to hold an evidentiary hearing to the district court. *Id.* Nevertheless, the Fifth Circuit's stated concern that a remand was necessary—even in the face of extensive documentary evidence that Canales was able to submit with his federal habeas petition—because Canales "has not yet had the chance to develop the factual basis for this claim because . . . it was procedurally defaulted," should be read as a thinly veiled instruction to the district court to allow full factual development, which would include an evidentiary hearing. *Id.* at 571. Even though the court's analysis of what a petitioner must show to excuse a procedural default is an outlier that disfavors habeas petitioners, the court's reasoning involving evidentiary development is neither an outlier nor disadvantageous to habeas petitioners.

155. *Id.* at 567-68.

156. *Id.* at 568.

fully prove a winning trial-IAC claim will result in the default not being excused. Conversely, if you prove deficient performance by state IRCP counsel for failing to raise a claim, and prove the full merits of a winning trial-IAC claim, then the default will be excused, the federal habeas court will no longer be precluded from addressing the merits of the petition, and the writ will be granted.[157]

But, these conclusions are inconsistent with previous and subsequent Fifth Circuit opinions, which state simply that a petitioner will excuse a procedural default by satisfying the two-part *Martinez*-pre-*Trevino* test, or the four-part *Martinez/Trevino* test.[158] And while the Fifth Circuit's opinion generated a favorable outcome for petitioner Canales on at least one of his trial-IAC claims,[159] the *Canales* court's analysis puts the analytical cart before the horse; it is the rare case, indeed, in which a federal habeas petitioner will be able to present to the courts sufficient evidence to prove the merits of his defaulted claim *before* the default is excused and the petitioner is granted a meaningful opportunity to investigate the factual record.

Further undermining any significance to *Canales* is the fact that district court treatment of *Canales* is inconsistent. One district court within the Fifth Circuit cited *Canales* to follow the majority approach.[160] A different district court in the Fifth Circuit applied *Canales* and *Martinez/Trevino* in a way that vividly underscores the "through the

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157. This analysis echoes that offered by the district court in *Duncan v. Carpenter*:

> As a practical matter, then, in many habeas cases where a petitioner seeks to overcome procedural default under *Martinez*, it will be more efficient for the reviewing court to consider in the first instance whether the alleged underlying [IAC] was "substantial" enough to satisfy the "actual prejudice" prong of *Coleman*. If not, the court would have no need to consider whether the petitioner has established deficient performance by post-conviction counsel.

No. 3:88-00992, 2015 U.S. Dist. LEXIS 28009, *118-19 (M.D. Tenn. Mar. 4, 2015). The court's observation that substantiality might be most efficiently assessed at the outset is astute. Where the *Duncan* court veered into error territory was its use of the qualifier "enough" after "substantial" to mean "substantial enough to warrant relief," and its corresponding equation of that substantiality requirement—an elevated requirement above the requirement for substantiality articulated in *Martinez* or *Trevino*—to *Coleman*'s actual prejudice inquiry.

158. *See supra* notes 107-12 and accompanying text.

159. *Canales*, 765 F.3d at 567-68, 571.

160. Cole v. Stephens, No. H-13-3003, 2014 U.S. Dist. LEXIS 178404, at *16-19 (S.D. Tex. Nov. 5, 2014). The court in *Cole*, explained:

> *Martinez* and *Trevino* allow procedural defaults of ineffectiveness claims to be overcome if it can be shown that: (1) the petitioner either did not have counsel in his state habeas proceeding or his state habeas attorney's representation fell below the standards established in *Strickland* and (2) the petitioner's underlying ineffective-assistance claim is "substantial," meaning that it "has some merit."

Id.

looking glass" nature of federal habeas circa 2014.[161] In short, the court in *Rhodes v. Cain* found the pro se petitioner had shown deficient performance by his trial counsel and prejudice therefrom, and, thus, had demonstrated that his Sixth Amendment right to effective counsel was denied.[162] But, because the claim was defaulted, the court concluded, the petitioner needed to "establish cause for failing to raise this claim properly in the state court" in order to obtain a writ of habeas corpus.[163] Applying *Martinez/Trevino* through *Canales*, the district court explained the test to overcome the default as follows:

> With respect to [*Canales*] prong 1, a petitioner must demonstrate that his IATC claim is substantial, *i.e.*, that it "has some merit." However, [*Canales*] prongs 1 and 4 overlap on this question, and [*Canales*] prong 4 requires the petitioner *to demonstrate outright satisfaction* of *Strickland v. Washington*'s prejudice requirement on his IATC claim. While in some cases, it may make sense to consider these questions separately, in this case, the parties have briefed the merits of this IATC claim exhaustively. The Court will therefore analyze the merit of the IATC claim fully, understanding that the merit of the claim would necessarily satisfy [*Canales*] prongs 1 and 4; the absence of merit would render the remainder of the *Martinez* test a moot point.[164]

In other words, where Judge Fletcher saw superfluous language in *Detrich*, the court in *Rhodes* saw only "overlap" between the questions of substantiality and whether petitioner was "actually prejudiced" because his defaulted claim was a winning claim.[165]

B. So Now What?

At the core of any conflict between the majority approach and the outlier approach is a fundamental question: does it (or should it) really matter if we categorize the *Martinez/Trevino* elements in an effort to shoehorn them into boxes labeled "cause," and/or "prejudice" and/or something additional? Such intellectual wrestling, although fodder for the scholarly publication grist mill, seems to elevate form over substance.

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161. Rhodes v. Cain, No. 11-0399, 2014 U.S. Dist. LEXIS 132573, at *30-33 (E.D. La. Sept. 19, 2014).

162. *Id.* at *56.

163. *Id.*

164. *Id.* at *32-33 (emphasis added) (citations omitted).

165. Detrich v. Ryan, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc) (plurality opinion); *Rhodes*, 2014 U.S. Dist. LEXIS 132573, at *32-33.

The baseline consideration in the *Martinez/Trevino* context is what a petitioner must demonstrate to excuse a procedural default and obtain a meaningful merits review of his defaulted claim, when there was no meaningful opportunity for a meaningful review in state-court proceedings due to IRCP counsel's failures.[166] And, the Supreme Court bluntly answered this question in *Trevino*: if a petitioner can satisfy the four articulated *Martinez/Trevino* elements as to a defaulted claim, then the procedural default is "thereby excus[ed]."[167] Any different approach would be erroneously failing to take the *Trevino* Court at its word.[168] The Court has articulated the four elements that, if demonstrated, excuse a procedural default. The labels assigned to particular parts of the analysis should be irrelevant in view of the Court's pronouncement. Similarly, the labels used are irrelevant in light of the ultimate consideration: is meaningful review of a claim available to the prisoner in federal habeas, or is it not?[169]

Accordingly, I submit that the majority approach is faithful to the Court's intent in *Martinez* and *Trevino*, but the outlier approach is not. The Supreme Court is free to define—and revise—its own equitable rules, including the *Coleman* rule.[170] Whether the Court's *Trevino* pronouncement is a revision or redefinition of its own equitable rules is, thus, irrelevant; if it was not, then so be it, and if it was, then that was certainly within the Court's equitable power. Moreover, whether

166. Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013); *see also* Woolbright v. Crews, 2015 U.S. App. LEXIS 11043, at *22 (6th Cir. June 29, 2015) (emphasizing the petitioner had "thus far been unable to obtain an evidentiary hearing on his IATC claims in either state post-conviction proceedings or federal habeas proceedings," and that the "absence of factual development . . . nullifies a key advantage of bringing such IATC claims in collateral proceedings").

167. *Id.* at 1918.

168. *See* Hodges v. Colson, 727 F.3d 517, 531 (6th Cir. 2013) (declaring that one must assume that "the Supreme Court meant exactly what it wrote").

169. One commentator has suggested that a proper *Martinez/Trevino* inquiry involves three different determinations of prejudice: first, to determine substantiality under *Martinez/Trevino* element (1); second, to determine whether IRCP counsel provided ineffective assistance under *Martinez/Trevino* element (2); and third, to determine "actual prejudice" under the *Coleman* "cause and prejudice" standard. Michael Ellis, Comment, *A Tale of Three Prejudices: Restructuring the "*Martinez *Gateway,"* 90 WASH. L. REV. 405, 441-51 (2015). The commentator then suggests that all three prejudice inquiries "should be collapsed into a single analysis focused on the *Martinez* 'substantiality' prong" if "the *Martinez* first prong is to have any practical effect." *Id.* at 443; *see also id.* at 448 (reconfirming this notion). While the commentator's suggested approach is subtly different than the analysis and suggestions presented in this article, the commentator's proposed bottom-line result is largely the same: evidentiary development and meaningful opportunity for factual development must be afforded to ensure a meaningful merits review of the underlying claim.

170. Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012) ("The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion.").

Martinez and *Trevino* constitute a revision or a "relaxed version" of the general *Coleman* rule—as the Supreme Court, the Ninth Circuit, and some district courts say they do—or whether the new equitable rule simply establishes the way by which default may be excused in a fact-specific context, it is clear the Supreme Court intended to allow a petitioner to obtain merits review of a defaulted claim in federal habeas if he satisfies the four *Martinez/Trevino* elements.[171] Insisting on identifying the correct labels for "cause" and "prejudice" is formalism without purpose.

Moreover, the outlier approach, at least in the ordinary case, is irreconcilable with *Trevino*'s mandates and the constitutional concerns that animated *Martinez* and *Trevino*. The core of *Martinez* and *Trevino*, the Court's constitutional motivation, was the Court's concern for protecting the fundamental, bedrock right to effective assistance of counsel, and the Court's belief that it absolutely undermines confidence in the reliability of proceedings if even a single substantial trial-IAC claim has never been reviewed on the merits.[172] The federal merits review that a petitioner seeks via *Martinez* and *Trevino* is not just perfunctory review. *Martinez* suggests, and *Trevino* explicitly demands, that it must be "meaningful" review.[173] *Martinez* suggests, and *Trevino* explicitly establishes, what a petitioner must be afforded in order to have a meaningful opportunity to obtain a meaningful review.[174] The outlier approach, by deciding the ultimate merits question in the course of deciding whether the default can be excused, would functionally require a petitioner to prove he will be entitled to habeas relief on a defaulted claim *before* being afforded a meaningful opportunity to investigate and litigate his claim.

True, there may be some cases in which a petitioner has somehow obtained evidence to present to the federal habeas court with his petition to support his *Martinez/Trevino* arguments *and* to demonstrate the ultimate merits of his defaulted claim. Indeed, that was partly the situation in *Canales* and *Rhodes*. But those cases are the exceptions that prove the rule. When a petitioner requires a meaningful opportunity—

171. *Trevino*, 133 S. Ct. at 1918.

172. *See id.* at 1917-18, 1921; *Martinez*, 132 S. Ct. at 1317-18.

173. *Trevino*, 133 S. Ct. at 1917, 1921; *see Martinez*, 132 S. Ct. at 1317-18.

174. Among the procedures that are necessary to ensure a meaningful opportunity for factual development and, in turn, a meaningful merits review of a constitutional claim, are the following: new, effective counsel; sufficient time for new counsel to investigate and develop the claim, and to raise the federal constitutional claim in compliance with procedural rules; and an opportunity to expand the evidentiary record, including an evidentiary hearing. *See Trevino*, 133 S. Ct. at 1921; *Martinez*, 132 S. Ct. at 1317-18.

time; appointment of new, effective counsel; court-authorized funding; and process to obtain and present the necessary evidence—to support his *Martinez/Trevino* arguments and the full-blown merits of his underlying defaulted claim, that meaningful opportunity is typically only available *after* the default has been excused.[175] Requiring the petitioner to demonstrate that he will obtain relief on the merits of his defaulted claim *before* he has a meaningful opportunity to investigate, obtain, and present that evidence—as the outlier approach does—is illogical at best, and directly contrary to *Martinez* and *Trevino*.[176] Only in the context contemplated by *Sasser I* and *Sasser II*—a federal district court deciding whether default can be excused following everything necessary to ensure a meaningful opportunity to present the defaulted claim for a meaningful merits review—would the outlier approach be in accord with *Martinez* and *Trevino*.[177]

III. WHAT DOES "SUBSTANTIAL" MEAN AND HOW DOES IT MATTER?

The first enumerated *Martinez/Trevino* factor is whether a defaulted claim is "substantial."[178] The Court referenced the COA standard to define what "substantial" means in the *Martinez* context.[179] The COA standard, in turn, requires less than proving that a petitioner would prevail on the claim in question.[180] Indeed, the Court has previously explained that a decision in the COA inquiry should NOT be a full-blown merits determination.[181]

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175. *See Trevino*, 133 S. Ct. at 1921.

176. It is also contrary to analogous Supreme Court authority addressing the other avenue through which a petitioner can excuse a procedural default: the "miscarriage of justice" avenue. Such an argument requires the petitioner "to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995). Discussing that evidentiary requirement in a later opinion, the Court explained that "[a] petitioner's burden at th[is] gateway stage is to demonstrate that more likely than not, in light of the new evidence, . . . any reasonable juror would have reasonable doubt." House v. Bell, 547 U.S. 518, 538 (2006). Like the "miscarriage of justice" avenue, the *Martinez/Trevino* route to excusing a procedural default is but a "gateway stage" regarding the underlying, defaulted claim, and a petitioner should not be required to prove the full merits of his defaulted claim at this "gateway stage."

177. *See Sasser II*, 743 F.3d 1151, 1151 (8th Cir. 2014); *Sasser I*, 735 F.3d 833, 851, 853-55 (8th Cir. 2013).

178. *Trevino*, 133 S. Ct. at 1918; *Martinez*, 132 S. Ct. at 1318.

179. *See Martinez*, 132 S. Ct. at 1318-19 (referencing *Miller-El v. Cockrell*, 537 U.S. 322 (2003), which discusses the standards to issuing a COA).

180. *Miller-El*, 537 U.S. at 342.

181. *Id.*

It follows, then, that inquiring into whether a defaulted claim is "substantial" is a different inquiry than whether the defaulted claim, if considered on the merits after a meaningful opportunity for factual development, would prevail. And, this is not a distinction without a difference, whether doctrinally or practically, due to the very circumstances and equitable considerations that give rise to a *Martinez/Trevino* situation. A prisoner might be able to satisfy the relatively low COA bar with allegations of a constitutional claim supported by at least some facts. Such a claim is debatable or deserves further investigation, and thus, after the default is excused, the prisoner should be afforded an opportunity for meaningful investigation and litigation of the defaulted claim.

However, if a prisoner has never had a meaningful opportunity to investigate and develop the factual bases for a constitutional claim, due to inadequate IRCP counsel, then the prisoner will unlikely be able to definitively *prove* at the preliminary review stage that he should prevail on the merits of that constitutional claim in federal habeas review. After all, how can he prevail without the necessary evidence, which could only have been obtained through a meaningful investigation of the claim—which was not done because of inadequate IRCP counsel?[182]

Some federal courts have explicitly identified this difference between full merits review and substantiality review, and proceeded accordingly. But, others have explicitly required at least some quantum of proof of the merits of the defaulted claim—if not full proof that relief is required—as part of a *Martinez/Trevino* analysis, while still others have implicitly done the same.[183]

A. What the Federal Courts Have Done

One of the first opinions to articulate a difference between substantiality and proof sufficient to prevail on the merits was the 2013 order in *Barnett v. Roper*.[184] Another well-articulated opinion explaining the distinction between a merits review and the substantiality inquiry can be found in *Weber v. Sinclair*.[185] In *Weber*, the petitioner presented to

182. *Woolbright*, 2015 U.S. App. LEXIS 11043, at *22-23 (explaining that the lack of an evidentiary hearing in state IRCP or federal habeas proceedings "hamstrings" a federal habeas court's ability to meaningfully review a constitutional claim).

183. *See infra* Part III.A.

184. 941 F. Supp. 2d 1099, 1113 (E.D. Mo. 2013).

185. No. C08-1676RSL, 2014 U.S. Dist. LEXIS 58849, at *17-19 (W.D. Wash. Apr. 28, 2014).

the district court a list of numerous allegations of counsel's failures.[186] The district court found the petitioner had satisfied the *Martinez* substantiality standard, while explicitly stating that it reached that decision "[w]ithout passing judgment on the merits of petitioner's IAC claim."[187] The court explained that substantiality "requires a petitioner to demonstrate that 'reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'"[188] And, "[b]ased on petitioner's list of alleged pre-trial and trial errors, . . . the Court f[ound] that 'reasonable jurists could debate' whether petitioner's trial-counsel performed deficiently."[189] Furthermore, the court concluded, the alleged errors "potentially resulted in prejudice as they cast doubt upon the primary state witness's identification of petitioner."[190] Thus, "'[r]easonable jurists could debate' whether the 'decision reached would reasonably likely have been different absent the errors,'" and, therefore, the petitioner satisfied the *Martinez* substantiality requirement.[191]

The district court in *Sanders v. White* carefully applied the "debatable amongst jurists of reason" standard in its *Martinez/Trevino* assessment, distinguishing that inquiry from a full merits inquiry.[192] The court ultimately concluded that the petitioner should be permitted to pursue discovery regarding his procedurally defaulted trial-IAC claim—and discovery regarding his *Martinez/Trevino* arguments—because the defaulted claim was substantial and the IRCP IAC allegations deserved further evidentiary development.[193] Only after further evidentiary development, the court reasoned, was it possible to engage in a full, meaningful merits review of the underlying trial-IAC claim.[194]

A trio of district court opinions from the District of Idaho, likewise, specified that the substantiality inquiry is "not the same as a merits review," but rather is "more akin to a preliminary review" of a trial-IAC

186. *Id.* at *15-25.

187. *Id.* at *18-19.

188. *Id.* at *17-18 (quoting Detrich v. Ryan, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc) (plurality opinion)).

189. *Id.* at *19 (finding that the "petitioner's allegations that trial-counsel failed to adequately question the victim concerning his assailant's haircut, failed to present evidence that a phone area code tattoo is very common, failed to elicit testimony about the 'Boxer' nickname, and failed to properly interview key witnesses meet the standard of 'substantial' under *Martinez*").

190. *Id.*

191. *Id.*

192. No. 03-455-ART, 2015 U.S. Dist. LEXIS 91633, at *17-20 (E.D. Ky. July 15, 2015).

193. *Id.* at *17-25.

194. *Id.* at *28-33.

claim "for purposes of determining whether a [COA] should issue."[195] Thus, the *Tellez-Vasquez v. Smith* court explained:

> [T]o determine whether a claim is substantial, *Martinez* requires the district court to *review* but not *determine* whether trial or appellate counsel's acts or omissions resulted in deficient performance and in a reasonable probability of prejudice, and to *determine* only whether resolution of the merits of the claim would be debatable among jurists of reason and the issues are deserving enough to encourage further pursuit of them.[196]

The importance of including factual allegations that might, if ultimately proven, prove a trial-IAC claim, or of presenting to the federal habeas court some kind of preliminary evidence in support of the defaulted trial-IAC claim such as affidavits from relevant parties can be seen in some cases.[197] Indeed, if evidence can be obtained and presented to the habeas court in support of a petition's *Martinez/Trevino* arguments, that evidence can directly affect the court's determination of whether the default can be excused.[198] But, there is a critical distinction between a court considering evidence, such as affidavits or sworn declarations, in addition to sufficiently detailed allegations of ineffective assistance in its determination of the substantiality inquiry, and a court *requiring* such additional evidence before it will find a defaulted claim substantial. The former complies with the Supreme Court's COA jurisprudence, while the latter contravenes it.[199]

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195. Workman v. Blades, No. 1:08-CV-00052, 2014 U.S. Dist. LEXIS 136607, at *24-25 (D. Idaho Sept. 24, 2014); Tellez-Vasquez v. Smith, No. 1:10-cv-00406-CWD, 2014 U.S. Dist. LEXIS 131662, at *14-15 (D. Idaho Sept. 15, 2014); Ngabirano v. Wengler, No. 1:11-CV-00450, 2014 U.S. Dist. LEXIS 15922, at *22-23 (D. Idaho Feb. 7, 2014).

196. 2014 U.S. Dist. LEXIS 131662, at *15.

197. *See, e.g.*, Preyor v. Stephens, 537 F. App'x 412, 422-25 (5th Cir. 2013) (affirming the district court's conclusion that the petitioner's defaulted trial-IAC claims were not substantial in part because petitioner had not presented any specific factual allegations about counsel's failures, nor any evidence such as affidavits from trial counsel or potential witnesses, that would go to showing how and why counsel's assistance was ineffective); Davis v. Warden, No. 2:05-cv-01179-KJD-NJK, 2013 U.S. Dist. LEXIS 122637, at *9-10, *14-15 (D. Nev. Aug. 27, 2013) (holding that defaulted failure-to-advise IAC claims were not substantial when no allegations were presented regarding how or whether counsel advised petitioner to testify).

198. *See* Canales v. Stephens, 765 F.3d 551, 569-71 (5th Cir. 2014) (finding petitioner's state habeas counsel performed deficiently and that petitioner's trial-IAC claim was substantial, based on voluminous allegations and evidence presented to federal habeas court, including declaration from trial counsel stating that counsel did no mitigation investigation, and other, preliminary evidence of unpresented mitigation evidence).

199. *See supra* text accompanying notes 179-81.

B. So Now What?

A bottom-line understanding of the substantiality requirement is best framed as a two-part analysis: first, what a petitioner is not required to do, followed by what *is* required.

The first step is minding the Supreme Court's admonishment that the COA inquiry does not require that a petitioner prove he would definitively prevail on the merits of his claim, and that courts should *not* "make a definitive inquiry" into the claim's merits, because a "COA determination is . . . distinct from the underlying merits."[200]

Then, once the distinction between substantiality and the full merits of a claim is established, the substantiality of the claim can be more effectively argued. Taking the Supreme Court at its word, a petitioner should be able to satisfy the *Martinez/Trevino* substantiality requirement in any of the three ways discussed above.[201] Thus, a petitioner should be able to satisfy the substantiality requirement by showing the defaulted claim has "some merit"—that is, the claim is not totally meritless—because, for instance, there are allegations regarding counsel's performance and prejudice therefrom, or even some modicum of evidence such as affidavits from counsel or other potential witnesses that support the claim.

By the same token, a petitioner should be able to satisfy the substantiality requirement by showing that reasonable jurists could debate the merits of the defaulted claim—that is, that reasonable jurists could debate whether trial counsel performed deficiently, and whether the specific state-court outcome at issue would likely have been different if counsel had performed sufficiently.[202] This, too, may require some amount of evidentiary development, or perhaps citation to other cases involving similar issues that were decided favorably for the petitioner to establish that other jurists have found resolution of similar issues debatable.

Further, a petitioner should also be able to satisfy the substantiality requirement by showing that the issues presented by his defaulted claim "deserve encouragement to proceed further" because, for example, the trial-IAC claim relates to significant mitigation evidence never investigated or presented, or counsel's failures involving errors that would be harmful or prejudicial per se if considered on the merits.[203]

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200. Miller-El v. Cockrell, 537 U.S. 322, 342 (2003).

201. *See supra* Part III.A.

202. *See supra* notes 195-98 and accompanying text.

203. Workman v. Blades, No. 1:08-CV-00052, 2014 U.S. Dist. LEXIS 136607, at *24-25 (D.

Counsel's task, in short, is to somehow demonstrate to the habeas court, whether by detailed allegations, or preliminary evidence, or something else, that there is "something there," and not just a trial-IAC claim that would be worthless and underserving of relief even if ultimately reviewed on the merits.

IV. HOW TO ASSESS POST-CONVICTION COUNSEL'S PERFORMANCE?

A question that has thus far received little attention, but which will undoubtedly push its way into view, is how post-conviction counsel's performance should be assessed. To find IAC under *Strickland v. Washington*, a court must determine whether counsel's performance was objectively unreasonable as measured against the prevailing professional norms, or determine that counsel's performance was "outside the wide range of professionally competent assistance."[204] Unfortunately, the "Supreme Court in *Martinez* did little to adumbrate a standard for ineffective assistance of post-conviction counsel beyond saying *Strickland v. Washington* . . . would provide the governing standard."[205] But for decades, IRCP counsel's effectiveness was constitutionally and equitably irrelevant in the Court's habeas jurisprudence. Thus, while the prevailing professional norms for trial counsel and direct appeals counsel have been the subject of much discussion by the federal courts for years, the same is not necessarily true as to IRCP counsel. Similarly, what constitutes the "wide range of professionally competent assistance" for post-conviction counsel has not received significant attention. Following *Martinez/Trevino*, of course, establishing the relevant professional norms measuring stick is now significant. Similarly, establishing the bounds of the "wide range of professionally competent assistance" for post-conviction counsel is significant now, whereas, it was irrelevant before *Martinez*. But, which standards should apply to mark the measuring stick? Those applicable to trial counsel? To direct appeals counsel? Something else? After all, "the tasks to be performed and the possibilities of prejudice are quite different on appeal than at trial, so the *Strickland* standard is applied to different conduct and

Idaho Sept. 24, 2014).

204. 466 U.S. 668, 687-88, 690 (1984).

205. Landrum v. Anderson, No. 1:96 CV 641, 2012 U.S. Dist. LEXIS 118501, at *14-15 (S.D. Ohio Aug. 22, 2012); *see also* Detrich v. Ryan, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc) (plurality opinion) (explaining that "the Court did not specify the manner in which *Strickland* should be applied" to assess IAC of IRCP counsel).

decisions when ineffective assistance of appellate counsel claims are being considered."[206]

An ancillary question asks what source(s) of professional norms should be invoked. In general, prevailing professional norms against which to measure an attorney's performance can be drawn from myriad sources, including such things as: case law; state or federal statutes or other rules; professional standards established by state or federal agencies, such as the federal Department of Justice; publications of private state or national organizations, such as the American Bar Association, the National Association of Criminal Defense Lawyers, or the National Legal Aid and Defender Association; training manuals or similar educational materials; or scholarship published in legal journals.[207] The body of case law *explicitly* discussing the prevailing professional norms applicable to IRCP counsel is slim to nonexistent at this time. That is not a surprise, given the massive shift in significance attributable to IRCP counsel's performance from irrelevant to potentially hugely significant. That cannot mean, however, that there are no professional norms under which IRCP counsel labored pre-*Martinez*.

A. What the Federal Courts Have Done

Federal courts' discussion of this issue has been limited, but the courts have generally applied the standards applicable to trial counsel,[208]

206. *Landrum*, 2012 U.S. Dist. LEXIS 118501, at *15 (citation omitted).

207. *See Strickland*, 466 U.S. at 687-89.

208. *See, e.g.*, Tabler v. Stephens, 591 F. App'x 281, 281 (5th Cir. 2015), *vacating in part* 588 F. App'x 297 (5th Cir. 2014) (applying *Martinez/Trevino* to circumstances in which state habeas counsel's failures prevented an initial-review collateral proceeding from ever taking place, because counsel allowed prisoner to waive state habeas proceedings without an adversarial process to test his competency to do so); Canales v. Stephens, 765 F.3d 551, 569-70 (5th Cir. 2014) (finding state habeas counsel's performance deficient when counsel failed to seek funding for investigation and comparing state habeas counsel's deficient performance to trial counsel's deficient performance discussed in *Hinton v. Alabama*, 134 S. Ct. 1081, 1088-89 (2014) (per curiam)); Wessinger v. Cain, No. 04-637-JJB-SCR, 2015 U.S. Dist. LEXIS 97266, at *4-12 (M.D. La. July 27, 2015) (finding, after evidentiary hearing with experts testifying to professional norms for post-conviction counsel, deficient performance by state post-conviction counsel); *see also* In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila., 790 F.3d 457, 2015 U.S. App. LEXIS 9878, at *32-33 (3d Cir. June 12, 2015) (stating that because state-court proceedings are, under AEDPA, "the central process, not just a preliminary step for a later federal habeas proceeding," post-conviction counsel "must be careful to comply with state procedural rules, file within applicable limitations periods, and fully exhaust their clients' claims in order to secure meaningful habeas review in federal court"); *id.* at *47-59 (McKee, C.J., concurring) (extensive discussion of importance of state post-conviction proceedings in modern habeas jurisprudence, including the first opportunity to investigate, raise, and preserve claims; discussing the need for a "thoroughly investigated and well-presented petition" to "ensure that petitioners' claims are fully heard and appropriately decided on the merits, rather than going unresolved in federal court because

or declined to articulate any particular standard at all, choosing instead to simply determine whether post-conviction counsel's performance was so incompetent as to be outside the wide range of professionally competent assistance.[209]

For instance, in *Leberry v. Howerton*, the Sixth Circuit seemed to suggest an ipso facto approach; failing to raise a trial-IAC claim is deficient performance by post-conviction counsel if that claim is substantial.[210] Leberry's post-conviction counsel failed to raise the trial-IAC claims in question, rendering them defaulted in federal habeas.[211] The court found that "under *Martinez* . . . and *Trevino* . . . Leberry can establish cause."[212] This suggests an implicit finding that post-conviction counsel's failure to raise the trial-IAC claims was deficient performance.[213] Chief Judge McKee's concurring opinion in *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia* is also noteworthy in its extended discussion of all the things post-conviction counsel must do to ensure effective representation at that stage, many of which are akin to trial

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of earlier procedural defects;" and emphasizing the "significant investigation" required by post-conviction counsel, "the important investigative and substantive legal work that an attorney must undertake during post-conviction proceedings in state court," and post-conviction counsel's additional obligations to ensure compliance with state and AEDPA's procedural rules).

209. Leberry v. Howerton, 583 F. App'x 497, 500-01 (6th Cir. 2014); Barnett v. Roper, 941 F. Supp. 2d 1099, 1114 n.17 (E.D. Mo. 2013) ("[T]he state motion court's determination that Barnett's post-conviction counsel[] failed to comply with the state procedural rule, which barred review on the merits, establishes deficient performance and a reasonable probability of prejudice under *Strickland*."); Miles v. Ryan, 713 F.3d 477, 494 (9th Cir. 2013) (finding post-conviction counsel's performance was not so incompetent as to be outside the wide range of professionally competent assistance, when counsel "conducted an extensive investigation during post-conviction review," akin to trial counsel's investigative duties); Sheridan v. Curley, No. 10-3987, 2015 U.S. Dist. LEXIS 32406, at *13 (E.D. Pa. Mar. 16, 2015) (citing Glenn v. Wynder, 743 F.3d 402, 409-10 (3d Cir. 2014)) (stating "[w]here a habeas petitioner argues that his initial-review post-conviction counsel failed to raise a claim, *thus procedurally defaulting it, the petitioner can overcome that default* if he shows" the defaulted claim is substantial (emphasis added)); Landrum v. Anderson, No. 1:96 CV 641, 2012 U.S. Dist. LEXIS 118501, at *18 (S.D. Ohio Aug. 22, 2012) (explaining that "post-conviction counsel recognized the [trial-IAC claim] and presented it twice in affidavits attached to the post-conviction petition, but did not actually plead the claim in the body of the petition," and finding "that to be deficient performance").

210. 583 F. App'x at 501.

211. *Id.* at 499.

212. *Id.* at 498, 500 ("In this case, the warden conceded at oral argument that *Sutton* resolves the question of whether *Martinez* and *Trevino* apply to Tennessee's procedures; therefore, Leberry has cause to excuse his defaulted ineffectiveness claims.").

213. *See* Sheridan v. Curley, No. 10-3987, 2015 U.S. Dist. LEXIS 32406, at *13 (E.D. Pa. Mar. 16, 2015). As articulated by the *Sheridan* court, if post-conviction counsel's failure to raise a claim resulted in that claim being procedurally defaulted in federal habeas, that failure becomes deficient performance if the defaulted claim is substantial.

counsel's duties to thoroughly investigate and raise claims for the first time.[214]

I also note that a few courts have implied or suggested that post-conviction counsel's performance might be assessed against the standards applicable to direct appeal counsel.[215]

B. So Now What?

The most straightforward answer to the question of how to assess post-conviction counsel's performance is to follow *Leberry* and tie that inquiry directly to the substantiality inquiry. If the defaulted claim is substantial, and if post-conviction counsel failed to meaningfully investigate, present, and litigate that substantial claim, then, ipso facto, post-conviction counsel failed to perform sufficiently.[216] So, for instance, state post-conviction counsel who failed to argue that mental illness—as opposed to intellectual disability—is a categorical ineligibility for the death penalty would have performed deficiently, because a mental illness categorical exemption is certainly within the definition of "substantial" at this time. So, too, would counsel who failed to identify and raise issues related to mitigation evidence not presented to the jury in a capital case.

Furthermore, this ipso facto approach best fits with the prevailing professional standards for post-conviction counsel, as drawn from various sources. Among those sources—especially for capital cases—is the ABA Guidelines for the Appointment and Performance of Defense

214. *See supra* note 208 and accompanying text. Chief Judge McKee's concurring opinion suggests post-conviction counsel also shoulders professional obligations akin to direct-appeal counsel's, such as the duty to preserve all claims in state court to ensure meaningful federal habeas review, or the duty to ensure timely filing of various pleadings and otherwise compliance with all state and federal procedural rules. That does not detract from the trial-counsel-related duties to which post-conviction counsel is subject, but rather reflects the unique, hybrid nature of post-conviction counsel's responsibilities.

215. *See, e.g.*, Hittson v. GDCP Warden, 759 F.3d 1210, 1263 (11th Cir. 2014); Folino v. Harlow, No. 11-1582, 2014 U.S. Dist. LEXIS 177441, at *36-39 (W.D. Pa. Dec. 24, 2014); Runningeagle v. Ryan, No. CV-98-1903-PHX-PGR, 2014 U.S. Dist. LEXIS 140289, at *48-52 (D. Ariz. Oct. 2, 2014); Sampson v. Palmer, No. 3:11-cv-00019-LRH-WGC, 2014 U.S. Dist. LEXIS 43488, at *18-19 (D. Nev. Mar. 31, 2014). It should be noted that the *Runningeagle* court's application of appellate-counsel standards to post-conviction counsel's performance was dicta, since that court held that the *Martinez/Trevino* exception did not apply in that particular case. *Runningeagle*, 2014 U.S. Dist. LEXIS 140289, at *24.

216. *Leberry*, 583 F. App'x at 500-01.

Counsel in Death Penalty Cases ("ABA Guidelines"),[217] and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases ("Supplementary Guidelines").[218] For example, ABA Guideline 10.15.1 describes the duties of post-conviction counsel, which include aggressive investigation into all aspects of the client's case, monitoring of the client's mental, physical, and emotional condition, and modifying prior counsel's theories of the case, while the commentary to that Guideline provides more in-depth explanation of what is expected of post-conviction counsel.[219] ABA Guideline 10.8 contains a strong mandate to raise every issue of possible conceivable merit, including ones that are flatly contrary to existing law.[220] There is a long discussion in the commentary at the beginning of the ABA Guidelines regarding the duties of post-conviction counsel in state collateral-review proceedings[221] that is similarly helpful in articulating the "[p]revailing norms of practice"[222] and the "standard practice"[223] for post-conviction counsel. Similarly, the Supplementary Guidelines contain a great deal of guidance for counsel to mind, and Supplemental Guideline 1.1 makes clear that those guides explicitly apply to post-conviction counsel just as to counsel at every other stage of a capital case.[224] A significant amount of scholarship has been devoted to articulating the prevailing professional norms for capital-case representation[225]—including a growing body of scholarship focusing on

217. AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES], *available at* http://www.ambar.org/2003Guidelines.

218. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, *in* 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

219. ABA GUIDELINES, *supra* note 217, at 1079-87.

220. *Id.* at 1028-29.

221. *Id.* at 932-35.

222. Strickland v. Washington, 466 U.S. 668, 688 (1984).

223. Wiggins v. Smith, 539 U.S. 510, 524 (2003).

224. SUPPLEMENTARY GUIDELINES, *supra* note 218, at 679.

225. Ty Alper, *'So What?': Using Reverse Investigation to Articulate Prejudice and Win Post-Conviction Claims*, 35 CHAMPION 44 (Dec. 2011). *See generally* Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325 (2003); Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635 (2013).

Attorneys representing capital clients should also be aware of the American Bar Association's collection of representation performance standards for death penalty cases that is available exclusively to such practitioners. *See* Am. Bar Ass'n, NAT'L CAPITAL STANDARDS DATABASE, http://www.capstandards.org (last visited Sept. 2, 2015).

Martinez and *Trevino*[226]—and those, too, should be construed as relevant sources against which to measure IRCP counsel's performance.

State law can provide yet another source of prevailing professional norms, such as the Louisiana Public Defender Board's Performance Standards for Criminal Defense Representation in Indigent Capital Cases ("Louisiana Standards").[227] The Louisiana Standards include numerous provisions that would encompass post-conviction counsel's obligations to investigate, present, litigate, and preserve all arguably meritorious issues, not just substantial ones.[228] The same is true for the Oregon State Bar's *Principles and Standards for Post-Conviction Relief Practitioners*,[229] or the Oregon Public Defense Services Commission report, *Delivery of Public Defense Services in Death Penalty Cases*.[230] And of course, case law can provide a source of the prevailing professional norms.[231] Relevant to the discussion here, the Supreme Court in *Martinez*, in the course of explaining why effective post-conviction counsel was necessary, even if as a matter of equity, stated that "[e]ffective . . . counsel preserves claims to be considered on appeal . . . and in federal habeas proceedings."[232] Indeed, Chief Judge

226. *See* Uhrig, *supra* note 9, at 1280. *See generally* Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839 (2013); Freedman, *supra* note 10; Lawrence Kornreich & Alexander I. Platt, *The Temptation of* Martinez v. Ryan*: Legal Ethics for the Habeas Bar*, CRIM. L. BRIEF, Fall 2012, at 1; Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604 (2013); Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473 (2013); David M. Barron, Martinez *Casts Doubt on State Postconviction and Federal Habeas Representation*, CRIM. JUST., Fall 2012, at 42.

227. LA. ADMIN. CODE tit. 22 §§ 1901–1923 (2015).

228. LA. ADMIN. CODE tit. 22 § 1921 (2015).

229. *See generally* PRINCIPLES & STANDARDS FOR COUNSEL IN STATE POST-CONVICTION RELIEF PROCEEDINGS, ch. 6 (Or. State Bar 2009), *available at* http://www.osbar.org/_docs/resources/ConvictionReliefProceedings/CSPCRP3.pdf. The Oregon Standards apply to all post-conviction counsel, but they are under-inclusive because they explicitly "do not address many of the special obligations and responsibilities of counsel representing the petitioner in death penalty cases." *Id.* at ch. 6, intro.

230. *See generally* PUB. DEF. SERVS. COMMISS'N, DELIVERY OF PUBLIC DEFENSE SERVICES IN DEATH PENALTY CASES (2007), *available at* http://www.oregon.gov/OPDS/docs/Reports/pdscdeathpenaltyreportandplan.pdf. The Report explicitly embraces and formally adopts the ABA Guidelines, including those aspects relevant to post-conviction counsel's duties. *Id.*

231. *See, e.g.*, Porter v. McCollum, 558 U.S. 30, 39-40 (2009) (citing Williams v. Taylor, 529 U.S. 362, 395-96 (2000)) (stating that the prevailing professional norms at the time of trial included an obligation to thoroughly investigate the defendant's background). The pincite in *Williams* to which the Court cited in *Porter*, in turn, referenced the commentary from the second edition of *ABA Standards for Criminal Justice*. *Porter* also cited *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003), as a source of professional norms, and the pincites to *Wiggins*, in turn, cite to the ABA Guidelines and their contents. The Supreme Court, likewise, confirmed counsel's investigative duties in *Rompilla v. Beard*, 545 U.S. 374, 382-83 (2005), and *Sears v. Upton*, 561 U.S. 945, 946-56 (2010).

232. Martinez v. Ryan, 132 S. Ct. 1309, 1317-18 (citing FED. R. CRIM. P. 52(b) and Edwards v.

McKee cited *Martinez* for the proposition that post-conviction proceedings are the first chance to raise certain constitutional claims, "and many such claims require significant investigation" by post-conviction counsel.[233] Accordingly, IRCP counsel "must raise all claims during state post-conviction proceedings or forfeit review of those claims in federal court," and IRCP counsel's investigations must be thorough because "federal review is almost always limited to the results of the investigations that occurred during state post-conviction proceedings."[234]

While the Supreme Court has held that the Sixth Amendment does not incorporate the ABA Guidelines as inexorable requirements,[235] the ABA Guidelines and other sources, such as those noted here, are, nevertheless, guides to what constitutes objectively reasonable performance by counsel.[236] And because *Martinez* declined to decide whether a Sixth Amendment right to post-conviction counsel exists and, instead, created an equitable rather than constitutional remedy, whether the Sixth Amendment incorporates the ABA Guidelines or any other sources of professional norms is, in practical terms, irrelevant. As such, the Court can decide questions of post-conviction counsel's performance without the traditional, rigid *Strickland* analysis.

So, we have established the suitable analysis for assessing IRCP counsel's performance, and identified some appropriate sources of those professional norms. But an additional word is necessary to explain why those courts that applied direct-appeal counsel standards are, in general, mistaken. First and foremost is the actual context in state court; a state post-conviction petition is not litigated in the first instance in the appellate court, but rather in the trial court.[237] Thus, the matters at hand involve investigating and presenting issues, evidence, theories, and such—all for the first time at the trial court level, not the post-conviction appeals level. So, on that basis alone, direct appeal professional norms are an inappropriate measuring stick against which to assess post-conviction counsel's performance.

Second, using a direct-appeal-counsel standard of performance—by which a petitioner must argue that the unraised claim is "clearly

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Carpenter, 529 U.S. 446 (2000)).

233. In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila., 2015 U.S. App. LEXIS 9878, at *50-52 (3d Cir. June 12, 2015) (McKee, C.J., concurring).

234. *Id.* at *52.

235. Bobby v. Van Hook, 558 U.S. 4, 8 (2009).

236. *Id.* at 8-9; *Wiggins*, 539 U.S. at 524.

237. *See* Alper, *supra* note 226, at 844 n.20.

stronger" than those presented, or conversely, that issues counsel raised were "clearly weaker" than the claim not raised—when there has been no factual development of the underlying trial-IAC claim, would effectively mean that, as long as post-conviction counsel raised *some* trial-IAC issues, counsel's performance could never be deficient under *Strickland*. This is not what the Supreme Court intended in *Martinez* or *Trevino*, as the Ninth Circuit recognized in *Dickens*.[238] Indeed, that

238. Dickens v. Ryan, 740 F.3d 1302, 1320-21 (9th Cir. 2014). The *Dickens* court rejected the state's argument that a petitioner cannot overcome a default of a trial-IAC claim via *Martinez/Trevino* if the petitioner raised other trial-IAC claims in the IRCP. *Id.* The court reasoned that

> *Martinez* contains no language limiting this "equitable exception" simply because a petitioner brought other IAC claims that were exhausted. . . . Because courts evaluate procedural default on a claim-by-claim basis, it follows that *Martinez* would allow a petitioner to show cause, irrespective of the presence of other, separate claims.

Id. Applying a comparative-strength test to assess post-conviction counsel's performance also erroneously perpetuates the outdated notion that winnowing of constitutional claims in state court in a criminal case should be acceptable under established professional norms. The Supreme Court long ago stated that winnowing of issues on appeal is important, to focus on "one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-54 (1983). In doing so, the Court cited statements from Justice Jackson published in 1951, along with other sources containing guidance for effective appellate advocacy published in 1940, 1976, 1981, and 1982. *Id.* at 752-53. In the years since, federal courts have relied upon the Court's statements in *Jones*, and its progeny issued three years later, *Smith v. Murray*, 477 U.S. 527, 536 (1986), to reject innumerable ineffective-assistance-of-appellate-counsel claims. *See, e.g.*, Wright v. Poole, No. 02-CV-8669 (KMK)(MDF), 2012 U.S. Dist. LEXIS 141210, at *18-19 (S.D.N.Y. Sept. 28, 2012).

But, doggedly clinging to the Court's statements about effective appellate advocacy made decades ago fails to recognize how significantly the criminal justice world—especially the habeas corpus world—has changed since that time. Especially with the passage of AEDPA in 1996, which severely limited state prisoners' ability to seek federal habeas review of their constitutional claims and virtually guaranteed that a prisoner will be made to disappear through myriad procedural trap doors if he did not raise a claim at every level of state-court proceedings. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2241–2255). In the current world of the Roberts Court—that is, the world in which the Court is clear that state prisoners should get only a single bite at the apple, and that it bite should occur in state court—cases such as *Cullen v. Pinholster* and *Harrington v. Richter* expand AEDPA's restrictions on federal habeas review even further, thereby shackling the typical state prisoner in federal habeas to the claims and evidence presented in the state courts. *See* Harrington v. Richter, 562 U.S. 86, 98-100 (2011); Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011). In this world, winnowing of issues by appellate counsel can no longer reasonably be said to constitute objectively sufficient performance. The consequences from winnowing are now so severe that counsel must preserve all arguably meritorious claims. After all, yesterday's losing claim that one's client is categorically ineligible for the death penalty, due to intellectual deficiency or juvenile status at the time of the offense, is today's life preserver—but only if appellate counsel preserved the claim, rather than winnowing it out as a clear loser. The same is true for categorical claims such as severe mental illness or disproportionality, or systemic claims, *see, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2755-80 (2015) (Breyer, J., dissenting) (stating belief that it is "highly likely that the death penalty violates the Eighth Amendment," and that the Court "should call for full briefing on the basic question"); Jones v. Chappell, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014) (finding death penalty as administered in California violates the Eighth Amendment), which are well-settled losers today, but

functional reality is the exact opposite of what the Court intended to do. Allowing post-conviction counsel's performance to escape review if counsel raised other claims in post-conviction ignores the Court's expressed concern for "protect[ing] prisoners with a *potentially legitimate* claim" of trial-IAC.[239] Using a direct appeal standard also artificially elevates the requisite standard attributable to the defaulted claim to something more than the "some merit" standard emphasized by the Court.[240]

Third, IRCP counsel's duties are not strictly limited to "raising and pursuing claims arising from a criminal trial" like direct appeal counsel, as one district court erroneously characterized it.[241] Rather, claims to be raised on collateral review are, often by definition, dependent upon evidence outside the trial record, thus requiring IRCP counsel to thoroughly investigate—and reinvestigate—a case, much more akin to trial counsel's professional obligations than direct appeal counsel's responsibilities to preserve issues that are apparent on the face of the trial record.[242]

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which may save a life tomorrow.

239. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012) (emphasis added).

240. *See* Folino v. Harlow, No. 11-1582, 2014 U.S. Dist. LEXIS 177441, at *34-39 (Dec. 24, 2014). According to the *Folino* court, failing to raise a trial-IAC claim may "directly establish deficient performance" by post-conviction counsel if "the omitted issue is *so plainly meritorious* that it would have been unreasonable to winnow it out even from an otherwise strong appeal." *Id.* at *37-38 (emphasis added) (quoting Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003)). Conversely, the court concluded, "if the omitted issue *has merit but is not so compelling*," then the court would assess "the issue relative to the rest of the appeal, and [give] deferential consideration . . . to any professional judgment involved in its omission." *Id.* (emphasis added).

241. Sampson v. Palmer, No. 3:11-cv-00019-LHR-WGC, 2014 U.S. Dist. LEXIS 43488, at *19 (D. Nev. Mar. 31, 2014).

242. For example, the Louisiana Standards include numerous provisions requiring counsel to investigate various matters that would be inapplicable for direct appeal counsel. *See, e.g.*, LA. ADMIN. CODE tit. 22 § 1921(A)(9)–(15), (20)–(21), (24)–(31) (2015). For example, the most pertinent provisions of the Louisiana Standards are those that follow:

> 9. Post-conviction counsel should interview the client and previous defense team members about the case, including any relevant matters that do not appear in the record [and] consider whether any potential off-record matters should have an impact on how post-conviction review is pursued, and what kind of an investigation of the matter is warranted.
>
> 10. Post-conviction counsel should seek to investigate and litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules and any good faith argument for the extension, modification or reversal of existing law. Counsel should undertake a high quality, independent, exhaustive investigation and should not assume that investigation of issues by prior counsel has been complete or adequate.
>
> 11. The investigation and litigation of claims should encompass all arguably available claims for relief . . . .

Fundamentally, the issue is this: post-conviction counsel has demanding responsibilities, including a duty, as drawn from myriad sources, to pursue and preserve arguably meritorious claims.[243] A substantial claim would certainly rise above the level of "arguably meritorious." Hence, failure to investigate, present, litigate, and preserve a substantial claim is professional incompetence. It is objectively unreasonable. It is ipso facto deficient performance by post-conviction counsel for *Martinez/Trevino* purposes. And, that conclusion is only reinforced in a capital case, when the stakes are life and death.

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12. In conducting the investigation, counsel should have particular regard to the possibility that claims for relief may arise from matters not previously fully investigated or litigated . . . .

13. In investigating the possibility that the client received [IAC], post-conviction counsel must review both the record in the case and also conduct a thorough investigation of the facts and circumstances beyond the record in order to determine whether a claim exists that counsel's performance was deficient. . . .

. . . .

15. In investigating, preparing and submitting a petition, counsel should seek such pre-filing discovery, compulsory process, requests for admissions, depositions and other orders as are available and appropriate to a high quality, independent, exhaustive investigation. Counsel should investigate the possibility of and, where appropriate, file an application for DNA testing pursuant to La. C.Cr.P. art. 926.1.

. . . .

20. Where counsel raises a claim that has previously been fully litigated in earlier appeal proceedings in the case, counsel shall fully investigate, prepare and submit an argument that the claim is nevertheless eligible for consideration in the interests of justice.

21. Where counsel raises a claim that was not raised in the proceedings leading to conviction or sentence, was not pursued on appeal or was not included in a prior post-conviction petition, counsel shall fully investigate, prepare and submit a claim that the failure to previously raise the claim is excusable.

. . . .

29. Counsel should seek such discovery, compulsory process, requests for admissions, depositions and other orders as are available and appropriate to the full development and presentation of all claims in the petition and should document the denial of any such attempts to secure facts in support of possible claims.

30. Counsel should request an evidentiary hearing for all claims in which the state does not clearly admit the factual allegations contained in the petition and seek to prove by admissible evidence those factual allegations that support or establish the client's claims for relief.

31. Where counsel is considering seeking an evidentiary hearing, counsel should undertake a full factual investigation of the issue for which the hearing would be sought so that the decision as to whether to seek a hearing may be made in light of the evidence that might be adduced at such a hearing. Where counsel does seek an evidentiary hearing, counsel should ensure that adequate investigation and preparation has been undertaken to allow counsel to promptly litigate the matter if an evidentiary hearing is granted.

Id. § 1921(A)(9)–(13), (15), (20)–(21), (29)–(31).

243. *See supra* Part IV.

V. HOW TO ASSESS PREJUDICE FROM POST-CONVICTION COUNSEL'S DEFICIENT PERFORMANCE?

Assessing "prejudice" from post-conviction counsel's deficient performance presents what should be a simple inquiry. Because the *Martinez/Trevino* context is not a constitutional question, conventional notions of *Strickland* prejudice should be inapplicable; indeed, they are doctrinal mumbo-jumbo at best and functionally unworkable at worst. And yet, to date, the federal courts have found this part of the *Martinez/Trevino* analysis among the most vexing.

A. What the Federal Courts Have Done

As with many matters involving *Martinez* and *Trevino*, the Ninth Circuit has done the primary wrestling with this deceptively simple question. First, in *Detrich*, the en banc court touched on what must be shown to satisfy what is now identified as *Martinez/Trevino* element (2). The four-judge plurality concluded that "prejudice" from post-conviction counsel's failures could be shown by establishing that the substantial claim will not be heard on the merits.[244] In his plurality opinion, Judge Fletcher first explained that satisfying *Martinez/Trevino* element (2) "does not demand a showing of prejudice beyond that demanded under the first requirement"—that is, that the defaulted claim is substantial.[245] Judge Fletcher then addressed what is necessary to show in either of the two situations that might result in inadequate IRCP counsel: no counsel and ineffective counsel.[246] When there was "no counsel," there is no need to show prejudice from the pro se inmate failing to raise a claim "over and above the need to satisfy the first *Martinez* requirement that the underlying trial-court IAC claim be 'substantial.'"[247] Similarly, when there was appointed—but allegedly ineffective—counsel, a prisoner must show that his counsel "performed in a deficient manner" and must also satisfy "his required showing that the trial-counsel IAC claim be 'substantial' under the first *Martinez* requirement."[248] Thus, regardless of whether one had no counsel or deficient appointed counsel, there is no additional requirement to

244. Detrich v. Ryan, 740 F.3d 1237, 1245-46 (9th Cir. 2013) (plurality opinion).
245. *Id.* at 1245.
246. *Id.* at 1245-46.
247. *Id.* at 1245.
248. *Id.* at 1245-46.

establish *Martinez/Trevino* element (2) "over and above a showing that PCR counsel defaulted a 'substantial' claim of trial-counsel IAC."[249]

The five-judge dissent, authored by Judge Graber, seemed to disagree with the plurality's notion that prejudice from inadequate IRCP counsel can be shown by demonstrating *Martinez/Trevino* element (1).[250] Nevertheless, the dissent actually agreed with *the substance* of Judge Fletcher's bottom-line conclusion. The dissent recognized that a prisoner is harmed when post-conviction counsel's failures "might have resulted in the procedural default [of a constitutional claim] that is, *in prejudice*" to the prisoner because no meaningful merits review would then be afforded to the claim.[251]

Judge Nguyen's concurrence "agree[d] with the plurality" that a prisoner is prejudiced when post-conviction counsel fails to raise a substantial claim.[252] Where Judge Nguyen departed from the plurality was in their apparent position that prejudice from inadequate IRCP counsel can be presumed.[253] But, Judge Nguyen misread the plurality's standard, and cited instead the dissent's invocation of the "usual *Strickland* prejudice showing."[254] Accordingly, she concluded, a petitioner must show "a reasonable probability that the result would have been different if *post-conviction counsel* had highlighted trial counsel's deficient performance."[255] But Judge Nguyen's twist on the "usual *Strickland* prejudice showing" as the measure of satisfying *Martinez/Trevino* element (2) is inconsistent with the plurality's "measure of prejudice" with which Judge Nguyen agreed one page earlier.[256] Thus, there were nine—and maybe ten?—votes in *Detrich*—a

249. *Id.* at 1246.

250. *Id.* at 1265 n.3 (Graber, J., dissenting).

251. *Id.* (emphasis added).

252. *Id.* at 1260-61 (Nguyen, J., concurring). Judge Nguyen stated:

> Post-conviction counsel's ineffective assistance meets the cause prong [of *Coleman*] where, among other things, the claim that post-conviction counsel should have raised but did not—i.e., that trial counsel rendered ineffective assistance—is a substantial one, which is to say that . . . the claim has some merit. . . . I agree with the plurality that this is, in a sense, a measure of prejudice, and that it is not a demanding standard.

Id. at 1261.

253. *Id.* (referring to the plurality's statement that a "prisoner need show only that his PCR counsel performed in a deficient manner" (quoting *id.* at 1245 (plurality opinion))). Judge Nguyen also disagreed with the understanding that a petitioner can overcome a procedural default under *Martinez* by showing inadequate IRCP counsel and that the underlying claim is substantial. *Id.* Judge Nguyen noted only that she disagreed with the dissent's reading, but failed to note that the plurality had also reached the same reading.

254. *Id.* at 1262.

255. *Id.*

256. *Id.* I submit that the root of any apparent disagreement between the plurality and Judge

majority—for the proposition that precluding any meaningful opportunity for a meaningful merits review of a substantial constitutional claim was sufficient for fully satisfying *Martinez/Trevino* element (2).[257]

Then, in holding that § 2254(e)(2) does not prohibit factual development in federal habeas in the *Martinez/Trevino* context, the en banc Ninth Circuit in *Dickens* explained that demonstrating ineffective assistance from IRCP "requires a showing that [petitioner's] underlying trial-counsel IAC claim is substantial."[258] The court did not further specify, but its holding establishes that showing the underlying claim is substantial is part of demonstrating either that IRCP counsel performed deficiently by failing to raise the (substantial) claim, as discussed in Part IV above, or that showing substantiality suffices to establish any *Strickland* prejudice in the *Martinez/Trevino* context, or both.[259]

Also potentially notable is a footnote in *Rudin v. Myles*, a Ninth Circuit panel decision involving a question of potential tolling of the statute-of-limitations deadline.[260] The petitioner presented arguments seeking statutory tolling under 28 U.S.C. § 2244(d)(2), as well as arguments seeking equitable tolling. Although the court denied statutory tolling, footnote thirteen of the majority's opinion included a short

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Nguyen in *Detrich* was simply a matter of substandard drafting by the plurality, and Judge Nguyen's misunderstanding of what the plurality's standard actually required. The plurality's introduction of its discussion of *Martinez/Trevino* element (2) plainly stated the position that meeting element (2) does require showing something; that is, a showing of that which is "demanded under" element (1), i.e., that the claim which will never be afforded a meaningful opportunity for meaningful review is substantial. *Id.* at 1245 (plurality opinion). Unfortunately, the plurality's subsequent reiterations of that requirement were less than precise; twice, the plurality began sentences by appearing to state that no prejudice showing was required in a given IRCP situation. *Id.* Hence Judge Nguyen's purported disagreement, as evidenced by her reference to the plurality's statement that a "prisoner need show only that his PCR counsel performed in a deficient manner," without also considering the (qualified) sentence that followed. *Id.* at 1261 (Nguyen, J., concurring). A closer examination of the plurality's assertions, such as the one Judge Nguyen quoted, reveals that both assertions were qualified by a second part of the sentence beginning with "over and above." *Id.* at 1245 (plurality opinion). What followed the "over and above" phrase was consistent language stating that establishing *Martinez/Trevino* element (1) satisfied the required prejudice showing under element (2). *Id.* at 1245-46. And, on that matter, the plurality and the five-judge dissent functionally agreed, and Judge Nguyen initially agreed. *Id.* at 1245-46 (plurality opinion); *id.* at 1261 (Nguyen, J., concurring); *id.* at 1265 (Graber, J., dissenting).

257. *Id.* at 1245-46 (plurality opinion); *id.* at 1261 (Nguyen, J., concurring); *id.* at 1265 (Graber, J., dissenting).

258. 28 U.S.C. § 2254(e)(2); Dickens v. Ryan, 740 F.3d 1302, 1321-22 (9th Cir. 2014) (en banc).

259. *Dickens*, 740 F.3d at 1321-22; *see supra* text accompanying notes 210-12.

260. No. 12-15362, 2015 U.S. App. LEXIS 3823, at *26 n.13 (9th Cir. Mar. 10, 2015).

discussion of the potential implications of *Martinez* on a statutory tolling argument.[261]

Notably for our purposes here, the Court explained the "factual predicate" of Rudin's post-conviction-IAC claim: post-conviction counsel's deficient performance (based on counsel's abandonment of his client and failure to file a timely state post-conviction petition), and that Rudin was "prejudiced by his deficient performance . . . *when the Nevada Supreme Court declined to toll the time of [counsel]'s abandonment and barred Rudin's state petition as untimely.*"[262] Although this statement was dicta, it articulates a straightforward understanding that a petitioner is "prejudiced" for purposes of *Strickland* analysis when post-conviction counsel's failures resulted in no meaningful merits review by the state court.[263]

In the Sixth Circuit, we return again to *Leberry* for a similar approach. In that case, the court implicitly found prejudice from post-conviction counsel's failures when those failures resulted in the default of the trial-IAC claims in federal habeas, and, therefore, denial of any meaningful merits review of those claims.[264]

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261. *Id.* Footnote thirteen of the majority opinion reads as follows:

> In *Coleman v. Thompson*, 501 U.S. 722, 755 . . . (1991), the Court noted that a habeas petitioner may have a constitutional right to the assistance of effective counsel in collateral proceedings, where state collateral review is the first place a prisoner can present an ineffective assistance claim. *See id.*; *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1315 . . . (2012) ("*Coleman v. Thompson* left open . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."). *But see Buenrostro v. United States*, 697 F.3d 1137, 1139[-]40 (9th Cir. 2012) ("*Martinez* did not decide a new rule of constitutional law."). Rudin does not explicitly articulate a claim for ineffective assistance of her state [PCR] counsel, but we notice that this claim nonetheless pervades her claim for equitable tolling. Assuming *arguendo* that Rudin had stated such a claim, and that this Court were to recognize the constitutional right left open by *Coleman* and acknowledged by *Martinez*, Rudin may have qualified for statutory tolling under 28 U.S.C. § 2244(d)(1)(D).

Id.

262. *Id.* (emphasis added).

263. But don't just take my word for it: the Office of the Attorney General of California has explicitly asserted the same argument to the federal court. The State argued that, in *Martinez* and *Trevino*, "the default was a failure to present a claim at all, and the prejudice for the ineffectiveness finding was the inability of the state court to conduct a merits review." Respondents Brief in Response to Petitioner's Brief Addressing Exceptions to Procedural Default for First Group of Defaulted Claims 5, Branner v. Mitchell, No. 3:90-cv-3219-JD (N.D. Cal. Nov. 17, 2014) (addressing exceptions to procedural default for the first group of defaulted claims). The State then immediately reiterated this understanding, argued that "Martinez created a narrow exception to allow for a claim to be reviewed at least one time, *thereby 'fixing' the prejudice resulting from the deficiency of state collateral counsel*—i.e., in the absence of counsel's deficient performance, a petitioner would obtain a merits review of his claims." *Id.* (emphasis added).

264. Leberry v. Howerton, 583 F. App'x 497, 502 (6th Cir. 2014). The Sixth Circuit ordered

In the Eighth Circuit, the *Sasser II* court's orders reveal its conclusion that determining the substantiality of the underlying trial-IAC claims was important for determining whether *Martinez/Trevino* element (2) could be satisfied in that case; if the claims were substantial, then denial of any meaningful opportunity for meaningful merits review was unacceptable under *Martinez/Trevino*.[265]

Other courts have applied the same reasoning.[266]

There is a line of cases that takes a different, more rigid—and incorrect—approach, primarily arising from the Ninth Circuit panel decision in *Clabourne v. Ryan*.[267] The *Clabourne* court tried to extract holdings from the fractured *Detrich* opinion by counting votes for majority support for a given proposition.[268] According to the court's counting, a majority of the *Detrich* panel supported the proposition that a petitioner must show both *Strickland* deficient performance and prejudice from post-conviction counsel in order to overcome a procedural default under *Martinez/Trevino*.[269] The court then wedged *Strickland* language into the *Martinez/Trevino* context by concluding that a petitioner must show "(a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the

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the district court on remand to consider, in the course of determining "actual prejudice" from the *Martinez* cause, "whether the particular [IATC] claims defaulted by Leberry are *sufficiently* substantial to overcome the default." *Id.* (emphasis added). The court's qualification of "substantial" suggests the court found the defaulted IAC claims substantial enough that being denied any meaningful review of the claims because his post-conviction counsel failed to raise them in state court prejudiced Leberry enough to meet *Martinez*'s IAC-of-IRCP counsel requirement. *Id.*

265. *Sasser II*, 743 F.3d 1151, 1151 (8th Cir. 2014).

266. Dosch v. Dooley, No. 1:14-CV-01016-CBK, 2014 U.S. Dist. LEXIS 177456, at *6-9 (D.S.D. Dec. 22, 2014) (explaining that post-conviction counsel's failures would have precluded any merits review of the underlying claim, before concluding that "[u]nder principles of equity and law, these practices cannot be excused or condoned," and, thus, the petitioner's default was excused, and the court would allow further litigation of the claim's merits); Landrum v. Anderson, No. 1:96-cv-641, 2013 U.S. Dist. LEXIS 138635, at *13-14 (S.D. Ohio Sept. 26, 2013) (concluding that post-conviction counsel's deficient performance for failing to raise a claim "was prejudicial because it prevented consideration of the claim on the merits by the Ohio courts and ultimately in habeas corpus"), *adopted by* Landrum v. Anderson, No. 1:96-cv-641, 2014 U.S. Dist. LEXIS 72640 (S.D. Ohio May 28, 2014); Hairston v. Folino, No. 2:12-cv-313, 2012 U.S. Dist. LEXIS 159708, at *11 (W.D. Pa. Oct. 15, 2012) (recommending that Rule 59(e) motion be granted following *Martinez* and explaining that the "prejudice prong of the [*Strickland*] test is satisfied by the petitioner's total involuntary exclusion from the criminal appellate process"); Landrum v. Anderson, No. 1:96 CV 641, 2012 U.S. Dist. LEXIS 118501, at *18 (S.D. Ohio Aug. 22, 2012) (finding prejudice from post-conviction counsel's failures because the default precluded merits review of a substantial claim by the Sixth Circuit), *adopted by* Landrum v. Anderson, No. 1:96-cv-641, 2012 U.S. Dist. LEXIS 171777 (S.D. Ohio Dec. 4, 2012).

267. 745 F.3d 362, 376-77 (9th Cir. 2014).

268. *Id.*

269. *Id.* at 376.

deficient performance, the result of the post-conviction proceedings would have been different."[270]

But, *Clabourne*'s analysis on this issue is mistaken, and should not be considered supporting authority for several reasons.[271] First, the court conceded that its approach of cobbling together a majority view by counting votes from a fractured en banc opinion is not endorsed by the Supreme Court and is, in fact, the subject of a circuit split.[272] Thus, in those circuits that do not follow the vote-aggregation method of construing a holding from a circuit court en banc opinion, neither *Clabourne*'s reasoning, nor its approach, should be considered valid or authoritative in any way.

Second, the court's vote-counting is flawed. The *Clabourne* panel failed to recognize what the *Detrich* dissent was actually saying in its assertion, that a petitioner must demonstrate both deficient performance and prejudice.[273] True, the dissent used traditional *Strickland* language of "deficient performance" and "prejudice."[274] But the dissent also recognized that a petitioner is prejudiced by post-conviction counsel's failures which result in a procedural default of a claim, thereby denying the prisoner a meaningful opportunity for a meaningful merits review.[275] In other words, the *Detrich* dissent said yes, a petitioner must still show "prejudice" from post-conviction counsel's deficient performance because that is what the *Strickland* paradigm requires. But then the *Detrich* dissent proffered a substantive explanation of what satisfies that

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270. *Id.* at 377. Some district courts have cited this language in *Clabourne* to likewise require that a prisoner must show a reasonable probability of a different result in post-conviction proceedings but for post-conviction counsel's deficient performance in order to excuse a default. *See, e.g.*, Runningeagle v. Ryan, No. CV-98-1903-PHX-PGR, 2014 U.S. Dist. LEXIS 140289, at *25-26 (D. Ariz. Oct. 2, 2014). Those district courts that have followed *Clabourne* are, with only two exceptions, confined to district courts in Tennessee and within the Ninth Circuit. *See, e.g.*, *id.*; Duncan v. Carpenter, No. 3:88-00992, 2014 U.S. Dist. LEXIS 110595, at *48-49 (M.D. Tenn. Aug. 11, 2014). Other courts have also articulated the same reading of *Martinez/Trevino* element (2) without citing *Clabourne*, but those courts are mistaken for the same reasons identified here. *See, e.g.*, Bland v. Pash, No. 15-0041-CV-W-GAF-P, 2015 U.S. Dist. LEXIS 72234, at *6-9 (W.D. Mo. June 4, 2015).

271. *Clabourne* also erred by at least purporting to use the traditional *Coleman* "cause and prejudice" analysis for overcoming a procedural default in the *Martinez/Trevino* context. *See Clabourne*, 745 F.3d at 375. That error is somewhat mitigated by the fact that the court functionally just adopted the "substantiality" inquiry—*Martinez/Trevino* element (1)—as the measure of *Coleman* prejudice, while applying *Martinez/Trevino* element (2)—showing IAC of post-conviction counsel—as *Coleman* "cause." *See supra* notes 68-69 and accompanying text.

272. *Clabourne*, 745 F.3d at 376 n.3.

273. Detrich v. Ryan, 740 F.3d 1237, 1265 (9th Cir. 2013) (Graber, J., dissenting).

274. *Id.*

275. *See id.* at 1268.

"prejudice" requirement that comports with what the plurality—without explicitly using the label of "prejudice"—would have required.[276]

Moreover, the *Detrich* dissent's primary point of contention was not what a petitioner needed to show to satisfy *Martinez/Trevino* element (2), but rather those judges' conclusion that, on the record in that case, the petitioner could not establish that his defaulted claims were substantial, and, thus, there was no need for further judicial review of the case.[277] Judge Nguyen's concurrence actually addresses the matter more substantively. But, her concurring opinion is internally contradictory, and predicated on a misreading of what the *Detrich* plurality was substantively requiring to establish *Martinez/Trevino* element (2).[278]

So, the *Clabourne* court's requirement for demonstrating prejudice is *not* actually supported by a cobbled-together majority in *Detrich*, and, in fact, contravenes such a majority. The difference between the standards contemplated by the plurality, the dissent, and Judge Nguyen's concurrence is more a matter of labels; they seemingly agreed on the matter of substance. But, *Clabourne* failed to recognize the substantive agreement, noted the labeling difference, and then grafted its own substantive interpretation into the analysis.

Put differently still, a majority of judges (Judge Graber with the plurality and Judge Nguyen) in *Detrich* said that *Strickland* requires prejudice from post-conviction counsel's failures, while the plurality implicitly said the same. And, a different majority of judges (those joining Judge Fletcher and those joining Judge Graber)—initially joined by Judge Nguyen—added that prejudice in this context means default of a claim thereby denying a prisoner any meaningful opportunity for meaningful merits review.[279] But the *Clabourne* court missed the mark by erroneously concluding that the majority of judges in *Detrich* were saying: "*Strickland* requires prejudice from post-conviction counsel's failures, *and* 'prejudice' in this context means a reasonable probability of a different outcome in post-conviction proceedings."[280]

Third, the court's articulation of the "usual *Strickland* standard" as applicable in the *Martinez/Trevino* context is unfaithful to both *Strickland* itself and to *Martinez*. *Strickland* asks whether there is a reasonable probability of a different outcome but for counsel's

276. *See id.*

277. *Id.*

278. *See supra* note 256 and accompanying text.

279. *Id.* at 1245-46 (plurality opinion); *id.* at 1261 (Nguyen, J., concurring); *id.* at 1265 (Graber, J., dissenting).

280. *See* Clabourne v. Ryan, 745 F.3d 362, 377 (9th Cir. 2014).

failures,[281] with the "ultimate focus of inquiry" being the "fundamental fairness" of the proceeding in question and whether the result of the particular proceeding is unreliable due to a breakdown in the adversarial process when counsel performs deficiently.[282] So, when the claim in question is a trial-IAC claim, prejudice exists when there is a reasonable probability of a different result but for trial counsel's failures, or when confidence in the reliability of the verdict is undermined due to counsel's failures.[283]

Thus, in the context of overcoming a default of a trial-IAC claim via *Martinez/Trevino*, the relevant question under *Clabourne*'s approach would become whether there is a reasonable probability of a reasonable probability of a different outcome at trial but for post-conviction counsel's deficient performance. Those double-headed reasonable probabilities are nonsense. Moreover, they either: (1) dilute what a petitioner would need to show, or (2) impermissibly enhance what a petitioner would need to show.

On one hand, if a "reasonable probability" for IAC is some quantum less than "more likely than not,"[284] or the "preponderance of the evidence,"[285] then a "reasonable probability of a reasonable probability" must be a still-lower standard, not a requirement of showing that the post-conviction court *would have* granted post-conviction relief, as the *Clabourne* court concluded, or a requirement of showing that the outcome of trial *would have* been different but for trial counsel's deficient performance.[286] Furthermore, the *Clabourne* standard removes entirely what the Supreme Court identified as the "ultimate inquiry" in an IAC claim, namely the fundamental fairness of the proceeding and whether the outcome is unreliable due to the breakdowns in the adversary process caused by counsel's failures.[287]

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281. Strickland v. Washington, 466 U.S. 668, 694-95 (1984).

282. *Id.* at 696; *see also, e.g.*, Jackson v. Bradshaw, 681 F.3d 753, 760 (6th Cir. 2012) (explaining that "[a] defendant is not accorded his Sixth Amendment right to counsel if 'counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result'" (quoting *Strickland*, 466 U.S. at 686)).

283. *Strickland*, 466 U.S. at 686. This is also consistent with the prejudice standard articulated in *Brady v. Maryland*, 373 U.S. 83 (1963), from which the Court cribbed in its *Strickland* ruling. Prejudice from a *Brady* violation is demonstrated by showing that the disclosure of the exculpatory evidence would have undermined confidence in the verdict. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 434-35 (1995); Gumm v. Mitchell, 775 F.3d 345, 363 (6th Cir. 2014).

284. *Strickland*, 466 U.S. at 693-94 (rejecting the "more likely than not" standard of prejudice); *see* Porter v. McCollum, 558 U.S. 30, 44 (2009).

285. *Strickland*, 466 U.S. at 694 (rejecting the "preponderance of the evidence" standard).

286. *See id.*

287. *See id.* at 686.

On the other hand, if the *Clabourne* standard is construed as being an outcome-determinative showing, by which a prisoner must show that his underlying trial-IAC claim is a meritorious or even a winning—rather than just "substantial"—claim in order to show prejudice from post-conviction counsel's deficient performance, then that, too, contravenes the Supreme Court's rule. It demands more than what *Martinez/Trevino* require at the preliminary inquiry stage.[288]

Finally, *Clabourne* should not be relied upon as authority for the simple reason that it contradicts earlier-issued published opinions in *Detrich* and *Dickens*.[289]

B. So Now What?

Answering the question of how to assess prejudice from post-conviction counsel's deficient performance should start with reframing the question. Instead, ask and then identify what the court intended to accomplish by *Martinez* and *Trevino*—to create an avenue by which a prisoner could overcome a procedural default of a claimed violation of a bedrock, constitutional right, thereby ensuring a meaningful opportunity to obtain a meaningful merits review of that constitutional claim. That understanding leads inexorably to the following conclusion: ineffective assistance of IRCP counsel can be demonstrated—and *Martinez/Trevino* element (2) thereby established—if counsel failed to properly and fully raise a claim that was substantial, depriving the prisoner of any meaningful chance to litigate the claim and any meaningful merits review of the claim.

That conclusion, in turn, is supported by the text of *Martinez* itself. The Court explained the responsive options a state has when a petitioner asserts that his default can be excused based on IAC of IRCP counsel.[290] The State can argue that "the [IATC] claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding *did not perform* below constitutional standards."[291] In *Martinez*, "[n]owhere does the

288. For further explanation of why the *Clabourne* court's approach creates an "impractical application of *Martinez*," see Robin C. Konrad, *Post-Conviction and Prejudice: The Ninth Circuit's Application of* Martinez *in Pending Capital Cases*, 7 PHX. L. REV. 289, 308 n.102 (2013).

289. *See, e.g.*, United States v. Sinisterra, 237 F. App'x 467, 471 (11th Cir. 2007) (stating that the court "adopted the rule that a prior decision of the circuit (panel or *en banc*) *cannot be overruled by a later panel* but only by the court sitting *en banc* or by the United States Supreme Court" (emphasis added)).

290. Martinez v. Ryan, 132 S. Ct. 1309, 1319 (2012).

291. *Id.* (emphasis added).

Court mention that a state could answer by arguing that post-conviction counsel's substandard performance did not prejudice petitioner" in post-conviction proceedings.[292] This can be taken as evidence that the Court viewed prejudice from post-conviction counsel's deficient performance to be self-evident—the prisoner was prejudiced by virtue of being denied a meaningful opportunity for a meaningful merits review of his substantial constitutional claim.

Trevino likewise supports the same, by explaining that the *Martinez/Trevino* exception is necessary because, where it applies, "a lawyer's failure to raise [a trial-IAC] claim during initial-review collateral proceedings, could . . . deprive a defendant of any review of that claim at all."[293] The Court further reiterated the same understanding, explaining that a prisoner will be denied any opportunity at all for review of a constitutional claim if the claim is one that was required to be litigated in IRCP, but was not due to counsel's failures.[294]

Furthermore, although the "traditional" *Strickland* prejudice inquiry should be inapplicable in the *Martinez/Trevino* context, the result is the same even if we invoke the language of the traditional *Strickland* prejudice inquiry. Post-conviction counsel's failure to raise the substantial claim is analogous to the "deficient performance" element under the traditional *Strickland* analysis.[295] And, the deprivation of any meaningful opportunity for investigation and factual development, leading to deprivation of any chance for a meaningful merits review of the substantial claim, is analogous to the "prejudice" element under *Strickland*.[296]

Support for this conclusion is drawn directly from *Martinez* and *Trevino*, as well as the language of *Strickland*. As the Supreme Court explained, habeas courts determining the question of prejudice from deficient performance by counsel "should be concerned with

292. Konrad, *supra* note 288, at 321.

293. Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013).

294. *Id.* at 1921. Interestingly, the Court used quotation marks around the word "ineffectiveness" when referencing "a lawyer's 'ineffectiveness' during an [IRCP]," which is further evidence that the Court recognized that a *Strickland* ineffectiveness inquiry is different in the *Martinez/Trevino* context. *See id.*

295. *See supra* Part IV.

296. *See supra* Part IV. We also see shades of this line of reasoning in the recent order granting habeas relief in *Barnett*. Memorandum and Order at 167, Barnett v. Roper, 941 F. Supp. 2d 1099 (E.D. Mo. Aug. 18, 2015) (No. 4:03-cv-00614-ERW) (explaining that "[c]onsidering the substantial and compelling nature of Mr. Barnett's underlying claim . . . the Court believes Mr. Barnett would have received relief from the [state post-conviction court] under his [trial-IAC claim], had he received an evidentiary hearing," and then explaining why Barnett would have likely received an evidentiary hearing but for IRCP counsel's failures).

whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."[297] And, that concern for protecting the "foundation for our adversary system" from breakdowns that occur due to post-conviction counsel's failures was the first of three reasons that drove the Court's holding first in *Martinez*, and then in *Trevino*.[298] *Trevino* made clear that the absence of any meaningful investigative opportunity and any meaningful merits review of a substantial claim subverts protection of "a bedrock principle in our justice system."[299] And, when the "critically important" right to effective counsel that lies at "the foundation of our adversary system" has been subverted,[300] confidence in the reliability of the verdict is undermined, thereby establishing the fundamental definition of *Strickland* prejudice.[301] Indeed, the Court found such subversion sufficiently harmful—prejudicial—to a prisoner to carve out an equitable exception to the normal procedural default rules that were well-settled for decades.[302]

Finally, the logic articulated in Judge Fletcher's *Detrich* plurality distills the answer nicely. Allowing satisfaction of *Martinez/Trevino* element (2) by showing that post-conviction counsel failed to raise a substantial claim that is, consequently, never to be investigated or reviewed meaningfully, "is necessary to harmonize the second *Martinez* requirement with the rest of the *Martinez* framework."[303] If a petitioner would be required to show that he has a reasonable probability of a different outcome in post-conviction proceedings "in order to satisfy the second *Martinez* requirement," however, "the prisoner would have to show, as a condition for excusing his procedural default of a claim, that he would succeed on the merits of that same claim."[304] "But if a prisoner were required to show that the defaulted trial-counsel IAC claims" would fully prevail on the merits "in order to satisfy the second *Martinez* requirement, this would render superfluous the first *Martinez*

297. Strickland v. Washington, 466 U.S. 668, 696 (1984); *see also* Williams v. Taylor, 529 U.S. 362, 390-91 (2000).

298. *See Trevino*, 133 S. Ct. at 1917, 1921 (citing Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012)).

299. *Id.* at 1917; *Martinez*, 132 S. Ct. at 1317.

300. *Trevino*, 133 S. Ct. at 1917, 1921; *Martinez*, 132 S. Ct. at 1317.

301. *Strickland*, 466 U.S. at 696.

302. *See id.*

303. Detrich v. Ryan, 740 F.3d 1237, 1246 (9th Cir. 2013).

304. *Id.*

requirement of showing that the underlying [constitutional] claims were 'substantial'—that is, that they merely had 'some merit.'"[305]

VI. CONCLUSION

The Court's decisions in *Martinez* and *Trevino* have the potential to be among the most significant entries to the Court's habeas jurisprudence since *Strickland* itself.[306] That which was barred for decades is now available to prisoners, giving significance to post-conviction proceedings, a part of the criminal justice system that has long been neglected or given short shrift by the States.[307] That the Court has now recognized that equity demands a prisoner be given a meaningful opportunity for factual development of a substantial claim, followed by at least one chance for a meaningful merits review of that substantial claim is, itself, significant.[308] That the Court based that equitable development on concerns for protecting bedrock constitutional rights is even more significant.[309] Nevertheless, how the federal courts interpret and apply the thorny substantive questions *Martinez* and *Trevino* identified, and discussed in this article and others, will ultimately be the true measure of how serious we, the people, are about genuinely protecting those fundamental constitutional rights.

305. *Id.*

306. *See* Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2131-32 (2014).

307. *See id.*

308. *See supra* Part V.

309. *See supra* Part V.