

Washington Law Review

Volume 90 | Number 1

3-1-2015

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Michael Ellis

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Recommended Citation

Michael Ellis, Notes and Comments, *A Tale of Three Prejudices: Restructuring the "Martinez Gateway"*, 90 Wash. L. Rev. 405 (2015).

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A TALE OF THREE PREJUDICES: RESTRUCTURING THE “MARTINEZ GATEWAY”

Michael Ellis*

Abstract. *Martinez v. Ryan* opened a door previously closed to federal habeas petitioners. In the past, where attorney negligence or a pro se defendant’s lack of legal knowledge caused ineffective-assistance-of-trial-counsel claims to be procedurally defaulted, those claims were likely lost forever. Now, following *Martinez*, petitioners get a second chance should they satisfy the Supreme Court’s four-pronged test. The *Martinez* test, however, is not a simple one. This Comment addresses some problems concerning the four-pronged test, including multiple and conflicting standards for the same element, tensions between *Martinez* and the underlying *Strickland v. Washington* ineffective-assistance-of-counsel standard, and confusion where the same term of art is used in different contexts. The proposed modifications would simplify *Martinez* for petitioners—ideally resulting in more evidentiary hearings exploring underlying ineffective-assistance-of-trial-counsel claims in federal district court.

INTRODUCTION

In the vast majority of cases, litigants in the United States get a single bite of the apple. The issue, case, or appeal may be waived, barred by the passage of time, or simply lost on the merits. The litigant is then precluded from raising the issue or claim in a subsequent proceeding. The same principle generally applies to habeas corpus—if a petitioner fails to raise a claim at the appropriate moment or before the correct court, that ground for relief could very well be forfeited forever. When a state court dismisses or rejects a habeas petitioner’s alleged grounds for relief on a procedural basis (for example, the failure to comply with a statute of limitations), federal courts will deem such claims “procedurally defaulted.”¹ Out of deference to the state court’s prior determination, federal habeas courts generally will not adjudicate such defaulted claims.² While there are a variety of mechanisms by which a

* The author was a judicial extern in the Chambers of Judge Robert Lasnik of the District Court for the Western District of Washington from January to March 2014. As an extern, the author assisted in drafting the order in *Weber v. Sinclair*, No. C08-1676RSL, 2014 WL 1671508 (W.D. Wash. Apr. 28, 2014), cited throughout this Comment.

1. *Coleman v. Thompson*, 501 U.S. 722, 728–30 (1991).

2. *Id.*

habeas petitioner may resurrect barred claims, each carries a high burden of proof.³ The most common method of breathing life into a procedurally defaulted claim requires the habeas petitioner to demonstrate both “cause” for not raising the claim below and “prejudice” from not being allowed another shot at the merits in a federal proceeding.⁴

Petitioners seeking to resurrect ineffective-assistance-of-counsel claims once faced the same gauntlet as all other procedurally defaulted habeas grounds for relief.⁵ If a petitioner fails to raise an ineffective-assistance-of-counsel claim in an earlier state court proceeding, it becomes exceedingly difficult to reach the merits of that ground for relief during any subsequent federal review.⁶ This situation was exacerbated by the United States Supreme Court’s 1991 decision in *Coleman v. Thompson*,⁷ which held that an attorney’s ineffective assistance could not constitute the “cause” required for a petitioner to resurrect a procedurally defaulted claim.⁸

In 2012, the Supreme Court narrowly opened the door previously sealed by *Coleman*. Under *Martinez v. Ryan*,⁹ petitioners can now use either their state post-conviction review (PCR) counsel’s ineffectiveness or their own status as a pro se litigant as the “cause” necessary to excuse a procedural default.¹⁰ Part of the Court’s reasoning was that effective assistance of counsel is a “bedrock principle in our justice system.”¹¹ Due to a variety of factors—including the need for both an expanded

3. See Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 336 (2010) (describing how the Supreme Court, in its cases after *Fay v. Noia*, 372 U.S. 391 (1963), “ratcheted up the cause and prejudice standard under the auspices of the Court’s equitable authority over the writ”); Morgan Suder, Comment, *Harmonizing Equitable Exceptions: Why Courts Should Recognize an “Actual Innocence” Exception to the AEDPA’s Statute of Limitations*, 49 SAN DIEGO L. REV. 1283, 1286 (2012) (noting that “[p]risoners rarely meet the extremely high burden [for the actual innocence exception] because the standard for proving innocence is so high”).

4. See *Coleman*, 501 U.S. at 750; Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM. & MARY L. REV. 2071, 2115 (2014) (noting that “the most common way to argue that a procedural default ought not to apply is for the prisoner to demonstrate ‘cause and prejudice’”).

5. See, e.g., *Bonds v. Vail*, No. C09–5239 RJB/KLS, 2009 WL 3713067, at *9 (W.D. Wash. Nov. 4, 2009) (noting that “[u]nder *Coleman*, an error of appellate counsel on a discretionary appeal simply cannot constitute cause to excuse a procedural default in a federal habeas proceeding”).

6. See, e.g., Kovarsky, *supra* note 3, at 336.

7. 501 U.S. 722 (1991).

8. *Id.* at 753–54.

9. ___ U.S. ___, 132 S. Ct. 1309 (2012).

10. See *id.* at 1315, 1318.

11. *Id.* at 1317.

record and new counsel—direct review is often not the most appropriate procedural phase for adjudicating ineffective-assistance-of-trial-counsel (IATC) claims.¹² One of the Court’s primary concerns was that, where a state required an IATC claim to be initially raised on collateral review, an incompetent counsel or the petitioner’s own unfamiliarity with the legal system could result in a procedural default.¹³

However, the *Martinez* test is not a simple one.¹⁴ It requires a petitioner to establish four elements concerning his or her defaulted claim: (1) the claim is “substantial”; (2) the state PCR counsel was ineffective or there was no PCR counsel; (3) the claim was initially heard in state PCR proceedings; and (4) the claim was required, under state procedural law, to be raised in the state PCR proceeding.¹⁵ While the Supreme Court subsequently altered the fourth prong,¹⁶ *Martinez* still controls the first three. Although courts refer to the *Martinez* test in different ways,¹⁷ this Comment will style it as the “*Martinez* gateway,”¹⁸ due largely to its procedural similarities with the “actual innocence gateway.”¹⁹

12. *See id.* at 1318.

13. *See id.* at 1316. Where a state forces petitioners to initially raise IATC claims on collateral review, a procedural default would bar any court from ever being able to adjudicate that ground for relief. Under *Coleman*, a PCR attorney’s negligence does not qualify as “cause,” so a defense counsel’s error in an initial PCR proceeding could not be used to demonstrate “cause and prejudice.” Further, as the state procedural rule would be both independent of the federal ground as well as adequate to support the judgment, the Supreme Court “on direct review of the state proceeding could not consider or adjudicate the claim.” *Id.*

14. *See, e.g.*, Robin C. Konrad, *Post-Conviction and Prejudice: The Ninth Circuit’s Application of Martinez in Pending Capital Cases*, 7 PHOENIX L. REV. 289, 319–27 (2013) (describing complications that have arisen concerning the various “prejudice” determinations).

15. *See Martinez*, 132 S. Ct. at 1318–21.

16. *See Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911, 1921 (2013) (modifying the fourth *Martinez* prong so that a petitioner may take advantage of *Martinez* where a state’s procedural framework “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”).

17. The *Martinez* standard has been referred to by a number of different names in various courts. *See, e.g.*, Langdeaux v. Lund, No. C12-4081-MWB, 2014 WL 2093860, at *10 (N.D. Iowa May 20, 2014) (“the exception found in *Martinez v. Ryan*”); Givens v. Jindal, No. 13-00089-BAJ-SCR, 2014 WL 68722, at *2 (M.D. La. Jan. 8, 2014) (“*Martinez v. Ryan*”); Fodor v. Palmer, No. 3:12-cv-00330-MMD-VPC, 2013 WL 3864245, at *3 (D. Nev. July 23, 2013) (“a claim under *Martinez v. Ryan*”).

18. At least one scholar has previously used the term “*Martinez* gateway.” Nancy J. King, *Enforcing Effective Assistance After Martinez*, 122 YALE L.J. 2428, 2433 (2013); *see also* Toliver v. Pfister, 13 C 8679, 2014 WL 4245788, at *5 (N.D. Ill. Aug. 27, 2014) (quoting King, *supra*).

19. The actual innocence gateway also requires a petitioner to make a certain showing in order to overcome a procedural default and have the underlying claims heard on the merits. *Schlup v. Delo*, 513 U.S. 298, 314 (1995). In this manner it functions similarly to the “cause and prejudice” petitioners must show under *Coleman* in order to reach their substantive claims. If satisfied, both

The *Martinez* test is not without its problems. The exact language of the opinion is open to interpretation, as the Court included conflicting definitions for the same element.²⁰ There are also inherent tensions between *Martinez* and the incorporated *Strickland v. Washington*²¹ ineffective-assistance-of-counsel standard.²² Further, the Court did not go far enough to ensure that the high burden placed on petitioners by *Strickland* does not swallow the equitable exception designed in *Martinez*.

This Comment analyzes, and offers suggestions for improving, two facets of *Martinez* that prove troublesome for lower courts and are overly burdensome on federal habeas petitioners. Part I briefly outlines federal habeas law including the “cause and prejudice” equitable exception. Part II examines *Strickland v. Washington* and the ineffective-assistance-of-counsel standard. Part III analyzes both *Coleman v. Thompson* and *Martinez v. Ryan*, the two central cases in this Comment. Part IV examines the *Martinez* “substantiality” prong. It argues that federal district courts should impose a lower burden for “substantial” IATC claims and conduct a greater number of evidentiary hearings on the underlying grounds for relief. Part V argues that, as all three potential prejudice determinations scattered throughout *Martinez/Coleman* look to the same underlying issue—trial counsel’s alleged ineffectiveness—all such analyses should be adjudicated under the same, lower standard of “substantiality,” as opposed to a full *Strickland* showing of “actual prejudice.” Federal district courts should utilize these suggestions to allow more habeas petitioners through the “*Martinez* gateway.” This would result in more potentially meritorious IATC claims being adjudicated on the record—an outcome that could grant justice to some who did not get a fair shake at the trial level.

gateways allow a federal habeas petitioner to overcome a procedural default and have their claims adjudicated on the merits.

20. Compare *Martinez*, 132 S. Ct. at 1318 (describing the first prong as requiring a “substantial” showing which has “some merit,” as analogized to *Miller-El v. Cockrell*, 537 U.S. 322 (2003)), with *Martinez*, 132 S. Ct. at 1319 (defining an “insubstantial” claim as one that “does not have any merit or that . . . is wholly without factual support”). See *infra* Part IV.

21. 466 U.S. 668 (1984).

22. See *Martinez*, 132 S. Ct. at 1318. Under the *Strickland* two-pronged test, a court must “first determine whether counsel’s representation ‘fell below an objective standard of reasonableness’” and then “ask whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 688, 694).

I. HABEAS CORPUS IN THE UNITED STATES

In order to understand *Martinez*'s place in the federal habeas system, it is necessary to examine habeas corpus both generally and in the context of procedural default. This Part begins with a big-picture overview of federal habeas law. Next, it discusses the doctrine of procedural default as well as the various equitable exceptions that can potentially resurrect a forfeited claim, in particular "cause and prejudice."

A. *A (Very) Brief History of Habeas*

The doctrine of habeas corpus is built around the simple tenet that "no man would be imprisoned contrary to the law of the land."²³ This principle was given constitutional significance in the Suspension Clause.²⁴ The Framers were able to take advantage of centuries of legal development through English constitutional history.²⁵ This shared cultural experience, along with the Framers' own tribulations during the Revolutionary Era,²⁶ motivated them to permanently enshrine habeas rights in the fledgling Constitution.²⁷

23. *Boumediene v. Bush*, 553 U.S. 723, 740 (2008). This idea stems from the Magna Carta. See Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 924 (2012) ("[T]he [writ of habeas corpus] enjoyed a long and celebrated link with English conceptions of due process rooted in Magna Carta or the 'Great Charter.'"). Habeas is traced to Chapter Thirty-Nine, which translated from the original Latin reads, "[n]o freemen shall be taken or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so except by the lawful judgment of his peers or by the law of the land." MAGNA CARTA, ch. 39 (1215), translation from <http://www.bl.uk/collection-items/magna-carta-1215>. While there has been some debate concerning the viability of a link between the Magna Carta and modern habeas, the document is widely considered the root of common-law habeas corpus. See Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1060–61 (1947) (arguing that "whatever *lex terre* [the law of the land] does mean . . . it is nothing like the notion of 'due process,' as it has been developed, chiefly in the United States").

24. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

25. See *Boumediene*, 553 U.S. at 740–45 (discussing the "painstaking" development of the Writ).

26. See *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 337–38 (2001) (Scalia, J., dissenting) ("This was a distinct abuse of majority power, and one that had manifested itself often in the Framers' experience: temporarily but entirely eliminating the 'Privilege of the Writ' for a certain geographic area or areas, or for a certain class or classes of individuals."); James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1071 (2008) ("Every member of the Constitutional Convention that convened in Philadelphia 110 years after the Habeas Corpus Act of 1679 knew about it. English history was their history, after all, so they knew that the Great Writ had been forged on the anvil of struggle between King and Parliament over nearly a century.").

27. See *Boumediene*, 553 U.S. at 741 (noting that "habeas relief often was denied by the courts or

Habeas corpus has played a prominent role in American jurisprudence dating back to the nation's founding.²⁸ Chief Justice John Marshall described it as a "great constitutional privilege."²⁹ Other documents from the founding generation share this viewpoint.³⁰ As the Supreme Court has explained, "[a]lthough in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty."³¹ The core of common law habeas has been that no civilized society can permit its government to deprive citizens of liberty without accountability.³² The use and adjudication of the writ has long been viewed as an "incident of federal judicial power."³³

A habeas claim is in essence an allegation that the government is holding the petitioner in custody in violation of law.³⁴ The writ functions as a remedy for those whose continued restraint is deemed unlawful.³⁵ Should a reviewing court determine that the restraint is illegal, "the individual is entitled to his immediate release."³⁶ Habeas relief can take a variety of forms, including new trials or sentencing proceedings.³⁷

As an essential mechanism in the system of government established by the Framers, habeas law has developed over the centuries into its own

suspended by Parliament"). Justice Kennedy comments that "[t]his history was known to the Framers" and played an influential role in their decision to grant considerable protection to habeas corpus in the Constitution. *See id.* at 742–43.

28. *See id.* at 742–45.

29. *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). Many different Justices have expressed a similar sentiment over the years. *See, e.g.*, *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.").

30. THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citing Blackstone for the conclusion that the Habeas Corpus Act is a remedy for the "fatal evil" of "arbitrary imprisonments . . . the favorite and most formidable instruments of tyranny").

31. *Fay v. Noia*, 372 U.S. 391, 401 (1963).

32. *See id.* at 402 ("[The Writ's] root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.").

33. *McNally v. Hill*, 293 U.S. 131, 135 (1934) (noting that this power is "implicitly recognized by" the Suspension Clause).

34. *See, e.g.*, 28 U.S.C. § 2241(c) (2012); *see also* Larry Yankle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 999 (1985).

35. *See Fay*, 372 U.S. at 401–02.

36. *Id.* at 402.

37. *See, e.g.*, *Ramchair v. Conway*, 601 F.3d 66, 78 (2d Cir. 2010) (affirming district court grant of a new trial); *Chioino v. Kernan*, 581 F.3d 1182, 1186 (9th Cir. 2009) (directing district court to remand matter to state trial court for resentencing).

brand of unique and often perplexing litigation. Even with extensive congressional interference,³⁸ the Court has long noted that justice is at the core of the Great Writ.³⁹ The fact that Congress, despite being granted wide-ranging powers in the Constitution, can suspend the writ only in very limited circumstances demonstrates that the writ is a “vital instrument for the protection of individual liberty.”⁴⁰

As all fifty states have their own distinct legal systems,⁴¹ the federal habeas pathway creates a means by which persons convicted at the state level can have their federal constitutional claims adjudicated in a federal forum.⁴² State court defendants must generally exhaust their own state’s PCR procedures before the federal alternative becomes available.⁴³ As such, many habeas proceedings can extend years after conviction as a

38. See, e.g., John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 263–64 (2006) (noting how to habeas critics, federal court review of state criminal judgments has created “federal-state friction, disrupted the state’s legitimate interest in finality, and undermined effective law enforcement”); Emily G. 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 (2012) (discussing how AEDPA advocates had “identified habeas practice . . . as the source of unacceptable delay between conviction and execution”).

39. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 515 (1986) (Stevens, J., concurring) (mentioning that “the history of the Court’s jurisprudence . . . unambiguously requires that we carefully preserve the exception which enables the federal writ to grant relief in cases of manifest injustice”); *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) (describing habeas corpus as “a constitutional guaranty specifically designed to prevent injustice”).

40. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008); see also Daniel J. Meltzer, *Habeas Corpus, Suspension and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 15–16 (noting that as *Boumediene* held that “the Suspension Clause affirmatively confers a right to habeas corpus review,” Congress is limited to the suspension rationale enumerated in the Constitution).

41. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 504 (3d ed. 2001) (“In theory, each state is sovereign. Each one has its own legal system.”).

42. See 28 U.S.C. § 2254(a) (2012) (“[Federal courts] shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463 (1963) (arguing that debate over habeas corpus assumes “it is the proper function of the writ to provide a determination of the merits of all federal constitutional claims arising in state criminal proceedings, no matter how fully these have been canvassed in the state system”); Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1316 (1961) (stating that “[i]t is a fundamental purpose of the habeas corpus jurisdiction to secure the federal rights of state prisoners through an independent proceeding in a federal forum”).

43. See 28 U.S.C. § 2254(b)(1) (requiring that “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant”).

petition makes its way through both the state and federal court systems.⁴⁴

B. Contemporary Federal Habeas Procedure: The Anti-Terrorism and Effective Death Penalty Act

The Anti-Terrorism and Effective Death Penalty Act (AEDPA),⁴⁵ enacted in 1996, governs contemporary federal habeas procedure.⁴⁶ Under AEDPA, federal courts are required to review state court decisions with a substantial amount of deference, and can only grant habeas relief in strictly limited circumstances.⁴⁷ Congress' goal in enacting AEDPA was to promote "'comity, finality, and federalism' by giving state courts 'the first opportunity to review [the] claim,' and to 'correct' any 'constitutional violation in the first instance.'"⁴⁸ The statute also altered various elements of federal habeas procedure.⁴⁹ While AEDPA's supporters believed that the power of federal courts had been sufficiently restrained,⁵⁰ the various equitable exceptions discussed in the following Section have survived the statute's passage.⁵¹

One provision of federal habeas law amended by AEDPA, 28 U.S.C. § 2254, greatly limits the discretion available to federal district courts

44. *See, e.g.,* *Coleman v. Thompson*, 501 U.S. 722, 726–29 (1991). Roger Coleman's state conviction was upheld by the Virginia Supreme Court in 1983 and the Supreme Court did not uphold the dismissal of his federal habeas petition until 1991. *See id.* at 727–29.

45. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

46. *See, e.g.,* Blume, *supra* note 38, at 270–71 (described various procedural changes brought about by AEDPA).

47. 28 U.S.C. § 2254(d)–(e); *see, e.g.,* *Renico v. Lett*, 559 U.S. 766, 778 (2010) ("The Court of Appeals' ruling in Lett's favor failed to grant the Michigan courts the dual layers of deference required by AEDPA."). *Compare* *Williams v. Taylor*, 529 U.S. 362, 386 (2000) ("AEDPA plainly sought to ensure a level of 'deference to the determinations of state courts,' provided those determinations did not conflict with federal law or apply federal law in an unreasonable way." (internal citation omitted)), *with id.* ("On the other hand, it is significant that the word 'deference' does not appear in the text of [AEDPA] itself.").

48. *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (internal citations omitted).

49. *See, e.g.,* Blume, *supra* note 38, at 270–71 (listing various procedural changes wrought by AEDPA including a statute of limitations for habeas corpus cases, stringent restrictions on successive petitions, limitations on the availability of evidentiary hearings, and changes to exhaustion requirements).

50. *See id.* at 259–60 (noting that AEDPA supporters believed the bill would end "the years of waiting to carry out executions" and "the days of a lone federal judge or panel of judges routinely finding constitutional defects in state court convictions").

51. *See* *McQuiggin v. Perkins*, ___ U.S. ___, 133 S. Ct. 1924, 1932 (2013) ("The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage."); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 450 (2007) (noting that "AEDPA actually did little to alter existing default doctrine").

when they entertain an application for the writ of habeas corpus filed by a prisoner in state custody.⁵² Under § 2254(d), when a claim has been adjudicated on the merits in state court, a federal court may only grant habeas relief if that adjudication

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.⁵³

Further, § 2254(e)(2) mandates that, where the factual basis of a claim has not been developed in a state court proceeding, a federal district court can only hold an evidentiary hearing under very limited circumstances.⁵⁴ While AEDPA poses serious obstacles to relief for habeas petitioners to overcome,⁵⁵ any further discussion of its impact on habeas is beyond the scope of this Comment.

C. *Equitable Exceptions (or How to Revive a Defaulted Habeas Claim)*

A federal district court cannot address every federal constitutional claim a petitioner raises. Along with other doctrines,⁵⁶ procedural default may bar a district court from reviewing a petitioner's asserted grounds

52. See AEDPA, Pub. L. No. 104-132, § 104, 110 Stat. 1214 (1996); Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 1398 (2011) (per curiam) (“As amended by AEDPA, 28 U.S.C. § 2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner.”).

53. 28 U.S.C. § 2254(d)(1)–(2) (2012).

54. 28 U.S.C. § 2254(e)(2) (“If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that (A) the claim relies on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”); see also *Pinholster*, 131 S. Ct. at 1400–01 (“Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take evidence in an evidentiary hearing.”).

55. See Kimberly A. Thomas, *Substantive Habeas*, 63 AM U. L. REV. 1749, 1775 (2014) (“In summary, the Court, both before and after passage of AEDPA, has constrained state prisoners’ access to federal court by creating significant procedural barriers, and it has also answered many of the pressing procedural questions left open by AEDPA. Despite these barriers, state inmates have persisted in their pursuit of federal review and, at least in some cases, have surmounted the procedural hurdles, albeit in smaller percentages than before AEDPA.”).

56. See, e.g., Blume, *supra* note 38, at 270–71 (listing various AEDPA procedural hurdles).

for relief.⁵⁷ A habeas claim is procedurally defaulted where the state court has “declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement.”⁵⁸ In such a case, a ruling on the alleged federal constitutional issue would be superfluous as the decision already rests on independent and adequate state procedural grounds.⁵⁹ Procedural default, although modified in some cases, has survived the enactment of AEDPA.⁶⁰

After a claim is procedurally defaulted, two primary options exist by which a federal habeas petitioner can revive the claim for a federal district court to adjudicate on the merits.⁶¹ A petitioner can either show “cause and prejudice” for the procedural default or “demonstrate that the failure to consider the claim will result in a fundamental miscarriage of justice.”⁶² This Comment focuses on the “cause and prejudice” standard and does not address the miscarriage-of-justice equitable exception.⁶³

The “cause and prejudice” standard for excusing a procedural default was first articulated by the Supreme Court in 1973.⁶⁴ The test is based generally on principles of comity and finality: federal courts should respect and show deference to state court judgments unless a habeas

57. See *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Walker v. Martin*, ___ U.S. ___, 131 S. Ct. 1120, 1127 (2011) (noting that “federal habeas relief will be unavailable when (1) ‘a state court [has] declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement,’ and (2) ‘the state judgment rests on independent and adequate state procedural grounds’” (quoting *Coleman*, 501 U.S. at 729–30)).

58. *Coleman*, 501 U.S. at 729–30; see also Stephanie Dest, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 264 (1989) (noting that “[s]uch defaults usually involve traditional ‘make it or waive it’ defenses, such as contemporaneous objections rules, in which appeals are forfeited if not made in a timely fashion”).

59. See *Coleman*, 501 U.S. at 730; Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2341 n.163 (2007) (noting that the *Coleman* decision declared that “as a general rule, all state procedural defaults are fatal in federal habeas proceedings”). Cf. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (“Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground.”).

60. See Kovarsky, *supra* note 51, at 450 (noting that “AEDPA actually did little to alter existing default doctrine”).

61. See *Coleman*, 501 U.S. at 750.

62. *Id.* The miscarriage-of-justice exception manifests when petitioners raise actual-innocence gateway claims. See *Schlup v. Delo*, 513 U.S. 298, 309 (1995).

63. For more information on the miscarriage-of-justice equitable exception, see Jay Nelson, *Facing up to Wrongful Convictions: Broadly Defining “New” Evidence at the Actual Innocence Gateway*, 59 HASTINGS L.J. 711, 712–17 (2008).

64. *Davis v. United States*, 411 U.S. 233, 242 (1973) (noting that “a claim once waived . . . may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of ‘cause’”).

petitioner can demonstrate a compelling rationale to do otherwise.⁶⁵ “Cause,” as described in *Coleman v. Thompson*, must be a force external to the petitioner that “cannot fairly be attributed to him.”⁶⁶ While there appears to be little direct guidance on the issue, prejudice—at a minimum—demands the same standard as that required to demonstrate an ineffective-assistance-of-counsel claim under *Strickland v. Washington*.⁶⁷ Because the word prejudice appears in a number of different contexts in this Comment, the prejudice required for the equitable exception will be referred to as “*Coleman* prejudice.”

II. INEFFECTIVE-ASSISTANCE-OF-COUNSEL: *STRICKLAND V. WASHINGTON*

Ineffective-assistance-of-counsel constitutes one of the most common habeas grounds for relief asserted by petitioners.⁶⁸ A petitioner alleging

65. See *Engle v. Isaac*, 456 U.S. 107, 135 (1982) (noting that “[t]he terms ‘cause’ and ‘actual prejudice’ are not rigid concepts; they take their meaning from the principles of comity and finality”); Rae K. Inafuku, *Coleman v. Thompson—Sacrificing Fundamental Rights in Deference to the States: The Supreme Court’s 1991 Interpretation of the Writ of Habeas Corpus*, 34 SANTA CLARA L. REV. 625, 647 (1994) (discussing how “[t]he Court found that [the cause and prejudice] standard avoided an unnecessary retrial by balancing the state interests against federal concerns protecting constitutional rights”).

66. *Coleman*, 501 U.S. at 753. There has been debate about what exactly constitutes sufficient “cause” to excuse a procedural default. See Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1148 (1986) (discussing how “[t]he lack of any definitive elaboration of the meaning of cause . . . [has] resulted in considerable uncertainty, especially with regard to whether or when unintentional defaults may constitute cause”).

67. Discussed *infra* Part II. See Meltzer, *supra* note 66, at 1149 (“The Supreme Court’s discussion of the prejudice prong of the test has been no more illuminating.”). A number of courts have utilized the *Strickland* standard to determine whether a petitioner has suffered “prejudice” where the underlying claim is for ineffective-assistance-of-counsel. See, e.g., *Robinson v. Ignacio*, 360 F.3d 1044, 1054 (9th Cir. 2004) (“When conducting a ‘prejudice’ analysis in the context of [overcoming a procedural default], this court applies the standard outlined in *Strickland*.”); *Smith v. Dixon*, 14 F.3d 956, 976 (4th Cir. 1994) (noting that the court is “already required to conduct this same [prejudicial impact] evaluation in the context of determining prejudice under *Strickland* and in deciding whether to excuse Smith’s procedural default”); see also John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 684 (1990) (describing how “habeas and Sixth Amendment doctrine converge, for both require a showing of ‘prejudice’”); cf. *Felder v. Johnson*, 180 F.3d 206, 215 n.12 (5th Cir. 1999) (mentioning that “without *Strickland* prejudice at a minimum, there is not even cause to overcome the procedural bar”); *United States v. Dale*, 140 F.3d 1054, 1056 n.3 (D.C. Cir. 1998) (“Circuit precedent suggests that habeas prejudice may require a greater showing, namely, ‘by a preponderance of the evidence, that the outcome of his trial would have been different but for the errors in question.’” (internal citation omitted)); *Zinzer v. Iowa*, 60 F.3d 1296, 1299 n.7 (8th Cir. 1995) (“The ‘actual prejudice’ required to overcome the procedural bar must be a higher standard than the *Strickland* prejudice required to establish the underlying claim for ineffective assistance of counsel.”).

68. See Marceau, *supra* note 4, at 2092 (“Two of the most commonly raised claims by prisoners

ineffective-assistance-of-counsel must satisfy the two-pronged test mandated by *Strickland v. Washington*.⁶⁹ To demonstrate ineffective-assistance-of-counsel, *Strickland* places the burden on the defendant to show that “counsel’s performance was deficient” and that “the deficient performance prejudiced the defense.”⁷⁰ As the Court concluded, “[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.”⁷¹

Under *Strickland*’s first prong, defense counsel is given a strong presumption of having represented a client in an effective, and therefore constitutional, manner.⁷² Further, if a decision by defense counsel can be characterized as one of legitimate trial strategy, counsel has not been ineffective.⁷³ The Court held that, as part of the test for determining whether defense counsel was ineffective, the reasonableness of counsel’s actions should be judged based on the facts of the case at hand.⁷⁴ This standard is largely to discourage courts from engaging in “intrusive post-trial inquiry into attorney performance” and to “eliminate the distorting effects of hindsight.”⁷⁵ This rationale makes sense because a subsequent trial on effectiveness in every criminal case would impose an unbearable burden on an already taxed criminal justice system.⁷⁶

To satisfy *Strickland*’s second prong, a petitioner must “affirmatively prove prejudice.”⁷⁷ *Strickland* prejudice “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial.”⁷⁸ To show prejudice, a petitioner must demonstrate that “there is a

seeking federal habeas relief are Sixth Amendment claims pursuant to *Strickland v. Washington* and due process claims based on *Brady v. Maryland*.”).

69. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

70. *Id.* at 687.

71. *Id.*

72. *Id.* at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.”).

73. See *id.*

74. *Id.* at 690.

75. *Id.* at 689–90.

76. See Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 439 (1996) (noting that critics of *Strickland* argue that “the strong deference given to a trial counsel’s performance indicates the Court’s great concern for judicial economy and attorneys’ reputations”).

77. *Strickland*, 466 U.S. at 693.

78. *Id.* at 687.

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁷⁹ This standard poses a tough challenge for petitioners to overcome.⁸⁰ A petitioner who successfully alleges ineffective-assistance-of-counsel by demonstrating both prongs is entitled to some form of relief, be it a re-trial or new sentencing phase.⁸¹ The *Strickland* two-pronged test is a critical element of both decisions discussed in the following Part: *Coleman v. Thompson* and *Martinez v. Ryan*.

III. *COLEMAN v. THOMPSON AND MARTINEZ v. RYAN*: THE INTERSECTION OF "CAUSE AND PREJUDICE" AND INEFFECTIVE-ASSISTANCE-OF-COUNSEL

As this Comment focuses on *Martinez v. Ryan* and the changes to "cause and prejudice" brought about by that decision, the opinion's four-prongs will now be analyzed in detail. This Part will primarily concern the first and second *Martinez* prongs. However, *Martinez* cannot be understood without first looking at the decision it modified, *Coleman v. Thompson*.

A. *Coleman v. Thompson: Barring Ineffective-Assistance-of-Counsel from Constituting "Cause"*

Coleman v. Thompson did more than merely lay out the "cause and prejudice" test in an articulated form for lower federal courts. The decision also barred a petitioner from using his counsel's deficient performance as "cause" to excuse a procedural default.⁸² Roger Coleman was convicted of rape and capital murder in the early 1980s.⁸³ After the Virginia Court of Appeals upheld his conviction, Coleman filed a writ of habeas corpus in Virginia state court alleging a variety of new federal constitutional claims that he had not raised on direct appeal.⁸⁴ After these claims were denied, Coleman failed to file a notice of appeal for his habeas claims in a timely manner, missing the Virginia procedural

79. *Id.* at 694.

80. *See* Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task.").

81. *See, e.g.,* Crace v. Herzog, No. C12-5672 RBL/KLS, 2013 WL 3338498, at *6 (W.D. Wash. July 2, 2013) (granting petitioner a writ of habeas corpus and ordering that the petitioner be released unless the state elects to retry him within ninety days).

82. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

83. *Id.* at 726-27.

84. *Id.* at 727.

deadline by three days.⁸⁵ Based on that oversight, the Virginia Supreme Court dismissed the petition on appeal.⁸⁶ When attempting to raise these same claims in a subsequent federal habeas petition, the district court concluded that those grounds for relief were procedurally barred by the state court's earlier dismissal.⁸⁷

On appeal to the United States Supreme Court, Coleman asserted that his attorney's failure to timely file his state habeas appeal was a sufficiently grievous error to constitute "cause" to excuse the procedural default.⁸⁸ The Court rejected this argument, holding that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'"⁸⁹ Because an attorney acts on the petitioner's behalf, the attorney's errors are not external to the petitioner.⁹⁰ As such, attorney error cannot constitute "cause" for the procedural default.⁹¹ This result is problematic because a petitioner's potentially valid federal constitutional claims may rest on the effectiveness of his representation.⁹²

B. Martinez v. Ryan Creates a Narrow Exception to "Cause and Prejudice"

In 2012, the Supreme Court created an exception to the *Coleman* absolute bar: under limited circumstances, a petitioner can now demonstrate "cause" through the deficient performance of his state PCR counsel.⁹³ Luis Mariano Martinez was convicted of two counts of sexual conduct with a minor in Arizona.⁹⁴ Arizona procedural law mandated that petitioners bring IATC claims in a state PCR proceeding as opposed

85. *Id.*

86. *Id.*

87. *Id.* at 728.

88. *Id.* at 752.

89. *Id.* at 753.

90. *See id.*

91. *See Inafuku, supra* note 65, at 649 (noting that "[t]he attorney's actions failed to meet the 'cause' standard because they were not instigated by a force external to the attorney").

92. *See id.* at 652 ("The result in *Coleman*, however, is fundamentally unsettling."). Roger Coleman was executed on May 20, 1992 following the Supreme Court's judgment and the Virginia governor's decision not to intervene. Peter Applebome, *Virginia Executes Inmate Despite Claim of Innocence*, N.Y. TIMES (May 21, 1992), www.nytimes.com/1992/05/21/us/Virginia-executes-inmate-despite-claim-of-innocence.html.

93. *See Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1315 (2012).

94. *Id.* at 1313.

to doing so on direct appeal.⁹⁵ Although Martinez’s counsel did file a state collateral review claim, counsel failed to raise any IATC grounds for relief.⁹⁶ When Martinez eventually sought federal habeas relief in the District Court for the District of Arizona, the court denied the IATC claims because they were procedurally defaulted under Arizona law.⁹⁷ As the *Coleman* rule controlled, Martinez was unable to show the “cause” necessary to excuse his procedural default.⁹⁸

The Supreme Court decided that it was “necessary to modify the unqualified statement in *Coleman* that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.”⁹⁹ The Court held that litigating either pro se or with appointed, yet ineffective, counsel during an initial state PCR proceeding could constitute “cause” that would excuse a procedural default.¹⁰⁰ The Court emphasized that, where initial review was in a state PCR proceeding, no court would ever review the prisoner’s claims if PCR counsel’s errors could not establish “cause.”¹⁰¹ Even so, the “*Martinez* gateway” can only be utilized to revive procedurally defaulted IATC claims—other possible habeas grounds for relief remain barred.¹⁰²

This Section will first describe the Court’s rationale behind modifying the *Coleman* rule. It will then analyze the four-pronged *Martinez* standard by discussing how each element has been interpreted, with a particular emphasis on the first and second *Martinez* prongs as those are the primary focus of this Comment.

1. *The Supreme Court’s Rationale for Modifying the Coleman Bar*

The Supreme Court addressed a number of issues concerning the adjudication of IATC claims on direct appeal. First, writing for the Court, Justice Kennedy recognized that “[i]neffective-assistance claims

95. *Id.* at 1314; *see also* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) (noting that “ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit.”).

96. *Martinez*, 132 S. Ct. at 1314.

97. *Id.* at 1315 (noting that “the District Court denied the petition, ruling that Arizona’s preclusion rule was an adequate and independent state-law ground to bar federal review”).

98. *Id.* at 1314.

99. *Id.* at 1315.

100. *Id.* at 1317.

101. *Id.* at 1316.

102. *Id.* at 1320 (“The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings . . .”).

often depend on evidence outside the trial record.”¹⁰³ Due to various factors inherent in direct appeals,¹⁰⁴ the Court found that “there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral review stage.”¹⁰⁵ The Court also discussed the availability of state appointed counsel for collateral review proceedings¹⁰⁶ and how, “[w]ithout the help of an adequate attorney, a prisoner will have . . . difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim.”¹⁰⁷

Second, the Court was concerned about the complexity of some state procedural rules for untrained *pro se* petitioners.¹⁰⁸ As the Court noted, “[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance [of counsel], which often turns on evidence outside the trial record.”¹⁰⁹ Further, *Martinez* recognized that “[t]he prisoner, unlearned in the law, may not comply with the State’s procedural rules or may misapprehend the substantive details of federal constitutional law.”¹¹⁰

Finally, the Court noted that ineffective-assistance-of-counsel claims differ from many other habeas grounds for relief often raised by petitioners.¹¹¹ For example, defendants “cannot rely on a court opinion or the prior work of an attorney addressing [the ineffective-assistance-of-counsel] claim.”¹¹² This means that *pro se* defendants are unable to utilize prior attorney work product—leaving petitioners to figure out the legal issues entirely on their own. Another issue concerns how defendants may be forced to retain the same trial counsel for their direct appeal.¹¹³ As another commentator stated, “[t]his often places trial

103. *Id.* at 1318.

104. *Id.* (noting the difficulty of expanding the record given abbreviated deadlines).

105. *Id.*

106. *Id.* at 1319.

107. *Id.* at 1317.

108. *See id.* at 1317.

109. *Id.*

110. *Id.*; *see also* *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (discussing how “many [criminal defendants] have learning disabilities and mental impairments”); *Kowalski v. Tesmer*, 543 U.S. 125, 140–41 (2004) (Ginsburg, J., dissenting) (noting how “[a] Department of Education study found that about seven out of ten inmates fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article. An inmate so handicapped surely does not possess the skill necessary to pursue a competent *pro se* appeal” (internal citation omitted)).

111. *See Martinez*, 132 S. Ct. at 1317.

112. *Id.*

counsel in the untenable position of having to assert his own ineffectiveness.”¹¹⁴

The Court’s rationales in *Martinez* were similar to those in a prior decision, *Massaro v. United States*.¹¹⁵ While *Massaro* did not mandate that IATC claims be reserved for collateral review, the Court did observe that IATC claims may be more effectively adjudicated in that setting.¹¹⁶ Joseph Massaro was indicted and convicted in the District Court for the Southern District of New York for racketeering.¹¹⁷ On direct appeal, Massaro did not raise any claims relating to IATC.¹¹⁸ When Massaro later attempted to raise an IATC claim through a petition for a writ of habeas corpus, the district court found the claim procedurally defaulted due to Massaro’s failure to raise it on direct appeal.¹¹⁹

Massaro argued before the Supreme Court that “claims of ineffective assistance of counsel need not be raised on direct appeal, whether or not there is new counsel and whether or not the basis for the claim is apparent from the trial record.”¹²⁰ A major point in the Court’s analysis was that “[t]he trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them.”¹²¹ The Court continued by noting that “[w]ithout additional factual development . . . an appellate court may not be able to ascertain whether the alleged error was prejudicial.”¹²² Once again writing for the Court, Justice Kennedy specifically espoused the benefit of a reviewing court hearing testimony from the allegedly deficient trial counsel.¹²³

The Court was concerned that not allowing these claims to be initially raised during a PCR proceeding would “creat[e] the risk that defendants would feel compelled to raise the issue before there had been an

113. See Eve B. Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 711 (2007) (noting that “[a]lthough some states have recognized the importance of new counsel, they do not make it a requirement”).

114. *Id.*

115. 538 U.S. 500 (2003).

116. See *id.* at 506.

117. *Id.* at 502.

118. *Id.* Massaro’s conviction was upheld on direct appeal by the Second Circuit Court of Appeals. *Id.*

119. *Id.* *Massaro* does not directly control *Martinez* as Massaro filed his habeas petition challenging a federal conviction, as opposed to a state conviction. Compare 28 U.S.C. § 2255 (2012), with 28 U.S.C. § 2254.

120. *Massaro*, 538 U.S. at 503.

121. *Id.* at 505.

122. *Id.*

123. *Id.*

opportunity fully to develop the factual predicate for the claim” and that “the issue would be raised for the first time in a forum not best suited to assess those facts.”¹²⁴ On direct appeal “appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate.”¹²⁵ Without the benefit of an expanded record, “[e]ven meritorious claims would fall when brought on direct appeal if the trial record were inadequate to support them.”¹²⁶ The Court did not, however, go so far as to hold that IATC claims must be reserved for collateral review.¹²⁷ While *Massaro* dealt with IATC claims arising in the federal system, the Supreme Court’s concerns were similar to those raised in *Martinez* concerning state law.

2. *How to Pass Through the “Martinez Gateway”: The Supreme Court’s Four-Pronged Standard*

Following *Martinez*, the “cause” required to excuse a procedural default can now be established where:

(1) the claim of “ineffective assistance of trial counsel” 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 “ineffective-assistance-of-trial-counsel claim”; and (4) state law *requires* that an “ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.”¹²⁸

Meeting the four-pronged *Martinez* standard satisfies the “cause” element of “cause and prejudice” to overcome a procedural default.¹²⁹ There is more debate about how *Martinez* affects the prejudice prong, an issue that will be developed later in this Comment.¹³⁰

The first prong of *Martinez* requires a petitioner to “demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a

124. *Id.* at 504.

125. *Id.* at 504–05.

126. *Id.* at 506.

127. *Id.* at 509.

128. *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911, 1918 (2013) (emphasis and alterations in original) (quoting *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1318–19, 1320–21 (2012)).

129. *Martinez*, 132 S. Ct. at 1318.

130. *See infra* Part V.

substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.”¹³¹ A petitioner must therefore present a “substantial” showing of both *Strickland* “deficient performance” and “actual prejudice” in order to satisfy the first prong.¹³²

However, *Martinez* is not clear about exactly what a “substantial” IATC claim entails. Whatever “substantial” means, it certainly requires something less than a full meritorious *Strickland* ineffective-assistance-of-counsel claim.¹³³ The Court used two different terms when discussing the first prong: “some merit” and “substantial.”¹³⁴ While the Court has given attorneys, judges, and pro se petitioners some guidance on how to interpret these terms,¹³⁵ taken together the exact standard remains unclear. This issue is further developed below.¹³⁶

There is an important difference between a *Strickland* claim with “merit” and an IATC claim with “some merit.” A meritorious ineffective-assistance-of-counsel claim satisfies the *Strickland v. Washington* two-pronged test.¹³⁷ For example, the Ninth Circuit approach when adjudicating ineffective-assistance-of-counsel directly parrots *Strickland v. Washington*.¹³⁸ In *Cook v. Ryan*,¹³⁹ the court held that “[a]n IAC [ineffective-assistance-of-counsel] claim has *merit* where (1) counsel’s ‘performance was unreasonable under prevailing professional standards,’ and (2) ‘there is a reasonable probability that but for counsel’s unprofessional errors, the result would have been different.’”¹⁴⁰ This standard mirrors the familiar *Strickland* test for evaluating ineffective-assistance-of-counsel claims.¹⁴¹ Other circuits also refer to “merit” when adjudicating a writ of habeas corpus based on

131. *Martinez*, 132 S. Ct. at 1318.

132. *See id.*

133. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1738 (5th ed. 2011) (defining “substantial” as “[c]onsiderable in importance, value, degree, amount, or extent”); *Substantial*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/substantial?show=0&t=1420508387> (last visited Feb. 13, 2015) (defining “substantial” as “being largely but not wholly that which is specified”).

134. *Id.*

135. *See id.* at 1318–19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003), as analogous support).

136. *See infra* Part IV.

137. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

138. *See Cook v. Ryan*, 688 F.3d 598, 610 (9th Cir. 2012).

139. 688 F.3d 598 (9th Cir. 2012)

140. *Id.* at 610 (emphasis added).

141. *See, e.g., Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001) (describing *Strickland* as a “seminal decision”).

ineffective-assistance-of-counsel claims.¹⁴²

The Supreme Court in *Martinez*, however, does not talk in terms of “merit”; instead, it refers to “some merit.”¹⁴³ The Court cited *Miller-El v. Cockrell*¹⁴⁴ as an analogous standard.¹⁴⁵ *Miller-El* concerned the denial of a certificate of appealability under 28 U.S.C. § 2253.¹⁴⁶ Under § 2253(c)(1)(A), federal habeas petitioners challenging their state conviction must obtain a certificate of appealability in order to appeal a district court denial of habeas corpus to a Circuit Court of Appeals.¹⁴⁷

To merit a certificate of appealability under *Miller-El*, a petitioner must 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.”¹⁴⁸ The *Miller-El* standard is “demanding but not insatiable.”¹⁴⁹ A petitioner is not “require[d] . . . to prove . . . that some jurists would grant the petition for habeas corpus”; a showing that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” is sufficient.¹⁵⁰

The Court continued by describing the certificate of appealability process as involving a “general assessment of [the claim’s] merits.”¹⁵¹ *Miller-El* provided a number of different formulations of the certificate of appealability standard including: (1) “‘something more than the absence of frivolity’ or the existence of mere ‘good faith’ on his or her part”; and (2) that “a claim can be debatable even though every jurist of reason might agree . . . that petitioner will not prevail.”¹⁵² Each phrase demonstrates how the certificate of appealability standard lies somewhere between frivolity and certain success.¹⁵³ “Some merit,” therefore, as tied directly to the *Miller-El* certificate of appealability standard, likely occupies this same middle ground. Subsequent lower

142. See, e.g., *Carpenter v. Vaughn*, 296 F.3d 138, 156 (3d Cir. 2002); *Bertolotti v. Dugger*, 883 F.2d 1503, 1520 (11th Cir. 1989).

143. *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1318 (2012).

144. 537 U.S. 322 (2003).

145. *Martinez*, 132 S. Ct. at 1319.

146. *Miller-El*, 537 U.S. at 327 (2003).

147. 28 U.S.C. § 2253 (2012).

148. *Miller-El*, 537 U.S. at 336 (internal quotations and citation omitted).

149. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

150. *Miller-El*, 537 U.S. at 338.

151. *Id.* at 336.

152. *Id.* at 338 (internal citations omitted).

153. See *id.*

court decisions have taken the Court's guidance seriously, often applying the *Miller-El* standard when adjudicating the substantiality prong.¹⁵⁴

Along with “some merit,” the Court used the term “substantial” when articulating the first *Martinez* prong.¹⁵⁵ The Court explained that an IATC claim would be “insubstantial” if it “does not have any merit or that . . . is wholly without factual support.”¹⁵⁶ The Court used this phrase when discussing how a state could defeat a petitioner's *Martinez* motion by answering that their IATC claim was “insubstantial” under the first prong.¹⁵⁷ This Comment will later develop the definitional differences in how the Court described the “substantial” language in the first prong.¹⁵⁸

In order to satisfy the second *Martinez* prong, a petitioner must show that “the ‘cause’ consisted of there being ‘no counsel’ or only ‘ineffective’ counsel during the state collateral review proceeding.”¹⁵⁹ In a situation where a petitioner filed pro se, “the second requirement is satisfied simply by showing that the prisoner was not represented by counsel during state PCR proceedings.”¹⁶⁰ This is logical because otherwise *Martinez* would force a petitioner to demonstrate his own deficient performance.

Strickland prejudice arises, however, when a petitioner was represented by appointed counsel during the initial state PCR proceeding. The second prong can be satisfied in this situation only where “appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*.”¹⁶¹ Petitioners must demonstrate that their PCR counsel was ineffective and that PCR counsel's performance actually prejudiced the petitioner's defense.¹⁶² This Comment develops below exactly what level of prejudice is required by the first and second prongs, in addition

154. Compare, e.g., *Crutsinger v. Stephens*, No. 12–70014, 2014 WL 3805464, at *7 (5th Cir. Aug. 4, 2014) (“Crutsinger has failed to show that his underlying IAC [ineffective-assistance-of-counsel] claim is substantial—that is, that it has ‘some merit.’”), with *Cook v. Ryan*, 688 F.3d 598, 610 n.13 (9th Cir. 2012) (noting that “[i]n explaining that an underlying trial IAC [ineffective-assistance-of-counsel] claim must have ‘some merit,’ *Martinez* referenced, not as direct but as generally analogous support, *Miller-El v. Cockrell*”).

155. *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1318 (2012).

156. *Id.* at 1319.

157. *See id.*

158. *See infra* Part IV.A.1.

159. *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911, 1918 (2013).

160. *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013).

161. *Martinez*, 132 S. Ct. at 1318.

162. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

to the prejudice showing required by the “cause and prejudice” equitable exception.¹⁶³

The third prong requires that the state PCR proceeding was the “initial” review proceeding with respect to the IATC claim.¹⁶⁴ While the “initial” nature of the proceeding was critical to the Supreme Court’s concerns,¹⁶⁵ any further discussion is beyond the scope of this Comment.

To satisfy the fourth prong, petitioners must demonstrate that *Martinez* applies to the state in which they were convicted.¹⁶⁶ Unlike the first three *Martinez* prongs, the fourth prong has undergone substantial changes in the few years since *Martinez* was decided.¹⁶⁷ The fourth prong is also the sole *Martinez* element that the Supreme Court has addressed in a subsequent case.¹⁶⁸

When the Supreme Court decided *Martinez*, the fourth prong only included states which “require[] a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding.”¹⁶⁹ This was the case in *Martinez*, as Arizona case law mandated that IATC claims be reserved for state PCR proceedings.¹⁷⁰ The fourth prong concerns one of the core ideas underlying *Martinez*: habeas petitioners should not be unduly punished for the procedural quirks of the jurisdiction where they were convicted.¹⁷¹

States did not react positively to the *Martinez* decision.¹⁷² Many jurisdictions argued that their state’s procedural mechanisms could be

163. See *infra* Part V.

164. *Martinez*, 132 S. Ct. at 1318.

165. See *id.* (“It is within the context of this state procedural framework that counsel’s ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.”).

166. *Id.*

167. See *Trevino v. Thaler*, __ U.S. __, 133 S. Ct. 1911, 1921 (2013) (modifying the fourth *Martinez* prong so that a petitioner may take advantage of *Martinez* where a state’s procedural framework “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”).

168. See *generally id.*

169. *Martinez*, 132 S. Ct. at 1318.

170. See *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002).

171. See *Martinez*, 132 S. Ct. at 1315, 1317; Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2612 (2013) (noting that the majority was “clearly concerned about precluding federal relief of ineffective assistance of trial counsel claims when the state itself had created a procedural system that effectively prevented defendants from having an opportunity to raise the claims in state court”).

172. See Primus, *supra* note 171, at 2618 (discussing how “[n]ot surprisingly, many states have attempted to construe *Martinez* in ways that limit their post-conviction obligations”).

distinguished from Arizona's.¹⁷³ Other states argued that, as defendants were not required to reserve ineffective-assistance-of-counsel claims for collateral review, *Martinez* was distinguishable and should not be available to habeas petitioners challenging a conviction originating in their state's court system.¹⁷⁴ This led a large number of federal district courts to reject the applicability of *Martinez* based on the procedural law of the forum state.¹⁷⁵

173. States, for example, often successfully argued that *Martinez* was inapplicable where IATC claims can be brought on direct appeal. See, e.g., *Lyons v. Sinclair*, No. C12-2216 RSM-BAT, 2014 WL 3055354, at *6 (W.D. Wash. July 7, 2014).

174. See *Primus*, *supra* note 171, at 2618 (noting how “[m]any states without an absolute prohibition on raising ineffective assistance of trial counsel claims on direct appeal have seized on this distinction to argue that *Martinez* does not apply to them”).

175. See, e.g., *Dansby v. Norris*, 682 F.3d 711, 729 (8th Cir. 2012) (“*Martinez* does not apply here, because Arkansas does not bar a defendant from raising claims of ineffective assistance of trial counsel on direct appeal.”); *vacated by*, *Dansby v. Norris*, 133 S. Ct. 2767; *Arthur v. Thomas*, No. 2:01-CV-0983-LSC, 2012 WL 2357919, at *9 (N.D. Ala. June 20, 2012) (“Alabama—unlike Arizona—not only permitted such claims to be raised on direct appeal but provided a mechanism by which Arthur was able to assert a claim of ineffective assistance of counsel on direct appeal.”); *Felix v. Cate*, No. CV 11-7713-JHN (RNB), 2012 WL 2874398, at *10 (C.D. Cal. May 8, 2012) (“California does not have a procedural rule requiring that all ineffective assistance of trial counsel claims be raised by way of a collateral attack in a writ of habeas corpus, and not on direct appeal.”); *Tierney v. Abercrombie*, No. 1:11-cv-00246 LEK-RLP, 2012 WL 3776487, at *4 (D. Haw. Aug. 29, 2012) (“Hawaii, unlike Arizona, does not require that a petitioner raise ineffective assistance of trial counsel claims on collateral proceedings”); *Weekly v. Hardy*, No. 11 C 9231, 2012 WL 3916269, at *5 (N.D. Ill. Sept. 6, 2012) (“Weekly had an adequate opportunity under Illinois law to raise his ineffective assistance of counsel claims and develop a record to use during his direct appeal.”); *Phillips v. Superintendent, Ind. State Prison*, No. 3:11-CV-399-TLS, 2012 WL 6097019, at *3 (N.D. Ind. Dec. 7, 2012) (“[T]he fact that the Indiana courts will entertain an attack on competency of trial counsel in a direct appeal excludes Indiana from the *Martinez* exception”); *Foley v. White*, No. 6:00-CV-552-DCR-REW, 2012 WL 6965070, at *4 (E.D. Ky. Nov. 15, 2012) (“Kentucky still permits direct-appeal consideration. This is distinct from Arizona and renders *Martinez* inapplicable by its own terms.”); *Holmes v. Cooper*, No. 12-1350, 2013 WL 694073, at *10 (E.D. La. Jan. 22, 2013) (“Thus, under Louisiana law, direct appeal was Holmes’s initial opportunity to raise his claim of ineffective assistance of counsel”); *Buckingham v. Symmes*, No. 11-2489 (PJS/SER), 2012 WL 3612070, at *6 (D. Minn. May 15, 2012) (“*Martinez* is inapplicable because Minnesota law permitted Buckingham to raise his ineffective assistance of trial counsel claim for the first on direct appeal.”); *Heidelberg v. King*, No. 2:12cv112 KS-MTP, 2013 WL 4483234, at *6 (S.D. Miss. Aug. 19, 2013) (“Heidelberg was not required under Mississippi law to bring his ineffective assistance claims in an initial-review collateral proceeding.”); *Sheppard v. Robinson*, No. 1:00-cv-493, 2012 WL 3583128, at *7 (S.D. Ohio Aug. 20, 2012) (“Ohio law required Sheppard to raise his ineffective assistance of trial counsel claim on direct appeal.”); *Fairchild v. Trammell*, No. CIV-01-1550-D, 2013 WL 139777, at *4 (W.D. Okla. Jan. 10, 2013) (“Because Oklahoma law permits defendants to raise trial counsel ineffectiveness claims on direct appeal, the *Martinez* exception does not apply.”); *Leberry v. Howerton*, No. 3:10-00624, 2012 WL 2999775, at *1 (M.D. Tenn. July 23, 2012) (“In contrast [to Arizona], in Tennessee, ‘there is no prohibition against litigation of ineffective counsel claims on direct appeal’” (internal citation omitted)); *Hearn v. Thaler*, No. 3:12-CV-2140-D, 2012 WL 2715653, at *3 (N.D. Tex. July 9, 2012) (“Hearn acknowledges that his argument does not circumvent binding Fifth Circuit precedent that the *Martinez* exception does not apply to Texas cases.”); *Prokasky v. Glebe*, No. C12-5134

A 2013 Supreme Court decision, *Trevino v. Thaler*,¹⁷⁶ slightly modified the fourth prong of *Martinez* in response to this widespread dissent.¹⁷⁷ *Trevino* involved a federal habeas petitioner from Texas.¹⁷⁸ Unlike Arizona, Texas procedural law did not require petitioners to reserve their IATC claims for state PCR proceedings.¹⁷⁹ However, due to various elements of Texas's appellate and PCR systems,¹⁸⁰ the Court concluded that Texas law failed to afford meaningful review of IATC claims on direct review.¹⁸¹ The Court held that “a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference.”¹⁸² The new standard for the fourth prong permits *Martinez* claims where direct review of IATC claims is “virtually impossible” or “highly unlikely” to succeed, as opposed to mandating that the defendant be “required” to reserve the claim for PCR proceedings.¹⁸³

Many of the former holdout jurisdictions adopted the *Martinez* exception following *Trevino*.¹⁸⁴ These federal district courts determined

BHS/KLS, 2012 WL 3877746, at *3 (W.D. Wash. June 11, 2012) (“Unlike the prisoner in *Martinez*, Washington prisoners may raise claims alleging ineffective assistance of trial counsel on direct review.”).

176. ___ U.S. ___, 133 S. Ct. 1911 (2013).

177. *See id.* at 1921 (holding that *Martinez* applied in Texas as “[w]hat the Arizona law prohibited by explicit terms, Texas law precludes as a matter of course”).

178. *Id.* at 1915.

179. *See id.* at 1918–19; *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012) (“Accordingly, *Ibarra* is not entitled to the benefit of *Martinez* for his ineffectiveness claims, as Texas procedures entitled him to review through counseled motions for new trial and direct appeal.”).

180. *See, e.g., Robinson v. State*, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000) (noting the “many practical difficulties with requiring an appellant to claim ineffective assistance at the time of trial or immediately post-trial” including that “there is not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions” and that “in most cases, the pursuit of such a claim on direct appeal may be fruitless”); *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999) (“In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.”).

181. *See Trevino*, 133 S. Ct. at 1921 (determining that “we believe that the Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal”).

182. *Id.*

183. *See id.* at 1918, 1921.

184. *See, e.g., Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013) (“For these reasons, we conclude Arkansas did not ‘as a systematic matter’ afford *Sasser* ‘meaningful review of a claim of ineffective assistance of trial counsel’ on direct appeal.” (internal citation omitted)); *Brown v. Thomas*, No 2:11-CV-3578-RDP, 2013 WL 5934648, at *2 (N.D. Ala. Nov. 5, 2013) (“Therefore,

that their forum states did not, as with Texas, afford meaningful review of IATC claims on direct review, despite the fact that the claims could be raised.¹⁸⁵

The adoption of *Martinez* following *Trevino* was by no means universal, however. Illinois and Indiana federal district courts continue to fully reject *Martinez* based on forum state procedural law.¹⁸⁶ Federal district courts in Illinois have barred *Martinez* claims because state law allows for the development of a record for appellants to make and succeed upon IATC claims on direct appeal.¹⁸⁷ The few post-*Trevino* cases from Indiana hold similarly: because defendants are allowed to raise IATC claims either on direct appeal or in a PCR proceeding, *Martinez* does not apply.¹⁸⁸

At least three other states have intradistrict or intrastate conflicting opinions concerning the applicability of *Martinez* to federal habeas petitioners: Ohio,¹⁸⁹ Tennessee,¹⁹⁰ and Washington.¹⁹¹ The procedural

in line with *Martinez* and *Trevino*, it was proper for the Magistrate Judge to consider the merits of the Mobley claim.”); *Hughes v. Keith*, No. 12-2841, 2014 WL 67587, at *11 (E.D. La. Jan. 8, 2014) (“Based upon these similarities between Louisiana and Texas post-conviction procedures, it is likely that *Hughes* could satisfy the 4th prong of the test for application of an exception under *Martinez*”).

185. See cases cited in note 184, *supra*.

186. See, e.g., *Murphy v. Atchison*, No. 12 C 3106, 2013 WL 4495652, at *22 (N.D. Ill. Aug. 19, 2013) (“Because of this critical difference between Illinois and Texas law, *Trevino* does not apply to this case, as *Murphy* had a meaningful chance to raise an ineffective assistance of trial counsel claim in his direct proceedings.”); *Johnson v. Superintendent, Ind. State Prison*, No. 3:12-CV-690-TLS, 2013 WL 3989417, at *1 (N.D. Ind. Aug. 1, 2013) (“In Indiana, a claim that trial counsel was ineffective can be raised either on direct appeal or in the post-conviction proceedings.”).

187. See *People v. Phipps*, 933 N.E.2d 1186, 1191 (Ill. 2010) (“In examining the factual basis, the trial court must usually question trial counsel and the defendant on the alleged claims. Thus, the basis for a possible ineffective assistance claim will ordinarily appear in the record.” (internal citation omitted)); *People v. Banks*, 934 N.E.2d 435, 468 (Ill. 2010) (“The law is clear, however, that new counsel is not required in every case, and that the operative concern for a reviewing court is whether the trial court conducted an adequate inquiry into the *pro se* defendant’s claim of ineffective assistance.”); *People v. Krankel*, 464 N.E.2d 1045, 1049 (Ill. 1984) (holding that defendant should have received appointed counsel other than his originally appointed counsel concerning his motion for a new trial based on the ineffectiveness of his trial counsel).

188. See *Johnson*, 2013 WL 3989417, at *1; *Brown v. Superintendent*, No. 3:10-CV-518, 2014 WL 495400, at *9, (N.D. Ind. Feb. 6, 2014) (“Indiana law allows (and in some instances, requires) ineffective assistance claims to be raised on direct appeal.”).

189. Compare *Landrum v. Anderson*, No. 1:96-cv-641, 2014 WL 1576869, at *4 (S.D. Ohio Apr. 18, 2014) (“Thus the applicability of *Martinez* and *Trevino* to Ohio post-conviction proceedings remains unclear.”), with *Raglin v. Mitchell*, No. 1:00cv767, 2013 WL 5468227, at *7 (S.D. Ohio Sept. 29, 2013) (“This Court has found that the *Martinez* exception applies to ‘a case where, because of the way Ohio post-conviction review law is structured, the ineffective assistance of trial counsel claim has to be brought in post-conviction.’” (internal citation omitted)).

190. Compare *Rahman v. Carpenter*, No. 3:96-0380, 2013 WL 3865071, at *4 (M.D. Tenn. July 25, 2013) (“This Court is persuaded that the Tennessee courts offer a meaningful opportunity for defendants to raise ineffective assistance claims during the direct appeal process, and therefore, the

systems in place for each of these three forum states makes it a much closer call whether *Martinez* would apply post-*Trevino*.¹⁹² Although the “*Martinez* gateway” is not available to federal habeas petitioners challenging convictions from all fifty states, further discussion of the fourth *Martinez* prong is beyond the scope of this Comment.¹⁹³

IV. *STRICKLAND* AND SUBSTANTIALITY: A TROUBLED PAIRING

Martinez v. Ryan mandates that a reviewing district court make an initial determination as to the “substantial” nature of a habeas petitioner’s IATC ground for relief.¹⁹⁴ In order to satisfy this first prong, “a prisoner must . . . demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.”¹⁹⁵ This Part explores the first *Martinez* prong and offers recommendations for alleviating a number of concerns that arise out of the “substantiality” standard.

This Part first analyzes two tensions that complicate a “substantiality” analysis under the first prong. One tension comes from the language

decisions in *Martinez/Trevino* do not apply to the Tennessee courts.”), *with* *Morrow v. Brandon*, No. 3:06-0955, 2014 WL 49817, at *9 (M.D. Tenn. Jan. 7, 2014) (holding that “Tennessee’s system by ‘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.’” (internal citation omitted)). The Sixth Circuit Court of Appeals has recently held that *Martinez* in fact applies in Tennessee. *See* *Sutton v. Carpenter*, 745 F.3d 787, 792 (6th Cir. 2014) (mentioning that “like Texas, Tennessee’s procedural rules make it almost impossible for a defendant in a typical case to adequately present an ineffective-assistance claim on direct appeal”).

191. *Compare* *Lyons v. Sinclair*, No. C12-2216 RSM-BAT, 2014 WL 3055354, at *6 (W.D. Wash. July 7, 2014) (“*Martinez* is inapplicable, however, because in Washington State ineffective assistance claims can be brought on direct appeal.”), *with* *Weber v. Sinclair*, No. C08-1676RSL, 2014 WL 1671508, at *8 (W.D. Wash. Apr. 28, 2014) (“This Court therefore finds that, since direct appeal is not the appropriate venue for reviewing evidence outside the record in Washington, petitioner was denied a ‘meaningful opportunity to present a claim ineffective assistance of trial counsel on direct appeal’” (internal citation omitted)).

192. *See, e.g., State v. McFarland*, 127 Wash. 2d 322, 338 n.5, 899 P.2d 1251, 1258 n.5 (1995) (noting that “[t]here is nothing intrinsic in a claim of ineffective assistance of counsel that requires it to be considered only in a collateral proceeding such as a personal restraint petition. We regularly consider such claims on direct appeal”).

193. For more information see generally Mary Dewey, *Martinez v. Ryan: A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U. L. REV. 269 (2012); Devon Lash, *Giving Meaning to “Meaningful Enough”: Why Trevino Requires New Counsel on Appeal*, 82 FORDHAM L. REV. 1855 (2014); Primus, *supra* note 171.

194. *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1318 (2012).

195. *Id.*

utilized by the Court in *Martinez*—the varying definitions for “some merit” and “substantial” are not coextensive, despite the reference to the *Miller-El v. Cockrell* certificate of appealability standard.¹⁹⁶ The other tension arises from *Strickland* itself—the two pronged test for ineffective-assistance-of-counsel does not lend itself to such a “substantial” analysis.¹⁹⁷ Then, this Part offers a solution to alleviate these tensions. Federal district courts should apply the lower standard for finding a “substantial” IATC claim under the first prong, allowing more petitioners through the “*Martinez* gateway.”

A. *Tensions Inherent in the Martinez “Substantiality” Determination*

While *Martinez* includes a number of guideposts for petitioners attempting to navigate the first prong,¹⁹⁸ the language is at times conflicting. This conflict creates tension between the *Miller-El* certificate of appealability standard—“some merit”—and, in particular, the definition provided for “insubstantial.”¹⁹⁹ Further tensions arise because of the incorporation of *Strickland v. Washington*.²⁰⁰ The two-pronged ineffective-assistance-of-counsel test does not easily adapt to a “substantial” version as required by the *Martinez* first prong.

1. “Some Merit” Versus “Substantial”: Varying Definitions Confuse the Standard

There are inherent difficulties for determining whether an IATC claim is “substantial” for the purposes of the first prong of *Martinez*. Based solely on the dictionary, the word “substantial” is a relatively close synonym for what the Supreme Court was trying to convey through the term “some merit.”²⁰¹ Both terms imply something less than a whole yet

196. See *infra* Part IV.A.1.

197. See *infra* Part IV.A.2.

198. See *Martinez*, 132 S. Ct. at 1318–19.

199. See *id.*

200. See *id.* at 1318 (incorporating the ineffective-assistance-of-counsel standard from *Strickland v. Washington*, 466 U.S. 668 (1984)).

201. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 133, at 1668 (defining “some” as “[b]eing a portion or an unspecified number or quantity of a whole or group”); *id.* at 1738 (defining “substantial” as “[c]onsiderable in importance, value, degree, amount, or extent”); *Some*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/some> (last visited Feb. 13, 2015) (defining “some” as “being at least one—used to indicate that a logical proposition is asserted only of a subclass or certain members of the class denoted by the term which it modifies”); *Substantial*, *supra* note 133 (defining “substantial” as “being largely but not wholly that which is specified.”).

more than nothing at all. *Martinez*, however, muddies the water by providing lower courts with a contrary version of “substantial” through the definition of “insubstantial.”²⁰² This results in multiple conflicting standards that are not analogous—“insubstantial” and “some merit.” The former creates a lower burden than the latter.

As discussed above, *Martinez* provided a number of guideposts by which a lower court could interpret “substantial.” One was the *Miller-El v. Cockrell* standard for a certificate of appealability.²⁰³ This test, in essence, requires a court to find that reasonable jurists could find the outcome on a petitioner’s grounds for relief debatable.²⁰⁴ The Court also described “substantial” in terms of “some merit.”²⁰⁵ Finally, and most importantly, *Martinez* defined “insubstantial” as a claim without “any merit or that . . . is wholly without factual support.”²⁰⁶ As that phrase defines “insubstantial,” one can assume that a claim not meeting these criteria would be deemed “substantial.”²⁰⁷

These conflicting phrases provide competing definitions for what constitutes a “substantial” claim. In fact, due to the far lower burden imposed by “insubstantial,” they are relatively incompatible. “Wholly without factual support” is very different from “some merit” as defined by the *Miller-El* certificate of appealability standard. While “some merit” demands a lesser showing than that required to directly grant a writ of habeas corpus under *Strickland*, the definition of “insubstantial” appears to require much less—namely, that any level of factual support or “merit” a petitioner can muster may satisfy the standard for a “substantial” IATC claim.

2. *Problems Concerning “Substantial” Strickland IATC Claims Prior to Expanding the Record*

As discussed above, the *Strickland* standard presumes that defense counsel was effective.²⁰⁸ The onus is therefore on the petitioner to overcome that presumption²⁰⁹—a difficult task when courts view

202. See *Martinez*, 132 S. Ct. at 1319.

203. See *id.* at 1318–19.

204. See *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

205. See *Martinez*, 132 S. Ct. at 1318.

206. *Id.* at 1319.

207. *Insubstantial*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/insubstantial> (last visited Feb. 13, 2015) (defining “insubstantial” as “not substantial”).

208. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

209. See *id.*

counsel's actions and decisions deferentially.²¹⁰ But how does a district court account for this presumption when adjudicating "substantiality" under *Martinez*? Are judges supposed to factor in the possibility (or probability as the case may be) that counsel was acting within reasonable bounds during the trial when the court makes its "substantiality" determination? If reasonable actions by counsel equal a meritless ineffective-assistance-of-counsel claim, how is "some merit" measured? Further, discovery and an expanded record are generally necessary to properly adjudicate IATC claims.²¹¹ Is a district court supposed to make a determination on reasonableness before the record has been expanded to include testimony concerning a defense counsel's actions during the trial? It is not at all clear how the presumption that counsel was effective fits into the "substantial" *Strickland* finding required by *Martinez*.

As part of the process for adjudicating ineffective-assistance-of-counsel claims in the federal system, trial defense counsel often either testifies or submits some writing explaining any alleged deficiencies in his performance.²¹² This makes sense: how else is the court to determine whether a certain action was legitimate trial strategy without input from the defense counsel who made those decisions? Although many actions taken by counsel fall under this umbrella, a court cannot be sure when undertaking a preliminary "substantiality" inquiry without an expanded record. This determination requires input from trial counsel explaining their actions, preferably through live testimony subject to cross-examination.²¹³

The Supreme Court addressed a similar issue in *Massaro v. United States*.²¹⁴ Although *Massaro* involved a habeas petition arising out of a federal conviction,²¹⁵ the Court's reasoning speaks to the same issues as *Martinez*. The Court in *Massaro* was also troubled by the lack of an expanded record when adjudicating IATC claims on direct appeal.²¹⁶ Among other factors, the Court found that the opportunity to hear

210. *See id.*

211. *See Martinez*, 132 S. Ct. at 1318.

212. *See, e.g.,* Buss v. Primo, Civil No. 6:12-cv-01539-BR, 2014 WL 3817228, at *5-6 (D. Or. July 31, 2014) (counsel explained actions in an affidavit); Richardson v. United States, No. C13-373RSL, 2014 WL 2115468, at *4 (W.D. Wash. May 21, 2014) (counsel explained in a declaration why certain strategic decisions were made).

213. *See Massaro v. United States*, 538 U.S. 500, 505 (2003).

214. 538 U.S. 500 (2003).

215. *Id.* at 502.

216. *Id.* at 505.

testimony from trial counsel was key to the fair resolution of IATC claims.²¹⁷

B. Applying a Lower “Substantiality” Standard Coupled with an Increase in Evidentiary Hearings Would Resolve these Tensions

Neither of the tensions surrounding the *Martinez* “substantiality” determination has an easy fix. The former is bogged down by the presence of multiple, conflicting tests from the opinion’s language. The latter is a fundamental problem when mandating a lessened demonstration of the two-pronged ineffective-assistance-of-counsel test as *Strickland*, due to presumption of effectiveness, does not lend itself to such a reduced showing.

This Comment offers two suggestions for relieving these tensions. The first Section below argues that, due to the conflicting language, federal courts should apply the lower showing required by the Supreme Court’s definition of “insubstantial.” This issue will likely only be alleviated through a new Supreme Court opinion clarifying exactly what showing is required for a “substantial” *Strickland* claim. The second Section argues that, as IATC claims generally rely on evidence outside the trial record, district courts should conduct more evidentiary hearings, so the courts can get input from the trial defense counsel. This hearing would take place when the petitioner has already been allowed through the “*Martinez* gateway.” These suggestions would allow more claims through the “*Martinez* gateway,” providing more habeas petitioners their day in court.

1. Courts Should Apply the Supreme Court’s Definition for “Insubstantial” When Adjudicating the First Prong

Due to the conflicting definitions in *Martinez*, courts should apply the lower “insubstantial” language when adjudicating the first prong. Until the Supreme Court clarifies the issue, this results in the fairest outcome for habeas petitioners. While most courts entertaining *Martinez* motions have relied on the Court’s reference to *Miller-El* and applied the certificate of appealability test,²¹⁸ the difference in language between *Miller-El* and *Martinez* suggests that approach is inappropriate. Based on the definition of “insubstantial” later in *Martinez*, any factual basis

217. *Id.*

218. *See, e.g.,* Lutz v. Valeska, No. 1:10cv950–TMH, 2014 WL 868870, at *4 (M.D. Ala. Mar. 5, 2014).

should technically be sufficient to constitute a substantial IATC claim. While the Supreme Court likely preferred the higher *Miller-El* standard,²¹⁹ the confusion in language should be read in the petitioner's favor to allow more claims to satisfy the first prong.²²⁰ Applying a lower standard would make *Martinez* clearer for petitioners either unfamiliar with habeas law or representing themselves pro se. A lower standard should be used until the Supreme Court provides some clarification, even in the form of an opinion reaffirming the use of the *Miller-El* certificate of appealability standard.

2. *Federal District Courts Should Allow More Petitioners Through the “Martinez Gateway” and Hold More Evidentiary Hearings on the Underlying IATC Claims*

The tension between *Strickland* and “substantiality” is more difficult to resolve. Due to the difficulty in adjudicating IATC claims without an expanded record, this Comment argues that more habeas petitions raising *Martinez* should be deemed “substantial” and allowed to proceed to an evidentiary hearing. Because *Martinez* mentioned both the possibility and utility of evidentiary hearings,²²¹ lower courts should employ such measures where appropriate.

a. *An Expanded Record Is Often Required to Determine Whether a Petitioner Has Raised a Meritorious IATC Claim*

When determining whether a petitioner has alleged a “substantial” IATC claim, a federal district court will likely require an expanded record to include testimony from the petitioner's trial defense counsel. Although counsel is presumed to have acted competently,²²² a judge cannot determine whether this presumption has or can be overcome without hearing from defense counsel herself. To examine this issue further, compare the following hypothetical exchange (concerning an allegation of failure to investigate potential alibi witnesses) between trial defense counsel and the petitioner's federal habeas counsel during an evidentiary hearing:

Q: Counsel, why did you fail to investigate, find, and interview

219. See *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1318–19 (2012) (specifically citing *Miller-El* as an analogous standard).

220. Cf. *United States v. Seckinger*, 397 U.S. 203, 210 (1970) (describing that, in contract law, it is a “general maxim that a contract should be construed most strongly against the drafter”).

221. See *Martinez*, 132 S. Ct. at 1318.

222. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

witness X who could have potentially supported petitioner's alibi defense?

A: Unfortunately, the police report only listed the individual by his first name and contained no information concerning an address or phone number at which witness X could be contacted. Further, I did not believe that petitioner's alibi defense was credible or would resonate with a jury. I therefore chose to focus on other strategies to undermine the prosecution's case.

Counsel's answer likely fits within the scope of *Strickland*'s required deference—defense counsel has explained why the omission occurred as well as how it can legitimately be considered within the bounds of a reasonable trial strategy.²²³ The court does not have to agree with trial counsel's decision under *Strickland*—the decision need only be reasonable.²²⁴ Now consider the following alternate answer:

Q: Counsel, why did you fail to investigate, find, and interview witness X who could have potentially supported petitioner's alibi defense?

A: Well, I asked petitioner if he knew who witness X was and where I could contact him. Petitioner informed me of his whereabouts and added that X could substantiate his alibi that he had not been on the scene when the crime occurred. However, I did not contact witness X because I was busy with my other cases.

This answer seems more problematic under *Strickland*. Instead of describing a decision reached as part of a reasonable trial strategy, counsel here has merely decided that he did not have time to fully investigate the leads he was given by the petitioner. As such, this omission is much closer to a failure to investigate—something that could be unreasonable under *Strickland* and therefore constitute ineffective-assistance-of-counsel.²²⁵

The difference between the two scenarios above is critical to a *Strickland* analysis—the first is unlikely to constitute IATC while the latter potentially supports a colorable claim.²²⁶ However, unless the

223. See, e.g., *United States v. Miller*, 907 F.2d 994, 999 (10th Cir. 1990) (holding that the attorney “cannot be held responsible for [the defendant’s] failure to inform him of the full import and breadth of his symptoms and claimed incapacities, especially where some aspects lay beyond the scope of reasonable investigation”).

224. See *Strickland*, 466 U.S. at 687–89.

225. See, e.g., *James v. Ryan*, 679 F.3d 780, 807–10 (9th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 1579 (2013) (finding deficient performance for “fail[ing] to conduct even the most basic investigation of James’s social history”).

226. See, e.g., *id.*

record is somehow expanded to include testimony from the trial defense counsel, a district court judge cannot know what kind of answer trial counsel will give in response to a petitioner's allegations. Although it may be (and likely is) far more probable that trial counsel will give an answer that falls within the bounds of reasonable trial strategy, the court cannot know this for sure without additional information and an expanded record. Judges should therefore not dismiss a petitioner's allegations out-of-hand without an expanded record. Courts should instead proceed to an evidentiary hearing on the underlying IATC issue. To do otherwise would deny a federal habeas petitioner the potential for relief granted by the Supreme Court in *Martinez*.

b. Evidentiary Hearings Should Be Held After Progressing Through the "Martinez Gateway"

*Weber v. Sinclair*²²⁷ is as an example of a district court granting an evidentiary hearing *after* allowing a petitioner through the "*Martinez gateway*."²²⁸ In *Weber*, the federal district court was presented with a list of allegations concerning the ineffectiveness of petitioner's trial counsel.²²⁹ These alleged errors included various omissions and elements of trial strategy, including the failure to investigate witnesses and identity-focused defenses.²³⁰ The court granted the hearing, finding that "[i]n order to determine whether these allegations constitute ineffective assistance of counsel, a court would need further evidence from outside the record that explains the trial-attorney's strategy and omissions, the reasons behind these decisions, and how or why such decisions were prejudicial to petitioner."²³¹

The evidentiary hearing allowed Weber to expand the record. Weber was able to call his own witnesses, including his trial defense counsel.²³² As an example, Weber had alleged that his counsel rendered ineffective

227. No. C08-1676RSL, 2014 WL 1671508 (W.D. Wash. Apr. 28, 2014).

228. *See id.* at *10.

229. *Id.* at *8.

230. *Id.* These allegations included the failure to investigate the party where the alleged crime occurred, the failure to interview actual and potential witnesses,

failure to consider evidence of the shooter's shaved head compared to the defendant's haircut, . . . failure to adequately cross-examine and impeach the victim on the identification of the shooter, . . . failure to present evidence that an area code tattoo is common, and failure to present evidence that the nickname 'Guero Loco' is common.

Id.

231. *Id.*

232. Evidentiary Hearing, *Weber v. Sinclair*, No. C08-1676RSL (W.D. Wash.), Sept. 29, 2014, Seattle Courtroom 15106.

assistance by failing to adequately challenge the identity of the perpetrator as part of Weber's purported alibi defense.²³³ During the hearing, defense counsel was asked why he failed to use the word "alibi" during closing argument.²³⁴ Counsel responded by stating that, in his opinion, juries considered "alibi" to be a dirty word that indicated a defendant was attempting to use some excuse to escape punishment.²³⁵ Whatever the outcome, Weber was able to adjudicate his claim based on a more complete record that included testimony from his trial counsel about counsel's explanation for the alleged deficiencies.

c. AEDPA Does Not Bar Such Evidentiary Hearings

Although AEDPA made evidentiary hearings for state habeas petitioners hard to come by,²³⁶ a hearing such as the one in *Weber* should satisfy both *Martinez* and 28 U.S.C. § 2254(e)(2). Motions to pass through the "*Martinez* gateway" are only made in cases where a mistake has been made that resulted in a procedural default. These claims have therefore never been adjudicated on the merits in state court. As such, another often implicated AEDPA section, 28 U.S.C. § 2254(d), has no application under *Martinez*.²³⁷ There is often no available mechanism to immediately expand the trial court record.²³⁸ This makes IATC claims extremely difficult if not impossible to prove on direct review.²³⁹

While § 2254(e)(2) has a number of provisions that a petitioner could utilize to gain an evidentiary hearing, the one most relevant to a *Martinez* claim is § 2254(e)(2)(A)(ii) which states that "the court shall not hold an evidentiary hearing on [the claim without the necessary factual basis] unless the applicant shows that . . . the claim relies on . . . a

233. *Weber*, 2014 WL 1671508, at *8.

234. Evidentiary Hearing, *Weber v. Sinclair*, No. C08-1676RSL (W.D. Wash.), Sept. 29, 2014, Seattle Courtroom 15106.

235. *Id.*

236. *See supra* Part I.B (discussing 28 U.S.C. § 2254(e)(2) (2012)).

237. *See* 28 U.S.C. § 2254(d). Section 2254(d) does not bar either an evidentiary hearing or the expansion of the trial record with new, relevant information. *See Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014) (determining that the *Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388 (2011), holding barring evidence not presented in state court has no application to claims not previously adjudicated on the merits in that state court); Marceau, *supra* note 4, at 2143 ("*Martinez* permits the prisoner to: (a) overcome the procedural default; and (b) avoid the strictures of § 2254(d) and, therefore, . . . *Pinholster*.").

238. *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1318 (2012) (noting that "[a]bbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective-assistance claim").

239. *See id.*

factual predicate that could not have been previously discovered through the exercise of due diligence.”²⁴⁰ This provision has been strictly construed and is interpreted as having a narrow scope.²⁴¹

Section 2254(e)(2)(A)(ii), however, does not take into account the peculiar situation in which *Martinez* is raised. In such circumstances, the petitioner’s attorney was ineffective at the time the ineffective-assistance-of-counsel claim should have been raised, leading to procedural default of that claim. Under § 2254(e)(2), “[a] petitioner’s attorney’s ‘fault’ is generally attributed to the petitioner for purposes of § 2254(e)(2)’s diligence requirement.”²⁴² This very idea, however, was a major distinguishing point between *Coleman* and *Martinez*.²⁴³ Because the Supreme Court made this distinction for *Martinez* claims, it seems likely the same principle would apply to holding an evidentiary hearing on a claim that was permitted to pass through the “*Martinez* gateway.” This conclusion is buttressed by the Supreme Court’s own discussion of the importance of expanded records when adjudicating IATC claims.²⁴⁴ It would be illogical for the Court to allow a petitioner to resuscitate his IATC claim and expound on how vital an expanded record is to the adjudication of such claims, only to bar the one procedure that can actually enable this result.²⁴⁵ Evidentiary hearings have, however, been denied by the majority of district courts reviewing *Martinez* claims.²⁴⁶

240. 28 U.S.C. § 2254(e)(2)(A)(ii) (2012).

241. See *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (“For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute’s other stringent requirements are met. . . . Yet comity is not served by saying a prisoner ‘has failed to develop the factual basis of a claim’ where he was unable to develop his claim in state court despite diligent effort.”).

242. *Dickens*, 740 F.3d at 1321.

243. See *Martinez*, 132 S. Ct. at 1316. The Court noted that although “*Coleman* held that ‘[n]egligence on the part of a prisoner’s post-conviction attorney does not qualify as ‘cause,’” “*Coleman* . . . did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default.” *Id.* The Court distinguished *Coleman* as “[t]he alleged failure of counsel in *Coleman* was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner’s claims had been addressed by the state habeas trial court.” *Id.*

244. See *id.* at 1318 (“Ineffective-assistance claims often depend on evidence outside the trial record.”).

245. See Marceau, *supra* note 4, at 2163–64 (“Because the inability to develop a factual record on habeas would prove fatal to most [ineffective-assistance-of-counsel] claims, reading § 2254(e)(2) as trumping *Martinez* would be a substantial death-knell to the full and fair model of habeas adjudication.”).

246. See, e.g., *Fielder v. Stevenson*, No. 2:12-cv-00412-JMC, 2013 WL 593657, at *4 (D.S.C.

The Ninth Circuit has formulated a different answer to the inherent problems between § 2254(e)(2) and *Martinez*. In *Dickens v. Ryan*²⁴⁷ the court found that, although § 2254(e)(2) would bar the petitioner from introducing new evidence to the district court, the statute would not bar an evidentiary hearing limited to the determination of “cause.”²⁴⁸ The court reasoned the language of § 2254(e)(2) limits the provision’s scope to “claim[s].”²⁴⁹ It followed that, because a “cause” determination is not a claim, a district court can hold an evidentiary hearing on that issue without heeding the strict guidelines of § 2254(e)(2).²⁵⁰ The Ninth Circuit had previously recognized that a petitioner would have to satisfy the diligence requirement of § 2254(e)(2) in order to receive an evidentiary hearing on the merits.²⁵¹ Alternatively, § 2254(e)(2) may not apply to claims where a procedural default has been excused.²⁵²

The Ninth Circuit approach, while potentially more in line with the statutory standard,²⁵³ seems like a work-around of the AEDPA scheme. The district court would have two unsatisfying options. The court could hold an evidentiary hearing limited strictly to “cause”—an approach that would not do a petitioner much good when it came to adjudicating the merits of his IATC claim. Or the district court could hold a hearing on “cause” and expand the record sufficiently to later adjudicate the underlying claim on the merits. Neither of these options is particularly appealing. The former would be largely pointless because petitioners, while potentially being able to show “cause,” would nonetheless be unable to expand the record sufficiently to prove their underlying IATC grounds for relief. The latter, when viewed through a cynical lens, is basically an attempt to avoid application of § 2254(e)(2).

Feb. 14, 2013) (noting that “*Martinez* does not directly provide the authority for a petitioner to expand the record in order to further develop facts that could have been presented in the state court proceeding”).

247. 740 F.3d 1302 (2014).

248. *Id.* at 1321.

249. *Id.*; 28 U.S.C. § 2254(e)(2) (2012).

250. *Dickens*, 740 F.3d at 1321.

251. *See Stokley v. Ryan*, 659 F.3d 802, 809 (9th Cir. 2011).

252. *See Dickens*, 740 F.3d at 1321 (“However, if *Dickens* can show cause and prejudice to excuse a procedural default, AEDPA no longer applies and a federal court may hear this new claim *de novo*.”). *But see Habeas Relief for State Prisoners*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 931, 954 n.2795 (2011) (noting that “[e]ven if the federal court is able to address the defaulted claim, it must . . . have a factual basis developed on the record, as an evidentiary hearing may be unavailable under 28 U.S.C. § 2254(e)(2)”). There is however no textual exception in § 2254(e)(2).

253. *See Dickens*, 740 F.3d at 1321 (noting that, under § 2254(e)(2)(A)(ii), “[w]hen a petitioner seeks to show ‘cause’ based on ineffective assistance of PCR counsel, he is not asserting a ‘claim’ for relief as that term is used in § 2254(e)(2)”).

C. *More Evidentiary Hearings Would Allow More IATC Claims To Be Adjudicated on the Merits*

There has so far been little sign of evidentiary hearings being granted in *Martinez* cases.²⁵⁴ Without an expanded record, however much a claim may appear to fit within the bounds of counsel's trial strategy or some other reasonable attorney conduct, any evidence to the contrary is often not before the judge. A hearing is required to hear testimony from the trial attorney to figure out exactly why the challenged decisions were made. The evidentiary hearing in *Weber* and future cases should comport with the requirements placed on district courts by § 2254(e)(2) when viewed through the lens of the *Martinez* decision.

Although this hearing could also be granted to determine whether a petitioner has met the burden for "cause," it seems more productive for a district court to make the "substantiality" determination and then proceed to the merits. The evidentiary hearing would then take place under circumstances where the district court could grant relief if the underlying IATC claim was meritorious. Even if the habeas ground for relief is denied, petitioners would still have been granted their day in court and would finally have had their IATC claims adjudicated on the merits based on an adequate record. Petitioners could also raise valid IATC claims through the "*Martinez* gateway"—a scenario that the Supreme Court must have believed possible when it decided *Martinez*. Due to both the conflicting language and inherent tension with *Strickland*, lower federal courts should be applying the lowest "substantial" definition from *Martinez*, that for an "insubstantial" IATC claim. Based on that lessened standard, those courts should then allow more petitioners through the "*Martinez* gateway" and on to evidentiary hearings addressing their underlying claims.

V. A TALE OF THREE PREJUDICES: ALL THREE SHOULD BE ANALYZED UNDER THE SAME STANDARD

The *Martinez* four-pronged test requires a court to potentially make two different determinations of prejudice before granting equitable relief for a procedurally defaulted claim. Under *Martinez*, a finding of

254. See King, *supra* note 18, at 2434 (noting that "even though it is within a judge's discretion to permit a petitioner to develop new facts for claims dismissed rather than denied in state court, federal judges after *Martinez* continue to deny IATC claims on their merits and without hearings when the petitioner was not diligent in developing the record in state court"); Primus, *supra* note 171, at 2616 (noting that "it remains to be seen how readily available federal evidentiary hearings will be to address these claims").

prejudice is required for: (1) the “substantiality” determination in the first prong, and (2) whether state PCR counsel was deficient in the second prong.²⁵⁵ As Judge Nguyen’s concurrence in *Detrich v. Ryan*²⁵⁶ correctly notes, *Martinez* only explicitly creates an exception for “cause”—the opinion does not on its face modify the required *Coleman* prejudice determination.²⁵⁷ The district court, therefore, must also make a third prejudice finding which satisfies the prejudice element of the “cause and prejudice” equitable exception.²⁵⁸

The first *Martinez* prong requires the court to find that a petitioner’s IATC claim is “substantial.”²⁵⁹ This initial showing mandates that a petitioner make a “substantial” showing of both *Strickland* elements for establishing ineffective-assistance-of-counsel—deficient performance and “actual prejudice.”²⁶⁰ The second prejudice determination must be made if petitioners were represented by appointed counsel during their initial state PCR proceedings.²⁶¹ As the second *Martinez* prong indicates, petitioner’s state PCR counsel must have been “ineffective.”²⁶² This requires another *Strickland* showing of deficient performance and “actual prejudice.”²⁶³ As the prejudice element of the second *Martinez* prong is only applicable to cases where a petitioner was actually represented by counsel, petitioners proceeding pro se are spared the burden of meeting *Strickland* here.²⁶⁴ The third prejudice showing is that required to satisfy the “cause and prejudice” equitable exception.²⁶⁵

255. See *Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309, 1318 (2012).

256. 740 F.3d 1237 (9th Cir. 2013).

257. See *id.* at 1260 (9th Cir. 2013) (Nguyen, J., concurring) (noting that “*Martinez* does not address—let alone modify—the [cause and prejudice] standard’s prejudice prong”). The *Martinez* four pronged test allows “a prisoner [to] establish cause to excuse a procedural default.” See *Martinez*, 132 S. Ct. at 1318.

258. See *Detrich*, 740 F.3d at 1260 (Nguyen, J., concurring) (“The Supreme Court left no doubt that *Coleman*’s cause-and-prejudice standard applies ‘[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule.’ *Martinez* does not address—let alone modify—the standard’s prejudice prong.” (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (alteration and emphasis added in *Detrich*))).

259. *Martinez*, 132 S. Ct. at 1318. Although there this Comment argues that there are strong reasons why the “substantiality” standard should be modified, based on the discussion in the previous section, it remains the governing law. As such, it will be referred to as the governing standard throughout this section. The analysis concerning the three potential levels of prejudice applies whatever the standard for determining them may be.

260. See *id.*; *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

261. *Martinez*, 132 S. Ct. at 1318.

262. *Id.*

263. See *id.*

264. See *id.*

265. See *id.* at 1319 (noting that *Martinez* only concerns “whether there is cause for an apparent

Because *Martinez* only provides the “cause” element of “cause and prejudice,” *Coleman* prejudice remains a final hurdle to excuse a procedural default.²⁶⁶

This Comment argues that the three different findings of prejudice a district court may make under *Martinez* and *Coleman* should be collapsed into a single analysis focused on the *Martinez* “substantiality” prong. This Part will discuss how the three different prejudice determinations operate within the *Martinez/Coleman* standard. The latter two prejudice showings, for the *Martinez* second prong and for *Coleman* “prejudice,” look to the same underlying issue—the prejudice suffered due to trial counsel’s deficient performance. As the *Martinez* first prong requires merely a lessened “substantial” showing of *Strickland* prejudice from trial counsel’s deficient performance, mandating an actual demonstration of prejudice at later stages would render the initial “substantial” prejudice a moot issue. The three prejudice elements should be interpreted at the same level if the *Martinez* first prong is to have any practical effect.

A. *The Three Levels of Prejudice in the Martinez/Coleman Standard*

1. *Level One: The “Substantial” Underlying IATC Claim*

Although the exact criteria to determine when a *Strickland* claim has “some merit” are not entirely clear,²⁶⁷ the Court did create guideposts to assist lower courts in differentiating the *Martinez* “substantiality” standard from the heavier burden under *Strickland*. A sufficient “actual prejudice” showing for a meritorious *Strickland* claim requires “a reasonable probability that, but for counsel’s unprofessional errors, the result . . . would have been different.”²⁶⁸ The *Martinez* analogy to *Miller-El*,²⁶⁹ a case in which the Supreme Court allowed a district court to grant a certificate of appealability when “reasonable jurists would find the district court’s assessment . . . debatable,”²⁷⁰ indicates a lessened

default”); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Detrich v. Ryan*, 740 F.3d 1237, 1260 (9th Cir. 2013) (Nguyen, J., concurring).

266. See *Martinez*, 132 S. Ct. at 1315 (noting that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish *cause* for a prisoner’s procedural default” (emphasis added)); *Detrich*, 740 F.3d at 1260 (9th Cir. 2013) (Nguyen, J., concurring) (noting that *Martinez* does not modify *Coleman*’s cause and prejudice standard).

267. See *supra* Part IV.

268. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

269. *Martinez*, 132 S. Ct. at 1318–19.

270. See *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S.

showing when adjudicating “substantial” *Strickland* prejudice.²⁷¹ If “reasonable probability” is the standard for “merit,” “some merit” should consequently be satisfied with something less. Finally, the very use of the word “substantial” implies a less than total burden.²⁷² While *Martinez* lacks a clear statement of how “substantial” the prejudice resulting from a trial counsel’s deficient performance must be, it is clear that it demands less than *Strickland*.

2. *Level Two: The Ineffectiveness of a Petitioner’s State PCR Counsel*

Any ineffective-assistance-of-counsel finding concerning state PCR counsel necessarily implicates the underlying IATC claim. In the *Martinez* context, state PCR counsel’s deficient performance must be counsel’s failure to raise a “substantial” claim of IATC.²⁷³ This is confirmed by the second element of the *Martinez* test: “the ‘cause’ consisted of there being . . . ‘ineffective’ counsel during the state collateral review proceeding.”²⁷⁴ In *Martinez*, the allegation was that state PCR counsel “caused” the procedural default by failing to allege the underlying “substantial” claim.²⁷⁵ While a literal reading of the second prong would lead to the assumption that full *Strickland* “actual prejudice” is necessary, such an interpretation would seriously impair the *Martinez* equitable exception.

For the second prong, the application of *Strickland* “actual prejudice” necessarily leads to an analysis of the IATC claim. If the deficient performance of the state PCR counsel consisted of the failure to assert the underlying ground for relief, “actual prejudice” must therefore turn on the potential merits of that claim. There is, in essence, a spectrum of possible scenarios. This Comment argues that if the IATC claim was so egregious as to automatically satisfy *Strickland* “actual prejudice,” a petitioner must have been prejudiced by state PCR counsel’s deficient

473, 484 (2000)).

271. *See supra* Part IV.

272. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 133, at 1738 (defining “substantial” as “[c]onsiderable in importance, value, degree, amount, or extent”); *Substantial*, *supra* note 133 (defining “substantial” as “being largely but not wholly that which is specified”).

273. *See Martinez*, 132 S. Ct. at 1318.

274. *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911, 1918 (2013) (describing *Martinez*’s four requirements that, if met, “allow[] a federal habeas court to find ‘cause,’ thereby excusing a defendant’s procedural default”).

275. *See Martinez*, 132 S. Ct. at 1314–15.

performance in failing to raise it.²⁷⁶ If, on the other hand, the underlying claim had no merit whatsoever, it follows that a petitioner has not been prejudiced by the decision not to raise it. The answer is much less clear, however, when the IATC claim is “substantial” under *Martinez*, yet does not automatically satisfy *Strickland* “actual prejudice.”

Because the prejudice showing for the *Martinez* second prong implicates the merits of the underlying IATC claim, demanding a full showing of *Strickland* “actual prejudice” would render the “substantial” element of the first prong utterly illusory. There would be little reason for the Supreme Court to explicitly allow for a lessened showing only to then demand full *Strickland* “actual prejudice” one step later. Although the second prong concerns the ineffectiveness of state PCR counsel, any analysis of that claim implicates the merits of a petitioner’s underlying IATC ground for relief. A contrary conclusion would “render superfluous the first *Martinez* requirement” of a lessened “substantial” showing of prejudice from the underlying claim.²⁷⁷

The Ninth Circuit addressed this distinction in *Detrich v. Ryan*.²⁷⁸ That decision, however, may have ventured too far in its collapse of the *Martinez* second prong.²⁷⁹ The Ninth Circuit reasoned that “the Court’s reference to *Strickland* . . . where the prisoner had PCR counsel . . . mean[s] the same thing . . . where the prisoner was pro se in PCR proceedings.”²⁸⁰ As discussed above,²⁸¹ the prejudice elements for the underlying trial and state PCR counsel ineffectiveness claims necessarily must collapse together for the lesser “substantial” requirement to have any practical effect. This does not, however, mean that the deficient performance of state PCR counsel may never be relevant when analyzing the second prong. As the Supreme Court noted, where state PCR counsel does “perform, according to prevailing

276. As, in this situation, the prejudice stemming from state PCR counsel’s deficient performance would be intertwined with the underlying prejudice from trial counsel’s deficient performance, the prejudice finding for both counsels would be the same. The prejudice finding for the second prong would therefore be automatic, mirroring the determination of the habeas court concerning the prejudice suffered from trial counsel’s performance. *Cf.* *United States v. Cronin*, 466 U.S. 648, 658–59 (1984) (noting that “[t]here are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified” and providing examples of such circumstances).

277. *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (collapsing both the deficient performance and prejudice elements between the first and second *Martinez* prongs).

278. 740 F.3d 1237 (9th Cir. 2013).

279. *See id.* at 1245–46.

280. *Id.* at 1246.

281. *See supra* Part V.A.2.

professional norms . . . the States may enforce a procedural default in federal habeas proceedings.”²⁸² Although the deficient performance of state PCR counsel under *Martinez* must involve the failure to raise a “substantial” IATC claim,²⁸³ the Court hints at a situation that does not rise to the level of deficient performance under *Strickland*.²⁸⁴ This may, for example, be the case where the failure to raise the underlying claim did not fall “below an objective standard of reasonableness.”²⁸⁵ As the Supreme Court expressly left open this possibility, the Ninth Circuit went too far by fully collapsing the *Martinez* second prong.

Judge Nguyen, concurring in *Detrich*, raised a second argument against merely requiring a finding of substantial prejudice stemming from state PCR counsel’s deficient performance.²⁸⁶ Judge Nguyen highlighted the difference between prejudice from trial counsel and prejudice from state PCR counsel, reiterating the “narrow exception” created by the Supreme Court.²⁸⁷ However, both the trial counsel and state PCR counsel prejudice analyses look to the same underlying issue: the deficient performance of trial counsel. If trial counsel did not perform deficiently and there were no valid arguments for state PCR counsel to raise during collateral proceedings, state PCR counsel was almost certainly not performing deficiently when failing to raise those nonexistent arguments.²⁸⁸ Further, as Judge Nguyen noted, “[t]here is, of course, considerable overlap between the two [analyses].”²⁸⁹

The first two prejudices look to the same underlying issue: the ineffective-assistance-of-trial-counsel. As such, requiring the ordinary *Strickland* showing of “actual prejudice” in the second prong would negate the utility of a lessened “substantiality” showing in the first prong. It hardly seems likely that the Supreme Court would have intended such an anomaly while crafting an exception for “equitable” reasons.²⁹⁰

282. *Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309, 1319 (2012).

283. *See supra* Part V.A.2.

284. *See Martinez*, 132 S. Ct. at 1319 (noting that a state could argue that “the attorney in the initial-review collateral proceeding did not perform below constitutional standards”).

285. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). This possibility is beyond the scope of this Comment and will therefore not be analyzed in detail.

286. *Detrich v. Ryan*, 740 F.3d 1237, 1261 (9th Cir. 2013) (Nguyen, J., concurring).

287. *Id.*

288. *See supra* Part V.A.2.

289. *Detrich*, 740 F.3d at 1262 (quoting *Moormann v. Ryan*, 628 F.3d 1102, 1106–07 (9th Cir. 2010)).

290. *See Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309, 1319 (2012) (describing *Martinez* as an equitable, as opposed to a constitutional, decision).

3. *Level Three: The “Prejudice” Required as Part of Demonstrating “Cause and Prejudice”*

Even after overcoming the prejudice hurdles in the first and second prongs of *Martinez*, a petitioner must still demonstrate a third prejudice element to excuse their procedural default: that of the “cause and prejudice” equitable exception.²⁹¹ *Martinez* only created a “narrow exception” to the showing required under *Coleman*.²⁹² While altering “cause,” *Martinez* did not on its face interpret the prejudice element necessary for the equitable exception.²⁹³ In fact, the Court explicitly left that prejudice determination for the district court to adjudicate on remand.²⁹⁴

In order to satisfy “cause and prejudice,” a petitioner must “demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.”²⁹⁵ When a petitioner attempts to show prejudice under *Coleman* for a defaulted *Strickland* claim, the *Strickland* standard for prejudice is applied.²⁹⁶ As such, when the underlying claim is ineffective-assistance-of-counsel, *Coleman* prejudice may be satisfied by demonstrating “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”²⁹⁷

The question then becomes whose deficient performance is relevant under *Martinez* to satisfy *Coleman* prejudice: that of trial counsel or state PCR counsel? If the court examines trial counsel’s performance, the analysis will require a typical *Strickland* showing of prejudice stemming from that counsel’s deficient performance.²⁹⁸ If, instead, the judge interprets “cause and prejudice” as applying to state PCR counsel, the analysis discussed above in Part V.A.2 takes place.²⁹⁹ Namely, a

291. *See id.*; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Detrich*, 740 F.3d at 1260 (Nguyen, J., concurring).

292. *Martinez*, 132 S. Ct. at 1315.

293. *See Detrich*, 740 F.3d at 1261 (Nguyen, J., concurring) (noting that *Martinez* did not modify *Coleman*’s prejudice prong).

294. *Martinez*, 133 S. Ct. at 1321.

295. *Coleman*, 501 U.S. at 750.

296. *See Robinson v. Ignacio*, 360 F.3d 1044, 1054 (9th Cir. 2004) (noting that “[w]hen conducting a ‘prejudice’ analysis in the context of [overcoming a procedural default], this court applies the standards outline in *Strickland*”).

297. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

298. *See Martinez*, 132 S. Ct. at 1318.

299. *See supra* Part V.A.2 (describing how the “prejudice” from a state PCR counsel’s deficient performance is based on the merits of the underlying trial counsel ineffectiveness claim).

state PCR counsel's deficient performance would be the failure to raise the petitioner's underlying "substantial" IATC claim, leaving the *Strickland* prejudice element necessarily tied to the merits of that ground for relief.³⁰⁰

This Comment argues that *Coleman* prejudice in the *Martinez* context should then, as with the *Strickland* prejudice showing required for state PCR counsel, necessitate only a "substantial" demonstration that a petitioner suffered prejudice from the trial counsel's deficient performance. If a higher showing of "actual prejudice" was demanded by "cause and prejudice," that requirement would erode any equitable relief available through the lessened prejudice showing in the *Martinez* first prong. This seems a highly unlikely outcome given the Supreme Court's intentionally lower "substantial" requirement for the IATC claim.³⁰¹ Why would the Court go to the trouble of designing a complicated equitable exception only to immediately undermine the standard by making the lessened requirement largely superfluous? Such a result would leave the "substantiality" showing a moot issue, utterly useless for habeas petitioners who have "substantial," yet unproven, trial counsel *Strickland* claims. Although *Coleman* may, on its face, demand a "more searching prejudice inquiry,"³⁰² the more logical and straightforward way of applying *Coleman* prejudice in the *Martinez* context would require merely the same "substantiality" standard as with the two prejudice findings scattered through the *Martinez* test.

B. Because All Prejudice Determinations Should be Based on Whether There Is "Substantial" Strickland "Actual Prejudice," More Petitioners Should Be Allowed Through the "Martinez Gateway"

All three prejudices potentially required by *Martinez* and *Coleman* should be determined based on whether a petitioner can demonstrate "substantial" prejudice from the trial counsel's alleged ineffective behavior. This will generally require an expanded record to take into account any explanation from the trial counsel.³⁰³ Another commentator has suggested that district courts hold evidentiary hearings *before*

300. See *supra* Part V.A.2.

301. See *Martinez*, 133 S. Ct. at 1318 (noting that "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit").

302. *Detrich v. Ryan*, 740 F.3d 1237, 1261 (9th Cir. 2013) (Nguyen, J., concurring).

303. See *Martinez*, 132 S. Ct. at 1318.

allowing a petitioner through the “*Martinez* gateway.”³⁰⁴ This Comment suggests, however, that it is more straightforward to hold the evidentiary hearing *after* a petitioner has passed through the “*Martinez* gateway.”

1. *Proposed Alternative: Evidentiary Hearings to Determine “Actual Prejudice” Before Being Allowed Through the “Martinez Gateway”*

Following similar reasoning found in *Detrich*,³⁰⁵ a commentator has argued that although the first two prejudice findings should be adjudicated based on a “substantial” standard, the final prejudice mandated by “cause and prejudice” should not.³⁰⁶ This would require a petitioner, after showing “cause” under *Martinez*, to demonstrate full “actual prejudice” in order to have his IATC claims adjudicated on the merits.³⁰⁷ Petitioners would be allowed discovery and an evidentiary hearing in order to develop the factual record to a level satisfying “actual prejudice.”³⁰⁸ The Ninth Circuit has tacitly approved this approach.³⁰⁹ The court noted that evidentiary hearings would be permitted under 28 U.S.C. § 2254(e)(2) to determine whether “cause” exists under *Martinez*.³¹⁰

2. *Evidentiary Hearings on a Petitioner’s Underlying IATC Claims Should be Held After the Petitioner Has Been Allowed Through the “Martinez Gateway”*

Holding the evidentiary hearing before a petitioner is allowed through the “*Martinez* gateway” seems to produce an incorrect outcome based on the structure of *Martinez*. The prejudice inquiry required to satisfy *Coleman* prejudice, as with that for the *Martinez* second prong, looks to the same underlying issue: that of trial counsel’s allegedly deficient

304. See Konrad, *supra* note 14, at 323–25.

305. See *Detrich*, 740 F.3d at 1246.

306. See Konrad, *supra* note 14, at 323 (arguing that “[r]eading *Martinez* to allow for the substantial-claim standard to suffice for PCR prejudice means that the default prejudice would remain consistent with precedent that a prisoner must show ‘actual prejudice as a result of the alleged violation of the law’”).

307. See *Martinez*, 132 S. Ct. at 1319.

308. Konrad, *supra* note 14, at 324–25.

309. See *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (“Section 2254(e)(2), however, does not bar a hearing before the district court to allow a petitioner to show ‘cause’ under *Martinez*.”).

310. See *id.*

performance.³¹¹ Demanding a higher standard would degrade the “substantiality” inquiry to a meaningless procedural hoop for petitioners to jump through. This is unlikely to be the Supreme Court’s desired result, considering that *Martinez* was intended to create an option for federal habeas petitioners to revive IATC claims that were lost or defaulted through no fault of their own.³¹²

This Comment therefore argues that such an evidentiary hearing into the merits of an IATC claim should be withheld until the district court actually has the power to rule on the merits. As the Supreme Court noted, an evidentiary fact-finding hearing is often required to complete the record for ineffective-assistance-of-counsel claims.³¹³ As such, when a *Martinez* motion is granted, a district court will very likely be forced to hold an evidentiary hearing to develop a substantial enough record to make a ruling on the merits of the claim.³¹⁴

It is more straightforward for a court to analyze the four prongs of *Martinez*, excuse the petitioner’s procedural default, and only then proceed to the merits with an evidentiary hearing. Were the evidentiary hearing to take place before a finding of *Coleman* prejudice, one of two possibilities would result. Courts could opt for the woefully inefficient option of holding an evidentiary hearing solely on *Coleman* prejudice and then convening a second proceeding on the merits. Few courts would, however, so willingly squander scarce judicial resources.³¹⁵ Alternatively, courts could hold an evidentiary hearing to both determine the existence of *Coleman* prejudice and adjudicate the merits of the underlying IATC claim. This method would result in holding an evidentiary hearing on the merits of a claim that remains procedurally defaulted only to potentially excuse the default and grant habeas relief in the same order.

It seems preferable to keep *Martinez* and the merits of the underlying

311. See *supra* Part V.A.3.

312. See *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1318 (2012).

313. *Id.*

314. This, for example, is what the court did in *Weber v. Sinclair*. There the court first found all the *Martinez* elements satisfied, including a finding of *Coleman* prejudice, and then granted an evidentiary hearing on the merits of the ineffective-assistance-of-counsel claims. See *Weber v. Sinclair*, No. C08-1676RSL, 2014 WL 1671508, at *9, *10 (W.D. Wash. Apr. 28, 2014) (granting an evidentiary hearing on petitioner’s ineffective-assistance-of-counsel claims “that could not have been raised on direct appeal because they rely on evidence outside the record”).

315. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (noting that various doctrines have the purpose of “promoting judicial economy by preventing needless litigation”); *Emp’rs Council on Flexible Comp. v. Feltman*, No. 1:08cv371 (JCC), 2009 WL 8705813, at *4 (E.D. Va. Aug. 20, 2009) (noting that “the Court is not in the habit of expending judicial resources to hear two days of argument and evidence that may or may not be relevant”).

IATC claim separated. This would maintain a lessened bar for *Coleman* prejudice—a modification implicit in *Martinez*. A district court could then hold an evidentiary hearing on the merits of the underlying claim once the procedural hurdles have been cleared. As all three potential prejudice inquiries look to the same underlying issue, this method seems to make the most sense for courts searching for simpler and more expeditious routes to analyze *Martinez* arguments. This result would, as with the generally lessened “substantiality” finding argued for in Part IV, expand the availability of the “*Martinez* gateway,” allowing more IATC claims to be adjudicated on the merits by federal district courts.

CONCLUSION

Martinez v. Ryan allows habeas petitioners a second chance to have their previously unadjudicated IATC claims analyzed by a federal district court. While this faint ray of hope may not seem like much in the grand scheme of things, to individual petitioners it represents everything because it may be their last shot at contesting an allegedly unfair conviction. However, the “*Martinez* gateway” is not perfect. This Comment has laid out some of the complexities concerning the *Martinez* standard and offered solutions to these problems. Additional evidentiary hearings would hopefully increase the likelihood of more meritorious IATC claims being uncovered by federal district courts. These suggestions, while individually minor, would permit more petitioners to pass through the gateway and have their IATC claims adjudicated on the merits. More than that, however, *Martinez* is meant to give petitioners who were unfairly deprived of the ability to adjudicate their IATC claims on the merits a second chance. Even if few of those claims are meritorious and result in relief, the ability to give finality to convictions as well as a day in court to habeas petitioners is a worthwhile goal.