THE YALE LAW JOURNAL

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Effective Trial Counsel After *Martinez v. Ryan*: Focusing on the Adequacy of State Procedures

ABSTRACT. Everyone knows that excessive caseloads, poor funding, and a lack of training plague indigent defense delivery systems throughout the states, such that the promise of *Gideon v. Wainwright* is largely unfulfilled. Commentators have disagreed about how best to breathe life into *Gideon*. Many disclaim any possibility that federal habeas corpus review of state criminal cases could catalyze reform given the many procedural obstacles that currently prevent state prisoners from getting into federal court. But the Supreme Court has recently taken a renewed interest in using federal habeas review to address the problem of ineffective attorneys in state criminal cases. Last year, in *Martinez v. Ryan*, the Supreme Court relied on equitable principles to sweep aside procedural barriers to federal habeas review and permit state prisoners to raise ineffective assistance of trial counsel claims in federal court.

Not surprisingly, many lower courts have resisted the Supreme Court's recent attempts to permit state prisoners to have their ineffective assistance of trial counsel claims heard on the merits. But this battle is far from over. After documenting the ways in which lower courts are restrictively interpreting the Supreme Court's recent decisions expanding the grounds for cause to excuse a state prisoner's procedural default of an ineffective assistance of trial counsel claim, I will suggest that the defendants still have an important equitable card to play. That card is the idea of adequacy. As lower courts attempt to re-characterize state procedures so as to avoid recent Supreme Court holdings that would open the federal doors to state prisoners' ineffective assistance of trial counsel claims, they inadvertently set themselves up for challenges to the adequacy of their state procedures. This shift is significant, I will explain, because of important differences in how cause and adequacy arguments influence state behavior. Whereas cause grounds are typically personal to the defendant, adequacy challenges are often used to expose systemic failures in a state's procedures. As a result, adequacy challenges have more potential to catalyze change in states' procedures.

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Everyone knows that excessive caseloads, poor funding, and a lack of training plague indigent defense delivery systems throughout the states, such that the promise of *Gideon v. Wainwright*[1] remains largely unfulfilled.[2] Although experts agree on the problem, there is no consensus on how to approach solving it. Some argue for more funding for state defender organizations or better training for defense attorneys.[3] Others want to decriminalize petty offenses to lighten defender caseloads.[4] Still others believe that judicial intervention is needed to effectuate change.[5]

One thing experts agree on is that federal habeas corpus review of state criminal convictions (as currently structured) cannot catalyze reform given the many procedural obstacles that prevent state prisoners from getting into federal court.[6] The Supreme Court, however, has recently taken a renewed interest in using federal habeas review to address the problem of ineffective attorneys in state criminal cases. In *Martinez v. Ryan*,[7] the Supreme Court relied on equitable principles to sweep aside procedural barriers to federal

1. 372 U.S. 335 (1963).

2. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter BROKEN PROMISE].

3. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793 (2009) (arguing that federal habeas corpus review should be eliminated for most prisoners and the money saved should be diverted to fund indigent defense delivery systems); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 90-92 (1995) (arguing for more funding); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 70-71 (1997) (same); Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331, 333 (2009-10) (arguing for better training).

4. *See, e.g.*, Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save $1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel*, AM. CONST. SOC'Y FOR L. & POL'Y 1 (Dec. 2010), http://www.acslaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf.

5. *See, e.g.*, Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, AM. CONST. SOC'Y FOR L. & POL'Y 1 (Sept. 2010), http://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf.

6. *See, e.g.*, Hoffmann & King, *supra* note 3; Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85 (2012); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541 (2006).

7. 132 S. Ct. 1309 (2012).

habeas review and permit state prisoners to raise ineffective assistance of trial counsel claims in federal court.[8] More specifically, the Court held that a state prisoner who fails to properly raise an ineffective assistance of trial counsel claim in the first state collateral proceeding in which it could be raised may demonstrate cause to excuse his procedural default if he lacked effective state postconviction counsel to help him raise the claim.

This Essay will discuss whether *Martinez* marks the first step down a path toward reinvigorating *Gideon*. First, I will explain how the procedural default doctrine made it virtually impossible for most state prisoners to have their ineffective assistance of trial counsel claims heard in federal habeas corpus proceedings prior to *Martinez*. Then I will document how *Martinez* drastically expanded the cause-and-prejudice exception to procedural default and, in so doing, opened the federal doors to habeas petitioners alleging ineffective assistance of trial counsel.

Not surprisingly, many states are resistant to expanded merits review of ineffective assistance of trial counsel claims in federal habeas corpus proceedings. After documenting some of the ways in which states are restrictively interpreting *Martinez*, I will suggest that their formalistic reading of the *Martinez* holding may provoke habeas petitioners to file broader, systemic challenges to the adequacy of state procedures. As states attempt to recharacterize their procedures so as to avoid the implications of *Martinez*, they inadvertently set themselves up for challenges to the adequacy of those procedures. This shift is significant, I will explain, because of important differences in how cause and adequacy arguments influence state behavior. Whereas cause grounds are typically personal to the defendant, adequacy challenges are often used to expose systemic failures in a state's procedures. As a result, adequacy challenges have more potential to catalyze change in states' procedures.

In the end, whether through cause grounds or adequacy challenges, I will argue that *Martinez* has started an important dialogue between the federal and state courts about what procedures states need to have to give defendants an opportunity to vindicate their Sixth Amendment rights to effective trial

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8. These ineffective assistance of trial counsel claims are often referred to as *Strickland* claims after the Supreme Court case that initially recognized a Sixth Amendment right to effective trial counsel. *See* Strickland v. Washington, 466 U.S. 668, 687-88, 693 (1984) (holding that, in order to prevail on a claim of trial attorney ineffectiveness, a defendant must show that (1) counsel's performance was deficient, meaning that the attorney performed unreasonably given prevailing norms of practice, and (2) this deficient performance prejudiced the defense, meaning that counsel's errors were serious enough to undermine confidence in the outcome of the trial).

counsel.[9] Whether that dialogue will result in more realistic opportunities for defendants to raise ineffective assistance of trial counsel claims in state courts remains to be seen, but the Supreme Court's willingness to intervene when the state courts prevent defendants from raising Sixth Amendment challenges is an important first step toward ensuring that those rights are honored in state criminal proceedings.

I. PROCEDURAL DEFAULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS

Federal courts have an arsenal of procedural barriers that they use to deny almost all habeas petitions without ever addressing the merits of the underlying claims.[10] One of these barriers to review—procedural default—has been particularly nefarious in preventing prisoners from having their ineffective assistance of trial counsel claims heard in federal habeas cases.[11]

Grounded in principles of federalism and finality as well as concerns about conserving resources, the procedural default doctrine requires federal habeas courts to respect adequate and independent state procedural grounds for denying federal constitutional claims. If a state prisoner fails to comply with the state's procedural requirements for raising a federal constitutional claim and the state courts refuse to address the underlying federal claim as a result, the federal courts will respect the state rules and similarly refuse to address the underlying federal claim.[12]

There are two exceptions to the procedural default doctrine. First, if a defendant can show cause for failing to comply with the state procedural

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9. *Cf.* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (explaining how federal habeas corpus review of state criminal convictions encourages an important dialogue between state and federal courts about the scope of constitutional rights).

10. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 45 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (noting that in forty-two percent of noncapital cases and twenty-eight percent of capital cases, the federal district court dismissed the claims without reaching the merits).

11. *See id.* at 48 (noting that, in over half of the capital cases and nineteen percent of the noncapital cases filed in district courts, claims had been procedurally defaulted); *Martinez*, 132 S. Ct. at 1323 & n.4 (Scalia, J., dissenting) (citing statistics indicating that procedural default accounted for the largest percentage of procedural dispositions for appeals in noncapital cases).

12. *See* Lee v. Kemna, 534 U.S. 362 (2002).

rule and prejudice to the outcome of the case, then the federal court will bypass the procedural default and consider the merits of the underlying constitutional claim.[13] Alternatively, if a defendant can demonstrate that he or she is actually innocent of the underlying criminal offense, the federal court will look beyond the procedural default to address the underlying constitutional claim.[14]

Many defendants seeking federal habeas relief on the basis of an ineffective assistance of trial counsel claim run head-on into the procedural default doctrine. In most states, defendants are not given realistic opportunities to expand their trial records on direct appeal.[15] As a result, claims that require extrarecord development are typically reserved for state collateral review.[16] Because ineffective assistance of trial counsel claims are often predicated on what trial attorneys failed to do, they frequently require extrarecord development.[17] Consequently, the first realistic opportunity that most defendants have to raise an ineffective assistance of trial counsel claim is on collateral review. However, most states do not provide defendants with the assistance of effective counsel for postconviction review. As a result, many defendants fail to preserve their ineffective assistance of trial counsel claims in state court and face procedural defaults when they attempt to challenge the effectiveness of their trial attorneys in federal habeas proceedings.

Until this past summer, the federal courts uniformly deemed these defendants' ineffective assistance of trial counsel claims waived absent a showing of actual innocence. No federal court believed that the ineffectiveness of state postconviction counsel in failing to preserve an ineffective assistance of trial counsel claim was sufficient cause to bypass a procedural default. After all, the Supreme Court had held that "cause" requires a petitioner to "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rules."[18] The Court had further stated that,

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13. *See* Wainwright v. Sykes, 433 U.S. 72 (1977).

14. *See* Schlup v. Delo, 513 U.S. 298, 314-15 (1995).

15. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (documenting this problem).

16. *See* Commonwealth v. Grant, 813 A.2d 726, 734-36 (Pa. 2002) (noting that the federal courts and the overwhelming majority of state courts refuse to hear ineffective assistance of trial counsel claims on direct appeal).

17. Ineffectiveness claims about what a trial attorney did that are clear on the face of the trial record often require extrarecord development as well, because the appellate court needs to conclude that the trial attorney's decision was not a strategic one in order to find deficient performance. As a result, testimony from defense counsel is often crucial.

18. Murray v. Carrier, 477 U.S. 478, 488 (1986).

under traditional agency principles, the actions of defense counsel are imputed to the client such that mistakes by defense counsel are not "external to the defense" unless the attorney error rises to the level of a constitutional violation.[19] Only when the state had failed in its constitutional obligation to provide effective representation was there an "objective factor external to the defense" that impeded the defendant's ability to comply with the state's rules. Because it was generally understood that there is no constitutional right to counsel beyond the first appeal as of right,[20] the federal courts unanimously held that the ineffectiveness of state postconviction counsel could not establish cause to excuse the procedural default of an ineffective assistance of trial counsel claim.[21]

The federal courts' unwillingness to permit the ineffectiveness of state postconviction counsel to establish cause to excuse a default, coupled with the practice in a majority of states of pushing ineffective assistance of trial counsel claims into state postconviction review where defendants do not have meaningful representation, meant that most defendants had no realistic opportunity to raise ineffective assistance of trial counsel claims. This was particularly problematic given statistics revealing structural problems in indigent defense delivery systems throughout the states.[22] Defendants were being convicted of crimes and condemned to prison having never met their appointed counsel until the day of their plea.[23] Trial attorneys readily admitted that they did not have time to investigate their cases.[24] Yet

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19. *See* Coleman v. Thompson, 501 U.S. 722, 753-54 (1991) (emphasizing that, while constitutionally ineffective attorney performance is "imputed to the State" and thus "external to the defense," errors committed by an attorney who is not constitutionally guaranteed to the defendant do not establish cause "because the attorney is the [defendant]'s agent when acting, or failing to act, in furtherance of the litigation, and the [defendant] must 'bear the risk of attorney error'" (quoting *Murray*, 477 U.S. at 488)).

20. *Id.* at 752 ("There is no constitutional right to an attorney in state post-conviction proceedings."); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."); Murray v. Giarratano, 492 U.S. 1 (1989) (applying that rule to capital cases).

21. *See, e.g.*, Livingston v. Kansas, 407 F. App'x 267, 273 (10th Cir. 2010); Wooten v. Norris, 578 F.3d 767, 778 (8th Cir. 2009); Pinkins v. Buss, 215 F. App'x 535, 540 (7th Cir. 2007); Paffhousen v. Grayson, No. 00-1117, 2000 WL 1888659, at *2 (6th Cir. Dec. 19, 2000); Johnson v. Singletary, 938 F.2d 1166, 1175 (11th Cir. 1991) (en banc).

22. *See, e.g.*, BROKEN PROMISE, *supra* note 2, at 7-28; Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 16 & nn.103-06 (2010) (documenting structural problems in indigent defense delivery systems).

23. *See, e.g.*, Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, http://www.nytimes.com/2008/11/09/us/09defender.html.

24. *See, e.g.*, *id.* (emphasizing that public defender offices in several states refused to take on new cases, citing overwhelming workloads that prevented them from effectively

most defendants had no real opportunity to argue that their bedrock right to effective counsel had been violated and that, as a result, their trial was fundamentally unfair.

To make matters worse, the operation of the procedural default doctrine meant that a defendant who had an ineffective trial attorney, an ineffective appellate attorney, and an ineffective state postconviction attorney was less likely to obtain federal review than a defendant who had an effective lawyer at any of those stages. In short, the more ineffective lawyers a state prisoner had, the less likely he was to obtain federal habeas review.

Maybe the perceived unfairness of this situation motivated the Court to take action, or perhaps it was the inability of most defendants to ever challenge their trial attorneys' performance despite overwhelming evidence of structural problems in indigent defense delivery systems in the states. Whatever its reasons, the Supreme Court recently decided to relax the procedural barriers to federal habeas review of ineffective assistance of trial counsel claims and give federal courts a chance to review the merits of those claims.[25]

II. THE IMPACT OF *MARTINEZ V. RYAN*

Martinez v. Ryan[26] started as a seemingly inconsequential case. Luis Martinez wanted to assert a claim of ineffective assistance of trial counsel, but Arizona law required him to wait until state collateral review proceedings to raise this claim. Martinez's state postconviction attorney failed to raise the claim in the initial collateral review proceeding. As a result, when Martinez later attempted, through new counsel, to file a successive state postconviction petition raising an ineffective assistance of trial counsel claim, the Arizona courts dismissed his petition, noting that he should have raised the claim in his first state postconviction petition. Not surprisingly, when Martinez filed a federal habeas corpus petition alleging ineffective assistance of trial counsel, the district court held that he had defaulted the claim and that the ineffectiveness of his postconviction counsel could not establish cause to excuse the default. The Ninth Circuit affirmed.[27]

Many were surprised when the Supreme Court took the case. After all,

representing clients); State v. Peart, 621 So.2d 780 (La. 1993) (describing how public defenders in New Orleans were too overwhelmed to adequately investigate and represent their clients).

25. *See* Martinez v. Ryan, 132 S. Ct. 1309 (2012).

26. *Id.*

27. *Id.* at 1313-15.

dozens of cases looked like *Martinez*, and there was no circuit split on the issue. In fact, the Supreme Court itself had come close to holding that ineffective performance by postconviction counsel could never establish cause. In *Coleman v. Thompson*,[28] it held that ineffective performance by a state postconviction attorney in failing to file a timely state postconviction appeal would not be sufficient to demonstrate cause. The Court emphasized that, "[i]n the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation."[29] True, the *Coleman* Court had reserved the question of whether it might reach a different result in a case "where state collateral review is the first place a prisoner can present a challenge to his conviction."[30] But it had been twenty years since *Coleman* was decided, and federal courts had consistently held that ineffective performance by postconviction counsel could not establish cause.[31]

In *Martinez v. Ryan*, however, the Supreme Court capitalized on its *Coleman* dicta and held that when a state requires its defendants to raise ineffective assistance of trial counsel claims in initial-review collateral proceedings, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective under *Strickland*.[32] In that limited circumstance, the habeas petitioner will be able to demonstrate cause to excuse his procedural default.

Justice Kennedy, writing for a seven-member majority, was clearly concerned about precluding federal review 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. In such circumstances, the Court noted, it would be likely that no court would ever hear the prisoner's claim.[33] This was particularly troubling to the Court given how fundamental the right to effective trial counsel is to the operation of the adversarial system.[34]

Arizona's system, the Court explained, may not provide defendants with a

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28. 501 U.S. 722 (1991).

29. *Id.* at 754.

30. *Id.* at 755.

31. *See* cases collected *supra* note 21.

32. *Martinez*, 132 S. Ct. at 1320.

33. *Id.* at 1316 ("When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim.").

34. *Id.* at 1317 (describing the right as "a bedrock principle in our justice system" and "the foundation for our adversary system").

realistic opportunity to raise ineffective assistance of trial counsel claims in state court. A state prisoner needs an effective attorney to raise an ineffective assistance of trial counsel claim, because such claims typically require extrarecord investigation and an understanding of trial strategy and legal arguments.[35] By choosing to locate ineffective assistance of trial counsel claims in collateral review and, at the same time, failing to provide prisoners with effective lawyers to help them raise the claims, Arizona was preventing its prisoners from complying with the State's established procedures for raising ineffective assistance of trial counsel claims. That is precisely the type of "objective factor external to the defense"[36] that underlies the cause exception to the procedural default doctrine.

The *Martinez* Court presented its ruling as a narrow one. For one thing, it said that its holding was equitable rather than constitutional, noting that states would therefore have the flexibility to choose between appointing initial state postconviction counsel or defending cases on the merits in federal habeas review.[37] Moreover, the Court said that its ruling was limited to cases in which (a) state law required ineffective assistance of trial counsel claims to be raised in initial-review collateral proceedings; (b) there was no initial postconviction attorney, or the initial postconviction attorney's performance rose to the level of a *Strickland* violation; (c) the underlying defaulted claim was an ineffective assistance of trial counsel claim; and (d) the ineffective assistance of trial counsel claim was substantial.[38]

Despite these cautions about the decision's limited reach, the *Martinez* Court's expansion of grounds for cause to include ineffective performance by initial collateral review counsel has broad implications for the majority of states where defendants must wait until state postconviction proceedings to raise claims of ineffective assistance of trial counsel.[39] In the wake of *Martinez*, these

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35. *Id.* ("The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." (citation omitted)).

36. *Id.* at 1324 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1985)).

37. *Id.* at 1319. The Court explicitly reserved judgment on the constitutional question. *Id.* at 1315.

38. *Id.* at 1318-19.

39. A handful of states have established procedures for expanding the record on direct appeal and either require defendants to raise ineffective assistance of trial counsel claims on appeal or give them a choice regarding when to raise the claims. *See* Tweedell v. State, 462 S.E.2d 181, 183 (Ga. Ct. App. 1995); People v. Ginther, 212 N.W.2d 922, 925 (Mich. 1973); Berget v. State, 907 P.2d 1078, 1084 (Okla. Crim. App. 1995); State v. Johnston, 13 P.3d 175, 178-79 (Utah App. 2000); Calene v. State, 846 P.2d 679, 686-87 (Wyo. 1993). *But see* State v. Van

Cleave, 716 P.2d 580, 582-83 (Kan. 1986) (establishing a remand procedure for supplementing the record but noting that, in most cases, it is better to raise these claims in postconviction proceedings); State v. Hosteen, 923 P.2d 595, 596 (N.M. Ct. App. 1996) (recognizing that a remand procedure is available but expressing a "preference for habeas corpus proceedings over remand for an evidentiary hearing"). In the vast majority of states, however, defendants must wait until state collateral review to raise ineffective assistance of trial counsel claims. A few states explicitly require prisoners to raise all ineffective assistance of trial counsel claims in state postconviction proceedings. *See, e.g.*, State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002); State v. Dell, 967 P.2d 507, 509 (Or. Ct. App. 1998); State v. Brouillard, 745 A.2d 759, 768 (R.I. 2000); Turner v. Commonwealth, 528 S.E.2d 112, 115 (Va. 2000). In most states, however, the requirement is de facto rather than de jure. The state does not forbid the claims on direct appeal, but it does not provide any mechanism for expanding the record to substantiate the claims. Without the ability to supplement the record, most defendants are unable to raise the claims on direct appeal. In these states with a de facto requirement, the courts strongly encourage defendants to wait until postconviction proceedings to raise ineffective assistance of trial counsel claims that require additional development, and that tends to be the overwhelming state practice. *See, e.g.*, Shouldis v. State, 953 So.2d 1275, 1285 (Ala. Crim. App. 2006) ("[I]neffective-assistance-of-trial-counsel claims cannot be presented on direct appeal when they have not been first presented to the trial court."); McLaughlin v. State, No. A-10406, 2012 WL 1957981, at *4 (Alaska Ct. App. May 30, 2012) "[W]e have consistently held that we will not consider claims of ineffective assistance for the first time on appeal when the appellate record is inadequate to allow the court to meaningfully assess the competence of the attorney's efforts."); Rounsaville v. State, 288 S.W.3d 213, 217 (Ark. 2008) (noting that postconviction review is "the primary vehicle" for raising ineffective assistance of counsel claims); Ardolino v. People, 69 P.3d 73, 77 (Colo. 2003) ("In light of the considerations potentially involved in determining ineffective assistance, defendants have regularly been discouraged from attempting to litigate their counsels' effectiveness on direct appeal."); State v. Crespo, 718 A.2d 925, 937-38 (Conn. 1998) ("Almost without exception, we have required that 'a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim.'" (quoting State v. Munoz, 659 A.2d 683, 695 n.16 (Conn. 1995)); McMullen v. State, 876 So.2d 589, 590 (Fla. Dist. Ct. App. 2004) ("With rare exceptions, ineffective assistance of trial counsel claims are not cognizable on direct appeal. . . . Only in cases where the incompetence and ineffectiveness of counsel is apparent on the face of the record and prejudice to the defendant is obvious do appellate courts address this issue on direct appeal."); State v. Elison, 21 P.3d 483, 488-89 (Idaho 2001) ("This Court typically does not address claims of ineffective assistance of counsel on direct appeal because the record is often not fully developed on this issue."); People v. Kunze, 550 N.E.2d 284, 296 (Ill. App. Ct. 1990) ("An adjudication of a claim of ineffective assistance of counsel is better made in proceedings on a petition for post-conviction relief, when a complete record can be made . . . ."); Lewis v. State, 929 N.E.2d 261, 263 (Ind. Ct. App. 2010) ("A post-conviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim. . . . When the reasoning of trial counsel is apparent from the record, the claim of ineffective assistance of trial counsel can be appropriately addressed on direct appeal."); State v. Schawl, No. 11-1471, 2012 WL 4097262, at *2 (Iowa Ct. App. Sept. 19, 2012) ("We generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings."); Payne v. Commonwealth, No. SC–0269–MR, 2005 WL 1412451, at *5 (Ky. June 16, 2005) ("We have held that an ineffective assistance of counsel claim must be raised in a post-conviction Rule 11.42 motion rather than

on direct appeal, thus we decline to review the issue on direct appeal."); State v. Vincent, 971 So.2d 363, 374 (La. Ct. App. 2007) ("An ineffective assistance of counsel claim is most appropriately addressed through an application for post-conviction relief filed in the trial court . . . ."); Mosley v. State, 836 A.2d 678, 684 (Md. 2003) ("[A] post-conviction proceeding . . . is the most appropriate way to raise the claim of ineffective assistance of counsel."); Commonwealth v. Zinser, 847 N.E.2d 1095, 1098 (Mass. 2006) ("[T]he preferred method for raising a claim of ineffective assistance of counsel is through a [postconviction] motion for a new trial."); State v. St. John, 15 P.3d 970, 975 (Mont. 2001) ("When the record does not provide the basis for the challenged acts or omissions of counsel, a defendant claiming ineffective assistance of counsel more appropriately makes his claims in a petition for postconviction relief."); Webb v. State, No. 59711, 2012 WL 3055765, at *3 (Nev. 2012) ("Claims of ineffective assistance of counsel should be raised in postconviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal."); State v. Thompson, 20 A.3d 242, 257 (N.H. 2011) ("[W]e maintain a strong preference for collateral review of ineffectiveness claims . . . ."); State v. Preciose, 609 A.2d 1280, 1285 (N.J. 1992) ("Our courts have expressed a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record."); State v. Stroud, 557 S.E.2d 544, 547 (N.C. Ct. App. 2001) ("In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal."); State v. Koenig, No. 20090391, 2010 WL 1875694, at *1 (N.D. May 11, 2010) ("We have previously cautioned that ineffective assistance of counsel claims should generally be raised in post-conviction proceedings to allow the parties to fully develop a record of counsel's performance and its impact upon the defendant's claim."); Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002) ("Deferring review of trial counsel effectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel."); State v. Carpenter, 286 S.E.2d 384, 384 (S.C. 1982) ("This Court usually will not consider [ineffective assistance of counsel claims] on appeal from a conviction."); State v. Thomas, 796 N.W.2d 706, 714 (S.D. 2011) ("Ineffective-assistance-of-counsel claims are generally not considered on direct appeal."); State v. Mosley, 200 S.W.3d 624, 629 (Tenn. Crim. App. 2005) ("Raising the issue of ineffective assistance of counsel on direct appeal is 'a practice fraught with peril.' . . . The defendant runs the risk of having the issue resolved 'without an evidentiary hearing which, if held, might be the only way that harm could be shown—a prerequisite for relief in ineffective trial counsel claims.' . . . The better practice is to make an ineffective assistance of counsel claim in a post-conviction proceeding." (quoting State v. Sluder, No. 1236, 1990 WL 26552, at *7 (Tenn. Crim. App. July 16, 1990); Wilson v. State, No. 909, 1991 WL 87245, at *6 (Tenn. Crim. App. May 29, 1991))); Robinson v. State, 16 S.W.3d 808, 809 (Tex. Crim. App. 2000) ("Rule 33.1(a) generally requires that a complaint be presented to the trial court 'by a timely request, objection, or motion' as a prerequisite to presenting the complaint for appellate review." (quoting TEX. R. APP. P. 33.1(a))); State v. Gabaree, 542 A.2d 272, 274 (Vt. 1988) ("We have held that the proper avenue of raising the issue of ineffective assistance of counsel is through a motion for post-conviction relief, and not through a direct appeal . . . ."); State v. McFarland, 899 P.2d 1251, 1257 (Wash. 1995) ("If a defendant wants to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition . . . ."); State v. Triplett, 421 S.E.2d 511, 522 (W.V. 1992) ("[I]t is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the

states must spend time and money either (a) ensuring that indigent prisoners have competent postconviction counsel, or (b) defending the adequacy of trial counsels' representation years after the fact. As Justice Scalia noted in his *Martinez* dissent, the decision "will impose considerable economic costs on the States,"[40] particularly in capital cases and cases involving life sentences—cases in which federal habeas petitions alleging ineffective assistance of trial counsel are a virtual certainty.

Some have suggested that Justice Scalia's predictions about the burden imposed on the states are overstated.[41] After all, most prisoners are not in custody long enough to file federal habeas petitions.[42] For those who are, the *Strickland* standard is very difficult for habeas petitioners to satisfy, particularly when the deferential standards of review of the Antiterrorism and Effective Death Penalty Act (AEDPA) are superimposed on top of it.[43] As a result, states may conclude that defending cases on the merits is easier and cheaper than providing state postconviction counsel.[44]

That calculation, however, may be misguided. For one thing, it remains to be seen how readily available federal evidentiary hearings will be to address these claims.[45] Hearings can be expensive and time consuming. Moreover, it is

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record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied."); State v. Balliette, 805 N.W.2d 334, 341 (Wisc. 2011) ("The first opportunity after trial to raise the issue of counsel's ineffectiveness at trial is in a postconviction motion under 974.02.").

40. 132 S. Ct. at 1327 (Scalia, J., dissenting).

41. *See, e.g.*, 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 28.4(d) (3d ed. 2007 & Supp. 2012); Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2454 (2013) (calling Justice Scalia's statements "absurd").

42. *See* Primus, *supra* note 15, at 693-94 (discussing this problem).

43. *See* Harrington v. Richter, 131 S. Ct. 770, 788 (2011) ("The standards created by *Strickland* and [28 U.S.C.] § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." (citations omitted) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984); Knowles v. Mirzayance, 556 U.S. 111, 123 (2009))); *see also* King, *supra* note 41, at 2451-52 (emphasizing the deferential nature of the *Strickland* standard). AEDPA's deference will not apply to cases in which there was no decision on the merits in state court, but state courts often deny ineffective assistance of trial counsel claims on the merits when the claims are raised and not substantiated with good evidence. If a pro se prisoner or a bad state postconviction attorney raises the claim but raises it poorly (as often happens) and the state court denies it, the state will get § 2254(d) deference on that decision in federal habeas.

44. *See* 7 LAFAVE ET AL., *supra* note 41, § 28.4(d); *see also* King, *supra* note 41, at 2451-53 (arguing that states will find ways to insulate their rulings from serious federal scrutiny and will resist appointing counsel).

45. *See* 7 LAFAVE ET AL., *supra* note 41, § 28.4(d) (discussing this question). Professor King has gathered some anecdotal evidence suggesting that federal courts are still refusing to grant hearings in these cases. *See* King, *supra* note 41, at 2434-35, nn. 22-24. However, given how

possible that refusing to give state prisoners reasonable opportunities to raise ineffective assistance of trial counsel claims will push the Supreme Court to recognize the constitutional right to postconviction counsel that it failed to recognize in this case. Alternatively, such refusal might encourage the Court to look to other equitable doctrines to give states more of an incentive to provide defendants with a realistic chance to contend that their Sixth Amendment rights were violated.[46]

There is reason to think that the Court would be motivated to do something to ensure that state prisoners have a realistic opportunity to raise ineffective assistance of trial counsel claims in state courts. *Martinez* is one in a series of recent cases in which the Supreme Court has addressed the problem of ineffective attorney representation in the state courts. In *Maples v. Thomas*,[47] the Supreme Court relied on equitable principles to hold that a state prisoner whose state postconviction attorneys abandoned him without notice thereby causing him to default his ineffective assistance of trial counsel claims could establish cause to excuse that default in federal court. Similarly, in *Holland v. Florida*,[48] the Supreme Court held that grossly ineffective performance by a state postconviction attorney could be the basis of a finding of extraordinary circumstances sufficient to equitably toll AEDPA's one-year statute of limitations.[49] Together, these cases send a strong signal that the Supreme Court takes seriously the need for states to provide prisoners with adequate

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recent the Supreme Court's *Martinez* decision is, it is not surprising that the first published cases to appear are those in which hearings are denied. Many of the cases in which a post-*Martinez* hearing was granted or a case was remanded for consideration about whether to grant a hearing are still open cases. *See, e.g.*, Dickens v. Ryan, 688 F.3d 1054 (9th Cir. 2012) (remanding for consideration in light of *Martinez*), *reh'g en banc granted*, 704 F.3d 816 (2013); Memorandum, Bilal v. Walsh, No. 11-1973 (E.D. Pa. Mar. 28 2012), http://law.justia.com/cases/federal/district-courts/pennsylvania/paedce/2:2011cv01973/411774/15 (granting a hearing in light of *Martinez*).

46. For example, states that continue to locate ineffective assistance of trial counsel claims in state collateral review but fail to appoint competent state postconviction counsel may face systemic adequacy challenges to their state procedures. *See infra* Part IV.

47. 132 S. Ct. 912, 924-27 (2012).

48. 130 S. Ct. 2549, 2564-65 (2010).

49. The Supreme Court has also recently broadened its definition of what constitutes ineffective attorney performance by extending *Strickland* into the plea bargaining process. First, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Court held that trial attorneys were constitutionally ineffective if they fail to advise clients of obvious immigration consequences that flow from plea offers. Then, in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012), the Supreme Court declared that bad advice during plea negotiations can give rise to a finding of trial attorney ineffectiveness if it deprives a defendant of a favorable plea.

representation to raise constitutional claims in state courts.

III. THE STATES' REACTION TO *MARTINEZ*

Not surprisingly, many states have attempted to construe *Martinez* in ways that limit their postconviction obligations. For example, the *Martinez* Court was careful to state that its equitable ruling applied to states like Arizona that "require[] a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding."[50] Although there are a handful of states that—like Arizona—explicitly require defendants to raise ineffective assistance of trial counsel claims in state postconviction proceedings, most states' procedures are not so clear.[51] Many 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.[52]

In Texas, for example, defendants are theoretically permitted to raise ineffective assistance of trial counsel claims on direct appeal.[53] There is no explicit ban as there is in Arizona. As a practical matter, however, there is no realistic mechanism for expanding the trial record on direct appeal such that ineffective assistance of trial counsel claims that require extrarecord development typically must be reserved for state postconviction proceedings. A motion for a new trial is the only way to supplement the trial record before a direct appeal, but defendants are given such a brief period of time in which to file this motion[54] that they often do not have time to retain new counsel, let alone have that counsel investigate the case and draft and file a motion to supplement the trial court record with information about the trial attorney's deficient performance.[55] With respect to ineffective assistance of trial counsel claims that are clear on the face of the trial record, defendants are frequently

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50. Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012).

51. *See* cases collected *supra* note 39.

52. *See infra* notes 58-64.

53. *See, e.g.*, Lopez v. State, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011); Robinson v. State, 16 S.W.3d 808, 809 (Tex. Crim. App. 2000).

54. *See* TEX. R. APP. P. 21.4 (requiring a motion for a new trial to be filed no later than thirty days after the trial court imposes the sentence).

55. *See, e.g.*, *Robinson*, 16 S.W.3d at 810 ("While expansion of the record may be accomplished in a motion for new trial, that vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point. Further, mounting an ineffective assistance attack in a motion for new trial is inherently unlikely if the trial counsel remains counsel during the time required to file such a motion." (quoting *Ex parte* Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997))).

represented by the same lawyer on appeal as at trial.[56] Because an attorney cannot be expected to raise his own ineffectiveness, the first practical opportunity these defendants have to raise ineffective assistance of trial counsel is in initial collateral review proceedings. Finally, many defendants have ineffective assistance of trial counsel claims that involve a mix of on-the-record and off-the-record components. These defendants are better off waiting until postconviction proceedings to present all of their ineffective assistance of trial counsel claims in the hopes that the cumulative prejudice from the record and extrarecord claims will be sufficient to satisfy *Strickland*'s prejudice requirement.

For all of these reasons, there is explicit language in Texas criminal cases encouraging defendants to wait until collateral review proceedings to raise ineffective assistance of trial counsel claims.[57] Despite this language, Texas is now arguing that *Martinez* does not apply to it because, unlike in Arizona, defendants in Texas are not always required to raise trial attorney ineffectiveness in postconviction proceedings.[58] Texas is not alone in making this claim. Alabama,[59] Arkansas,[60] Illinois,[61] Ohio,[62] Tennessee,[63] and Washington[64] have all convinced courts that they are not subject to *Martinez*'s requirements because their state procedures do not facially require that all ineffective assistance of trial counsel claims be raised in postconviction proceedings. This formalistic reading of *Martinez* has the virtue of providing an efficient and uniform rule for all defendants while avoiding a time-consuming,

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56. *See* Primus, *supra* note 15, at 711 (discussing this problem).

57. *See, e.g.*, *Lopez*, 343 S.W.3d at 143 ("This Court has repeatedly stated that claims of ineffective assistance of counsel are generally not successful on direct appeal and are more appropriately urged in a [state postconviction petition]."); *Robinson*, 16 S.W.3d at 810 ("[B]ecause there is not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions[,] . . . we have noted that a post-conviction writ proceeding, rather than a motion for new trial, is the preferred method for gathering the facts necessary to substantiate [a] Sixth Amendment challenge. . . ."). See *supra* note 39 for a collection of similar cases in other states.

58. *See* Gates v. Thaler, No. 11-70023, 2012 WL 2305855 (5th Cir. June 19, 2012). The Supreme Court recently granted certiorari to address this precise question. Trevino v. Thaler, 449 F. App'x 415 (5th Cir. 2011), *cert. granted*, 133 S. Ct. 524 (2012).

59. *See* Arthur v. Thomas, No. 2:01-CV-0983, 2012 WL 2357919 (N.D. Ala. June 20, 2012).

60. *See* Dansby v. Norris, 682 F.3d 711 (8th Cir. 2012).

61. *See* Weekly v. Hardy, No. 11 C 9231, 2012 WL 3916269 (N.D. Ill. Sept. 6, 2012).

62. *See* McGuire v. Warden, Chillicothe Corr. Inst., No. 3:99-cv-140, 2012 WL 5303804 (S.D. Ohio Oct. 25, 2012); Sheppard v. Robinson, No. 1:00-cv-493, 2012 WL 3583128 (S.D. Ohio Aug. 20, 2012).

63. *See* Leberry v. Howerton, No. 3:10-00624, 2012 WL 2999775 (M.D. Tenn. July 23, 2012).

64. *See* Prokasky v. Glebe, No. C12-5134, 2012 WL 3877746 (W.D. Wash. June 11, 2012).

resource-intensive, and highly intrusive process of case-by-case analysis. But these states' attempts to opt out of *Martinez*'s requirements may not allow them to avoid federal court analysis of whether their state procedures give defendants a realistic opportunity to raise ineffective assistance of trial counsel claims. Rather, the federal courts' inquiry may simply be recast as a question about the adequacy of the state procedures rather than a question about whether there is sufficient cause to excuse a procedural default. Thus, states like Texas that want to rely on wooden arguments to close the door on *Martinez* cause arguments may inadvertently be opening an even larger door to federal habeas review.

IV. THE PUSH TOWARD ADEQUACY DOCTRINE

A state court's reliance on a procedural rule will only bar federal review of a constitutional claim if the state procedural rule is a nonfederal ground adequate to support the state's judgment.[65] To be adequate, the underlying state procedural rule must be firmly established and consistently followed, and it must not be applied in ways that unduly burden the defendant's exercise of her constitutional rights.[66]

In states that successfully convince federal courts to adopt a formalistic interpretation that exempts them from the expanded grounds for cause announced in *Martinez*, habeas litigants may simply recast their arguments as adequacy challenges.[67] In states where defendants are de facto forced to raise their ineffective assistance of trial counsel claims in collateral review proceedings without the aid of competent counsel, defendants could argue that the state's procedural scheme discriminates against their Sixth Amendment right to an effective trial attorney by failing to afford them a reasonable opportunity to ever challenge their trial attorneys' performance.

There is precedent in the federal courts to support adequacy challenges predicated on a state's failure to provide effective procedures for allowing defendants to raise ineffective assistance of trial counsel claims. Oklahoma's procedural rules, for example, required defendants to raise ineffective assistance of trial counsel claims on direct appeal and provided defendants with the opportunity to ask for a remand for an evidentiary hearing to expand the

65. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012).

66. *See* Walker v. Martin, 131 S. Ct. 1120 (2011); Beard v. Kindler, 558 U.S. 53 (2009); Lee v. Kemna, 534 U.S. 362 (2002).

67. Martinez himself raised an alternative argument in the lower courts that Arizona's procedural rules were inadequate. *See* Martinez v. Schriro, 623 F.3d 731, 734 (9th Cir. 2010).

trial record to support their ineffective assistance of trial counsel claims when necessary. In practice, however, the appellate courts almost never granted hearings despite frequent requests. The Tenth Circuit Court of Appeals held that the state procedural rule requiring defendants to raise ineffective assistance of trial counsel claims on direct appeal or waive them was inadequate as applied to defendants with extrarecord ineffectiveness challenges, because the state did not evenhandedly provide all defendants with a fair opportunity to raise the claim at that stage.[68] As the Tenth Circuit explained,

> [t]he practical effect of [Oklahoma's rules] is to force [defendants] either to raise this claim on direct appeal, with new counsel but without the benefit of additional fact-finding, or have the claim forfeited under state law. This Hobson's choice cannot constitute an adequate state ground under the controlling case law because it deprives [the defendant] of any meaningful review of his ineffective assistance claim.[69]

Federal courts have also struck down procedures in Idaho[70] and New Mexico[71] that required defendants to raise ineffective assistance of trial counsel claims on direct appeal but did not provide them with new counsel to do so. The courts held that, because an attorney cannot be expected to raise his own ineffectiveness, these states' failure to provide defendants with the opportunity to consult with new counsel similarly deprived them of any meaningful review of their ineffective assistance claims.[72]

Although these adequacy challenges were raised in states that required defendants to present ineffective assistance of trial counsel claims on direct appeal, a similar challenge could be raised about the lack of a fair opportunity to present ineffective assistance of trial counsel claims in states like Texas that do not have that requirement. *Martinez* itself provides the framework for this adequacy argument. The *Martinez* Court recognized that many states that

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68. *See* Brecheen v. Reynolds, 41 F.3d 1343, 1364 (10th Cir. 1994). There has been a substantial dialogue since *Brecheen* between the Oklahoma state courts and the federal courts about the adequacy of Oklahoma's procedures. *See, e.g.*, English v. Cody, 146 F.3d 1257 (10th Cir. 1998); Berget v. State, 907 P.2d 1078 (Okla. Crim. App. 1995); *see also* Sanchez v. Shillinger, No. 94-8060, 1995 U.S. App. LEXIS 15374 (10th Cir. June 21, 1995) (applying *Brecheen* to Wyoming's procedures).

69. *Brecheen*, 41 F.3d at 1364.

70. *See* Hoffman v. Arave, 236 F.3d 523, 535-36 (9th Cir. 2001).

71. *See* Jackson v. Shanks, 143 F.3d 1313, 1319 (10th Cir. 1998).

72. *See id.* at 1319; *see also Hoffman*, 236 F.3d at 535-36 (holding that Idaho's procedural scheme "effectively prevented [the defendant] from timely raising his ineffective assistance of counsel claims").

theoretically allow defendants to raise ineffective assistance of trial counsel claims on direct appeal have such abbreviated deadlines for filing new trial motions to expand the trial record that there is not adequate time for attorneys to investigate ineffective assistance claims.[73] With deadlines of between five and thirty days from the date of conviction,[74] there is not sufficient time to hire new counsel and have that counsel obtain a copy of the trial transcript, investigate the trial attorney's performance, and draft a new trial motion. Because the opportunity to raise extrarecord claims of ineffective assistance of trial counsel on direct appeal in these jurisdictions is illusory, the state's procedures for raising ineffective assistance of trial counsel claims on direct appeal fail to give defendants a realistic opportunity to vindicate their Sixth Amendment rights to effective trial counsel and should be deemed inadequate.

Nor can these states rely on the fallback position that, if a defendant is unable to supplement the record in that brief period of time, she can raise the ineffective assistance of trial counsel claim in state postconviction proceedings. As an initial matter, a state like Texas, where the opportunity to raise ineffectiveness challenges on direct appeal is illusory, should be estopped from claiming that it is exempt from *Martinez* because it allows defendants to raise ineffective assistance of trial counsel on direct appeal and then, in the same breath, claiming that its procedures are adequate because defendants can raise ineffective assistance of trial counsel in state postconviction. Adequacy, much like cause, is a doctrine rooted in equity. If equity concerns motivated the *Martinez* Court to hold that states had to provide adequate postconviction counsel to defendants who were de jure forced to raise ineffective assistance of trial counsel in collateral review proceedings for their procedural defaults to be enforced in federal court, those same equity concerns should find a state procedural scheme that de facto forces defendants to raise ineffective assistance of trial counsel claims in postconviction proceedings without the assistance of effective counsel to be inadequate.

As the *Martinez* Court recognized, without an effective attorney, defendants will not be able to vindicate their ineffective assistance of trial counsel claims, because such claims often require extrarecord investigation and an understanding of trial strategy.[75] As a result, states that make a conscious choice to move trial ineffectiveness claims outside of the direct-appeal

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73. *See* Martinez v. Ryan, 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 [an] ineffective-assistance claim").

74. *See id.* (recognizing that most states give defendants between five and thirty days from the date of conviction to file a request to expand the record on appeal).

75. *Id.* at 1317.

process—where counsel is constitutionally guaranteed—and then refuse to appoint counsel to aid defendants in raising the claims in initial collateral review proceedings are significantly compromising defendants' abilities to file ineffective assistance of trial counsel claims.[76] Adequacy doctrine is designed to address state practices that place precisely this type of undue burden on the exercise of a federal right. Given that the right at issue is the fundamental right to effective counsel, which the *Martinez* Court described as a "bedrock principle in our justice system" and the "foundation for our adversary system,"[77] the federal courts should be particularly resistant to state procedures that prohibit enforcement of the right.

A petitioner who successfully challenges the adequacy of a state's procedures may open a wider door to federal habeas review than a petitioner who successfully establishes cause under *Martinez*. Whereas cause arguments tend to focus on the individual circumstances of a habeas petitioner's case, adequacy challenges are often used to raise broad questions about the operation of a state's procedural rules. The focus of a cause inquiry is whether there was some objective factor external to the defense that prohibited *that* defendant from complying with the state procedural rule(s) *in that case*. In order to show cause to excuse the procedural default of an ineffective assistance of trial counsel claim under *Martinez*, the petitioner must show that *his* initial collateral review attorney was ineffective under *Strickland* (or that *he* did not have a postconviction attorney) and that *his* underlying ineffective assistance of trial counsel claim is a substantial one. If he succeeds, there is very little precedential value to the decision because it involves determinations personal to his case. I do not mean to suggest that pattern and practice evidence of a state's behavior will be irrelevant to cause inquiries. If a habeas petitioner were to show that a state engaged in a systematic practice of providing ineffective appellate attorneys, that would certainly be relevant to the petitioner's argument that he was unable to comply with rules of appellate procedure. However, in the end, the question in a cause inquiry would still be whether the state's practices had the effect of preventing that particular petitioner of complying with the state rules. In short, the petitioner would have to show that *his* appellate attorney was constitutionally ineffective.

In contrast, the focus under adequacy doctrine is on the state's procedures. As a result, a federal court's ruling on an adequacy challenge often has broader implications for the offending state than an individualized finding of cause in a

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76. *Id.* at 1318 ("By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims.").

77. *Id.* at 1317.

particular litigant's case. To be sure, there are occasions when a petitioner asserting an adequacy challenge is claiming that an otherwise valid state procedural rule was applied to his particular case in a way that unduly burdened his ability to exercise his federal rights.[78] Such as-applied, individualized adequacy challenges look a lot like cause inquiries. However, many adequacy challenges are facial challenges to the adequacy of a state's procedural rules across all cases or as-applied challenges demonstrating that a state's procedural rules are applied in ways that systematically burden defendants' abilities to assert their constitutional rights.[79] For facial challenges and as-applied challenges that reveal systemic burdens on the exercise of federal rights, the question the court addresses is not personal to the defendant.[80] Rather, the federal court analyzes the relevant procedural rules and asks whether the state is unduly burdening the exercise of federal rights for an entire class of defendants. In the wake of *Martinez*, the Court has paved the way for petitioners to argue that a majority of states have procedural schemes that have the effect of preventing most defendants in the state from vindicating their Sixth Amendment rights to effective trial counsel. Once a federal court deems a state's procedural scheme inadequate as applied to a class of defendants, it paves the way for future petitioners from that state to walk through the adequacy door and have their claims heard on the merits. Thus, states like Texas may inadvertently be pushing habeas litigants down a path that will lead to easier and faster federal consideration of ineffective assistance of trial counsel claims than the cause regime established in *Martinez*.

CONCLUSION

Whether a state prisoner has had a full and fair opportunity to have her constitutional claims heard in state court has long been an important consideration in defining the scope of federal habeas review of state criminal

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78. *See, e.g.*, Lee v. Kemna, 534 U.S. 362 (2002) (holding that, although a Missouri state rule requiring defendants to put all requests for continuances in writing was not facially problematic, as applied to a defendant who was surprised in the midst of trial with the disappearance of his subpoenaed witnesses, the application of the rule unduly burdened his due process rights).

79. *See* cases collected *supra* note 68; *see also* Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243 (2003) (describing the facial and as-applied variants of the unduly burdensome branch of adequacy doctrine).

80. The habeas petitioner must, of course, show that his claims were defaulted because of the faulty rule(s), but that is different from a focus on the individual circumstances of his case.

convictions,[81] and the right to effective trial counsel has long been considered the most fundamental of a criminal defendant's constitutional rights.[82] Unfortunately, it has also long been the case that a majority of states routinely underenforce defendants' Sixth Amendment rights to counsel by erecting procedural regimes that effectively prevent them from ever challenging their trial attorneys' performance.[83] *Martinez v. Ryan* demonstrates that the Court has noticed this problem and is willing to use its equitable habeas power to begin addressing it.

Martinez may be the first step toward establishing a meaningful dialogue between the state and federal courts about what procedures states must have to give defendants an opportunity to vindicate their Sixth Amendment rights to effective trial counsel. If *Martinez*'s expanded grounds for cause do not send a strong enough message to the majority of states about the need to reform their procedures, the federal courts can use other, broader equitable doctrines—like adequacy—to catalyze change. More habeas petitioners should raise adequacy challenges to state procedural schemes that fail to adequately protect defendants' Sixth Amendment rights. And if adequacy is not a sufficiently powerful lever, the Supreme Court has other tools at its disposal to address the problem, including the possible recognition of a constitutional right to counsel on initial collateral review. How far the Court is willing to go and how resistant the states are to changing their procedures remains to be seen, but the Court's willingness to start this dialogue is crucially important. We will never solve the indigent defense crisis if states are permitted to avoid addressing alleged violations of the right to effective trial counsel. The first step toward effectuating change is to ensure that the state courts see and have to address the underlying issue.[84] Perhaps then we can put some pressure on the *Strickland* standard and begin to breathe life into *Gideon*.

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81. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

82. *See* Gideon v. Wainwright, 372 U.S. 335, 343 (1963).

83. *See* Primus, *supra* note 15.

84. *See* Primus, *supra* note 15 (arguing that the best way to ensure that state courts address ineffective assistance of trial counsel claims is to move such claims to direct appeal and proposing a procedural scheme that would give defendants realistic opportunities to have those claims considered on appeal).