Bloomberg BNA

Criminal Law Reporter™

HABEAS CORPUS

Habeas Review Under 28 U.S.C. § 2254 After *Martinez v. Ryan*: Federalization and Forum Shopping for Ineffective-Assistance Claims

BY GRAY R. PROCTOR

On March 20, the U.S. Supreme Court decided *Martinez v. Ryan*,[1] a federal habeas appeal of a defaulted claim of ineffective assistance of counsel. Martinez's appointed counsel had failed to raise the claim during state collateral review. Overruling every federal circuit court, *Martinez* held that, for claims that could not have been brought prior to the collateral review stage (''first-tier collateral claims,'' generally claims of ineffective assistance of counsel), prisoners who had no counsel or ineffective counsel on collateral review are not subject to procedural default. In this article, I explain why *Martinez* could offer certain litigants a choice of forum for first-tier collateral claims and will lead to increasing federalization of the law of ineffective assistance of counsel.

[1] 132 S. Ct. 1309 (2012).

Gray Proctor practices law in Orlando, Fla. His practice focuses on criminal appeals and post-conviction review, along with re-entry and clemency issues. He also serves as deputy director of the American Bar Association's National Inventory of Collateral Consequences of Conviction (NICCC), available online at http://www.abacollateralconsequences.com. The website of his law office is at http://www.appealsandhabeas.com.

Martinez v. Ryan: Background and Holding

Proceeding pro se on federal habeas review of his Arizona state conviction, Luis Martinez brought an ineffective-assistance-of-counsel claim that he had not presented to the Arizona courts. The state argued that Martinez had therefore procedurally defaulted his claim on habeas review.[2] Martinez countered by arguing that his claim fell within the ''cause and prejudice'' exception to procedural default because his post-conviction attorney[3] rendered ineffective assistance in failing to bring the claim.

The state's reply, well-supported by existing caselaw,[4] was that ineffective assistance of counsel could serve as ''cause'' only at trial and on direct appeal, because no right to counsel exists afterward.[5] Only if a right to counsel existed did the Sixth Amendment ''require[ ] that responsibility for the [procedural]

[2] See, e.g., *Jones v. United States*, 153 F.3d 1305, 1307 (11th Cir. 1998) (applying doctrine of procedural default to claims by federal prisoners under 28 U.S.C. § 2255 that were not raised at trial or on appeal); *Snowden v. Singletary*, 135 F.3d 732, 735-76 (11th Cir. 1998) (explaining that claims not ''exhausted'' in state court are procedurally defaulted if they could no longer be raised at the time the federal court considers a Section 2255 petition).

[3] Arizona is one of a few states that appoint counsel for every first post-conviction proceeding. Ariz. R. Crim. Proc. 32.4(c)(2).

[4] *Coleman v. Thompson*, 501 U.S. 722 (1991) (reiterating that ''counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation'').

[5] *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (''We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions.'').

 ISSN 0011-1341

default be imputed to the State.''[6] Unsurprisingly, Martinez did not prevail in the district court.

Before the U.S. Court of Appeals for the Ninth Circuit, Martinez argued that the Sixth Amendment's guarantee of effective counsel applied on collateral review insofar as it was the first time he could have brought his claim of ineffective assistance.[7] The Ninth Circuit aptly identified the competing legal principles:

> On the one hand, the Court's decisions in *Halbert* [*v. Michigan*, 545 U.S. 605 (2005)] and *Douglas* [*v. California*, 372 U.S. 353 (1963)] recognized a federal constitutional right to counsel in connection with a criminal defendant's direct appeal from his conviction (or the equivalent of direct appeal). On the other hand, in *Ross v. Moffitt*, the Court declined to recognize a right to counsel in connection with a criminal defendant's pursuit of second-tier review. 417 U.S. 600 (1974).[8]

Douglas established that the Equal Protection Clause guarantees effective assistance of counsel on direct appeal because ''where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.''[9] *Halbert* involved Michigan's procedure granting its courts of appeal discretion to reject appeals of guilty pleas. Although the Supreme Court in *Ross* refused to extend the Sixth Amendment's guarantee of effective counsel to discretionary appeals in state supreme court or the Supreme Court itself, it held in *Halbert* that the right to counsel does extend to discretionary first-tier review, which is ''likely the only[ ] direct review the defendant's conviction and sentence will receive.''[10]

The Ninth Circuit ultimately decided that ''there is no federal constitutional right to the assistance of counsel in connection with state collateral relief proceedings, even where those proceedings constitute the first tier of review for an ineffective assistance of counsel claim.''[11] Having concluded that there was no right to counsel, the *Martinez* court adhered to the existing law on the ''cause'' element of the cause-and-prejudice exception to procedural default: An attorney's actions cannot serve to excuse default unless her client has a right to counsel at that time.

On review of the Ninth Circuit's decision, the Supreme Court recognized that it had not answered the question of whether a right to counsel attaches to claims that cannot be brought until post-conviction review, but it found that ''[t]his is not the case . . . to resolve whether that exception exists as a constitutional matter.''[12] Instead, the Supreme Court limited its ruling to the doctrine of procedural default:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.[13]

After *Martinez*, states must either appoint counsel for at least one opportunity to bring claims of ineffective assistance of counsel[14] or always lose the benefit of the procedural-default defense for claims not raised at the first tier of review.[15]

Procedural History Of *Martinez*-Excused Claims: The Two Paths to Federal Review

From the viewpoint of individual petitioners, *Martinez*'s role in federal habeas review will be relatively minor in states that appoint counsel for collateral review. Only where collateral counsel renders constitutionally ineffective assistance will petitioners be able to bring new claims. In states that do not appoint counsel, the absence of procedural default will give petitioners a choice between the state and federal forums for initial review of their first-tier collateral claims. As explained below, this choice of forum may be quite significant because many of the laws that restrict federal habeas courts will not apply to *Martinez*-excused claims.

***Martinez* in states that appoint counsel on collateral review.** The heartland scenario here occurs when an appointed post-conviction attorney fails to raise an ineffective-assistance-of-counsel claim, which the petitioner then brings in a federal habeas case. The prosecutor will then argue that the claim is procedurally defaulted because it is not exhausted and the petitioner cannot now raise it in state court. The petitioner must reply by contending that his procedural default is excused because his attorney rendered constitutionally ineffective assistance of counsel.

Before *Martinez*, the petitioner would have lost every time because, as a matter of law, ineffective assistance of counsel could not excuse procedural default. After *Martinez*, the petitioner can bring his claim on federal habeas if—and only if—he can show that his post-conviction attorney's failure to bring the claim was itself constitutionally ineffective.

The test for constitutional ineffectiveness is set forth in *Strickland v. Washington*[16] and requires proof of two elements: unreasonably deficient performance and

---

[6] *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[7] *Massaro v. United States*, 538 U.S. 500 (2003) (explaining that ''almost all jurisdictions prefer that ineffective assistance claims be presented on collateral attack'').

[8] *Martinez v. Schriro*, 623 F.3d 731, 736-37 (9th Cir. 2010). Following the quoted text is a useful review of the law governing the right to counsel both at trial and on appeal.

[9] 372 U.S. at 357.

[10] *Halbert v. Michigan*, 545 U.S. 605, 609 (2005).

[11] 623 F.3d at 739-40.

[12] *Martinez*, 132 S. Ct. at 1315.

[13] Id. at 1320.

[14] It remains to be seen whether opportunities to raise these claims prior to collateral review will suffice. The Supreme Court has granted certiorari in *Trevino v. Thaler* (No. 11-10189) to review whether Texas's procedure for raising ineffective-assistance claims in a motion for a new trial renders *Martinez* inapplicable to claims defaulted on collateral review.

[15] Claims defaulted on appeal of first-tier collateral proceedings are not excused by *Martinez*. 132 S. Ct. at 1320 (''The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.'').

[16] 466 U.S. 668 (1984).

  CRL ISSN 0011-1341

prejudice. To determine whether counsel's performance was deficient, a court must ''judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct.''[17] Reasonableness is a very deferential standard of review.[18] The law on ineffective assistance in post-conviction proceedings is not yet well developed; nevertheless, it seems likely that as with appellate counsel, post-conviction counsel will not be required to bring every conceivable claim nor to exhaust every line of factual investigation.[19] Therefore, as a practical matter, proof of the deficiency element will depend on whether the second element—prejudice—exists. As with prejudice on appeal, on collateral review a petitioner will have to show that he could have prevailed if the claim had been brought.[20]

There is no reason to predict that many claims will be *Martinez*-excused in right-to-counsel states. We expect attorneys to render effective assistance; nothing suggests that a significant number of attorneys will fail to do so. Although petitioners may want to refuse counsel to obtain the forum-shopping benefits of initial review at the federal level, they will probably not have any right to do so.[21] As for retained counsel, noted commentator Nancy King has suggested that *Martinez* may not apply, ''because *Martinez* is an equitable rule, and the state's oversight in failing to provide effective counsel falls somewhere short of a constitutional violation, the equities of allowing a petitioner to avoid the mistakes of his own agent'' do not have the same strength.[22] Thus, petitioners in states that appoint counsel for collateral review are not likely to reap the direct benefits of *Martinez* as a vehicle for de novo federal review.

***Martinez* in states that do not appoint counsel.** When counsel is not appointed, the *Strickland* analysis will not be necessary to determine whether a claim is defaulted. A literal reading of *Martinez* would always protect such a petitioner from default.[23] However, exceptions might be found. Where a petitioner has used *Martinez* as a tactic for forum shopping, courts may find that counsel's absence was not the actual cause of the petitioner's failure to raise his claim below and, therefore, not ''cause'' for the purposes of the cause-and-prejudice exception to procedural default. Courts might also resurrect a jurisprudence of ''deliberate bypass''[24] or something similar for *Martinez*-defaulted claims. I predict that federal courts will be more likely to address the merits of the underlying claim than to expend resources making a factual determination on a petitioner's intent.

Other possible exceptions will not be as problematic for federal courts to apply. King has predicted that petitioners in appointment-of-counsel states will not be able to reap the benefits of *Martinez* by rejecting appointed counsel because in that case equitable principles would not require it.[25] Petitioners should also be aware that some courts have ruled that *Martinez* does not apply where no state post-conviction filing occurs at all.[26] There may be other situations where courts find it inequitable to give a petitioner the benefit of *Martinez* due to his own actions.[27]

Results of Federal Review Of *Martinez*-Excused Claims

Once a claim arrives in federal court in a *Martinez*-excused posture, federal courts are free of the statutory limits on habeas review. The factual basis and governing law of the claim will be reviewed de novo rather than with deference to the state court decision. If an evi-

[17] *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

[18] *Strickland*, 466 U.S. at 690-91 (holding that ''strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation''); *Chandler v. United States*, 218 F.3d 1305, 1315-16 (11th Cir. 2000) (citing cases for the proposition that ''because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take.'').

[19] *Jones v. Barnes*, 463 U.S. 745, 753-54 (1983) (''Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.''); *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (explaining that appellate counsel cannot be deemed ineffective for failing to raise issues ''reasonably considered to be without merit'').

[20] *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Nyhuis*, 211 F.3d at 1344.

[21] See text accompanying footnote 34 (discussing the right to self-representation on collateral review).

[22] Nancy King, ''Preview: A Preliminary Survey of Issues Raised by Martinez v. Ryan,'' at 12-13 (2012), available at http://ssrn.com/abstract_id=2147164.

[23] *Martinez*, 132 S. Ct. at 1320 (''Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel.'').

[24] ''Deliberate bypass'' is an older standard for deciding whether a claim was procedurally defaulted. *Fay v. Noia*, 372 U.S. 391 (1963). This standard is no longer applied in habeas corpus. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[25] King, supra, at 12; see also *Martinez*, 132 S. Ct. at 1318 (explaining that the cause-and-prejudice exception to procedural default ''reflect[s] an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default'').

[26] *Jones v. Penn. Bd. of Prob. and Parole*, No. 10-2944, 2012 WL 3024969 (3d Cir. 2012) (unpublished). See also *Uptegrove v. Villmer*, 2012 WL 3637707 (W.D. Mo. 2012).

[27] See King, supra, at 13 (''If the Court meant what it said when it found that to present a claim in accordance with state procedures is one of the challenges that requires the effective assistance of an attorney, then *Martinez* should not be limited to those petitioners who actually succeed in complying with state rules for filing their initial review collateral pleading. Will a petitioner be able to invoke *Martinez* if his state petition was rejected because it was incomplete, on the wrong form, or sent to the wrong place? What if a state petitioner was told he had to pay a filing fee or file an in forma pauperis affidavit and never did? What if the proceeding was filed, but later dismissed—would voluntary dismissal bar *Martinez*? If so, how about dismissal for lack of prosecution, or dismissal as a sanction? What if an unrepresented petitioner never sought state post-conviction relief because his plea agreement, negotiated by his trial counsel, expressly waived that opportunity—does his subsequent failure to file for state collateral relief preclude a federal court from finding ''cause'' for the default of a later ineffectiveness claim challenging the attorney's advice to sign the waiver?'').

dentiary hearing is granted, petitioners will gain the assistance of counsel for that proceeding. Moreover, the district court will not be limited to the law of the Supreme Court. Petitioners with claims of ineffective assistance of counsel that are meritorious according to circuit precedent but not under state law will now be able to prevail on federal habeas review.

Aside from the increase in federal law caused by ruling on the merits of *Martinez*-excused claims, federal courts will generate de novo holdings on ineffective assistance of counsel in the course of determining whether *Martinez* applies. Aside from increasing the amount of federal law pertaining to ineffective assistance, *Martinez* will give federal courts the authority to set the standards for effective assistance and apply them in a far greater range of cases than before.

Bypassing limits on federal habeas authority. Where *Martinez* applies, federal courts can make de novo determinations of fact and law free of the limiting statutory framework that would otherwise apply.

One core principle of federal habeas review is deference to state courts in decisions of fact and law. Where a state court makes a finding of fact, that finding ''shall be presumed to be correct'' unless the petitioner rebuts that presumption ''by clear and convincing evidence.''[28] Because *Martinez* will enable federal courts to hear claims never brought in state court, the more relevant provision of 18 U.S.C. § 2254 is its command that petitioners who have ''*failed* to develop the factual basis of a claim in State court'' will not receive an evidentiary hearing unless the petitioner can show that no reasonable factfinder would have found the petitioner guilty if his constitutional rights had not been violated.[29] A petitioner ''fails'' to develop the factual basis of a claim when there exists ''a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.''[30] The reasoning of *Martinez* would seem to require that the Supreme Court redefine ''failure'' to exclude cases where counsel is responsible for the undeveloped state of the record. If so, evidentiary hearings on *Martinez*-excused claims will be governed by the more generous standard of *Townsend v. Sain*:

> A federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[31]

Petitioners bringing *Martinez*-excused claims are very likely to meet this lower standard for an evidentiary hearing.

A side effect of federal evidentiary hearings is access to counsel. Counsel must be appointed under Rule 8(c).[32] The law of Rule 8(c) is not currently well developed, doubtless due to the rarity of evidentiary hearings in federal court.[33] Nevertheless, a good argument exists that a right to counsel without a right to effectiveness is worse than no right at all. This is especially important on habeas review, where petitioners probably do not enjoy any right to self-representation.[34] It seems likely that courts will draw on constitutional principles and find that Rule 8(c) incorporates a right to effective counsel.[35]

A similar benefit accrues with respect to state court decisions of law. For any claim ''adjudicated on the merits in State court,'' the standard of relief requires federal courts to find ''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.''[36] Applying this deferential standard to state court rejections of ineffective-assistance claims—which already apply a presumption of effective assistance—has led the Supreme Court to speak of ''the doubly deferential judicial review that applies to a Strickland claim evaluated under the § 2254(d)(1) standard.''[37] Because there is no state court decision, *Martinez*-excused claims can prevail if they are meritorious under circuit or district precedent, without having to be so plain as to be beyond debate when measured against decisions of the Supreme Court only.

Thus, where *Martinez* applies, federal courts become a forum for meaningful review of claims of ineffective assistance of counsel.

Increasing federal control of the law of ineffective assistance of counsel. A second consequence of *Martinez* is an opportunity for federal courts to develop the law of ineffective assistance, regardless of whether a state appoints counsel.

---

[28] 28 U.S.C. § 2254(e)(1).

[29] Section 2254(e)(2)(B) (emphasis added). In addition to this requirement, a petitioner must show that the claim either relies on a new, retroactive rule of constitutional law or depends on facts that could not have been discovered earlier. Section 2254(e)(2)(A).

[30] *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

[31] 372 U.S. 293, 313 (1963).

[32] Rules Governing Section 2254 Cases in the United States District Court, Rule 8(c) (''Section 2254 Rules'') (''If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A'' (governing appointment of counsel for indigents)).

[33] In noncapital cases, fewer than 1 percent of habeas petitions involve an evidentiary hearing. King et al., Executive Summary at 5 (2007), available at https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf.

[34] Compare *Faretta v. California*, 422 U.S. 806 (1975) (recognizing that criminal defendants have a qualified constitutional right to self-representation at trial), with *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000) (declining to extend the right to self-representation on direct appeal, where the interests of the court and society in accuracy outweigh the defendant's interest in autonomy); Advisory Committee notes to Rule 8 of the Section 2254 Rules (describing appointment of counsel as benefitting ''both the court and the petitioner'').

[35] Cf. *McGriff v. Dep't of Corr.*, 338 F.3d 1231, 1235 (11th Cir. 2003) (''If the Supreme Court had intended a § 2254 petitioner to have a more substantial right to counsel than those provided by the Constitution, we would expect to see language to that effect in the text of the rule. We find no such language in Rule 8(c). We therefore turn to the Constitution not for authority, but instruction.'').

[36] Section 2254(d)(1).

[37] *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

  CRL ISSN 0011-1341

In states that do not appoint counsel, federal courts will directly address a petitioner's claim of ineffective assistance for merit, without the requirement that the ineffectiveness be so clear that no reasonable jurist could disagree. But even if counsel was present, federal courts applying *Martinez* will have to address the merits of the substantive claim of ineffective assistance at trial or on appeal in determining whether collateral counsel rendered ineffective assistance by failing to raise that claim. Exceptions will exist only where the federal habeas court can find no deficiency without reference to the merits of the petitioner's claim. Examples include instances where counsel's failure to discover a fact was not unreasonable, such as: the petitioner failing to inform his lawyer of facts that either underlie the claim or would have lead to discovery of those facts;[38] claims based on facts that were not discoverable given the resources available; and claims based on facts that seemed unlikely to be true at the time of the investigation.[39]

Thus, *Martinez* will leave federal courts more involved in articulating and enforcing standards by which criminal lawyers will be judged.

[38] See *Strickland*, 466 U.S. at 691 (''The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.'').

[39] *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (observing that ''*Strickland* . . . permits counsel to make a reasonable decision that makes particular investigations unnecessary.'' (quotation omitted)).

Conclusion

Martinez clearly helps unrepresented federal habeas petitioners who did not discover the factual or legal basis of their claims of ineffective assistance in time to bring them in state court. Petitioners who receive ineffective assistance of counsel on collateral review also receive the benefit of *Martinez*.

It remains to be seen whether *Martinez* will function as a choice-of-forum rule for ineffective-assistance claims and, if so, to what extent. But it should be understood that *Martinez* operates to give federal courts greater control over the law of ineffective assistance of counsel. By freeing lower courts from the deferential standards of federal habeas review on this issue, I think it very likely *Martinez* will prove to be more important than the expansions of the scope of the right to effective assistance announced in recent years.[40] Regardless of whether that prediction holds, *Martinez* is definitely a significant procedural complement to those rules with an impact beyond its narrow holding.[41]

[40] *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (holding that ineffective advice to reject a plea bargain requires that the prosecution re-offer the agreement even after a conviction at trial); *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (holding that the right to counsel protects a defendant to whom a plea offer was never communicated, resulting in a less favorable agreement); *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (holding that defendants are entitled to a reasonable level of advice about the immigration consequences of a guilty plea and perhaps other collateral consequences of a conviction).

[41] See also *Maples v. Thomas*, 132 S. Ct. 912 (2012) (holding that abandonment by counsel on state post-conviction proceedings constituted cause and prejudice for claims procedurally defaulted on federal habeas review).