No. 13-868

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

DAVID SCOTT DETRICH,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT HAS MISCONSTRUED THIS COURT'S HOLDINGS ON IMPORTANT FEDERAL QUESTIONS.

Detrich seeks to avoid review merely because the Ninth Circuit remanded this case after contravening this Court's controlling precedent. That procedural happenstance does not weigh against discretionary review under Supreme Court Rule 10(c). The important legal question is squarely presented regardless of the remand.

This Court has long required a habeas corpus petitioner seeking to excuse a procedural default to "demonstrate *cause* for the default and *actual prejudice* as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (emphasis added).[1] To show "actual prejudice," a habeas petitioner must demonstrate "not merely that the errors at trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (internal quotation marks and alteration omitted).

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[1] A petitioner may alternatively "demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. This means of excusing procedural default is not at issue here.

In *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012), this Court held that, in some limited circumstances, a petitioner may demonstrate "cause" to excuse the procedural default of a claim of ineffective assistance of counsel (IAC) at trial by showing (1) that his post-conviction relief (PCR) counsel was ineffective for failing to raise the claim, and (2) that the underlying IAC claim was "substantial," or had "some merit."[2] *Martinez* left unchanged the "actual prejudice" that is also required for a procedural default to be excused. *See id.* at 1321 (noting that the lower court "did not address the question of prejudice" and that prejudice must be decided by the court on remand). In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), this Court expanded *Martinez's* applicability but did not change its requirements.[3] Because *Martinez* already applied to habeas petitioners in Arizona, however, *Trevino* did not affect the instant case.

Even though neither *Martinez* nor *Trevino* altered the prejudice prong of *Coleman's* cause and prejudice standard, nine of the eleven judges on the *en banc* panel below held that "actual prejudice" to excuse a procedural default is satisfied in *Martinez* cases by showing that a claim is "substantial," or has "some

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[2] *Martinez* applies where, as in Arizona, "a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding." 132 S. Ct. at 1318.

[3] *Trevino* made *Martinez* applicable where a state "does not offer … defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." 133 S. Ct. at 1921.

merit." 740 F.3d at 1245 (plurality), 1265 (dissent); *see also Clabourne v. Ryan*, No. 09–99022, 2014 WL 866382, at *11 (9th Cir. Mar. 5, 2014) ("Nine of the eleven judges" in *Detrich V* concluded that "'prejudice' for purposes of the *Coleman* 'cause and prejudice' analysis in the *Martinez* context requires only a showing that the trial-level ineffective assistance of counsel claim was 'substantial.'"). Neither *Martinez* nor *Trevino* permits such a result, and the Ninth Circuit exceeded its authority by effectively eliminating "actual prejudice" from the showing a petitioner must make in order to excuse his procedural default.

Detrich contends that this Court should not grant certiorari because Petitioner is not challenging the Ninth Circuit's remand of the matter to the district court, and because the four-judge plurality ruling is not controlling. But, as discussed below, this Court often grants certiorari when a federal court of appeals remands a case after deciding a legal issue incorrectly. Further, Petitioner does not merely seek certiorari on the decision of the four-judge plurality, but also on the holding of a *nine-judge majority*. Given the frequency with which *Martinez* claims arise, there is a compelling need to grant certiorari to prevent systematic error in excusing procedural default throughout the lower courts within the Ninth Circuit.

A. This case involves a "case or controversy" allowing this Court to grant certiorari.

Detrich argues that because Petitioner does not challenge the Ninth Circuit's remand of this matter to district court, this Court should not grant the petition.

But, in remanding, the majority below effectively instructed the district court *not* to consider prejudice when deciding whether to excuse Detrich's procedural default. Consequently, the interlocutory phase of this case is the appropriate juncture for intervention because interlocutory review is warranted if the petition presents an "important and clear-cut issue of law" that "would otherwise qualify as a basis for certiorari" and "is fundamental to the further conduct of the case." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (citing cases).

The precedential effect of the nine-judge majority holding—that *Martinez* does not require a petitioner to demonstrate prejudice (but only a "substantial" claim) to excuse a procedural default—will inject error into every *Martinez* case litigated in the Ninth Circuit. At least one Ninth Circuit panel has already identified the nine-judge holding and perpetuated its error by similarly instructing the district court that *Coleman* prejudice need not be demonstrated before excusing a procedural default. *Clabourne*, 2014 WL 866382, at *11 (observing that "[n]ine of the eleven judges" in this case reached the conclusion that '"prejudice' for purposes of the *Coleman* 'cause and prejudice' analysis in the *Martinez* context requires only a showing that the trial-level ineffective assistance of counsel claim was 'substantial.'"). The *Clabourne* Court remanded the matter to district court, instructing it that, "to meet the 'prejudice' requirement to excuse a procedural default, it is only necessary for Clabourne to establish that his 'underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has

some merit.'" *Id.* at *16 (quoting *Martinez*, 132 S. Ct. at 1318).

Even though the opinion below resulted in a remand to the district court, nine judges on the Ninth Circuit panel improperly held that *Coleman* prejudice need not be demonstrated in *Martinez* cases before a procedural default may be excused. This holding conflicts with this Court's clear precedent in both *Coleman* and *Martinez*, and certiorari is proper to review the Ninth Circuit's ruling.

B. The absence of a circuit split does not preclude this Court from granting certiorari.

Detrich also contends that certiorari is not proper here because "Petitioner has not alleged that any circuit's court of appeals has interpreted *Martinez* or *Trevino* differently than the plurality opinion below." (Br. in Opp. at 3.) That point might carry weight if other circuits had published the same holding, but none has. The Ninth Circuit alone has lowered the showing a petitioner must make to excuse default under *Martinez*, *Trevino*, and *Coleman*. Certiorari may be granted when "a United States court of appeals … has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Nine judges on the en banc panel below agreed that *Martinez's* substantiality requirement satisfies *Coleman's* prejudice prong. This conclusion directly conflicts with *Martinez*, *Trevino*, and *Coleman*.

This Court has repeatedly granted certiorari when federal courts of appeals have declined to abide by the

limits set forth in the Anti-terrorism and Effective Death Penalty Act (AEDPA)—irrespective whether there was a conflict with respect to the underlying legal issue. *See, e.g., Rice v. Collins*, 546 U.S. 333 (2006); *Bradshaw v. Richey*, 546 U.S. 74 (2005) (*per curiam*); *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*); *Middleton v. McNeil*, 541 U.S. 433 (2004) (*per curiam*); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (*per curiam*); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*); *Bell v. Cone*, 535 U.S. 685 (2002). In fact, neither *Martinez* nor *Trevino* involved a circuit split.

Further, a three-judge panel of the Fifth Circuit has reached a different result on the *Coleman* prejudice issue, albeit in an unpublished decision.[4] *See Hernandez v. Stephens*, 537 Fed.Appx. 531 (5th Cir. 2013). The *Hernandez* Court recognized *Martinez's* applicability to its facts, but determined that the petitioner's claim failed for lack of prejudice:

> Even after [*Trevino's*] clarification of *Martinez*, Hernandez's claim fails because he has not shown any actual prejudice to excuse the procedural default. To show 'actual prejudice,' a petitioner 'must establish not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his

[4] Fed. R. App. P. 32.1 allows the citation of unpublished decisions issued after January 1, 2007. Such cases, however, lack precedential value in the Fifth Circuit. *See* 5th Cir. R. 47.5.4.

> entire trial with error of constitutional dimensions.'

Id. at 542 (quoting *Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008)). Thus, the Fifth Circuit did not interpret *Martinez's* substantiality requirement as satisfying *Coleman* prejudice, but instead, consistent with *Martinez*, applied the proper standard established by this Court for excusing a procedural default. The Fifth Circuit's unpublished decision highlights the Ninth Circuit's error in removing *Coleman's* prejudice prong in *Martinez* cases, and foreshadows an inevitable circuit split. This Court should grant certiorari to clarify that a state habeas corpus petitioner must demonstrate *Coleman* prejudice in order to excuse his default may in *Martinez* cases.

Detrich also cites Justice Ginsburg's dissent in *Arizona v. Evans*, 514 U.S. 1 (1995), as a basis for allowing the Ninth Circuit's improper holding to "'percolat[e]'" in the lower courts to allow this Court to "'yield a better informed and more enduring final pronouncement by this Court.'" (Br. in Opp. at 4 (quoting *Evans*, 514 U.S. at 23 n.1 (Ginsburg, J., dissenting)).) Unlike the issue here, the issue in *Evans* arose from a novel application of the Fourth Amendment in light of the computer age which *"illustrate[d] an evolving problem*" that this Court "should not[] resolve too hastily." 514 U.S. at 23 (Ginsburg, J., dissenting) (emphasis added). The showing a petitioner must make to excuse procedural default is not a "frontier legal problem" this Court has yet to address. *Id.* at 23 n.1 (Ginsburg, J., dissenting).

Rather, this case implicates the meaning of this Court's holdings in both *Martinez* and *Coleman*.

C. Neither *Martinez* nor *Trevino* permits the elimination of *Coleman's* prejudice prong from a cause and prejudice showing under *Martinez*.

Detrich attempts to buoy the majority's conclusion—that *Coleman* prejudice is satisfied by showing that the underlying IAC claim is substantial—by applying what it refers to as *Trevino's* "four-part test." (Br. in Opp. at 8–9.) That attempt fails because *Trevino* did not expand the applicability of *Martinez* in any manner that is relevant to this case. *Trevino*, 133 S. Ct. at 1921. While the *Trevino* Court summarized *Martinez*, it did not set forth a new "four-step analysis" or change *Martinez's* requirements. (Br. in Opp. at 9); *see Trevino*, 133 S. Ct. at 1918.

Even if this Court had formulated a new "four-step analysis" in *Trevino*, that analysis would not support the Ninth Circuit's removal of *Coleman's* prejudice prong. This Court stated in *Trevino*:

> We consequently read *Coleman* as containing an exception, allowing a federal habeas court to find "*cause*," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-

> counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding." *Martinez, supra,* at ——, 132 S. Ct., at 1318–1319, 1320–1321.

133 S. Ct. at 1918 (emphasis added). Like *Martinez*, *Trevino* limits its discussion to the *cause* required to excuse a procedural default. To the extent *Trevino* sets forth a four-part test to apply in *Martinez* cases, it applies only to a finding of *cause*, and not *prejudice*, to excuse a procedural default.

The en banc Ninth Circuit majority erroneously equated the omission of a discussion in *Trevino* regarding *Coleman* prejudice as an implicit elimination (or at least a dramatic reduction) of that prejudice requirement in *Martinez* cases. But *Coleman's* cause and prejudice standard is well-established as the rule for excusing procedural default in AEDPA cases. Had this Court intended to change the landscape of the cause and prejudice standard so dramatically, it surely would have done so explicitly, and not by merely omitting a discussion of prejudice.

Detrich also wrongly claims that Petitioner argues "in favor of a stricter prejudice requirement than this Court set forth in *Trevino*, *Martinez*, or *Coleman*." (Br. in Opp. at 12.) Neither *Trevino* nor *Martinez* sets forth a prejudice requirement; those cases address only *cause* to excuse a procedural default. And the standard set forth in *Coleman* is the very standard Petitioner argues *should* apply here, not some "stricter" standard. The en banc majority, however, eliminated *Coleman*

prejudice and replaced it with a "substantial" IAC claim requirement.

Martinez can only be sensibly read as addressing the *cause* to excuse a procedural default under certain narrow circumstances. It neither lessened the burden on a petitioner to demonstrate that cause exists to excuse a procedural default, nor removed the prejudice prong from that analysis. *See Martinez*, 132 S. Ct. at 1321 (stating that "the question of prejudice" "remain[s] open for a decision on remand"). *Trevino* merely expanded the applicability of *Martinez's* requirements. Detrich is therefore wrong in contending, without explanation, that the removal of *Coleman's* prejudice prong by the en banc majority flowed from a "plain reading of *Trevino*." (Br. in Opp. at 9.)

II

THE EN BANC PLURALITY IMPROPERLY REMOVED A SHOWING OF PREJUDICE IN DETERMINING WHETHER PCR COUNSEL WAS INEFFECTIVE.

In order to establish ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a petitioner must demonstrate *both* that his attorney performed deficiently *and* that he was prejudiced by the deficient performance. The four-judge plurality below improperly removed the prejudice prong from the analysis in *Martinez* cases. *Detrich v. Ryan* (*Detrich V*), 740 F.3d 1237, 1245 (9th Cir. 2013). While the majority did not embrace that holding, the plurality's ruling demonstrates the need to clarify the

meaning of this Court's holdings in *Martinez* and *Trevino*.

Detrich defends the plurality's action on the theory that Justice Breyer's statement respecting the denial of certiorari in *Gallow v. Cooper*, 133 S. Ct. 2730 (2013) (mem.), "suggests that at least some members of this Court would allow the consideration of an underlying trial ineffective-assistance claim on the merits *without requiring an additional* Strickland *showing of prejudice* for the ineffectiveness of post-conviction counsel." (Br. in Opp. at 10 (emphasis added).) Detrich misconstrues and misapplies Justice Breyer's observation.

In *Gallow*, Justice Breyer, joined by Justice Sotomayor, stated, "[t]he ineffective assistance of state habeas counsel might provide cause to excuse the default of the claim, thereby allowing the federal habeas court to consider the full contours of Gallow's ineffective-assistance claim." 133 S. Ct. at 2731. Detrich misconstrues this language as suggesting that Justices Breyer and Sotomayor would omit "prejudice" from a finding that PCR counsel was ineffective. (Br. in Opp. at 10.) To the contrary, the term "ineffective assistance of counsel" invariably refers to *Strickland's* test, which requires both deficient performance and prejudice. Justice Breyer's reference to "the ineffective assistance of state habeas counsel" presumes the application of the *Strickland* standard. Nothing in Justice Breyer's statement suggests that he would dramatically alter *Strickland's* requirements by removing its prejudice prong.

Detrich also asserts "[i]t would be impractical, if not impossible, for a federal habeas petitioner whose claim

has been defaulted to prove state post-conviction counsel's ineffectiveness at this stage." (*Id.*) The premise of that assertion is unclear. Petitioner does not contend that Detrich should present evidence of his PCR counsel's ineffectiveness "at this stage." Rather, Petitioner asserts that, when this evidence is presented in the district court, Detrich must present evidence of *both* deficient performance *and* resulting prejudice to demonstrate that his PCR counsel was ineffective. This is required when a claim of ineffective assistance of trial or appellate counsel is made as cause to excuse a procedural default, and applies no less to a claim of ineffective assistance of PCR counsel. As it stands, the plurality improperly instructed the district court, contrary to *Strickland* and *Martinez*, that a habeas petitioner need not show prejudice resulting from the deficient performance of PCR counsel.

Detrich claims that "under the four-judge plurality opinion, a habeas petitioner will not earn relief unless he proves the merits of his underlying ineffective assistance of counsel claim." (*Id.* at 13.) But the plurality would severely reduce the habeas petitioner's burden to demonstrate cause and prejudice to excuse the default of that claim by eliminating *Strickland* prejudice from a showing that PCR counsel was ineffective for cause to excuse the default, and eliminating *Coleman* prejudice from a determination of whether cause and prejudice exists to excuse the default. The plurality would substitute "substantiality" for the prejudice component of both ineffective assistance of counsel *and* cause and prejudice to excuse a default.

A claimant cannot establish ineffective assistance of counsel without demonstrating that a defendant was prejudiced by his counsel's deficient performance. *Strickland*, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."). Contrary to Detrich's assertions, it is *not* consistent with *Trevino* to conclude that a "substantial" trial-IAC claim establishes the required prejudice.

CONCLUSION

For all the reasons stated, this Court should grant the writ of certiorari.

Respectfully submitted,

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