No. 13-_____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Did the Ninth Circuit improperly hold that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), provides a "more lenient rule . . . for excusing procedural default" than does *Coleman v. Thompson*, 501 U.S. 722 (1991), and encompasses both cause and prejudice to excuse the procedural default of a habeas claim?

2. Did the Ninth Circuit improperly remove the prejudice prong from an analysis of ineffective assistance of post-conviction counsel as provided in *Martinez* and *Strickland v. Washington*, 466 U.S. 668 (1984)?

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OPINIONS BELOW

The Ninth Circuit's *en banc* opinion remanding this matter for consideration of whether Detrich can show cause for the procedural default of his claims under *Martinez* is reported at *Detrich v. Ryan (Detrich V)*, ___ F.3d ___, No. 08–99001 (9th Cir. Sept. 3, 2013) (Pet. App. A.). This opinion is the subject of this certiorari petition. *Detrich V* came about after the Ninth Circuit granted *en banc* review of the Ninth Circuit panel's opinion vacating Detrich's death sentence. The panel decision is reported at *Detrich v. Ryan (Detrich IV),* 677 F.3d 958 (9th Cir. 2012). The order granting *en banc* review is reported at *Detrich v. Ryan*, 696 F.3d 1265 (9th Cir. 2012).

Prior to *Detrich IV*, this Court vacated the Ninth Circuit's original panel opinion, which reversed the district court's denial of habeas relief and vacated Detrich's death sentence, and this Court remanded in light of *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *Ryan v. Detrich*, 131 S. Ct. 2449 (2011) (mem.). The vacated Ninth Circuit opinion is reported at *Detrich v. Ryan (Detrich III)*, 619 F.3d 1038 (9th Cir. 2010).

The district court denied habeas relief in an unpublished order reported electronically at *Detrich v. Schriro*, 2007 WL 4024551 (D. Ariz. Nov. 15, 2007). The district court also denied Detrich's motion to alter or amend the judgment in an unpublished order reported electronically at *Detrich v. Schriro*, 2007 WL 4287738 (D. Ariz. Dec. 5, 2007).

The Arizona Supreme Court reversed Detrich's first-degree murder conviction and remanded for a new

trial in an opinion reported at *State v. Detrich (Detrich I)*, 873 P.2d 1302 (Ariz. 1994). After retrial, the Arizona Supreme Court affirmed Detrich's convictions and death sentence in an opinion reported at *State v. Detrich (Detrich II)*, 932 P.2d 1328 (Ariz. 1997).

STATEMENT OF JURISDICTION

On September 3, 2013, the Ninth Circuit filed its opinion remanding this matter to the district court for consideration of whether Detrich can demonstrate cause under *Martinez* for his procedural default of certain ineffective assistance of trial counsel claims. (Pet. App. A.) This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1) and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254(b)(1) provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or

> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF THE CASE

A jury convicted Detrich of the 1989 first-degree murder, kidnapping, and sexual abuse of Elizabeth Souter.[1] *Detrich I,* 873 P.2d at 1303–04. On appeal, the Arizona Supreme Court reversed Detrich's convictions for lack of a jury instruction on unlawful imprisonment as a lesser-included offense of kidnapping. *Id.* at 1305–06. A second jury again convicted Detrich of first-degree murder and kidnapping. *Detrich II*, 932 P.2d at 1332. The trial court sentenced Detrich to death for the murder and to 21 years in prison for the kidnapping. *Id.* The Arizona Supreme Court affirmed these convictions and sentences. *Id.* at 1340.

In his first state post-conviction relief (PCR) petition, Detrich alleged several claims of ineffective assistance of counsel (IAC). *Detrich V*, at 6. The state trial court denied all claims on their merits, and the Arizona Supreme Court denied review of Detrich's claims. *Id.*

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[1] The Arizona Supreme Court's decision in *Detrich II* describes the underlying crimes.

Detrich then filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254, alleging some of the claims raised in state court, and also presenting new trial-counsel IAC claims that he had not presented in state court. *Id.* Before the district court ruled on his petition, Detrich filed a second PCR petition in state court, raising many of the trial-counsel IAC claims that he had raised for the first time in his federal habeas petition. *Id.* at 6–7. The state trial court found these claims procedurally barred under state rules. *Id.* at 7. The federal district court found these barred claims to be procedurally defaulted for purposes of federal habeas review and denied them. *Id.*

As to the non-defaulted IAC claims, the district court found that Detrich's trial counsel had performed deficiently, but that no prejudice resulted. *Id.* It therefore denied Detrich's petition. The Ninth Circuit reversed, finding that Detrich had demonstrated both deficient performance and resulting prejudice. *Id.* at 7–8. This Court vacated that opinion and remanded in light of its decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *Id.* at 8. On remand, the panel again reversed, and Petitioner sought a rehearing *en banc*, which was granted. *Id.* While this matter was pending *en banc* review, this Court issued its decision in *Martinez*.

The *en banc* panel remanded the case to the district court to determine whether there was cause under *Martinez* to excuse the procedural default of Detrich's claims and delayed consideration of Detrich's non-defaulted IAC claims. *Id.* at 45.

A. The *En Banc* Plurality Opinion[2]

In remanding this matter to the district court for consideration of cause under *Martinez*, the plurality discussed the required showing of "cause and prejudice" for excusing procedural default under *Coleman* and the *Strickland* standard for analyzing a claim of ineffective assistance of post-conviction relief counsel.

1. The cause and prejudice standard for excusing procedural default.

The *Detrich V* plurality held that *Martinez* "created an exception to the normally applicable 'cause' and 'prejudice' rule for excusing state-court procedural default on federal habeas." *Detrich V*, at 11. This "exception," according to the plurality, states a "more lenient rule … for excusing procedural default" than the "usual" "cause and prejudice" inquiry requires. *Id.* at 11–12. The plurality concludes that *Martinez'* requirement of "a 'substantial' underlying trial-counsel IAC claim[] may be seen as the *Martinez* equivalent of the 'prejudice' requirement under the ordinary 'cause' and 'prejudice' rule from *Wainwright* [*v. Sykes*, 433 U.S. 72 (1977)]." *Id.* at 13. Thus, the plurality concluded that the "prejudice" prong of *Coleman's* cause and prejudice standard was satisfied by the

[2] While six of the eleven judges on the panel concurred in the judgment remanding the matter to the district court for a determination of cause and prejudice under *Martinez*, only four of those judges concurred in Part II of the opinion, the portion addressed in this petition. *Detrich V*, at 4.

showing that the underlying trial-IAC claim was "substantial."

2. The Strickland *standard.*

Martinez also requires a petitioner who had PCR counsel to demonstrate that his counsel was ineffective under *Strickland*'s standard in order to show cause to excuse a procedural default of an underlying trial-IAC claim. 132 S. Ct. at 1318. *Strickland* requires a showing that counsel performed deficiently ***and*** that the petitioner was prejudiced by that deficient performance. 466 U.S. at 687.

The *Detrich V* plurality, however, held that a petitioner need ***not*** show *Strickland* prejudice in order to establish that PCR counsel was ineffective:

> We conclude, for the narrow purpose of satisfying the second *Martinez* requirement to establish "cause," that a prisoner need show only that his PCR counsel performed in a deficient manner. ***A prisoner need not show actual prejudice resulting from his PCR counsel's deficient performance***, over and above his required showing that the trial-counsel IAC claim be "substantial" under the first *Martinez* requirement.

Id. at 15 (emphasis added). Thus, the plurality concluded that *Martinez'* requirement of a "substantial" trial-IAC claim also satisfies a showing of prejudice under *Strickland*.

B. Judge Nguyen's Concurring Opinion.

In her concurring opinion, Judge Nguyen disagreed with the plurality's holding "that *Martinez* modifies the prejudice showings required to establish ineffective assistance of counsel under *Strickland* … and to overcome a procedural default under *Coleman*." *Id.* at 46 (Nguyen, J., concurring).

Judge Nguyen observed that "*Martinez* does not address—let alone modify—the [*Coleman*] standard's prejudice prong." *Id.* at 48 (Nguyen, J., concurring). Thus, "*Coleman's* cause-and-prejudice standard still applies 'in ***all*** cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule.'" *Detrich V*, at 47–48 (Nguyen, J., concurring) (*quoting Coleman*, 501 U.S. at 750) (internal alteration omitted). Further, because *Martinez* addresses only the "cause" prong of the *Coleman* standard, it does not eliminate the requirement that prejudice also be shown before a procedural default may be excused. *Id.* at 49 (Nguyen, J., concurring) ("Only if the claim is substantial and *Martinez's* other cause requirements are met must the federal court perform *Coleman's* more searching prejudice inquiry.").

Further, while Judge Nguyen acknowledged that *Martinez'* substantiality requirement "is, in a sense, a measure of prejudice," she disagreed with the plurality's removal of *Strickland's* prejudice prong from the analysis of IAC of PCR counsel. *Id.* at 48 (Nguyen, J., concurring). Judge Nguyen explained that the plurality improperly presumed prejudice and "conflate[d] the situation where a petitioner has *no*

postconviction counsel with one where there was postconviction counsel but counsel was ineffective." *Id.* at 48–49 (Nguyen, J., concurring).

C. Judge Watford's Concurring Opinion

Judge Watford concurred only in the plurality's conclusion that this matter should be remanded for the district court to "determine in the first instance whether petitioner's procedural default may be excused under *Martinez*." *Id.* at 51 (Watford, J., concurring). He further stated, "I see no need at this point for us to say anything more than that petitioner's motion to remand is granted." *Id.*

D. Judge Graber's Dissent

Judge Graber was joined by four other judges in dissent. *Id.* at 52. In addressing the plurality's holding that a petitioner need not demonstrate *Strickland* prejudice in order to show that PCR counsel was ineffective, the dissent noted that this Court "has never suggested that the prejudice prong of *Strickland* has a unique meaning in the context of the second *Martinez* requirement." *Id.* at 59, n.3 (Graber, J., dissenting). The dissent, however, agreed with the plurality that *Martinez'* "substantiality" requirement satisfies *Coleman's* prejudice prong:

> Under *Martinez*, a court may excuse the procedural default of an IAC claim in cases like this one if the petitioner establishes both (1) ***cause***, by showing either that no counsel was appointed in the initial-review collateral proceeding or that the appointed post-conviction

> counsel was ineffective under *Strickland* . . . ; and (2) ***prejudice***, by showing that the underlying claim of trial counsel's ineffectiveness is "substantial," meaning that it has "some merit."

Id. at 58 (Graber, J., dissenting) (emphasis added).

SUMMARY OF ARGUMENT

The *Detrich V* plurality erred by holding that *Martinez'* requirement of a substantial trial-IAC claim satisfies both the prejudice required by *Coleman* to excuse a procedural default ***and*** the prejudice required by *Strickland* for proving an IAC claim. This Court made clear that *Martinez'* requirement of a substantial claim is necessary for a showing of "cause" to excuse a procedural default and is in addition to the showing that PCR counsel was ineffective. *Martinez* does not address, much less alter, the prejudice showings required under *Coleman* and *Strickland*. *See, e.g., Martinez*, 132 S. Ct. at 1321 ("[T]he Court of Appeals did not determine whether Martinez's attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice. These issues remain open for a decision on remand.").

The plurality first erred in determining that *Martinez* provides a "more lenient rule … for excusing procedural default" and that, under this "more lenient rule," *Coleman* prejudice is satisfied merely by showing that the underlying trial-IAC claim is "substantial." *Detrich V*, at 12. A claim is "substantial" if it merely

has "some merit." *Martinez*, 132 S. Ct. at 1318. To demonstrate prejudice to excuse a procedural default, however, a petitioner must show "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). In holding that *Martinez'* requirement of a "substantial" claim satisfies *Coleman* prejudice, the plurality effectively removed the prejudice prong from analysis under *Martinez* of whether a petitioner can demonstrate cause and prejudice to excuse a procedural default. Neither *Martinez* nor any other authority supports this dramatic change to *Coleman's* requirements.

The plurality also erred by holding that, in demonstrating that PCR counsel was ineffective under *Strickland*, "a prisoner need show only that his PCR counsel performed in a deficient manner." *Detrich V*, at 15. The plurality opinion states that "[*a*] *prisoner need not show actual prejudice resulting from his PCR counsel's deficient performance*, over and above his required showing that the trial-counsel IAC claim be 'substantial' under the first *Martinez* requirement." *Id.* at 15 (emphasis added). In requiring a petitioner to demonstrate that PCR counsel "was ineffective under the standards of *Strickland*," this Court reaffirmed *Strickland's* requirement that a petitioner show prejudice resulting from his PCR counsel's performance. *Martinez*, 132 S. Ct. at 1318. A petitioner cannot establish *Strickland* prejudice merely by showing that the underlying trial-IAC claim is

"substantial," or has "some merit," as the plurality suggests. Rather, *Strickland* prejudice requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Under the plurality's construction of *Martinez*, the requirement of a "substantial" underlying trial-IAC claim does double-duty, satisfying the prejudice requirements of both *Coleman* and *Strickland*. Because there is no justification for the plurality's construction of *Martinez* or its elimination of the prejudice prongs of *Coleman* and *Strickland,* it has "decided an important federal question in a way that conflicts with relevant decisions of this Court," and must be reversed. Sup. Ct. R. 10(c).

REASONS FOR GRANTING CERTIORARI

This Court will grant a petition for writ of certiorari "only for compelling reasons," such as 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(a), (c). Here, the Ninth Circuit's holding that *Martinez'* requirement of a "substantial" trial-IAC claim satisfies prejudice under both *Strickland* and *Coleman* conflicts with this Court's decisions in *Coleman*, *Strickland*, and *Martinez*. This Court should grant this petition in order to correct the Ninth Circuit's errors and preserve the holdings of those decisions.

I. THE NINTH CIRCUIT IMPROPERLY REMOVES *COLEMAN'S* PREJUDICE PRONG FROM THE ANALYSIS UNDER MARTINEZ OF WHETHER A PROCEDURAL DEFAULT MAY BE EXCUSED.

A. *Martinez v. Ryan* did not affect *Coleman*'s requirement of showing prejudice to excuse a procedural default.

This Court held in *Martinez* that ineffective assistance of PCR counsel may constitute cause to excuse the procedural default of certain claims in very limited circumstances:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish ***cause*** for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

132 S. Ct. at 1318 (emphasis added).

This Court emphasized that *Martinez* is a "narrow exception" to "the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id.* at 1315. Thus, *Martinez* did not modify any of *Coleman's* other requirements, including that a petitioner demonstrate prejudice before a procedural default may be excused. *See Coleman*, 501 U.S. at 750.

Martinez acknowledged that a petitioner must still demonstrate *Coleman* prejudice before a federal court can excuse a default, stating "the Court of Appeals did not determine whether Martinez's attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. *And the court did not address the question of prejudice. These issues remain open for a decision on remand*." 132 S. Ct. at 1321 (emphasis added). Thus, substantiality of the defaulted trial-IAC claim is different from prejudice under *Coleman*.

Accordingly, both of *Martinez'* requirements—substantiality of the defaulted trial-IAC claim and ineffectiveness of PCR counsel—go to a showing of *cause* to excuse a procedural default. *See, e.g.*, 132 S. Ct. at 1315 (*Martinez* "modif[ies] the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as *cause* to excuse a procedural default." (emphasis added)). Once a petitioner demonstrates cause under *Martinez* by establishing both a substantial trial-IAC claim and ineffective PCR counsel under *Strickland's* standard, he still must

demonstrate *prejudice*, i.e., that an error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," before his procedural default may be excused. *Carrier,* 477 U.S. at 494 (internal quotation marks omitted).

This prejudice is different from, and more stringent than, either the showing that a trial-IAC claim be "substantial," or the showing of prejudice under *Strickland*. *See, e.g., Zinzer v. Iowa*, 60 F.3d 1296, 1299 n.7 (8th Cir. 1995) ("The 'actual prejudice' required to overcome the procedural bar must be a higher standard than the *Strickland* prejudice required to establish the underlying claim for ineffective assistance of counsel.").

B. The *Detrich V* plurality significantly expands relief under 28 U.S.C. § 2254 by wrongly reading *Martinez* as imposing a "more lenient rule" for establishing cause and prejudice than the standard required by *Coleman*.

The *Detrich V* plurality perceives in *Martinez* a "more lenient rule … for excusing procedural default" than that required by *Coleman*, stating that *Martinez* "created an exception to the normally applicable *'cause' and 'prejudice' rule* for excusing state-court procedural default on federal habeas." *Detrich V*, at 11 (emphasis added). But *Martinez* simply "recogniz[ed] a narrow exception" to *Coleman's* "unqualified statement … that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." 132 S. Ct. at 1315. Thus, *Martinez* created a new circumstance that could qualify as cause to excuse a procedural default. It

made no "exception" to the "cause and prejudice" rule itself, and certainly did not create a "more lenient rule" to be applied in *Martinez* cases.

The *Detrich V* plurality justifies its departure from the "normally applicable" cause and prejudice rule on the dubious proposition that "[t]he concern that gave rise to the strict 'cause' and 'prejudice' rule is not at issue in a *Martinez* motion." *Detrich V*, at 11–12. That "concern," according to the plurality, is "sandbagging," which occurs when "defense lawyers … take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Wainwright*, 433 U.S. at 89. The plurality provides an example of such sandbagging:

> Sandbagging might consist, for example of competent defense counsel deliberately failing to make a constitutional objection to testimony of a key prosecution witness, with the result that neither the court nor the prosecutor takes corrective action during the trial. Then in the event that the defendant is convicted, defense counsel could raise for the first time on federal habeas the constitutional objection he deliberately failed to make during trial, with the result that the conviction would be set aside.

Detrich V, at 12. The plurality wrongly concludes that sandbagging is not a danger in *Martinez* cases:

> There is no concern about competent defense counsel who might "sandbag" at trial. The premise of *Martinez* is incompetent counsel.

> Indeed, the premise is *two* incompetent counsel—trial counsel and state PCR counsel. *This quite different circumstance is reflected in the Court's more lenient rule in* Martinez *for excusing procedural default*.

Id. (emphasis added).

But the danger of sandbagging is not diminished in *Martinez* cases, because a court may find PCR counsel ineffective for failing to raise a viable trial-IAC claim, even if counsel raised and exhausted other viable trial-IAC claims. *See id.* at 19–20 ("The fact that some trial-counsel IAC claims may have been properly raised by the allegedly ineffective state PCR counsel does not prevent a prisoner from making a *Martinez* motion with respect to trial-counsel claims that were not raised by that counsel."). Instead of removing the danger of sandbagging, *Martinez* arguably provides *incentive* for otherwise-effective PCR counsel to ignore a viable claim of trial-IAC in state court, knowing that *Martinez* will allow federal habeas counsel to raise the claim for the first time in habeas proceedings. Because the claim was not presented in the state court, the federal court would decide the claim without the usual deference that AEDPA requires. The *Coleman* prejudice standard, and not a "more lenient rule," remains the law in *Martinez* cases as a safeguard against such practices.

Judge Nguyen explained that *Martinez* did not diminish the required showing of *Coleman* prejudice:

> The Supreme Court left no doubt that *Coleman's* cause-and-prejudice standard applies

> "[i]n *all* cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule." *Coleman*, 501 U.S. at 750 (emphasis added). Martinez *does not address—let alone modify—the standard's prejudice prong.*

Id. at 47–48 (Nguyen, J., concurring) (emphasis added).

Since *Wainwright,* this Court has consistently adhered to and reiterated the same stringent cause and prejudice standard. *See, e.g., Carrier*, 477 U.S. at 494 ("The habeas petitioner must show '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.'") (quoting *United States v. Frady,* 456 U.S. 152, 170 (1982)); *Coleman*, 501 U.S. at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law."). There is no justification for a "more lenient rule … for excusing procedural default" in *Martinez* cases, and this Court did not relax the cause and prejudice standard in such cases. *Detrich V*, at 12. Rather, it announced one additional, narrow, avenue for a petitioner to satisfy the "cause" prong of the established and unchanged *Coleman* standard.

C. The substantiality requirement in *Martinez* does not encompass the prejudice prong of *Coleman's* cause and prejudice standard.

Having wrongly determined that *Martinez* establishes a new cause and prejudice rule, the *Detrich V* plurality concludes that the requirement "that the prisoner show a 'substantial' underlying trial-counsel IAC claim[] may be seen as the *Martinez* equivalent of the 'prejudice' requirement under the ordinary 'cause' and 'prejudice' rule from *Wainwright*." *Id.* at 13. The dissent agrees that *Coleman's* prejudice prong is satisfied "by showing that the underlying claim of trial counsel's ineffectiveness is 'substantial,' meaning that it has 'some merit.'" *Id.* at 58 (Graber, J., dissenting). Thus, nine of the 11 judges on the *en banc* panel incorrectly believed that *Martinez'* requirement of a substantial trial-IAC claim satisfies *Coleman* prejudice. Only Judge Nguyen, in her concurring opinion, properly noted that "*Martinez* does not address—let alone modify—[*Coleman's*] prejudice prong." *Id.* at 48 (Nguyen, J., concurring).

As explained in subsection B above, this Court limited its discussion in *Martinez* to the "cause" prong of *Coleman's* cause and prejudice standard, answering only the question "whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide *cause* for a procedural default in a federal habeas proceeding." 132 S. Ct. at 1315 (emphasis added); *see id.* at 1319 ("*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish *cause*, and this remains true except as to initial-review collateral

proceedings for claims of ineffective assistance of counsel at trial." (Emphasis added)). Thus, *both* of *Martinez'* requirements of (1) a "substantial" claim, and (2) ineffective PCR counsel, are necessary to show *cause* for a procedural default. *See Detrich V*, at 48 (Nguyen, J., concurring) ("Post-conviction counsel's ineffective assistance meets the cause prong where, among other things, the claim that post-conviction counsel should have raised but did not—i.e., that trial counsel rendered ineffective assistance—'is a substantial one, which is to say that … the claim has some merit.'" (*quoting Martinez*, 132 S. Ct. at 1318)).

This Court confirmed that the "substantiality" requirement goes to cause, and not prejudice, when it explained:

> When faced with the question whether there is *cause* for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

Martinez, 132 S. Ct. at 1319 (emphasis added). And it established that *Coleman* prejudice must be shown *in addition to* the substantiality of the trial-IAC claim:

> [T]he Court of Appeals did not determine whether Martinez's attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. *And the court did not address*

> *the question of prejudice*. These issues remain open for a decision on remand.

Id. at 1321 (emphasis added). Accordingly, a substantial trial-IAC claim does not substitute for *Coleman* prejudice.

The showing of *Coleman* prejudice is much more demanding than *Martinez'* requirement of a substantial trial-IAC claim. To show that a claim is substantial under *Martinez*, a petitioner need show only that his underlying trial-IAC claim "has some merit." 132 S. Ct. at 1318. A claim is not substantial if it "does not have any merit or … is wholly without factual support." *Id.* at 1319. To excuse a procedural default, however, a 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." *Carrier*, 477 U.S. at 494 (internal quotation marks and alteration omitted). Thus, *Martinez'* substantiality requirement is very different from, and much less demanding than, the prejudice required to excuse a procedural default, and this Court clearly did not intend for *Martinez'* "substantial claim" requirement to substitute for *Coleman* prejudice.

It was error to hold that showing a claim is "substantial" under *Martinez* satisfies *Coleman* prejudice. Because the Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court," *i.e.*, *Coleman* and

Martinez, this Court should grant this petition in order to correct this error. Sup. Ct. R. 10(c).

II. THE NINTH CIRCUIT IMPROPERLY REMOVED *STRICKLAND'S* PREJUDICE PRONG FROM THE SHOWING UNDER *MARTINEZ* THAT PCR COUNSEL WAS INEFFECTIVE.

In addition to showing that a claim is substantial, *Martinez* requires a petitioner to demonstrate either that he had no PCR counsel or that his PCR counsel provided ineffective assistance under *Strickland's* standard. 132 S. Ct. at 1318. *Strickland* requires a showing of both deficient performance by counsel and prejudice resulting from that deficient performance. 466 U.S. at 687. Prejudice is established by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The *Detrich V* plurality has removed *Strickland's* prejudice prong from the analysis of PCR counsel's effectiveness:

> We conclude, for the narrow purpose of satisfying the second *Martinez* requirement to establish "cause," that a prisoner need show only that his PCR counsel performed in a deficient manner. *A prisoner need not show actual prejudice resulting from his PCR counsel's deficient performance*, over and above his required showing that the trial-counsel IAC claim be "substantial" under the first *Martinez* requirement.

Detrich V, at 15 (emphasis added).

The plurality justifies its elimination of *Strickland's* prejudice prong by stating that *Martinez* "did not specify the manner in which *Strickland* should be applied." *Detrich V*, at 15. This Court had no reason to explain "the manner in which *Strickland* should be applied," because *Strickland* is always applied in the *same* manner: by showing both deficient performance and resulting prejudice. 466 U.S. at 687.

By removing *Strickland's* prejudice prong and subsuming it into the *Martinez*–substantiality requirement, the plurality decision directly contradicts this Court's holding in *Martinez* that a petitioner must demonstrate *both* a substantial claim *and* ineffective assistance of PCR counsel. In collapsing *Strickland's* prejudice prong into *Martinez'* substantiality requirement, the *Detrich V* plurality has unjustifiably removed one of the required showings for cause specifically laid out in *Martinez*.

A. Removing *Strickland's* prejudice prong does not make *Strickland* "mean the same thing" for petitioners with and without PCR counsel.

The plurality reached the conclusion that removing the prejudice prong will "harmonize" the situation in which a petitioner is appointed PCR counsel "with the rest of the *Martinez* framework":

> If a prisoner who had PCR counsel were required to show prejudice, *in the ordinary* Strickland *sense*, resulting from his PCR counsel's deficient performance in order to satisfy the second *Martinez* requirement, the prisoner would have to show, as a condition for

> excusing his procedural default of a claim, that he would succeed on the merits of that same claim.
>
> …
>
> We therefore read the Court's reference to *Strickland* in the second-posited case of the second requirement (where the prisoner had PCR counsel) to *mean the same thing* as in the first-posited case (where the prisoner was pro se in PCR proceedings). That is, in both of the posited cases, no showing of prejudice from PCR counsel's deficient performance is required, over and above a showing that PCR counsel defaulted a "substantial" claim of trial-counsel IAC, in order to establish "cause" for the procedural default.

Detrich V, at 15–16 (emphasis added).

The error in the plurality's reasoning becomes apparent when considering that *Martinez* expressly applies *Strickland* ***only*** when a petitioner had PCR counsel. In the absence of counsel, there can be no *Strickland* IAC analysis:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of

> ineffective assistance at trial. *The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland*.

Martinez, 132 S. Ct. at 1318 (emphasis added). That this Court *intended* pro se PCR petitioners to be treated differently under *Martinez* than represented petitioners is also clear from its observation that *Martinez* "permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings." *Id.* at 1320. Given that *Strickland* cannot apply to pro se petitioners, the plurality's attempt to make *Strickland* "mean the same thing" when applied to both represented and pro se petitioners is untenable.

The plurality's efforts do not achieve the intended result in any event. Making *Strickland* "mean the same thing" regardless of whether a petitioner has counsel means, under the plurality's view, that a petitioner who had PCR counsel still must demonstrate that his counsel's performance was deficient in order to demonstrate cause under *Martinez*. *Detrich V*, at 15. A pro se petitioner does not have this burden. In order to truly make *Strickland* "mean the same thing" in both situations, both prongs of *Strickland* would have to be eliminated. That cannot possibly have been this Court's intention under *Martinez*.

Both Judge Nguyen and the dissent identified the plurality's error in eliminating a showing of *Strickland*

prejudice. Judge Nguyen noted that "[t]he plurality conflates the situation where a petitioner has no postconviction counsel with one where there was postconviction counsel but counsel was ineffective." *Detrich V*, at 48–49 (Nguyen, J., concurring). The dissent observed that "the Supreme Court has never suggested that the prejudice prong of *Strickland* has a unique meaning in the context of the second *Martinez* requirement." *Id.* at 59 n.3 (Graber, J., dissenting).

The *Detrich V* plurality erred by removing *Strickland's* prejudice prong from the analysis of the ineffective assistance of PCR counsel required by *Martinez*. That analysis must be conducted as it has always been conducted—by requiring a showing of *both* deficient performance *and* prejudice. This Court should grant this petition and correct the plurality's error in removing *Strickland's* prejudice prong from the analysis of IAC of PCR counsel.

B. The plurality's removal of *Strickland's* prejudice prong is not justified by the fact that there may be overlap between *Martinez'* substantiality requirement and *Strickland's* prejudice prong.

The *Detrich V* plurality also sets aside *Strickland's* prejudice prong on the rationale that requiring a petitioner to demonstrate prejudice from PCR counsel's deficient performance "would render superfluous the first *Martinez* requirement of showing that the underlying *Strickland* claims were 'substantial.'" *Id.* at 16. Cases will undoubtedly arise with overlap between the showings of substantiality and *Strickland* prejudice required under *Martinez*. But, as Judge Nguyen

explained, this does not justify eliminating *Strickland's* prejudice prong:

> I disagree with the plurality … that prejudice can be presumed…. *Strickland* warns against presuming prejudice except where there is "[a]ctual or constructive denial of the assistance of counsel altogether," "state interference with counsel's assistance," or "when counsel is burdened by an actual conflict of interest." *Strickland*, 466 U.S. at 692.

Detrich V, at 48–49 (Nguyen, J., concurring).

While there may be overlap between the showing of a substantial trial-IAC claim and ineffective assistance of PCR counsel, the two showings are distinct. And a showing of *Strickland* prejudice requires more than merely demonstrating that a trial-IAC claim has "some merit." Rather, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, the showing that a claim is substantial, or has "some merit," is insufficient to satisfy *Strickland's* prejudice prong.

The plurality has improperly removed prejudice from an analysis of IAC of PCR counsel under *Martinez*. *Martinez* requires a complete *Strickland* analysis of both deficient performance by PCR counsel ***and*** resulting prejudice. The Ninth Circuit exceeded

its authority by setting aside this Court's binding *Strickland* analysis.

CONCLUSION

The Ninth Circuit has effectively removed the showings of prejudice required by both *Coleman* and *Strickland*, deeming them satisfied by *Martinez'* requirement of a substantial trial-IAC claim. In so holding, the plurality conflicts with all three of these decisions. This Court should grant review to correct the error and preserve the well-established requirements that petitioners must meet to demonstrate ineffective assistance of counsel in a proceeding under 28 U.S.C. § 2254.

Respectfully submitted,

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