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# The Temptation of *Martinez v. Ryan*: Legal Ethics for the Habeas Bar<sup>1</sup>

LAWRENCE KORNREICH & ALEXANDER I. PLATT

## I. INTRODUCTION

In *Martinez v. Ryan*, the Supreme Court opened a new route for convicted defendants to obtain habeas relief.<sup>2</sup> A defendant whose first-tier state habeas counsel failed to adequately challenge the ineffectiveness of his trial counsel—in jurisdictions where that is the first opportunity to do so—will now be able to raise that ineffectiveness claim in a subsequent federal habeas proceeding.<sup>3</sup> *Martinez* allows a federal habeas petitioner to avoid losing this claim through procedural default if he successfully asserts that (1) the ineffectiveness of his state habeas counsel was the “cause”<sup>4</sup> of his failure to raise the ineffectiveness of his trial counsel during first-tier state post-conviction proceedings, and (2) his trial counsel was, in fact, ineffective under *Strickland v. Washington*.<sup>5</sup> Though the Court did not recognize a constitutional right to effective counsel on collateral review, it ensured that ineffective state habeas counsel would not prevent a defendant from raising claims about constitutionally ineffective trial counsel on federal collateral review.<sup>6</sup>

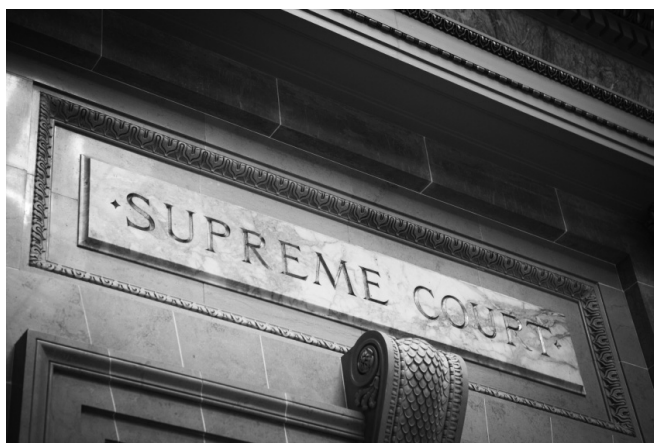
By introducing a new category of eligible claims reviewable in federal habeas proceedings, however, the Court also introduced a new and difficult choice for certain convicted defendants as their cases move along the procedural path from state to federal habeas review.<sup>7</sup> Because many habeas lawyers represent their clients across both state and federal habeas proceedings,<sup>8</sup> and because these lawyers must adhere to ethical rules that prohibit conflicts of interest in their representation,<sup>9</sup> many clients in *Martinez*’s position will be forced to choose whether (a) to retain their state habeas counsel through subsequent post-conviction appeals and forego a possible *Martinez* claim, or (b) to pursue a federal habeas *Martinez* claim with new counsel.<sup>10</sup> With this choice for habeas litigants come important and difficult ethical questions for the habeas bar: Is it possible to advise a client regarding a claim based on one’s own ineffectiveness without

committing an ethics violation? Can a client provide informed consent with respect to his lawyer’s conflict in order to receive the lawyer’s advice about making this choice, or is it necessary to bring in outside counsel to advise the client?

To a habeas bar already burdened by extreme resource scarcity and exacting procedural and timing requirements, *Martinez* adds yet another potential source of friction between effective representation and professional ethical responsibilities. Due to the additional costs entailed in complying with ethical

standards, individual lawyers and those who set the rules that govern them may be tempted to loosen these rules in the name of access to justice.<sup>11</sup> This would be a mistake. To preserve the integrity and autonomy of the legal profession, this temptation must be resisted.<sup>12</sup>

This Article aims to alert the habeas bar to the ethical responsibilities implicated by the *Martinez* decision and to provide guidance for what counsel must do when presented with *Martinez* situations to comply with professional ethical obligations. It proceeds in three parts. Part II reviews *Martinez* and the new category of claims that convicted defendants may now bring on federal habeas review. Part III explores the two conflicts of interest created by the *Martinez* decision. It shows the reach of these conflicts by surveying the structure of the habeas bar and relates these conflicts to similar ones that exist at other procedural stages in criminal defense. Part IV suggests steps that habeas counsel should take to comply with their ethical obligations in light of these conflicts.



## II. RAISING INEFFECTIVE-ASSISTANCE- OF-TRIAL-COUNSEL CLAIMS IN FEDERAL HABEAS AFTER MARTINEZ

A federal judge may not issue a writ of habeas corpus freeing a state prisoner “if an adequate and independent state-law

ground justifies the prisoner's detention."<sup>13</sup> "One 'state ground' often asserted," in justifying detention is "a state-law 'procedural default,' such as the prisoner's failure to raise his federal claim at the proper time."<sup>14</sup> However, the state court's assertion of a procedural ground for default does not bar the assertion of the federal claim "where the prisoner had good 'cause' for not following the state procedural rule and was 'prejudiced' by not having done so."<sup>15</sup>

In *Murray v. Carrier*, the Court determined that a lawyer's constitutionally inadequate performance on direct appeal could amount to a cause sufficient to overcome a procedural default.<sup>16</sup> But in *Coleman v. Thompson*, the Court found that since "[t]here is no constitutional right to an attorney in state *post-conviction* proceedings . . . a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."<sup>17</sup> That opinion concluded, therefore, that a habeas lawyer's error in post-conviction proceedings, even one that were to fall below the *Strickland* standard, could never be constitutionally ineffective.<sup>18</sup>

*Martinez* carved out an exception to *Coleman*.<sup>19</sup> Where ineffective-assistance-of-counsel claims relating to counsel's conduct during trial or direct appeal can only initially be brought in state habeas proceedings, lawyer error in those state habeas proceedings can now constitute cause, excusing a procedural default.<sup>20</sup> *Martinez* applies only to claims that could not be raised prior to an "initial-review collateral proceeding."<sup>21</sup> With respect to such claims, if either (1) the state courts did not appoint counsel in the initial-review collateral proceeding, or (2) the appointed counsel was ineffective under the *Strickland* standard,<sup>22</sup> then a procedural default will not bar a federal habeas court from hearing those claims.<sup>23</sup>

"To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is . . . substantial."<sup>24</sup> In response, the state can raise the defense that the ineffective-assistance-of-trial-counsel claim is "wholly without factual support, or that the lawyer in the initial-review collateral proceeding did not perform below constitutional standards."<sup>25</sup> The *Martinez* majority insisted, over Justice Scalia's objections,<sup>26</sup> that its decision did not establish a constitutional right to counsel in post-conviction proceedings.<sup>27</sup> Rather, in the majority's view, a state can either provide effective counsel in initial-review collateral proceedings *or* give up its procedural default defense in federal habeas.<sup>28</sup>

*Martinez* opens up a new category of claims for prisoners seeking collateral relief. The next part begins to examine the ethical implications of this development.

### III. MARTINEZ'S TWO CONFLICTS OF INTEREST

Imagine the following scenario. Lawyer "L" routinely represents clients on collateral review across both state and federal habeas proceedings. L represents a client who

recently lost on his initial-review collateral proceeding. In that proceeding, L did not raise any claim regarding the constitutional ineffectiveness of her client's trial counsel ("TC"). L is now preparing for federal habeas proceedings. Under *Martinez*, L may still obtain federal collateral relief based on the constitutional ineffectiveness of TC by asserting that she was ineffective by failing to raise the claim on the initial-review proceeding, thereby avoiding procedural default.<sup>29</sup>

*Martinez*'s innovation is likely to be warmly received by those eager to see habeas clients add a new procedural arrow to their quivers.<sup>30</sup> But the opinion also introduces a new dilemma for these litigants and their counsel—one that has gone unrecognized until now. A client in this situation now faces an extremely difficult decision about the next phase of his representation. He may either (a) find new counsel to pursue a *Martinez* claim in federal court based on L's ineffectiveness in state habeas proceedings, or (b) keep L on as his lawyer and abandon his *Martinez* claim.

This choice is unavoidable because L cannot argue her own ineffectiveness without facing an unwaivable conflict of interest.<sup>31</sup> The Model Rules of Professional Conduct provide that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."<sup>32</sup> A conflict exists where "there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer."<sup>33</sup> A lawyer has a personal interest in not being found to have performed ineffectively and in preserving her reputation as an effective practitioner. That interest, by definition, conflicts with the interests of a client asserting a claim based on his habeas lawyer's prior ineffectiveness. As the comment to the Rule explains, "[I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."<sup>34</sup> Accordingly, many jurisdictions have held that a lawyer who enters representation in which she might be obliged to assert her own ineffectiveness necessarily encounters a conflict of interest.<sup>35</sup>

A strong presumption of a conflicted representation in this context is reinforced by the reality that a lawyer is simply "unlikely to raise a challenge to his or her own effectiveness."<sup>36</sup> As one commentator/practitioner noted, lawyers are unlikely to embrace allegations of their own ineffectiveness because "[b]eing second-guessed is not pleasant, and the impulse to defend one's self is all too human."<sup>37</sup>

Of course, "unlikely" is not synonymous with "never." There are undoubtedly examples of dedicated defense counsel vigorously pursuing their clients' best interests by asserting their own prior ineffectiveness. It may even be the case that trial counsel has an ethical obligation to ensure that her present client will later be able to raise the best possible

ineffective-assistance-of-counsel claim by documenting all strategic choices in the course of the representation.<sup>38</sup>

However, the ethical rule against conflicted representation reflects a deeper concern. Unlike “other ethical or representational failures, which are discrete and whose effects are manifest and readily measured, a conflict of interest casts a shadow over every aspect of the lawyer-client relationship.”<sup>39</sup> Even where a selfless counsel does assert her own prior ineffectiveness on behalf of a client, her conflict of interest with respect to this claim may *still* affect the quality of her advocacy on behalf of that claim. It might lead her to pay more attention to alternative claims or to pursue the claim with less zealousness. These effects are hard to measure. As the Supreme Court stated, the “evil” posed by conflicted representation is “in what the advocate finds himself compelled to *refrain* from doing . . . [a]nd to assess the impact of a conflict of interests on the attorney’s options, tactics, and decisions . . . would be virtually impossible.”<sup>40</sup> This rationale is echoed by the RESTATEMENT (THIRD) OF LAW GOVERNING LAW, which notes that “[e]ven if a lawyer could subordinate significant personal interests to the interests of clients, it is difficult to determine after the fact whether a lawyer had succeeded in keeping a client’s interests foremost.”<sup>41</sup> Because of the difficulty in finding concrete evidence of conflicted behavior, a broad prophylactic rule against conflicted representation is necessary to ensure that a “lawyer’s own interests [are] not . . . permitted to have an adverse effect on representation of a client.”<sup>42</sup>

Many jurisdictions have gone so far to hold that the conflict extends to situations where a different lawyer from the same office is faced with the possibility of raising an ineffective-assistance-of-counsel claim about her colleague.<sup>43</sup> Under these principles, if *L*’s client wanted to pursue a *Martinez* claim, *L* would face a conflict of interest in advocating that claim and so would any firm colleague of *L*.<sup>44</sup>

In fact, the conflict extends even further: not only would it affect *L*’s ability to *litigate* her client’s *Martinez* claim in federal court based on her own ineffectiveness on state habeas, but it would also affect *L*’s ability to advise her client about *making the choice* about how to proceed.<sup>45</sup> *L*’s personal interest in not being found ineffective means that she cannot provide

conflict-free advice to her client about whether or not to pursue a *Martinez* claim.

For example, as one commentator argues, when a client approaches her former trial counsel for advice regarding a pro se habeas petition involving an ineffective assistance claim regarding the trial counsel’s own conduct, that lawyer “should refrain from giving any legal advice other than the advice to obtain counsel.”<sup>46</sup> A parallel conflict arises after *Martinez* for state habeas counsel and their clients.

*Martinez* presents client and counsel with serious obstacles stemming from two conflicts of interest: (1) a conflict with respect to any *Martinez* claim based on the lawyer’s own ineffectiveness; and (2) a conflict with respect to any advice to her client as to whether he should or should not pursue that claim.

Before turning to examine what ethical obligations follow, this Article briefly pauses to consider two points: (1) how these conflicts will actually arise in habeas litigation; and (2) the relationship to similar conflicts at other stages of criminal defense litigation.

On the first point, despite the paucity of statistical data on the subject, it is likely that a substantial subset of habeas lawyers—and their clients—will confront the ethical dilemma outlined above. The habeas bar is comprised of court-appointed and privately retained lawyers.<sup>47</sup> Though most federal habeas petitions proceeded *without* any coun-

sel,<sup>48</sup> the first major study of federal habeas cases since the Antiterrorism and Effective Death Penalty Act of 1996 was enacted found that capital petitioners are substantially more likely to have counsel than non-capital petitioners,<sup>49</sup> and that for both capital and non-capital cases, habeas counsel is comprised of a mixture of both court-appointed and privately retained counsel.<sup>50</sup> Over the last several decades, a robust private bar comprised of law-firm pro-bono,<sup>51</sup> specialized non-profits,<sup>52</sup> and legal clinics<sup>53</sup> have taken on representation of many capital defendants in both state and federal post-conviction proceedings. Court-appointed lawyers may be more likely to practice only in one venue and only as long as their court-appointment lasts. In contrast, this private pro-bono bar frequently represents clients across both state and federal habeas claims because continuity of representation is regarded as valuable to both client and counsel.<sup>54</sup>

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***In fact, the conflict extends even further: not only would it affect L’s ability to litigate her client’s Martinez claim in federal court based on her own ineffectiveness on state habeas, but it would also affect L’s ability to advise her client about making the choice about how to proceed.***

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Unfortunately, anything more than anecdotal support as to the prevalence of cross-systemic habeas representation is difficult, not only because of the lack of data, but because the practices and composition of any particular habeas bar depends on highly localized factors. These factors include, legal rules about whether and which petitioners are entitled to court-appointed counsel,<sup>55</sup> or institutional factors such as whether a local public defender offers habeas representation.<sup>56</sup> But no further specificity is necessary. Some subset of habeas counsel will find itself facing the ethical dilemma created by *Martinez*. This article provides ethics advice for this subset.

On the second point, while the conflicts raised by *Martinez* are new to this stage of the procedural posture, they are not altogether new to criminal defense. In jurisdictions where ineffective-assistance-of-counsel claims may be raised initially on direct appeal, or in post-trial motions, trial counsel and client have long faced a similar dilemma.<sup>57</sup> Indeed, all of the case law previously cited for the proposition that a lawyer cannot argue his own ineffectiveness comes out of such cases.<sup>58</sup>

The conflicts created by *Martinez* are nonetheless worthy of attention for two reasons. First, flagging the conflict will help lawyers avoid being caught by surprise. Without notice of the post-*Martinez* ethical landscape, lawyers may engage in unintentional ethical violations. While jurisdictions have developed case law and practices regarding conflicts on direct appeals,<sup>59</sup> the novelty of the *Martinez* conflict generates a risk that lawyers will fail to pay attention to their ethical obligations unless they are made aware of the conflicts the case presents. Second, the novelty of the conflicts creates an *opportunity* to develop practices and rules that conform to ethical professional values, rather than merely the strong pull of on-the-ground realities. By drawing attention to this conflict in the immediate aftermath of the *Martinez* decision, before rules or practices have taken hold, this article hopes to help shape the development of those practices around an awareness of the conflict and a respect for the ethical duties of counsel.

With this framework in mind, the next part turns to provide ethics advice to the subset of habeas lawyers that is likely to face this new conflict in the post-*Martinez* era.

#### IV. RECOMMENDATIONS TO THE BAR

The Model Rules allow representation to go forward despite conflicts of interest, but this does not resolve the ethical dilemma framed by *Martinez*. The Rules distinguish between waivable and unwaivable conflicts.<sup>60</sup> Rule 1.7(b) provides that a conflicted lawyer may still represent a client if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation,” “the representation is not prohibited by law,” and “[the] client gives informed consent,

confirmed in writing.”<sup>61</sup> Any lawyer who finds herself in *L*’s position should proceed by asking herself whether these requirements can be met in her situation.

The first conflict is the question of whether the lawyer can proceed to *actually litigate* the *Martinez* claim based on her own prior ineffectiveness by obtaining informed written consent of her client. Some jurisdictions seem to have explicitly prohibited such representation, recognizing it as a per se prejudicial conflict.<sup>62</sup> In those jurisdictions the conflict would be unwaivable since it is “prohibited by law.”<sup>63</sup>

But, absent such express prohibition—or in those jurisdictions where it is ambiguous<sup>64</sup>—would it be possible for a lawyer to “reasonably believe[] that [she] will be able to provide competent and diligent representation” despite the conflict?<sup>65</sup>

We believe the answer should be no. As discussed above, even if a lawyer might proceed with a claim based on her own ineffectiveness, courts have recognized reasons to suspect that she would not pursue that claim as vigorously, or might devote more attention to alternative claims.<sup>66</sup> Because of these difficulties in monitoring the representation and the fundamental nature of the conflict of interest, it is unreasonable to think that a lawyer will be able to assess her own errors and argue that her actions fell below the objective standard of reasonableness.<sup>67</sup>

Insofar as a lawyer cannot competently and diligently advance an argument based on her own ineffectiveness, what should the lawyer do about the second conflict: how to advise the client regarding the choice he now faces between retaining counsel and abandoning the *Martinez* claim, or pursuing the claim with new counsel?

Because the lawyer is conflicted in this situation, once again, the question is whether she can “reasonably believe” that she will be able to provide “competent and diligent representation” in the course of providing the advice. If so, then she may counsel her client about this choice after obtaining informed written consent.<sup>68</sup> If not, then she must bring in outside counsel to provide this advice and can only continue with the non-*Martinez* representation in federal habeas after her client makes an informed decision to abandon that claim on the basis of consultation with outside counsel.<sup>69</sup>

Again, the answer should be no—and for similar reasons. For professional or reputational reasons, it is unlikely that a lawyer would be able to provide detached and unbiased advice regarding a claim based on her own inadequacy. Due to the fundamental nature of this conflict, it is not possible for a lawyer to “reasonably believe” that she will be able to provide “competent and diligent representation.”<sup>70</sup> Thus, she should bring in outside counsel to review the record and advise the client about whether to pursue this claim.<sup>71</sup>

To summarize: After *Martinez*, when a lawyer fails to completely raise a possible ineffective-assistance-of-counsel claim on first-tier collateral proceedings (i.e., she was arguably

ineffective), she has an ethical obligation to bring in outside counsel to review the record below and advise her client regarding the merits of such a claim. And, if her client chooses to go forward with this *Martinez* claim, he must use new counsel to do so.

## V. CONCLUSION: THE TEMPTATION OF *MARTINEZ*

Even though *Martinez* adds an arrow to the quiver of convicted defendants seeking collateral relief, it also introduces new difficulties for both the habeas bar and its clients.

*Martinez*, therefore, has the perhaps surprising consequence of imposing substantial new burdens on habeas counsel and on habeas petitioners themselves. Significant time and money must be spent on bringing in a lawyer to review the record and advise the client as to his choices. Time and money which might have been spent litigating claims must be devoted to ensuring clients receive conflict-free representation. Even as *Martinez* opened one door to federal habeas, it may have closed another.

To a habeas bar already burdened by extreme professional challenges owing to a lack of resources, a maze of onerous and rigid procedural hurdles, and incarcerated clients who are often difficult to reach, the *Martinez* decision adds an additional professional obligation. To an already disempowered and vulnerable clientele of habeas petitioners, *Martinez* poses a new and potentially troubling dilemma regarding the future course of their representation: give up your current habeas counsel and try to find a new lawyer in the hopes of raising a new claim in federal court, or continue with the current relationship at the cost of foregoing that potential claim.

These dilemmas are difficult for both counsel and client. They add new pressure on the system of habeas representation and may create a temptation to loosen the ethical obligations in the name of enhancing access to justice—both by practicing lawyers and by those who set the rules that govern them.

Lawyers should resist this temptation. The ethical obligations imposed on lawyers should not be sacrificed for enhanced efficiency. These obligations serve deeper values. Compromising on professional ethical responsibilities would undercut lawyers' tradition of self-regulation, and with it, the important values served by an independent legal profession. As the Preamble to the Model Rules explains:

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged

by a profession whose members are not dependent on government for the right to practice.<sup>72</sup>

Even as the ethical challenges of habeas proceedings grow more complex, lawyers have a duty to continue to provide zealous representation—bearing in mind that whatever the procedural changes, for their clients, the stakes remain as high as ever.

<sup>1</sup> Thanks to Professor Lawrence J. Fox and our colleagues in the Ethics Bureau at Yale. This Article is intended to bring a serious but heretofore unrecognized ethical issue to the attention of the habeas bar. It is not intended to provide specific legal or ethics advice for habeas lawyers. Lawyers unsure about the boundaries of their ethical responsibilities should review the applicable law and rules or contact professional responsibility counsel for specific advice. Please send comments to alex.i.platt@gmail.com.

<sup>2</sup> *Martinez v. Ryan*, 132 S. Ct. 1309, 1311 (2012).

<sup>3</sup> *See id.* at 1315 (qualifying *Coleman v. Thompson*, 501 U.S. 722 (1991)).

<sup>4</sup> *See infra* Part II, Raising Ineffective-Assistance-of-Trial-Counsel Claims in Federal Habeas After *Martinez*.

<sup>5</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (noting that “[a] convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable”).

<sup>6</sup> *See Martinez*, 132 S. Ct. at 1320-21 (holding that “where, under state law, claims . . . 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 . . .”).

<sup>7</sup> *See infra* Part III, *Martinez’s* Two Conflicts of Interest.

<sup>8</sup> *See infra* Part III, *Martinez’s* Two Conflicts of Interest.

<sup>9</sup> *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983); *see also infra* Part II, *Martinez’s* Two Conflicts of Interest.

<sup>10</sup> *See id.*

<sup>11</sup> *See infra* Part III, Recommendations to the Bar.

<sup>12</sup> *See id.*

<sup>13</sup> *Edwards v. Carpenter*, 529 U.S. 446, 454-55 (2000) (Breyer, J., concurring) (citing *Wainwright v. Sykes*, 433 U.S. 72, 81-88 (1977)).

<sup>14</sup> *Id.* at 455.

<sup>15</sup> *Id.* (citing *Sykes*, 433 U.S. at 87).

<sup>16</sup> *See Murray v. Carrier*, 477 U.S. 478, 488-89 (1986) (explaining that the exhaustion doctrine “generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default”).

<sup>17</sup> *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (emphasis added) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Wainwright v. Torna*, 455 U.S. 586 (1982)).

<sup>18</sup> *See Coleman*, 501 U.S. at 753 (stating that it would be inconsistent with the language and logic of *Murray*, 477 U.S. 478 to allow a claim for ineffective assistance of counsel where an attorney’s conduct meets the *Strickland* standard, but where there exists no independent Sixth Amendment claim).

<sup>19</sup> *Martinez*, 132 S. Ct. at 1315.

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* at 1316 (reasoning that an initial-review collateral proceeding is unique because a prisoner’s claim of lawyer error at such proceeding will likely not be heard by any other court at any level). Some lower courts have already interpreted *Martinez* narrowly as applying only to ineffective-assistance-of-counsel claims and only to state habeas trial counsel. See, e.g., *Hunton v. Sinclair*, No. CV-06-0054-FVS, 2012 WL 1409608, at \*1 (E.D. Wash. Apr. 23, 2012) (declining to extend *Martinez* to a *Brady* claim); *Dunn v. Norman*, No. 4:11CV872 CDP, 2012 WL 1060128, at \*5 (E.D. Mo. Mar. 29, 2012) (declining to extend *Martinez* to state habeas appellate counsel).

<sup>22</sup> It is unclear whether the petitioner must still exhaust his ineffective-assistance-of-trial-counsel claim at the state level or whether the state procedural default itself counts as exhaustion. While *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991), seemed to equate the procedural default and the exhaustion requirement, *Martinez* does not directly address this question. Nonetheless, by stating that a claim of ineffective assistance of initial-review collateral counsel can provide cause to excuse a procedural default in state habeas, the Court in *Martinez* implies that exhaustion of the ineffective-assistance-of-counsel claim at the state-court level has been satisfied by the procedural default (i.e., that by declining to hear the ineffective-assistance-of-trial-counsel claim for reason of procedural default, that claim has been exhausted at the state level). *Martinez*, 132 S. Ct. at 1320.

<sup>23</sup> See *Martinez*, 132 S. Ct. at 1320.

<sup>24</sup> *Id.* at 1318-19.

<sup>25</sup> *Id.* at 1319.

<sup>26</sup> See *id.* at 1321 (Scalia, J., dissenting)

<sup>27</sup> See *id.* at 1321 (Scalia, J., dissenting) (arguing that the result of the Court’s decision would be the same as a constitutional guarantee to counsel in initial-review state habeas proceedings, since failing to provide effective assistance of counsel now constitutes cause excusing procedural default); see also *id.* at 1327 (Scalia, J., dissenting) (stating that the Court’s holding “as a practical matter requires States to appoint counsel in initial-review collateral proceedings”).

<sup>28</sup> See *id.* at 1320. The Florida Supreme Court recently confirmed the *Martinez* majority’s interpretation, rejecting a petitioner’s claim that *Martinez* guaranteed him the right to appointed counsel on state habeas. See *Gore v. State*, 91 So. 3d 769, 778 (Fla. 2012).

<sup>29</sup> See *supra* Part III, Raising Ineffective-Assistance-of-Trial-Counsel Claims in Federal Habeas After *Martinez*.

<sup>30</sup> Academic commentary on the case—both before and after the Supreme Court issued its opinion earlier this year—has focused exclusively on the extension of the right to counsel. See Steve Vladeck, *Opinion analysis: A new remedy, but no right*, SCOTUSBLOG (Mar. 21, 2012, 10:30 AM), <http://www.scotusblog.com/2012/03/opinion-analysis-a-new-remedy-but-no-right> (emphasizing the majority’s surprising creativity in splitting the difference in this case by neither recognizing a constitutional right to counsel on state collateral proceedings nor foreclosing habeas ineffective assistance of counsel as a route around procedural default); see also Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel has Endangered Access to the Writ of Habeas Corpus and What the Supreme Court Can Do in Maples and Martinez To Restore It*, 45 CREIGHTON L. REV. 185, 212-14 (2011) (urging the court to use *Martinez* to extend the Sixth Amendment right to first-tier habeas.); Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U.L. REV. 597, 618 & n.115 (2011) (same); Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 459-60 (2011) (speculating about *Martinez*). None of these accounts address the ethics issue framed by the extension of the right to counsel in *Martinez*.

<sup>31</sup> See *infra* Part IV, Recommendations to the Bar (explaining why this conflict is unwaivable).

<sup>32</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983). Every state bar has an ethical rule prohibiting a lawyer from undertaking a representation that involves a conflict of interest; many of the rules are based on Model Rule 1.7. See NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, Vols. I – IV (Univ. Publ’ns of Am. 2001) (reprinting the codes of professional responsibility for all fifty states).

<sup>33</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 (2000) (“[A] lawyer may not represent a client if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s . . . personal interests.”).

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 10 (1983).

<sup>35</sup> See, e.g., *People v. Young*, 105 P.3d 487, 539 (Cal. 2005) (recognizing that a conflict of interest arises where a habeas lawyer is “placed in the position of urging [his or her] own incompetence as appellate counsel” for the same client.); *Sullivan v. United States*, 721 A.2d 936, 937 (D.C. 1998) (“It would be a conflict of interest for a lawyer to appeal a ruling premised on the lawyer’s own ineffectiveness.” (quoting *Ramsey v. United States*, 569 A.2d 142, 146 (D.C. 1990))); *People v. Keener*, 655 N.E.2d 294, 297 (Ill. App. Ct. 1995) (“A per se conflict of interest arises when attorneys argue motions in which they allege their own ineffectiveness.”); *State v. Toney*, 187 P.3d 138, 142 (Kan. Ct. App. 2008) (finding a conflict of interest where a defense counsel was “obligated to advocate and prove her own professional ineffectiveness” in order to win a motion to withdraw her client’s plea); *State v. Molina*, 713 N.W.2d 412, 451 (Neb. 2006) (“[Defendant]’s desire to argue that trial counsel was ineffective gave rise to a potential conflict of interest, because it placed trial counsel in the position of having to argue his own ineffectiveness.”); see also *Lopez v. Scully*, 58 F.3d 38, 41 (2d Cir. 1995) (finding an actual conflict of interest where defendant filed a pro se motion alleging his lawyer had coerced him into pleading guilty because it forced the lawyer to choose between admitting “serious ethical violations” and “attacking his own client’s credibility”); *United States v. Ellison*, 798 F.2d 1102, 1107 (7th Cir. 1986) (finding an actual conflict of interest where counsel testified against his client, among other things, stating that a criminal defendant is entitled to counsel whose undivided loyalties lie with his client). But see *Johnston v. Mizell*, 912 F.2d 172, 177-78 (7th Cir. 1990) (declining to embrace or reject a categorical rule that lawyers who bring ineffective-assistance-of-counsel claims about themselves are conflicted).

Other courts have recognized a conflict of interest where issues of a lawyer’s competence are implicated in a matter affecting his client’s interest. See *Murphy v. People*, 863 P.2d 301, 304-05 (Colo. 1993) (holding defendant is entitled to conflict-free assistance of counsel); see also *Shelton v. United States*, 323 A.2d 717, 718 (D.C. 1974) (acknowledging the duty of attorney to withdraw as counsel on appeal when “constitutional adequacy” of his representation at trial is a legitimate issue); *Garland v. State*, 657 S.E.2d 842, 844-45 (Ga. 2008) (holding that the trial court’s refusal to appoint new appellate counsel to a defendant who wanted to raise his trial counsel’s ineffectiveness on appeal violated the defendant’s constitutional right to counsel on appeal); *Commonwealth v. Fox*, 383 A.2d 199, 200 (Pa. 1978) (remanding case to be reheard once appellant has been appointed new counsel to represent him on the issue of ineffectiveness of trial counsel, stating it is unrealistic to expect counsel to argue his own ineffectiveness, or that of someone associated with his office); see also Christopher M. Johnson, *Not for Love or Money: Appointing a Public Defender to Litigate a Claim of Ineffective Assistance Involving Another Public Defender*, 78 MISS. L.J. 69, 77 (2008) (describing how a lawyer litigating a claim of his own ineffectiveness does not withstand the reasonableness step of conflict-of-interest analysis; conflict may extend to other lawyers affiliated with allegedly ineffective colleague); Patrick Emery Longan, *Legal Ethics*, 60 MERCER L. REV. 237, 250-51 (2008) [hereinafter Longan, *Legal Ethics* (2008)] (discussing *Garland* decision,

which held that Garland was constitutionally entitled to appointment of new, conflict-free counsel to prosecute his appeal). *But see* Williams v. Moody, 697 S.E.2d 199, 203 (Ga. 2010) (holding the trial court erred in finding Moody was denied his constitutional right to conflict-free appellate representation because Moody asserted his pro se claim of ineffective assistance while represented by counsel, making his motion unauthorized and without effect); *see also* Patrick Emery Longan, *Legal Ethics*, 63 MERCER L. REV. 217, 230-31 (2011) [hereinafter Longan, *Legal Ethics* (2011)] (suggesting the court in *Moody* used the wrong standard and reached the wrong result by being deferential to the lawyer rather than treating his judgments as suspect precisely because of the conflict; the standard that should have been used is whether the conflict of interest adversely affected the lawyer's performance, which is satisfied by recognizing things the lawyer failed to do as a result of the conflict).

<sup>36</sup> Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 6, 7 (2009); *see also* State v. Ballew, 729 N.E.2d 753 (Ohio 2000) (stating “[c]ounsel cannot be expected to argue his or her own ineffectiveness”); *see also* United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996) (“When [a Defendant’s] allegedly incompetent trial attorney [is] compelled to . . . prove his services to the defendant were ineffective, he [is] burdened with a strong disincentive to engage in vigorous argument and examination, or to communicate candidly with his client.”).

<sup>37</sup> Ellen Henak, *When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 AM. J. TRIAL ADVOC. 347, 369-70 (2009); *see also* Johnson, *supra* note 35, at 75 (recognizing that “lawyers have a conflict precluding them from alleging themselves ineffective.”).

<sup>38</sup> *See* David M. Segal, *The Role of Trial Counsel In Ineffective Assistance Of Counsel Claims: Three Questions to Keep in Mind*, THE CHAMPION, Feb. 2009, at 15 (acknowledging that while difficult, all of a trial counsel’s actions must be documented for a potential IAC claim).

<sup>39</sup> Motion of Legal Ethicists and the Stein Center For Law and Ethics For Leave To File Brief as Amici Curiae and Brief in Support of Petitioner, at 5, *Mickens v. Taylor*, 535 U.S. 162 (2001) (No. 00-9285), 2001 WL 881242.

<sup>40</sup> *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978) (emphasis in original). *See also* *Young v. United States*, 481 U.S. 787, 812-13 (1987) (observing that a prosecution “contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are part of the record” and emphasizing the potential undetected harm that a non disinterested prosecutor can have on a case).

<sup>41</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 125 cmt. b (2000).

<sup>42</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 10 (1983).

<sup>43</sup> *See, e.g., Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999) (expressing “[n]o doubt there was a conflict of interest” where a lawyer who represented petitioner on direct appeal came from the same office as the lawyer who had represented him at trial, so that, with respect to any argument about ineffective assistance of trial counsel, “direct-appeal counsel had a clear conflict of interest”). Some jurisdictions have adopted a per se rule against such representation on the basis of this conflict. *See* State v. Veale, 919 A.2d 794, 800 (N.H. 2007); Commonwealth v. Moore, 805 A.2d 1212, 1215 (Pa. 2002); Ryan v. Thomas, 409 S.E.2d 507, 509 (Ga. 1991); McCall v. District Court, 783 P.2d 1223, 1228 (Colo. 1989); State v. Bell, 447 A.2d 525, 530 (N.J. 1982); Adams v. State, 380 So. 2d 421, 421 (Fla. 1980); Hill v. State, 566 S.W.2d 127, 127 (Ark. 1978); Angarano v. United States, 329 A.2d 453, 457 (D.C. 1974). Other jurisdictions engage in a case by case balancing test. *See e.g., Cannon v. Mullin*, 383 F.3d 1152, 1173 (10th Cir. 2004); Morales v. Bridgforth, 100 P.3d 668, 669 (N.M. 2004); Simpson v. State, 769 A.2d 1257, 1271 (R.I. 2001); State v. Lentz, 639 N.E.2d 784 (Ohio 1994); People v. Banks, 520 N.E.2d 617 (Ill. 1987);

*see also* Johnson, *supra* note 35, at 89-90 (advocating the per se rule on the basis of practical administrability considerations).

<sup>44</sup> *See, e.g.,* MODEL RULES OF PROF’L CONDUCT R. 1.10 cmt. 1 (1983) (defining a “firm” as “lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”).

<sup>45</sup> The rule against conflict of interests applies to advising a client as much as it does to representing a client in court. *See* MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 10 (1983) (“[I]f the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client *detached advice*.” (emphasis added)); *See id.* cmt. 7 (noting that “adverse conflicts can also arise in transactional matters”).

<sup>46</sup> Henak, *supra* note 37 at 377.

<sup>47</sup> *See* 18 U.S.C. § 3006A(b) (2010).

<sup>48</sup> *See* NANCY J. KING ET AL., 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 23 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

<sup>49</sup> *See id.* (finding in a statistical sampling of federal habeas cases that 7% of capital petitioners remained pro se, while 92.3% of non-capital petitioners did, but acknowledging substantial differences across jurisdictions). This is unsurprising given the limited statutory right to appointed counsel in capital cases. 18 U.S.C. § 3599.

<sup>50</sup> *See, e.g.,* KING ET AL., *supra* note 48 at 23 (finding in a statistical sampling of both capital and non-capital federal habeas cases involving counsel a mixture of appointed, privately retained and voluntary counsel, and also many whose nature could not be determined).

<sup>51</sup> *See, e.g.,* ABA DEATH PENALTY REPRESENTATION PROJECT, EXCEPTIONAL SERVICE AWARDS VOL. IV, iss. 2, [http://www.americanbar.org/publications/project\\_press/2011/year\\_end/exceptional\\_serviceawards.html](http://www.americanbar.org/publications/project_press/2011/year_end/exceptional_serviceawards.html) (recognizing, among others, Arnold & Porter, LLP, for dedicating 50,000 hours to pro bono death penalty representation work); *see also* ABA DEATH PENALTY REPRESENTATION PROJECT, SUCCESS STORIES & VOLUNTEER NEWS, [http://www.americanbar.org/advocacy/other\\_aba\\_initiatives/death\\_penalty\\_representation/news\\_announcements/success\\_stories.html](http://www.americanbar.org/advocacy/other_aba_initiatives/death_penalty_representation/news_announcements/success_stories.html) (listing pro bono law firm victories in capital habeas litigation).

<sup>52</sup> *See, e.g.,* EQUAL JUSTICE INITIATIVE, <http://www.eji.org/eji/> (“The Equal Justice Initiative is a private, nonprofit organization that provides legal representation to indigent defendants and prisoners who have been denied fair and just treatment in the legal system.”).

<sup>53</sup> *See, e.g.,* BERKELEY DEATH PENALTY CLINIC, <http://www.law.berkeley.edu/2842.htm>; *see also* MICHIGAN INNOCENCE CLINIC, <http://www.law.umich.edu/clinical/innocenceclinic/Pages/default.aspx>.

<sup>54</sup> This limited proposition—that non-appointed habeas counsel often represent clients across both state and federal proceedings—has been *uniformly* confirmed in our conversations with numerous habeas practitioners from leading non-profits, public defender services, and academics.

<sup>55</sup> *See* AMERICAN BAR ASSOCIATION, STATE STANDARDS FOR APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES (Jan. 12, 2012), available at [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/State\\_standards\\_memo\\_Jan2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/State_standards_memo_Jan2012.authcheckdam.pdf) (stating that in Arizona, for instance, the supreme court may establish more stringent rules for the competency of appointed postconviction counsel than what is provided for in the current rules).

<sup>56</sup> For instance, the District of Columbia’s Public Defender Service has a Special Litigation Division devoted to a wide variety of litigation to vindicate the constitutional rights of clients, including habeas litigation. *See, e.g.,* PDS DC: THE SPECIAL LITIGATION DIVISION, <http://www.pdsdc.org/PDS/SpecialLitigationDivision.aspx>.



<sup>57</sup> See *supra* notes 34-36, 42 (discussing the dilemma of counsel arguing his or her own ineffectiveness).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 19 (1983).

<sup>61</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1983).

<sup>62</sup> See, e.g., *supra* notes 33, 42.

<sup>63</sup> See, e.g., *supra* notes 33, 42.

<sup>64</sup> *Id.*

<sup>65</sup> See generally MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1) (1983).

<sup>66</sup> See *supra* text accompanying notes 38-41.

<sup>67</sup> Note that it may be possible, and for practical considerations, advisable to bring in an outside counsel to handle only the part of the case dealing with ineffectiveness, and

allow the previous counsel to handle the balance of the case.

<sup>68</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (1983).

<sup>69</sup> See generally *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

<sup>70</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1) (1983).

<sup>71</sup> Complexities surrounding conflicts of interest regarding a lawyer raising his own ineffectiveness have previously arisen at different stages in procedural posture. For instance, Professor Eve Brensike Primus suggests that a post-trial motion for a new trial is an important stage where trial counsel's ineffectiveness could be, but usually is not raised. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 (2007) ("The motion for a new trial . . . is the only mechanism currently available in most jurisdictions to supplement a trial court record before appellate review."). This is because ineffective-assistance claims are often based on what trial counsel did *not* do. See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003) (expanding the factual record can be defendant's best chance to demonstrate his lawyer's ineffectiveness on direct appeal). See Primus,

*supra*, at 689 ("[I]nformation outside of the record is essential to support the claim and to show why the defendant was prejudiced as a result of the trial attorney's deficient performance."). Post-trial motions for a new trial are often defendant's last and best chance to expand the trial court record in order to help establish the ineffectiveness of his counsel. But because of the time restrictions imposed on such motions, it is almost always the same trial counsel who will file any such motion, so the ineffectiveness claim is unlikely to be raised, the record is unlikely to be expanded, and the defendant's appellate counsel is unable to raise any ineffectiveness claim. *Id.* at 690; see also *United States v. Taglia*, 922 F.2d 413, 417 (7th Cir. 1991) (explaining that the ability to present "extrinsic evidence" of trial attorney ineffectiveness in a new trial motion is "more a theoretical than a real possibility") (quoted in Primus, *supra*, at 690 n.62).

<sup>72</sup> MODEL RULES OF PROF'L CONDUCT, PREAMBLE 11 (1983).

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