

No. 10-1001

IN THE
Supreme Court of the United States

LUIS MARIANO MARTINEZ,
Petitioner,

v.

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

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

**BRIEF OF THE AMERICAN BAR
ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

<i>Of Counsel:</i>	WILLIAM T. ROBINSON III
CLAUDIA WILSON FROST	<i>Counsel of Record</i>
LEE KOVARSKY	President
ELI BURRISS	AMERICAN BAR ASSOCIATION
DAWN JENKINS	321 North Clark Street
HAROUT SAMRA	Chicago, IL 60610
	(312) 988-5000
	abapresident@americanbar.org

*Counsel for Amicus Curiae
American Bar Association*

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QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim?

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**INTEREST OF THE AMERICAN BAR
ASSOCIATION AS *AMICUS CURIAE*¹**

Pursuant to Supreme Court Rule 37.3, the American Bar Association (“ABA”), as *amicus curiae*, respectfully submits this brief in support of the Petitioner. The ABA requests that, in determining whether a defendant has a constitutional right to effective assistance of counsel during a defendant’s first opportunity to assert a claim of ineffective assistance of trial counsel, the Court consider the critical protections afforded by effective first post-conviction counsel.²

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices. They also include judges, legislators, law professors, and law students.³ Since its inception,

¹ Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

² Because the Question Presented uses the term “defendant,” the ABA also does so, but notes that an individual may have other designations in relevant text or citations, including petitioner, appellant, applicant and inmate, based on the phase of a criminal prosecution.

³ Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in

and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of American legal services by “[p]romot[ing] competence, ethical conduct and professionalism.”⁴ In particular, the ABA has long been committed to the provision of competent counsel in criminal and related proceedings.

The ABA STANDARDS FOR CRIMINAL JUSTICE (“ABA Standards”) are among the ABA’s most prominent efforts to improve the quality of the criminal justice system. Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, and developed and refined over the last forty years, the ABA Standards represent a collection of “best practices” based on the consensus views of a broad array of professionals involved in the criminal justice system.⁵

the preparation of this brief, or in the adoption or endorsement of the positions in it.

⁴ ABA Mission and Association Goals, *available at* <http://www.abanet.org/about/goals.html>.

⁵ The ABA Standards are developed through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA. Before they become official ABA policy they must be approved by vote of the ABA House of Delegates (“HOD”). The HOD is composed of more than 550 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Standards are divided into volumes according to topical area and have been amended over the years by the same process. A complete set of the Standards and a history of their development is available at http://www.Americanbar.org/groups/criminal_justice/policy/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15

The ABA Standards do not provide *per se* rules or a checklist for judicial evaluation of attorney performance, nor do they purport to establish the constitutional baseline for effective assistance of counsel. See *Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting). They have, however, been recognized by this Court as “valuable measures of the prevailing professional norms of effective representation.” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010). See also *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable”).

The ABA Standards also embody the consistent recognition by ABA task forces of prosecutors, defenders and others in the criminal justice field that defendants must have effective assistance of counsel during the first proceeding in which a defendant may bring an ineffective assistance of trial counsel claim, regardless of whether that proceeding is direct appeal or state post-conviction review.

SUMMARY OF ARGUMENT

One of the most important constitutional challenges to the adequacy of criminal process is a claim that a defendant was denied the Sixth Amendment right to effective assistance of trial counsel. This is because the right to counsel is necessary to protect the fundamental right to a fair trial. Many states, including Arizona, designate post-conviction proceedings as the preferred or mandatory forum for litigating an

(Winter 2009) (describing the process by which the Standards are developed and promulgated).

ineffective assistance of trial counsel claim (“trial-phase IAC claim”) for the first time.

The ABA respectfully asserts that counsel representing a defendant at that proceeding should provide the same quality of representation—that is, effective assistance of counsel—as is constitutionally required of counsel at trial. First, unless counsel adequately investigates, builds a record for, and litigates a viable trial-phase IAC claim in that first proceeding, it is unlikely that the defendant will succeed on his trial-phase IAC claim. Second, effective assistance of counsel in the first state post-conviction proceeding is necessary in light of the potential for procedural and other errors that can preclude review of a defendant’s Sixth Amendment claim. Third, an inadequately constructed record will likely affect the defendant’s ability to obtain relief in a subsequent federal habeas proceeding because, under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), defendants can no longer obtain federal habeas relief on the basis of facts outside of a defectively-constructed state record.

That is, a defendant may have a viable trial-phase IAC claim, but if counsel at that first proceeding is ineffective, he may be foreclosed from any opportunity for relief in either state or federal post-conviction proceedings. The ABA accordingly asserts that recognition of a right to effective assistance of counsel at the first proceeding in which a defendant may bring a trial-phase IAC claim is paramount if state and federal post-conviction proceedings are to remain viable forums for enforcing a defendant’s Sixth Amendment right to trial counsel.

ARGUMENT**RECOGNITION OF A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT A DEFENDANT'S FIRST OPPORTUNITY TO BRING AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM IS PARAMOUNT FOR THE PROTECTION OF THE RIGHT TO A FAIR TRIAL.**

This Court has stated that “the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.” *Strickland*, 466 U.S. at 684. The Court has also stated that on direct appeal, there is no substitute for “the benefit of counsel’s examination into the record, research of the law, and marshalling of arguments on [the defendant’s] behalf.” *Douglas v. California*, 372 U.S. 353, 358 (1963). The ABA respectfully asserts that counsel is especially needed when, under the procedure adopted by a state, a post-conviction proceeding is the first opportunity for presenting a constitutional claim of ineffective assistance of trial counsel.

A. Effective Representation At The First Proceeding In Which A Trial-Phase IAC Claim May Be Presented Ensures Review Will Be Based On A Robust Record

To succeed on a trial-phase IAC claim, a defendant must show that trial counsel’s performance was objectively unreasonable and that it prejudiced the defendant. *See Strickland*, 466 U.S. at 687-88. While “[n]avigating the appellate process without a lawyer’s assistance is a perilous endeavor for a layperson,” *Halbert v. Michigan*, 545 U.S. 605, 621 (2005), establishing trial-phase IAC claims on post-conviction review is more perilous still, because such claims

almost always require evidence that is outside of the trial record.

Indeed, many states require trial-phase IAC claims to be brought during state post-conviction review precisely because direct appeal is limited to claims which are evident on the face of the record. *See, e.g., State v. Parrott*, 811 A.2d 705, 712 (Conn. 2003) (“Almost without exception, a claim of ineffective assistance of trial counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such a claim.”) (internal quotation marks omitted); *Archer v. State*, 986 So. 2d 951, 955 (Miss. 2008) (noting that while trial-phase IAC claims should ordinarily be brought on post-conviction review, they may be considered on direct appeal if facts of the claim are “fully apparent from the record.”). Additionally, direct appeal counsel who also served as trial counsel will not often attack his or her own performance at trial. *See Halbert*, 545 U.S. at 620 n.5 (“A [trial] lawyer may not, however, perceive his own errors or the need for [postconviction motions for preservation of issues for appellate review].”).

Preparing a robust record for review of a defendant’s trial-phase IAC claims may require development of the necessary factual background through: (1) interviewing the client; (2) questioning prior defense counsel for the client and requesting access to the complete client files; (3) interviewing law enforcement officials involved in the case and requesting access to their files; and (4) speaking with prosecutors involved in the case and requesting

access to their files.⁶ Investigating a trial-phase IAC claim may also require sophisticated legal assessments, such as determining whether trial counsel failed to move to suppress evidence obtained in violation of the Fourth Amendment.⁷

Effective litigation of a trial-phase IAC claim also requires the presentation of a written record in a form that comports with the rules of evidence and procedure applicable to that proceeding. At any oral hearing the court may conduct, effective assistance may also require compelling attendance of witnesses, admitting and presenting evidence, and cross-examining prosecution witnesses. Failure to comply with the forum's procedures and rules may foreclose the defendant's opportunity for relief in both state and federal post-conviction proceedings.

The ABA Standards recognize that a post-conviction proceeding is fundamentally an original judicial proceeding, involving problems of investigation and the development and presentation of a robust record. The ABA Standards accordingly provide that, "the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases." Standard 4-8.5 of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND

⁶ See generally, Randy Hertz and James S. Leibman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2[b] (6th ed. 2011).

⁷ See generally, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2[c] (outlining the various factual bases for an ineffective assistance of trial counsel claim). See also, *Kimmelman v. Morrison*, 477 U.S. 365, 383-87 (1986) (noting counsel's failure to request pretrial discovery that would have disclosed a potential Fourth Amendment violation).

DEFENSE FUNCTION (ABA 3d ed. 1993) (hereinafter "Defense Function Standards"). *See also* Commentary to Defense Function Standard 4-8.5 (the Standards applicable to lawyers performing these tasks "are essentially the same as those outlined in these Standards for the defense of a criminal case.").

The ABA Standards also provide that, when investigation reveals that trial counsel provided ineffective assistance, the first post-conviction counsel "should not hesitate to seek relief on that ground." Defense Function Standard 4-8.6(a).⁸

Without competent counsel, most indigent and incarcerated defendants who lack legal training will be unable to adequately perform these basic functions of assessment, investigation, and litigation that are necessary for presenting a trial-phase IAC claim. Rather, a defendant's attempt to enforce his Sixth Amendment right, especially "where the record is unclear or the errors are hidden," will often be a "meaningless ritual," *Douglas*, 372 U.S. at 358, without effective assistance of first state post-conviction counsel.

B. Effective Representation At The First Proceeding In Which A Trial-Phase IAC Claim May Be Brought Is Necessary In Light Of Procedural And Other Errors That Can Preclude Review

Effective representation during the first proceeding in which a trial-phase IAC claim may be brought is necessary if a defendant is to secure review in state

⁸ Similarly, counsel may decline to represent a defendant for his or her ineffective assistance of counsel claim only after investigation into prior defense counsel's conduct. Defense Function Standard 4-8.6(b).

and federal court forums because, to litigate a trial-phase IAC claim in state post-conviction proceedings, counsel must navigate a number of procedural rules specific to state post-conviction review.

These procedural rules include but are not limited to: statutes of limitations on post-conviction claims, tolling provisions for the pendency of some other event, rules about when a claim can or must be presented in a subsequent petition, appellate authorization procedures for certain kinds of claims, laws about when a collateral attack can be co-pending with certiorari proceedings in the United States Supreme Court, state comity and abstention rules that foreclose state courts from entertaining post-conviction challenges to convictions that are the subject of ongoing habeas proceedings, requirements for seeking discretionary review in the highest court of record in a state jurisdiction, and special types of leave necessary to appeal adverse trial decisions. Where counsel fails to comply, defendants will often be unable to obtain merits determinations on their trial-phase IAC claims.

Further, state post-conviction mistakes will often preclude federal post-conviction review. For example, trial-phase IAC claims rejected by state courts on procedural grounds are often “procedurally defaulted” on federal habeas review. *See, e.g., Walker v. Martin*, 131 S. Ct. 1120, 1124-25 (2011) (holding that claim not timely asserted in petition for discretionary state post-conviction review was procedurally defaulted). In addition, state post-conviction counsel’s failure to adequately litigate a trial-phase IAC claim, even if not dismissed on procedural grounds, can cause all of a defendant’s federal post-conviction claims to be dismissed as unexhausted. *See Rose v. Lundy*, 455

U.S. 509, 510 (1982). Finally, improperly-filed state post-conviction petitions fail to toll the applicable federal habeas limitations period, *see* 28 U.S.C. § 2244(d)(2), which may render the federal claim untimely. *See Artuz v. Bennett*, 531 U.S. 4, 6-8 (2000) (finding that, because state post-conviction petition was properly filed, the federal limitations period was tolled for defendant's otherwise untimely federal habeas petition).

Effective assistance of counsel in the first proceeding in which a defendant may present a trial-phase IAC claim, accordingly, is necessary in light of the procedural and other errors that can preclude review of a defendant's Sixth Amendment claim.

C. Even If A Defendant Obtains Federal Merits Review, An Inadequately-Constructed State Record Limits The Factual Basis On Which A Federal Court May Grant Relief

AEDPA provides that federal habeas relief may issue only when a state decision on the merits is either legally or factually unreasonable. *See* 28 U.S.C. § 2254(d). Whether a state's decision is legally unreasonable is governed by 28 U.S.C. § 2254(d)(1), which allows relief where state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Whether a state decision is factually unreasonable is determined in light of the state record; that requirement appears in AEDPA's plain text. *See* 28 U.S.C. § 2254(d)(2) (allowing habeas relief where the state proceedings "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*") (emphasis added).

Until recently, this Court had not decided whether the legal reasonableness of a state decision is also assessed exclusively against the evidence in the state record. In *Pinholster*, however, this Court decided that review under § 2254(d)(1) was restricted to the reasonableness of the state decision in light of the record before it. 131 S. Ct. 1388, 1398 (“The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits[, and we] agree with the State.”).

Since *Pinholster*, accordingly, recognition of a right to effective assistance of counsel in the first proceeding in which a defendant may present a trial-phase IAC claim has become paramount if state and federal post-conviction proceedings are to remain viable forums for enforcing a defendant’s Sixth Amendment right to trial counsel.

CONCLUSION

For the reasons stated above, *amicus curiae* American Bar Association requests that this Court reverse the decision below.

Respectfully submitted,

Of Counsel:

CLAUDIA WILSON FROST

LEE KOVARSKY

ELI BURRISS

DAWN JENKINS

HAROUT SAMRA

WILLIAM T. ROBINSON III

Counsel of Record

President

AMERICAN BAR ASSOCIATION

321 North Clark Street

Chicago, IL 60610

(312) 988-5000

abapresident@americanbar.org

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