No. 12-35363

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUKE M. HUNTON,

Petitioner-Appellant,

v.

STEPHEN SINCLAIR,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Washington
District Court No. CV-06-0054-FVS (Hon. Fred Van Sickle)

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER-APPELLANT'S PETITION FOR REHEARING EN BANC

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STATEMENT OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") regularly participates in litigation to ensure justice and due process for those accused of crime or misconduct.[1] The NACDL has prepared this Brief in order to support some of the contentions raised in Petitioner-Appellant's Petition for Rehearing En Banc.

The NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, the NACDL's approximately 10,000 direct members in twenty-eight countries—and ninety state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges are committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes the NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), counsel for Amicus states that no counsel for a party authored this Brief in whole or in part or made a monetary contribution to the preparation and submission of this Brief, and no person other than Amicus, its members, or its counsel made such a contribution. All parties consented to the filing of this Brief.

The NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the proper construction of the habeas corpus statutes and common law. In furtherance of this and its other objectives, the NACDL files numerous amicus curiae briefs each year in the U.S. Supreme Court and the U.S. Courts of Appeals, addressing a wide variety of criminal justice issues.

INTRODUCTION

In eight brief paragraphs the *Hunton* majority decided that one of the most important federal habeas corpus cases in the modern era, *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), was limited in scope to a single constitutional claim—ineffective assistance of trial counsel. The majority summarily denied that *Martinez* had any application beyond the single claim that *Martinez* examined. Just fifty-four days later, in a separate case, this Court declined to read *Martinez* as a one-off exception to the rigid procedural default doctrine and extended its framework to another class of cases—ineffective assistance of appellate counsel. The consequences of these two cases are standards that are irreconcilable, which will lead to inconsistent, inequitable, and unpredictable results. Because these cases touch on critical questions regarding the proper scope of federal habeas review post-*Martinez*, this Court should grant Petitioner-Appellant's Petition for Rehearing En Banc. This case presents an opportunity to definitively answer the question of *Martinez's* scope, a question that will repeatedly prove dispositive in pending and future federal habeas appeals before this Court.

STATEMENT OF THE CASE

A. Relevant Facts

The State of Washington convicted Luke M. Hunton of second degree bank robbery in 2002 and sentenced him to life in prison without parole. *Hunton v. Sinclair*, 732 F.3d 1124, 1125 (9th Cir. 2013). Hunton appealed to the Washington

Court of Appeals, arguing that the prosecution had failed to disclose exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *Hunton*, 732 F.3d at 1125. The Washington Court of Appeals refused to decide Hunton's *Brady* claim on direct appeal pursuant to *State v. Crane*, 804 P.2d 10 (Wash. 1991) (holding direct review is limited to appellate record). *Hunton*, 732 F.3d at 1127-28 (Fletcher, J., dissenting). The court of appeals noted, however, that Hunton's *Brady* claim may have been meritorious. *Id*. at 1127 (citing the state court of appeals). The Washington Supreme Court denied review. *Id*. at 1128.

Hunton subsequently filed a personal restraint petition ("PRP") *pro se*, which was denied by the Washington state courts. *Id*. Hunton's *Brady* claim was not included in his PRP. *Id*.

After denial of his PRP, Hunton filed a petition for federal habeas review in the U.S. District Court for the Eastern District of Washington, in part, seeking relief under *Brady*. *Id*. The district court dismissed Hunton's *Brady* claim, finding that it was procedurally defaulted because Hunton failed to raise it in his PRP. *Id*. Hunton moved for reconsideration in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which was announced seven days prior to the district court's dismissal. *Hunton*, 732 F.3d at 1128. The district court denied that motion but granted a certificate of appealability to this Court. *Id*.

B. Panel's Opinions

The Panel addressed a single question on appeal: Whether the equitable rule announced in *Martinez* for procedurally defaulted claims of ineffective assistance of counsel ("IAC") at trial also applied to a case in which the underlying claim was a *Brady* claim. *Id*. Applying a strict, literal reading of *Martinez*, a divided panel held that the rule enunciated in *Martinez* was not applicable to *Brady* claims. *See id*. at 1126-27 (majority opinion).

1. Majority Opinion

The majority grounded its decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), and summarily disposed of *Martinez*' exception to *Coleman*'s "cause" standard. *Hunton*, 732 F.3d at 1126–27. The majority stated that *Martinez* was limited to the proposition:

> [W]here ineffective assistance of counsel in a post-conviction relief proceeding results in failure to assert that there was ineffective assistance of counsel in the *trial* proceedings, the claim would be cognizable.

Id. at 1126 (emphasis added). Because Hunton's claim involved a procedural default of a *Brady* claim, and not a claim for IAC at trial, the majority denied Hunton's request for federal habeas review. *Id*. at 1127.

2. Dissenting Opinion

In his dissent, Judge Fletcher rejected the majority's narrow application of *Martinez*. The opinion explained that *Martinez* justified its departure from

Coleman because: (1) the Court feared instances where no court would review a prisoner's claims; (2) the importance of having legal assistance in bringing IAC claims; and (3) effective trial counsel ensured proper adjudication. *Id*. at 1129 (Fletcher, J., dissenting). Judge Fletcher noted that each of these justifications applied "with equal force to a defaulted *Brady* claim." *Id*.

Moreover, Judge Fletcher pointed out that although *Martinez* itself did not concern "attorney error in other kinds of proceedings," *Martinez*, 132 S. Ct. at 1320, nothing in the opinion "differentiate[d] a trial-counsel IAC claim from [a] *Brady* claim . . . ." *Hunton*, 732 F.3d at 1131. Accordingly, Judge Fletcher would have held that the equitable rule in *Martinez* applied equally to Hunton's procedurally defaulted *Brady* claim. *Id*.

ARGUMENT

Fed. R. App. P. 35(a) provides that en banc review is appropriate if: (1) "necessary to secure or maintain uniformity of the court's decisions"; or, (2) "the proceeding involves a question of exceptional importance." Both standards are implicated by the majority's decision in this case.

A. En Banc Review is Appropriate Because the Majority's Decision Conflicts with the Underlying Rationale and Holding of this Court in *Nguyen v. Curry*.

Similar to *Hunton*, this Court in *Nguyen v. Curry*, No. 11-56792, 2013 WL 6246285 (9th Cir. Dec. 4, 2013), was tasked with construing the defining features

of *Martinez*. The underlying claim at issue was a procedurally defaulted claim for ineffective assistance of *appellate counsel*. *Id*. at *2. This Court held that the *Martinez* exception applied to petitioner's claim—that is, that the application of *Martinez* was not only limited to claims of IAC at trial. *Id*. at *7. This holding conflicts with *Hunton*, creating an intra-circuit conflict ripe for resolution. The next two subsections detail the *Hunton* and *Nguyen* standards and exhibit the dangers of operating under both, collectively.

1. Hunton *and* Nguyen *Standards*

The majority in *Hunton* created a bright line rule for applying *Martinez*. In synthesizing the rule promulgated in *Coleman*, and the exception recognized in *Martinez*, the majority stated:

> The Supreme Court has told us that a person cannot raise a claim of ineffective assistance of post-conviction relief counsel because he is not entitled to post-conviction relief counsel, but that is subject to an exception where trial counsel was ineffective and the claim could not be raised earlier.

Hunton, 732 F.3d at 1126. Under the *Hunton* standard, *Coleman* continues to bar procedurally defaulted post-conviction relief claims, except for *one* limited exception, where *trial counsel* was ineffective and that claim could not have been raised earlier.[2] *Id*. (describing *Coleman* as "clearly" barring adjudication of the

[2] The Supreme Court has since refined its "could not have been raised earlier" requirement. In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Court held that even when there is no explicit barrier to raising a claim on direct appeal, if it is not

Brady claim at issue and holding that *Martinez* affords just "one exception" to procedural default).

By contrast, this Court in *Nguyen* adopted a more capacious application of *Martinez*, holding that the *Martinez* exception was not exclusively limited to claims of IAC at trial. *See Nguyen*, 2013 WL 6246285, at *7 ("We do not read . . . *Martinez* [as limited] to only one kind of Sixth Amendment ineffective assistance violation.") *Id*. That is to say, *Nguyen*, recognizes more than *one exception* to *Coleman* and the rigid, pre-*Martinez* rules governing procedural default.

The core of the two decisions cannot be reconciled. Under *Hunton*, only IAC at trial claims can be subjected to the *Martinez* exception, but under *Nguyen* other substantial claims "deserve[] one chance to be heard on initial review in a state post-conviction proceeding." *Id*. at *6. Simply stated, *Martinez* cannot be limited as just a "one [claim] exception to *Coleman*," *Hunton*, 732 F.3d at 1126, and

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likely, or if it is unreasonably difficult to litigate the claim on direct appeal, then *Martinez* continues to apply. *Trevino*, then, strongly undermines the *Hunton* majority's assumption that *Martinez* is to be formalistically applied. The four-part test announced in *Martinez*, 132 S. Ct at 1318-19, has already yielded to the decision's overriding concerns with the procedural adequacy of the state proceeding. It is strange for the *Hunton* majority to generate a formalistic syllogism in support of its cramped reading of *Martinez*, *Hunton*, 732 F.3d at 1127, when the Supreme Court itself has already eschewed overly rigid, formalist readings of *Martinez*. *Trevino*, 133 S. Ct at 1921. For a more complete discussion regarding the scope of *Martinez*, *see* Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2501 (2013) (anticipating that "*Martinez* will ultimately be applied so as to excuse procedural defaults for claims other than the right to counsel").

simultaneously read as not solely "limited to a claim of ineffective assistance by trial counsel," *Nguyen*, 2013 WL 6246285, at *7.

2. Dangers of Operating Under Inconsistent Standards

The *Nguyen* holding is predicated on two observations about *Martinez*. First, this Court emphasized that the equitable underpinnings of *Martinez* extended to claims that, "as a practical matter," cannot be raised on direct appeal such that post-conviction review is the first real opportunity for a claim to be reviewed. *Id*. at *6, 7. Second, this Court suggested that *Martinez* applied to all variety of Sixth Amendment claims, both effective assistance of "trial and appellate counsel." *Id*. at *5. The latter statement is an inaccurate summary of the law, and the former cannot be reconciled with *Hunton*. There is, then, no basis for meaningfully distinguishing the two cases.

This Court supported its holding in *Nguyen*, in part, by concluding that *Martinez* applied to all Sixth Amendment "right to effective counsel" claims, whether the failures were at the trial court or appellate level. *Id*. at *5. The notion is that so long as the claim arises under the Sixth Amendment right to counsel, then *Martinez*' exception to the procedural default framework applies. However, this distinction does not explain the result in *Nguyen.* It is Hornbook law that the right to effective assistance of appellate counsel derives *not* from the Sixth Amendment right to counsel, but rather from the Fourteenth Amendment right to due process.

See, e.g., Wayne R. LaFave, 3 Crim. Proc. § 11.1(b) (3d ed. 2013) (explaining that Sixth Amendment rights are limited to the pre-conviction, criminal prosecutions but recognizing that due process provides counsel rights beyond the Sixth Amendment). Distinguishing *Hunton* by reasoning that *Nguyen*, like *Martinez*, raised a Sixth Amendment claim is, therefore, off the mark. *Compare Nguyen*, 2013 WL 6246285, at *5 (reasoning that nothing suggests that the "Sixth Amendment Right to effective counsel is weaker or less important for appellate counsel than for trial counsel"); *with Evitts v. Lucey*, 469 U.S. 387 (1985) (holding errors of appellate counsel amounting to *ineffective assistance of counsel may violate defendant's right to due process*); *Douglas v. California*, 372 U.S. 353 (1963) (explaining the right to appellate counsel is strictly a due process right).

If *Martinez* applies to excuse defaults other than those associated with errors by trial counsel, then *Martinez* applies beyond the Sixth Amendment. Wayne R. LaFave, 3 Crim. Proc. § 11.1(d) (3d ed. 2013) (locating the right to appellate counsel in due process and equal protection alone). If it applies beyond the Sixth Amendment, *Hunton* is incorrectly decided.

Second, the *Nguyen* decision implicitly distinguished *Hunton* by focusing on the need for an exception to the procedural default rule only where the initial-review collateral proceeding was a prisoner's first real opportunity to vindicate a constitutional claim. *Nguyen*, 2013 WL 6246285, at *6. This Court emphasized

that undergirding *Martinez* was the recognition that a procedural default of an IAC claim may mean that "no court will ever hear that underlying IAC claim." *Id*. Notably, however, the exact same reasoning applies to the *Brady* claim at issue in *Hunton*. Stated differently, IAC (or the absence of counsel) during state post-conviction can effectively deprive a prisoner of his only opportunity to raise and preserve a *Brady* claim.[3] Because there is nothing less compelling about prosecutor misconduct as compared to IAC at trial, and because both claims are equally unsuited for a direct appeal, excluding *Brady* claims from the *Martinez* exception cannot be reconciled with the *Nguyen* decision.

In short, there is no clear way for future litigants to distinguish between the majority's decision in *Hunton* and this Court's subsequent decision in *Nguyen*. Future litigants will be left with uncertainty and confusion if this Court does not resolve the intra-circuit conflict concerning the proper application of the *Martinez* exception.

B. En Banc Review is Appropriate Because the Application of *Martinez* to *Brady* Claims Present a Question of Exceptional Importance.

From its perspective as an organization dedicated to criminal defense work, NACDL attests that *Martinez* stands as one of the most significant federal habeas

[3] In addition, the Supreme Court has explained that the need for having effective legal assistance in bringing ineffective assistance claims derives from the fact that these claims often require "investigative work and an understanding of trial strategy." *Martinez*, 132 S. Ct at 1317. The need for legal expertise and investigation is no less important in assessing and litigating a *Brady* claim.

corpus decisions in decades. Carving out an exception to the previously ironclad rule of *Coleman* is monumental and substantially changes the range of claims cognizable on federal habeas review. However, the full magnitude of this decision's impact remains to be measured. One of the most important such questions is whether the exception announced in *Martinez* applies to procedurally defaulted *Brady* claims. This is a question that will shape the scope of *Martinez*' application for years in this Circuit, and it is a question that easily qualifies as an issue of exceptional importance. Fed. R. App. P. 35(a).[4]

The importance of this issue can be measured by the division of members of the Supreme Court on the very question at issue, the role that *Martinez* is playing in lower court litigation, and the academic attention devoted to the question of *Martinez*' proper application.

That the contours of the *Martinez* exception to procedural default are undeveloped and subject to fair-minded debate cannot be doubted if one compares the *Hunton* majority's laconic refusal to apply *Martinez* to a new context with the reasoned assessment of other judges and commentators about the reach of *Martinez*. While the *Hunton* majority treated it as obvious that *Martinez* applies to IAC at trial only, Justice Scalia, among others, has observed that there is no

[4] Indeed, this Court has already recognized the need for full court review of issues regarding the application of *Martinez* as to an unrelated and more subsidiary issue. *See, e.g.*, *Detrich v. Ryan*, No. 08-99 001, 2013 WL 4712729 (9th Cir. Sept 3, 2013).

reasoned basis for distinguishing between ineffective assistance claims and other, not-record-based claims that are generally—or exclusively—litigated through post-conviction review. *Martinez*, 132 S. Ct. 1321 (Scalia, J., dissenting). Emphatically rejecting the tidiness of the distinction drawn by the *Hunton* majority, Justice Scalia observed:

> [N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised . . . .

Id.

The panel in *Hunton* was free to disregard Justice Scalia's dissenting pronouncements about the scope of *Martinez*, but it cannot be doubted that the issue is one of sufficient importance that it will divide lower court judges just as it has divided the Supreme Court. Prior to *Martinez*, circuit courts across the country took for granted that the ineffectiveness of post-conviction counsel was of no moment in assessing whether a prisoner's procedural default may be excused. That is no longer the case, and *Hunton* represents this Court's first opportunity to clarify the extent to which the ineffectiveness of post-conviction counsel may serve as a basis for overcoming a procedural default as to claims other than the ineffectiveness of trial counsel.

That *Martinez* represents unchartered territory in one of the most important pockets of federal habeas review is also evidenced by the frequency that *Martinez*-related issues are arising in lower courts. The *Martinez* decision has been cited in more than 1,200 lower court (and U.S. Supreme Court) decisions since it was decided less than two years ago. To be sure, the range of *Martinez* litigation is vast. But there is no question regarding *Martinez*' application that is more important than the determination of what types of claims are entitled to the *Martinez* exception. The proper scope of *Martinez* is a threshold question of the utmost importance, and one that lower courts in this Circuit deserve guidance on.

Finally, to the extent that academic commentary is a rough proxy of the importance of decisions, more than fifty papers discussing the contours and role of *Martinez* have been published in law reviews, an exceedingly high number so soon after a case given the delay that accompanies the publication process. Nothing short of the most prominent law reviews and leading scholars have begun a debate about the proper application of *Martinez*. *See, e.g.*, Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604 (2013); Nancy J. King, *Enforcing Effective Assistance after Martinez*, 122 YALE L.J. 2428 (2013); Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After*

Martinez and Pinholster, 41 HOFSTRA L. REV. 591 (2013); s*ee also* Recent Cases, 127 HARV. L. REV. 827 (2013).[5]

Whether one agrees or disagrees with the contention that *Martinez* must not be read as an exception limited *solely* to procedurally defaulted claims of IAC at trial, it is an issue that divides academics, promises to be litigated in lower courts, and is of unique significance to federal habeas review. Particularly in light of the number of habeas cases reviewed by this Court, the question presented in *Hunton* represents one of such exceptional importance as to warrant en banc review.

CONCLUSION

This Court's cases conflict as to the application of the *Martinez* exception. A careful, consistent resolution of these questions is a matter of life and death for numerous prisoners. Because the proper scope of *Martinez* is squarely presented in *Hunton*, this case constitutes one of the exceedingly rare instances in which en banc review is justified. For the foregoing reasons as well as those presented in Appellant-Petitioner's Petition for Rehearing En Banc, NACDL respectfully

[5] The author of this Brief has an article set for publication that examines the very issues raised in *Hunton* and *Nguyen*. *See* Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas after Martinez*, 55 WM & MARY L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract =2338588 or http://dx.doi.org/10.2139/ssrn.2338588 (noting that "it would seem largely untenable to suggest, post-*Trevino*, that the *Martinez* decision must be read narrowly and not applied beyond the strict language of the decision").

requests this Court grant en banc review in this case.

Date: December 30, 2013

Respectfully Submitted,

s/ *Justin F. Marceau*
JUSTIN F. MARCEAU

Attorney for Amicus Curiae
The National Association of
Criminal Defense Lawyers

CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The Brief is printed in proportionally spaced 14-point type, and there are 3,472 words in the Brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

2. The Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6). The Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2011 in 14-point Times New Roman.

December 30, 2013

By: s/ *Justin F. Marceau*

Justin F. Marceau
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The National Association of
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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

December 30, 2013 By: /s/ *Katina Whalen*