

# Michigan Law Review

---

Volume 114 | Issue 1

---

2015

## Pinholster's Hostility to Victims of Ineffective State Habeas Counsel

Jennifer Utrecht  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Jennifer Utrecht, *Pinholster's Hostility to Victims of Ineffective State Habeas Counsel*, 114 MICH. L. REV. 137 (2015).

Available at: <https://repository.law.umich.edu/mlr/vol114/iss1/4>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## NOTE

### PINHOLSTER'S HOSTILITY TO VICTIMS OF INEFFECTIVE STATE HABEAS COUNSEL

Jennifer Utrecht\*

*Cullen v. Pinholster foreclosed federal courts from considering new evidence when reviewing 28 U.S.C. § 2254(d) petitions for claims previously adjudicated on the merits in state court. This decision has a particularly adverse effect on petitioners whose state habeas counsel left an incomplete or undeveloped record. This Note discusses strategies for victims of ineffective state habeas counsel to avoid the hostile mandate of Pinholster. It argues that, in light of Martinez v. Ryan's recognition of the importance of counsel in initial-review collateral proceedings, courts should be wary of dismissing claims left un- or underdeveloped by ineffective state habeas counsel. It concludes that the course of action most consistent with the principles of the Antiterrorism and Effective Death Penalty Act of 1996 and petitioners' rights is to stay cases to give state courts the opportunity to further develop the record. This procedure allows petitioners to fully utilize the adversarial system and allows state courts the opportunity to correct any procedural errors. Should the state fail to allow for further record development, petitioners have a strong argument that the state procedures are systemically inadequate—a much-needed deterrent against hostility to federal claims.*

#### TABLE OF CONTENTS

INTRODUCTION .....	138
I. THE DISCREPANCY CAUSED BY <i>MARTINEZ V. RYAN</i> AND <i>CULLEN V. PINHOLSTER</i> .....	141
A. 28 U.S.C. § 2254: Comity, Federalism, and Finality .....	141
B. Exhaustion, Procedural Default, and <i>Martinez v. Ryan</i> .....	144
C. 28 U.S.C. § 2254(d) and <i>Cullen v. Pinholster</i> .....	148
D. <i>The Intersection of Martinez and Pinholster</i> .....	149
II. STRATEGIES FOR PETITIONERS TO EXPAND THE RECORD IN FEDERAL COURT .....	151
A. <i>No Adversarial Proceedings Without Effective Assistance of         Counsel: A Suspension Clause Challenge</i> .....	152
B. <i>Avoiding 28 U.S.C. § 2254's Trigger: Arguing that the Claim         Has Not Been "Adjudicated on the Merits"</i> .....	156

---

\* J.D., December 2014, University of Michigan Law School. I would like to thank my friends, the members of Volumes 113 and 114 of the *Michigan Law Review*, for their tremendous support while I worked on this piece. I would also like to thank my partner, Canek Acosta, for his review of early drafts and for his incredible patience with my incessant babbling about habeas corpus.

III. THE WAY FORWARD: ABEYANCE AND ADEQUACY . . . . .	161
CONCLUSION . . . . .	166

## INTRODUCTION

Elrick Gallow spent nearly thirteen years attempting to vindicate his constitutional right to effective counsel.<sup>1</sup> On the second day of Gallow's 1999 trial, his attorney Ahmad Muhammad requested a recess just before the victim took the stand.<sup>2</sup> Unbeknown to Gallow, Muhammad suffered from depression, anxiety disorder, and Post-Traumatic Stress Disorder; he withheld impeachment evidence regarding the victim from Gallow because he had a close personal relationship with the victim's mother; he had stopped practicing law entirely; and he only agreed to represent Gallow in order to convince Gallow to plead guilty.<sup>3</sup>

On September 1, 2000, Gallow and his new counsel, Dele Adebamiji, filed a motion to withdraw his guilty plea.<sup>4</sup> The motion asserted that his previous attorney had a conflict of interest and that his guilty plea was involuntary.<sup>5</sup> There was clear evidence of this conflict of interest. Muhammad gave a sworn statement before the Louisiana State Disciplinary Board that he had been "really hurt by what [Gallow] had done" and felt that Gallow "should have been punished" for his crimes. Muhammad testified, "I became his, 'Judgor' instead of his counsel."<sup>6</sup> Muhammad was subsequently disbarred—in part for his performance in this case.<sup>7</sup>

Adebamiji completely failed to develop a record of Muhammad's conflict. He did not submit the disciplinary evidence into the record.<sup>8</sup> He failed to subpoena Muhammad for the initial hearing on the matter.<sup>9</sup> The court continued the matter for a later hearing so that Muhammad could be brought to court, but neither Muhammad nor Adebamiji appeared for the

1. *Gallow v. Cooper (Gallow I)*, No. 04-1905, 2010 U.S. Dist. LEXIS 90576 (W.D. La. July 30, 2010), *report and recommendation adopted, Gallow II*, No. 6:04-cv-1905, 2010 U.S. Dist. LEXIS 90570 (W.D. La. Aug. 31, 2010), *aff'd, Gallow III*, 505 F. App'x 285 (5th Cir. 2012) (*per curiam*), *cert. denied, Gallow IV*, 133 S. Ct. 2730 (2013).

2. *Id.* at \*2.

3. *See Gallow v. Cooper (Gallow III)*, 505 F. App'x 285, 287, 292–93 (5th Cir. 2012) (*per curiam*); *see also In re Muhammad*, 3 So. 3d 458, 459–61 (La. 2009).

4. The actual procedural posture of Gallow's motion is a bit more complicated. On February 18, 2000, Gallow filed a *pro se* motion to withdraw his guilty plea, but for whatever reason, that document was not in the state court record. The motion filed by Adebamiji is on the record. *See Gallow I*, 2010 U.S. Dist. LEXIS 90576, at \*3–4, \*3 n.1.

5. *Gallow III*, 505 F. App'x at 286–87.

6. *Id.* at 293 (alteration in original) (quoting testimony of Ahmad Muhammad); *see also In re Muhammad*, 3 So. 3d at 460.

7. *See In re Muhammad*, 3 So. 3d at 460, 468.

8. *Gallow III*, 505 F. App'x at 293.

9. *Id.* at 287; *Gallow I*, 2010 U.S. Dist. LEXIS 90576, at \*6.

later hearing.<sup>10</sup> Ultimately, the state court dismissed the action with prejudice for failure to present any evidence.<sup>11</sup>

After attempting to correct this problem in the Louisiana state system for years,<sup>12</sup> Gallow filed a federal habeas petition under 28 U.S.C. § 2254, hoping to expand the record of his proceedings to include the affidavits from the Louisiana Disciplinary Board.<sup>13</sup> Section 2254, a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>14</sup> provides for federal review of state court convictions. A federal court may grant habeas relief when a state court's 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" or when it "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."<sup>15</sup> The federal district court denied Gallow's petition.<sup>16</sup> The Fifth Circuit affirmed, holding that it could not consider the testimony before the disciplinary board because it was not in the state court record.<sup>17</sup> Due to the ineffective assistance of his state habeas counsel, Gallow was without relief for the violation of his Sixth Amendment rights.

Gallow's case and others like it<sup>18</sup> illustrate that the intersection of *Martinez v. Ryan* and *Cullen v. Pinholster* creates an anomaly in AEDPA litigation:

10. *Gallow III*, 505 F. App'x at 287.

11. *Id.*; *Gallow I*, 2010 U.S. Dist. LEXIS 90576, at \*6.

12. Gallow, both with and without assistance of counsel, filed several more motions on the matter. On February 18, 2000 Gallow filed his own pro se motion that attached the Disciplinary Board affidavit, but the court somehow lost this. Adebamiji also filed subsequent applications for postconviction relief on August 29, 2001 and October 15, 2001, but Adebamiji continued to fail to subpoena Muhammad. On November 26, 2001 Adebamiji filed a motion for appeal, which was denied for failure to present evidence to prove his claim. See *Gallow III*, 505 F. App'x at 288, for a more complete description of Gallow's filings.

13. *Gallow I*, 2010 U.S. Dist. LEXIS 90576, at \*28–29.

14. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214.

15. 28 U.S.C. § 2254(d) (2012).

16. *Gallow II*, No. 6:04-cv-1905, 2010 U.S. Dist. LEXIS 90570 (W.D. La. Aug. 31, 2010) (adopting the magistrate judge's recommendation set out in *Gallow I*, 2010 U.S. Dist. LEXIS 90576, at \*44–45).

17. *Gallow III*, 505 F. App'x at 293–94.

18. See, e.g., *Escamilla v. Stephens*, 749 F.3d 380, 394–95 (5th Cir. 2014) (petitioner's state habeas counsel raised, but failed to adequately develop, a claim of ineffective assistance of trial counsel); *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013) (petitioner's appellate counsel raised, but failed to adequately develop, a claim of ineffective assistance of trial counsel); *Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012) (petitioner challenged state habeas counsel's failure to develop the basis of ineffective assistance of trial counsel claim); *Franklin v. Robinson*, No. 3:04-cv-187, 2015 WL 409796, at \*8 (S.D. Ohio Jan. 29, 2015) (same); *Henderson v. Carpenter*, 21 F. Supp. 3d 927, 933 (W.D. Tenn. 2014) (petitioner attempted to introduce new evidence of an ineffective assistance of trial counsel claim raised, but not fully developed, by his state habeas counsel in an initial-review collateral proceeding); *Au v. Buss*, No. 2:11-cv-103-Ftm-29UAM, 2014 WL 842446, at \*8 n.4 (M.D. Fla. Mar. 4, 2014) (same); *Colwell v. Warden, Chillicothe Corr. Inst.*, No. 1:13-cv-43, 2014 WL 546030, at \*10 (S.D. Ohio

petitioners who do not raise claims in state court proceedings at all can receive a more favorable standard of review in federal courts. If Gallow's state habeas counsel failed to raise ineffective assistance of trial counsel at all, Gallow could have presented the affidavits from the disciplinary board to the federal court. Ordinarily, federal courts may not hear 28 U.S.C. § 2254 claims that petitioners failed to raise in state court.<sup>19</sup> Under *Martinez v. Ryan*,<sup>20</sup> however, federal courts can excuse the default of a claim of ineffective assistance of trial counsel when the failure was caused by ineffective assistance, or total absence, of state habeas counsel.<sup>21</sup> Of course, Adebamiji *did* raise the claim before the state court, but he failed to present any evidence.<sup>22</sup> As such, under the Supreme Court's interpretation of § 2254's standard of review in *Cullen v. Pinholster*,<sup>23</sup> the federal court's review of the matter was limited to the record before the state court.<sup>24</sup> This presents a serious procedural roadblock for petitioners like Gallow, who have meritorious constitutional claims, but who have never received a fair process to vindicate these claims because of ineffective state habeas counsel.

The pervasive and systemic problems with current indigent defense<sup>25</sup> render it possible to have a chain of bad attorneys. While Gallow's story may be extreme, it is certainly not uncommon.<sup>26</sup> In addition, this abnormality incentivizes "sandbagging," the practice of deliberately failing to raise claims

---

Feb. 10, 2014) (same), *report and recommendation adopted*, No. 1:13-cv-43, 2014 WL 879896 (S.D. Ohio Mar. 5, 2014).

19. 28 U.S.C. § 2254(b) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State . . .").

20. 132 S. Ct. 1309 (2012).

21. Specifically, *Martinez v. Ryan* only applies when, under state law, claims of ineffective assistance of trial counsel had to be raised in an initial-review collateral proceeding. *Id.* at 1316–17. The precise contours of this decision are discussed in more detail *infra* in Section I.B.

22. See *Gallow III*, 505 F. App'x at 294.

23. 131 S. Ct. 1388, 1400 (2011) ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before the state court.").

24. *Gallow III*, 505 F. App'x at 293 ("[N]either the district court nor this court are permitted to consider any evidence presented for the first time in federal court in determining whether Gallow has met the standard under § 2254(d)(1).").

25. The problems with state indigent defense representation have been documented extensively elsewhere. For a thorough discussion of the poor state of indigent defense work as a reality of underfunding that is unsolvable by the Supreme Court's *Strickland* test, as well as a discussion of how courts can work to aggressively police and reform the system, see Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005). See also Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007).

26. See cases cited *supra* note 18.

in state court in order to receive more favorable federal review later, which the current procedural default doctrine was designed to avoid.<sup>27</sup>

This Note argues that in light of the equitable principles discussed in *Martinez*, courts should be loath to ignore pertinent evidence that was not brought before the state court solely because the state habeas counsel was incompetent. Part I explains the legal background surrounding this controversy and how the intersection of *Martinez* and *Pinholster* alters the incentives for § 2254 petitioners. Part II details arguments that may help a petitioner whose state habeas counsel failed to competently develop the record to overcome *Pinholster*'s hostility and to develop a complete record before the federal court. Part II also attempts to explain the circumstances and jurisdictions in which these arguments will be the most successful. Part III argues that courts, when faced with arguments that the record has been underdeveloped due to the ineffective assistance of state habeas counsel, should stay cases to allow state courts the opportunity to hear the case on a developed factual record. This process is consistent with the policies motivating AEDPA and allows petitioners to fully and properly utilize the adversarial system. Ultimately, Part III concludes, if states are unwilling to expand the record under these circumstances, petitioners should argue that courts should hear the federal claims de novo, because the states' procedures are systematically inadequate and hostile to federal rights.

#### I. THE DISCREPANCY CAUSED BY *MARTINEZ V. RYAN* AND *CULLEN V. PINHOLSTER*

This Part details the tremendous impact that *Martinez* and *Pinholster* have had on AEDPA litigation under 28 U.S.C. § 2254. Section I.A describes § 2254 litigation generally. Section I.B explains how *Martinez* changed AEDPA's twin doctrines of exhaustion and procedural default—doctrines that have been used to prevent courts from even addressing the merits of a § 2254 petition. Section I.C illustrates the impact of *Pinholster* on a court's ability to address the merits of a state petitioner's claims. Section I.D argues that the intersection of these two recent Supreme Court cases, each grounded in different ideas of what federal habeas review is for, alters § 2254 petitioners' incentives.

##### A. 28 U.S.C. § 2254: *Comity, Federalism, and Finality*

AEDPA was passed and signed into law in the immediate wake of the 1995 Oklahoma City bombing.<sup>28</sup> The centerpiece of the Act, now codified at

---

27. See *Wainwright v. Sykes*, 433 U.S. 72, 89–90 (1977) (reforming the procedural default doctrine because the old rule “may encourage ‘sandbagging’ on the part of defense lawyers” whereas the new standard would ensure that petitioners adequately followed state procedures to vindicate their claims).

28. See 142 CONG. REC. 7,968–69 (1996) (statement of Rep. Nancy Pelosi) (acknowledging the Oklahoma City bombing as the impetus for AEDPA); see also Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 447 (2007).

28 U.S.C. § 2254, “imposed [and] fortified . . . obstacles” to federal habeas corpus review for state prisoners.<sup>29</sup> Prior to AEDPA, and “[a]s long as there have been federally enforceable protections for state criminal defendants in the United States,” federal habeas corpus provided convicted state prisoners with “plenary review” of deprivations of federal rights.<sup>30</sup> AEDPA “dramatically altered” this review.<sup>31</sup>

To begin, AEDPA imposed a series of procedural obstacles<sup>32</sup> that allow federal courts to dismiss petitions without ever reaching the merits of the constitutional claims.<sup>33</sup> AEDPA created the first federal habeas statute of limitations.<sup>34</sup> It altered the preexisting exhaustion requirement, preventing federal courts from considering unexhausted claims that were meritorious,<sup>35</sup> without a clear and express waiver from the state’s attorney.<sup>36</sup> It limited appellate review by federal circuit courts,<sup>37</sup> and it substantially limited petitioners’ ability to bring successive petitions.<sup>38</sup>

It also codified limitations on a state prisoner’s ability to challenge facts found by a state court in a federal evidentiary hearing. Under § 2254(e), a federal court “shall not hold an evidentiary hearing” when the petitioner “failed to develop the factual basis of a claim in State court proceedings” unless the applicant shows (1) that the claim relies on a previously unavailable “new rule of constitutional law, made retroactive to cases on collateral review,” or “a factual predicate that could not have been previously discovered through the exercise of due diligence,” and (2) that “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”<sup>39</sup>

---

29. Kovarsky, *supra* note 28, at 447–48; see also Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 93–94 (2012).

30. James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 415 (2001).

31. Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 702–03; see also Marceau, *supra* note 29, at 95.

32. See generally Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

33. In fact, empirical studies have shown that courts dismiss a large percentage of federal habeas claims before ever reaching the merits. See NANCY J. KING ET AL., DEP’T OF JUSTICE, 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, at 45 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

34. 28 U.S.C. § 2244(d)(1) (2012).

35. *Id.* § 2254(b)(1).

36. *Id.* § 2254(b)(3).

37. See *id.* § 2253.

38. See *id.* § 2244(b)(2).

39. *Id.* § 2254(e)(2).

Perhaps most significant, in § 2254(d), AEDPA codified a standard of federal review calling for great deference to state courts on legal issues and mixed questions of law and fact.<sup>40</sup> Thus, even after the petitioner has cleared the many procedural hurdles, the federal court's review of a petitioner's constitutional claim is incredibly limited. A federal court may only grant a writ of habeas corpus on behalf of a person in state custody whose claim has been adjudicated on the merits in state court when the adjudication in state court:

- (1) 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; or
- (2) 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.<sup>41</sup>

The purpose of these changes was to “further the principles of comity, finality, and federalism.”<sup>42</sup> As the Supreme Court explained in *Williams v. Taylor*, federal habeas principles “inform and shape” the relations between the state courts and federal courts.<sup>43</sup> AEDPA's changes to federal habeas law were designed to protect the “integrity of [states'] criminal and collateral proceedings” and limit “federal intrusion into state criminal adjudications.”<sup>44</sup> Each of AEDPA's procedural changes ensures that petitioners first litigate their grievances in state court and that they do not abuse the system. The standard of review codified in § 2254(d) ensures finality by preventing petitioners from using the federal forum as a means to relitigate already-settled cases, and it ensures comity by deferring to states' decisions unless they are clearly erroneous or unreasonable.

Scholars have criticized AEDPA since its inception,<sup>45</sup> but it seems here to stay. Federal habeas law continues to develop around this lens of comity, finality, and federalism. Against this backdrop, the Supreme Court decided *Martinez v. Ryan* and *Cullen v. Pinholster*, both of which dramatically changed § 2254 litigation.

40. See *id.* § 2254(d).

41. *Id.*

42. *Williams v. Taylor (Michael Williams)*, 529 U.S. 420, 436 (2000).

43. *Id.*

44. *Id.*

45. See, e.g., Liebman, *supra* note 30, at 414, 426–27 (criticizing AEDPA on a number of grounds, most notably that Timothy McVeigh—the impetus for its passage—was not a state prisoner); Marceau, *supra* note 29, at 96 (“In light of recent developments in the interpretation and application of AEDPA, and in view of available empirical data, the conclusion is unmistakable that AEDPA's bite, though perhaps slow to manifest symptoms, has gradually and systemically infected and undermined the federal habeas infrastructure.”); Yackle, *supra* note 32, at 381 (“The new law is not well drafted.”); see also Kovarsky, *supra* note 28 (describing the problem with assuming comity, finality, and federalism require such a restrictive view of federal habeas).

B. *Exhaustion, Procedural Default, and Martinez v. Ryan*

Exhaustion is one of the many procedural hurdles a petitioner must clear before a federal court will hear a 28 U.S.C. § 2254 petition on the merits. The statute provides that a federal petitioner must first have “[e]xhausted the remedies available in the courts of the State.”<sup>46</sup> A petitioner has not exhausted his remedies “if he has the right under the law of the State to raise, by any available procedure, the question presented.”<sup>47</sup> This requirement is grounded in comity.<sup>48</sup> It protects the state court’s role in the enforcement of the law, gives the state courts the first opportunity to act on these claims and correct their errors, and prevents the disruption of state judicial proceedings.

To properly exhaust his claims, a petitioner must have already presented the federal issue in his § 2254 petition to the state courts.<sup>49</sup> If the petitioner did not alert the state to the substance of the federal claim, the state could not have corrected the violation.<sup>50</sup> As such, the claim is not exhausted.

Although the plain text of § 2254(b) assumes that a petitioner does not need to exhaust when no remedies are available,<sup>51</sup> federal courts will generally refuse to hear a claim that has been procedurally defaulted. A procedurally defaulted claim is one that could have, at some point, been exhausted in state court, but can no longer be raised in state court because the petitioner failed to follow some state procedural rule—including a failure to file within the state’s statute of limitations.<sup>52</sup>

---

46. 28 U.S.C. § 2254(b)(1)(A); *see also* *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (“Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court.”).

47. 28 U.S.C. § 2254(c). Generally, the exhaustion of a claim requires at least one complete run through the state’s appeals system. *See* *O’Sullivan v. Boerckel*, 526 U.S. 838, 842–45 (1999).

48. *See, e.g., O’Sullivan*, 526 U.S. at 844–45 (“Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. This . . . reduces friction between the state and federal court systems . . . .” (citations omitted)); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507 (1993). Professor Yackle has adamantly criticized this concern. *See* Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 371 (1988) (“[D]ismissals on this basis may entirely discourage undereducated prison inmates who find *themselves* exhausted before they are able to plumb state postconviction remedies to the bottom.”).

49. *Picard v. Connor*, 404 U.S. 270, 275–76 (1971) (“The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts.”).

50. *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) (per curiam) (“If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.”).

51. *See* 28 U.S.C. § 2254(b)(1)(B).

52. *Wainwright v. Sykes*, 433 U.S. 72, 81–83 (1977).

The procedural default doctrine is rooted in the “well-established principle of federalism that a state decision resting on an adequate foundation of [independent] state substantive law is immune from review in the federal courts.”<sup>53</sup> To be an “adequate” state ground, the “rule must be firmly established and consistently followed, and it must not be applied in ways that unduly burden the defendant’s exercise of her constitutional rights.”<sup>54</sup> To be “independent,” the rule must not be “interwoven with the federal law.”<sup>55</sup> This standard leaves room for a petitioner to argue that he is not procedurally defaulted because the state’s procedural rule is neither adequate nor independent.<sup>56</sup> In an average case, however, when the state consistently applies the procedural rule at issue, a petitioner’s unexhausted claim will be procedurally defaulted.

If a petitioner has procedurally defaulted his claim, he may overcome this default by showing cause and prejudice.<sup>57</sup> In order to show cause, the petitioner must show that “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.”<sup>58</sup> To show prejudice, the petitioner must show that the errors “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”<sup>59</sup> This rule balances the due process rights of defendants with the policy considerations of finality and respect for state procedural rules.<sup>60</sup> Importantly, in establishing this rule, the Supreme Court hoped to avoid extended litigation and “sandbagging” (the practice of withholding claims in order to receive a more favorable review later).<sup>61</sup>

As originally articulated, cause and prejudice did not cover ineffective assistance of (or a complete lack of) state habeas counsel, one of the most obvious sources of failure to exhaust. In *Pennsylvania v. Finley*, the Supreme

53. *Id.* at 81.

54. Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 *YALE L.J.* 2604, 2620 (2013).

55. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

56. See generally Primus, *supra* note 54. For examples of cases in which state procedural rules were considered inadequate, see *Lee v. Kemna*, 534 U.S. 362 (2002) (rule unduly burdensome), *Ford v. Georgia*, 498 U.S. 411 (1991) (requirement was novel), and *Rogers v. Alabama*, 192 U.S. 226 (1904) (rule inconsistently applied).

57. *Wainwright*, 433 U.S. at 87 (quoting *Francis v. Henderson*, 425 U.S. 536, 542 (1976)).

58. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Examples of factors external to the defense have included interference by officials, a showing that factual and legal bases were not available at the time, and a showing that the procedural default was the result of ineffective assistance of counsel. See Marceau, *supra* note 29, at 158 n.251; see also *Strickler v. Greene*, 527 U.S. 263 (1999) (interference by officials); *Amadeo v. Zant*, 486 U.S. 214 (1988) (factual and legal bases not available).

59. *United States v. Frady*, 456 U.S. 152, 170 (1982).

60. *Wainwright*, 433 U.S. at 88–91. Prior to *Wainwright v. Sykes*, procedural default did not apply to habeas or collateral proceedings, and a court would refuse to hear claims that could no longer be exhausted only if it was shown that the petitioner deliberately and willfully bypassed the state court proceedings. See *Fay v. Noia*, 372 U.S. 391 (1963), *overruled in part by Wainwright*, 433 U.S. 72.

61. *Wainwright*, 433 U.S. at 89.

Court declined to extend the constitutional right to counsel to collateral attack.<sup>62</sup> There, the Court held that the defendant had “sufficient tools” to gain meaningful access to the courts because she had already been represented at trial and on appeal.<sup>63</sup> The defendant’s claims had already been “organized and presented in a lawyerlike fashion” by her counsel on direct appeal, and the defendant could therefore proceed pro se with her collateral attack.<sup>64</sup> In *Coleman v. Thompson*, the Court determined that criminal defendants bear the risk of collateral attorney error because there is no constitutional right to collateral counsel.<sup>65</sup>

*Coleman*, however, explicitly left open the question of whether a right to habeas counsel should apply to “initial-review collateral proceedings”—situations in which a claim can only be raised for the first time on habeas.<sup>66</sup> Certain claims, like ineffective assistance of counsel claims and *Brady* claims (raised when a prosecutor has unlawfully withheld material and exculpatory information from a criminal defendant)<sup>67</sup> are founded on facts not occurring at trial, and therefore require expanding the record.<sup>68</sup> As a result, such claims are typically reserved for state collateral review and most states do not allow defendants to raise them earlier.<sup>69</sup>

*Martinez v. Ryan* addressed this question for the first time. The *Martinez* Court held that when ineffective assistance of trial counsel could be raised for the first time only in collateral proceedings, (“initial-review collateral proceedings”) the ineffective assistance of state habeas counsel could establish cause to excuse procedural default.<sup>70</sup>

The *Martinez* opinion rested on the profound equitable problems caused by failing to appoint counsel in initial-review collateral proceedings. As the Supreme Court had previously recognized, the need for counsel diminishes as a criminal defendant works his way through the criminal justice system.<sup>71</sup> *Martinez* recognized that, unlike the situation in *Finley*, when a claim can only be raised on collateral attack, no attorney has previously had the opportunity to present this claim to a court.<sup>72</sup>

---

62. 481 U.S. 551 (1987).

63. *Finley*, 481 U.S. at 557.

64. *Ross v. Moffitt*, 417 U.S. 600, 615–16 (1974); see *Finley*, 481 U.S. at 557.

65. 501 U.S. 722, 752 (1991).

66. *Coleman*, 501 U.S. at 755; *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012).

67. See *Brady v. Maryland*, 373 U.S. 83 (1963).

68. See *Primus*, *supra* note 25, at 689, 727 n.226.

69. See *id.* at 692 & n.70.

70. *Martinez*, 132 S. Ct. at 1318–19.

71. The Supreme Court has recognized a right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and for defendants’ first appeal as a matter of right, *Douglas v. California*, 372 U.S. 353 (1963). A series of cases, beginning with *Ross v. Moffitt*, 417 U.S. 600 (1974), and ending with *Coleman*, 501 U.S. 722, held that the Constitution generally does not require states to provide counsel beyond the first appeal as of right. For a much more extensive discussion of these cases, see Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839 (2013).

72. *Martinez*, 132 S. Ct. at 1317.

*Martinez* further noted that claims of ineffective assistance of trial counsel often necessitate an attorney's assistance: they "require investigative work and an understanding of trial strategy."<sup>73</sup> Many states prohibit these claims from being raised on direct appeal.<sup>74</sup> So when an attorney errs in raising a claim that can only be raised on collateral attack, "it is likely that no state court at any level will hear the prisoner's claim."<sup>75</sup> These problems led the Supreme Court to hold that when a claim of ineffective assistance of trial counsel can only be raised on collateral attack (an initial-review collateral proceeding), the ineffective assistance of habeas counsel can be cause to excuse the failure to raise the claim.<sup>76</sup>

Shortly afterward, in *Trevino v. Thaler*, the Court expanded *Martinez's* holding to include cases in which states *allow* ineffective assistance of counsel cases to be brought on direct appeal, but do not provide a meaningful opportunity for litigants to do so.<sup>77</sup> Critically, the court held that significant unfairness would result if *Martinez* did not apply:

In both instances practical considerations, such as the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than on direct, review. In both instances failure to consider a lawyer's "ineffectiveness" during an initial-review collateral proceeding as a potential "cause" for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim.<sup>78</sup>

It remains to be seen how far *Martinez* will extend. On one hand, scholars and judges have suggested that a broad reading of *Martinez* emphasizes the importance of postconviction counsel for a wide variety of claims not readily addressed on direct appeal, most notably, *Brady* claims and claims of jury misconduct.<sup>79</sup> On the other hand, the Court repeatedly emphasized the

73. *Id.*

74. See Primus, *supra* note 25, at 692 & n.70.

75. *Martinez*, 132 S. Ct. at 1316.

76. *Id.* at 1320.

77. *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

78. *Id.* at 1921 (citations omitted).

79. See, e.g., Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. 591, 596 (2013) ("Consider, for example, situations involving the prosecution's failure to disclose exculpatory evidence or deals with witnesses, its use of perjured testimony, or its suppression of evidence by the use of threats." (footnotes omitted)); see also Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 579 (2009) (listing a number of types of claims that can typically be raised only on collateral review, including extra-record claims and claims based on new legal developments). In 2013, the Ninth Circuit held that *Martinez* does not extend to claims that the state failed to disclose exculpatory evidence pursuant to *Brady v. Maryland*, over a powerful dissent by Judge Fletcher. *Hunton v. Sinclair*, 732 F.3d 1124 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1771 (2014). Professor Huq argues that "*Brady* claims are an even stronger candidate for exculpating cause than *Strickland* claims: by definition, an undiscovered *Brady* violation is not one that a petitioner can reasonably be blamed for having omitted." Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV.

narrowness of its holding.<sup>80</sup> It also stressed the fundamental importance of ineffective assistance of trial counsel claims, noting that

[a] prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."<sup>81</sup>

Regardless of the potential reach of *Martinez*, it is clear that a petitioner shows cause excusing procedural default when (1) the claim of ineffective assistance of trial counsel is a substantial claim, (2) the "cause" is that the petitioner had no counsel or ineffective counsel during the state collateral review proceeding, (3) the state collateral review proceeding was the first proceeding with respect to the ineffective assistance of trial counsel claim, and (4) state law does not give a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal.<sup>82</sup> In a situation like Gallow's, in which his claim of ineffective assistance of trial counsel was substantial, his state habeas counsel was ineffective, and the claim was heard for the first time on collateral attack, *Martinez* would serve as cause to excuse the procedural default of this claim *if* Gallow's attorney had not raised it at all.

### C. 28 U.S.C. § 2254(d) and *Cullen v. Pinholster*

Once a state court has rendered a decision on the merits, the claim is exhausted, and a federal court can only hear the petition under the deferential standard of review codified in 28 U.S.C. § 2254(d). The petition

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) 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; or (2) resulted in a decision that was

---

519, 592 (2014). *Martinez* could also potentially extend to include ineffective assistance of appellate counsel as exculpatory cause, as the Ninth Circuit has noted in *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013).

80. *Martinez*, 132 S. Ct. at 1315 ("This opinion qualifies *Coleman* by recognizing a narrow exception . . ."); *id.* at 1319 (noting "[t]his limited qualification to *Coleman*"); *id.* at 1320 ("The rule of *Coleman* governs all but the limited circumstances recognized here.").

81. *Martinez*, 132 S. Ct. at 1317 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)). Several circuits have used this and similar language in the opinion to hold that *Martinez* is strictly limited to trial counsel. See, e.g., *Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014), *petition for cert. filed*, No. 14-8782 (U.S. Mar. 5, 2015); *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013), *cert. denied sub nom.* *Hodges v. Carpenter*, 83 U.S.L.W. 3742 (U.S. Mar. 23, 2015) (No. 14-5246); *Banks v. Workman*, 692 F.3d 1133, 1147–48 (10th Cir. 2012).

82. *Trevino*, 133 S. Ct. at 1918.

based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.<sup>83</sup>

Prior to 2011, the circuit courts took two approaches to determining when federal courts could admit new evidence for claims adjudicated on the merits in the state court.<sup>84</sup> The first approach assumed that a federal court could hear the claim *de novo* when a state court had not heard the evidence.<sup>85</sup> The other viewed the state court decision through § 2254(d)(1)'s deferential standard, and considered new evidence relevant to the reasonableness of the state court decision.<sup>86</sup> *Cullen v. Pinholster* rejected both positions, holding that a federal court *cannot* consider new evidence in reviewing the state court's decision.<sup>87</sup> The Court found that this interpretation was "compelled by 'the broader context'" of AEDPA which intended "to channel [petitioners'] claims first to the state courts."<sup>88</sup>

In short, the Court's opinion grounded its interpretation in notions of comity and federalism. It continued AEDPA's tradition of ensuring that federal courts sitting in habeas "are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings."<sup>89</sup> It is under this reading of § 2254(d) that Gallow's claim, and others like his, fail. Since Louisiana's dismissal for failure to present evidence was a decision "on the merits," Gallow's federal habeas claim could only be reviewed on the record before the state court—a record that did not include any evidence due to his state habeas counsel's failure.<sup>90</sup>

#### D. *The Intersection of Martinez and Pinholster*

Scholars have harshly criticized *Pinholster*. They argue that *Pinholster* ignores the reality that many state courts' post-trial procedures for fact development are severely limited;<sup>91</sup> that the Supreme Court unfairly and incorrectly collapsed the concepts of comity and federalism into a "unitary

83. 28 U.S.C. § 2254(d) (2012).

84. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1417 (2011) (Sotomayor, J., dissenting).

85. *Id.*

86. *Id.*; see, e.g., *Pinholster v. Ayers*, 590 F.3d 651, 668 (9th Cir. 2009) (en banc), *rev'd sub nom.* *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

87. *Pinholster*, 131 S. Ct. at 1397–98.

88. *Id.* at 1398–99 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The Court further noted that "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id.* at 1399.

89. *Williams v. Taylor (Michael Williams)*, 529 U.S. 420, 437 (2000).

90. *Gallow III*, 505 F. App'x 285, 293–94 (5th Cir. 2012) (per curiam) ("We are loathe to turn a blind eye to the facts presented in the expanded record. However, the state court was not given the opportunity to review it, and we cannot now do so for the first time on federal habeas review pursuant to § 2254(d)(1).").

91. Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. Rev. 953 (2012).

interest in deference to state respondents<sup>92</sup>; and that *Pinholster* substantially undermines the availability of federal habeas relief in cases in which it is needed.<sup>93</sup> In the context of claims like Gallow's—in which state habeas counsel brought claims but entirely failed to develop these claims—*Pinholster* has a particularly harsh effect. If state habeas counsel ineffectively fails to raise a claim, the federal court could excuse the default under *Martinez* and consider all evidence. On the other hand, if state habeas counsel raised the claim, but entirely failed to develop the basis for it, the federal court must dismiss the claim. No matter how meritorious the underlying claim, the federal court must review the proceedings on the underdeveloped state court record.<sup>94</sup>

The interplay of these two cases incentivizes petitioners' counsel to avoid raising claims rather than risk leaving a claim underdeveloped. This would not be particularly problematic if courts could discern when the failure to raise a claim was actually due to the ineffectiveness of state habeas counsel and when counsel strategically and deliberately bypassed state procedures. This may be possible in some cases, but the average case is unlikely to have evidence of bad motives, leaving open the possibility that state habeas counsel will deliberately take advantage of *Martinez*'s open door. This alteration of incentives is contrary to *Pinholster* and the procedural default doctrine, both of which were designed to avoid sandbagging and to encourage channeling constitutional rights through the state courts.<sup>95</sup>

Moreover, the equitable principles outlined in *Martinez* illustrate the particularly harsh effect that *Pinholster* has on petitioners whose ineffective state habeas counsel failed to develop their claims. As an equitable matter, such petitioners are in the same boat as those whose counsel failed to raise the claims entirely. Neither have had a competent attorney to help develop

---

92. Kovarsky, *supra* note 28, at 455; *see also id.* at 507 (“‘Comity, finality, and federalism’ is now the favored idiom for erroneously invoking a legislative mood; it has become the means by which courts express an illegitimate hostility towards exacting standards of criminal procedure.”).

93. Marceau, *supra* note 29, at 122 (“Over the longer term, however, *Pinholster* threatens to substantially reduce the viability of federal habeas relief in cases where court assistance . . . is needed in order to substantiate a claim of constitutional injury.”); *id.* at 124 (“The impact of this limitation . . . will be to profoundly limit the availability of federal habeas relief.”); *see also* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1237 (2015) (“The Supreme Court’s decision in *Cullen v. Pinholster* provides perhaps the clearest example of the Supreme Court creating an unnecessary, unprecedented, and exceedingly harmful rule in the habeas context.” (footnote omitted)).

94. *See, e.g.*, *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 2662 (2014); *Pape v. Thaler*, 645 F.3d 281, 291 (5th Cir. 2011); *Ridgeway v. Zon*, 424 F. App’x 58, 59 (2d Cir. 2011).

95. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1392 (2011); *Wainwright v. Sykes*, 433 U.S. 72, 89–91 (1977).

the record.<sup>96</sup> Neither have had a competent attorney to present their arguments in an “organized” or “lawyerlike” fashion.<sup>97</sup> For both groups of petitioners, when their state habeas counsel “errs in [an] initial-review collateral proceeding[ ], it is likely than no state court . . . will hear” the fullest version of their claims.<sup>98</sup>

Despite this anomaly, as it stands, no federal court has provided relief from the deferential standard of § 2254(d) when ineffective state habeas counsel has failed to develop petitioners’ claims. This is not for petitioners’ lack of trying. Several circuits have considered arguments that the rationale in *Martinez* should allow courts to consider new evidence when the claim was raised but underdeveloped in state court because of ineffective habeas counsel.<sup>99</sup> All have rejected such arguments. A proper remedy is needed to fix this serious imbalance. Defendants who have been consistently deprived of competent counsel need a way to properly develop meritorious claims. As Justice Breyer wrote when commenting on the Supreme Court’s denial of certiorari in *Gallow v. Cooper*, “[i]n my view, a petitioner like Gallow is in a situation indistinguishable from that of a petitioner like Trevino . . . . A claim without any evidence to support it might as well be no claim at all.”<sup>100</sup>

## II. STRATEGIES FOR PETITIONERS TO EXPAND THE RECORD IN FEDERAL COURT

Since circuit courts have consistently rejected arguments that *Martinez* creates an exception to *Pinholster*,<sup>101</sup> this Part suggests alternative arguments that victims of ineffective assistance of state habeas counsel may make to avoid *Pinholster*’s hostile command. Section II.A discusses a handful of cases

---

96. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012).

97. *Ross v. Moffitt*, 417 U.S. 600, 615 (1974).

98. *Martinez*, 132 S. Ct. at 1316.

99. See, e.g., *Escamilla v. Stephens*, 749 F.3d 380, 394–95 (5th Cir. 2014) (“*Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted. Thus, once a claim is considered and denied on the merits by the state habeas court, *Martinez* is inapplicable, and may not function as an exception to *Pinholster*’s rule that bars a federal habeas court from considering evidence not presented to the state habeas court.” (citations omitted)); *Detrich*, 740 F.3d at 1246 (“*Martinez* does not apply to claims that were not procedurally defaulted, but were, rather, adjudicated on the merits in state court.”); *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013) (“*Moore* is not asking that we afford a *Martinez*-like review of a procedurally defaulted claim, but rather that we turn *Martinez* into a route to circumvent *Pinholster*. . . . As explained above, though, *Pinholster* plainly bans such an attempt to obtain review of the merits of claims presented in state court in light of facts that were not presented in state court. *Martinez* does not alter that conclusion.”).

100. *Cooper v. Gallow (Gallow IV)*, 133 S. Ct. 2730, 2731 (2013) (Breyer, J., concurring in denial of certiorari) (citation omitted). Despite his concerns with the current system, Justice Breyer concurred in the denial of certiorari because he recognized that “no United States Court of Appeals has clearly adopted a position that might give Gallow relief,” but he “stress[ed] that the denial of certiorari here is not a reflection of the merits of Gallow’s claims.” *Id.*

101. See cases cited *supra* note 99.

in which petitioners have raised a Suspension Clause challenge to 28 U.S.C. § 2254(d) in light of *Pinholster*. Petitioners have poorly articulated these challenges, and courts have summarily dismissed them. Although Section II.A argues that a lower court is unlikely to accept a sweeping Suspension Clause challenge, it attempts to aid petitioners intent on making such a challenge in properly articulating the contours of an as-applied Suspension Clause challenge. Its looming presence may influence a lower court to more seriously consider petitioners' other arguments as a matter of constitutional avoidance. Section II.B details arguments that petitioners can utilize to avoid 28 U.S.C. § 2254(d)'s "adjudicated on the merits" trigger and expand the record before the federal court.

A. *No Adversarial Proceedings Without Effective Assistance of Counsel: A Suspension Clause Challenge*

The Suspension Clause of the United States Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>102</sup> Petitioners have previously attempted, and lower courts have consistently rejected, Suspension Clause challenges to 28 U.S.C. § 2254(d). With the exception of one,<sup>103</sup> however, the circuit courts that have addressed the constitutionality of § 2254(d) did so before a significant development in Suspension Clause jurisprudence: *Boumediene v. Bush*.<sup>104</sup> Post-*Boumediene*, courts that have addressed the question have not grappled with situations in which petitioners' ineffective counsel failed to develop the record.<sup>105</sup> In fact, many cases summarily dismiss Suspension Clause arguments based on petitioners' incomprehensible arguments.<sup>106</sup>

Although this Section concludes that a Suspension Clause challenge is unlikely to prevail in any lower court, this Section provides a framework grounded in *Boumediene v. Bush* on which petitioners intent on making such challenges may flesh out their arguments to avoid summary dismissals.

---

102. U.S. CONST. art. I, § 9, cl. 2.

103. *Cobb v. Thaler*, 682 F.3d 364 (5th Cir. 2012).

104. *Evans v. Thompson*, 518 F.3d 1 (1st Cir. 2008); *Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007); *Olona v. Williams*, 13 F. App'x 745 (10th Cir. 2001); *Turner v. Johnson*, 177 F.3d 390 (5th Cir. 1999); *Green v. French*, 143 F.3d 865 (4th Cir. 1998), *abrogated by Williams v. Taylor (Terry Williams)*, 529 U.S. 362 (2000); *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *rev'd*, 521 U.S. 320 (1997).

105. See, e.g., *Mickle v. Chappell*, No. C 92-2951 TEH, 2014 U.S. Dist. LEXIS 107569 (N.D. Cal. Aug. 4, 2014); *Frye v. Warden, San Quentin State Prison*, No. 2:99-cv-0628, 2013 U.S. Dist. LEXIS 171220 (E.D. Cal. Dec. 3, 2013); *Bowling v. Parker*, 882 F. Supp. 2d 891 (E.D. Ky. 2012); see also *Magnan v. Trammell*, 719 F.3d 1159, 1177–78 (10th Cir. 2013) (Hartz, J., concurring).

106. See, e.g., *Frye*, 2013 U.S. Dist. LEXIS 171220, at \*39 ("*Boumediene v. Bush* [is a case] in which the Court struck down a statute denying some aliens access to the habeas remedy. Petitioner has made no comprehensible argument that the AEDPA suspends the writ of habeas corpus." (citation omitted)).

In short, *Boumediene v. Bush*<sup>107</sup> recognizes that when proceedings “lack the necessary adversarial character,” the privilege of the writ of habeas corpus must allow the opportunity to supplement the factual record on habeas review.<sup>108</sup> Petitioners who have been unable to develop the factual basis of ineffective assistance of trial counsel claims due to the ineffective assistance of habeas counsel may argue that the Suspension Clause guarantees them the right to supplement the record on review because they have been consistently denied the bedrock element of adversarial proceedings—competent counsel.

As the Supreme Court has held, the Suspension Clause “guarantees an affirmative right to judicial inquiry into the causes of detention.”<sup>109</sup> Suspension of the writ requires a specific declaration by Congress, but Congress can, in the alternative, provide an adequate substitute for the privilege without violating the Suspension Clause.<sup>110</sup>

Since “most of the major legislative enactments” have “expand[ed] . . . or . . . hasten[ed] resolution of prisoners’ claims,” rather than limited them, few cases have needed to extrapolate the meaning of what “the privilege of the writ” entails.<sup>111</sup> As a result, very little guidance exists as to what an “adequate substitute” would be.<sup>112</sup> Most discussion of the Suspension Clause comes from a series of cases in the 2000s addressing the constitutionality of holding enemy combatants in military confinement without the right of habeas corpus.<sup>113</sup> A great deal of this case law addresses (1) whether the Suspension Clause’s protection extends to noncitizens, and (2) the Suspension Clause’s territorial reach<sup>114</sup>—neither of which are at issue for many state prisoners. What little guidance does exist can help form the basis of a Suspension Clause challenge against § 2254(d) as applied to state prisoners who cannot present evidence of their claims because of the ineffective assistance of state habeas counsel.

In *Boumediene v. Bush*, the Court described the substantive coverage of “the privilege” of habeas corpus. It held that, at a bare minimum, the privilege “entitles the prisoner to a meaningful opportunity to demonstrate that he is being held” contrary to law, and that the “habeas court must have the

107. 553 U.S. 723 (2008).

108. *Boumediene*, 553 U.S. at 791–92.

109. *Id.* at 744.

110. *See id.* at 771–72.

111. *See id.* at 746, 773–74; *see also* *Rasul v. Bush*, 542 U.S. 466, 474 (2004).

112. *See Boumediene*, 553 U.S. at 773–74.

113. *See id.*; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

114. *See Boumediene*, 553 U.S. at 771 (holding that the Suspension Clause has full effect in Guantanamo Bay); *Hamdi*, 542 U.S. 507 (plurality opinion) (majority of Court recognizing that an American citizen held as an enemy combatant on U.S. soil is entitled to federal habeas corpus); *see also* *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that a noncitizen detained in the United States was entitled to federal habeas corpus), *superseded in part by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a), 119 Stat. 231, 310 (amending 8 U.S.C. § 1252(a)(5) (2000)).

power to order [his] conditional release.”<sup>115</sup> Depending on the circumstances, however, “more may be required.”<sup>116</sup> What “more” is required depends on “the rigor” of earlier proceedings.<sup>117</sup> In the case of Guantanamo Bay prisoners who never had a formal trial, the Court held that the privilege also required the “means to correct errors,” “the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding,” and the ability to “supplement the record on review” to ensure that the record was accurate and complete.<sup>118</sup>

A broad reading of *Boumediene* suggests that “the privilege” requires the means to supplement the record on review. There are two obstacles to extending this reading to § 2254 petitioners. First, it is unclear whether the federal right to habeas extends to state prisoners at all.<sup>119</sup>

Second, and more troublesome, unlike the prisoners in *Boumediene*, state petitioners have been convicted in formal trials. *Boumediene* carefully distinguished Guantanamo detainees from petitioners who have had a much more extensive procedure. As *Boumediene* noted, “[i]n other contexts, e.g., in post-trial habeas cases where the prisoner already has had a *full and fair opportunity* to develop the factual predicate of his claims, . . . limitations on the scope of habeas review may be appropriate.”<sup>120</sup> On its face, this seems to bar any prisoners who have had a full trial from a Suspension Clause challenge.<sup>121</sup> *Boumediene*, however, also recognized that the need to develop the record on habeas stems from circumstances in which the underlying proceedings “lack the necessary adversarial character.”<sup>122</sup> Without a proper adversarial system, the detainee could not “be held responsible for all deficiencies in the record.”<sup>123</sup> Thus, prisoners who have been denied proper adversarial process should be entitled to expand the record.

Counsel is a “bedrock” element in our adversarial system.<sup>124</sup> *Martinez* illustrated that when a petitioner has been denied effective assistance of

---

115. *Boumediene*, 553 U.S. at 779.

116. *Id.*

117. *Id.* at 781–83.

118. *Id.* at 786, 790.

119. Professor Steiker describes the continuing debate in great detail, arguing that even if the Suspension Clause did not originally guarantee an affirmative right to review for state prisoners, it should be incorporated against the states as a Fourteenth Amendment due process right. See generally Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994). See also Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 561–65 (2010).

120. *Boumediene*, 553 U.S. at 790–91 (emphasis added).

121. For a discussion of whether *Boumediene* should be so narrowly read, see Wiseman, *supra* note 91, at 992–99. Professor Wiseman suggests petitioners could use *Boumediene* to challenge 28 U.S.C. § 2254(d) when state courts have denied them fair evidentiary hearings. *Id.*

122. *Boumediene*, 553 U.S. at 791.

123. *Id.*

124. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012).

counsel in an initial-review collateral proceeding, he has never had any opportunity to fully and fairly present his claim.<sup>125</sup> When a petitioner has been denied effective assistance of counsel at every step of his proceedings—from trial to collateral attack—we should understand that petitioner as having been denied adversarial process. The privilege of the writ of habeas corpus therefore demands that he be able to supplement the record on review.<sup>126</sup>

*Boumediene* recognized that a competent representative is important to provide the prisoner with a “full and fair opportunity to develop the factual predicate of his claims.”<sup>127</sup> *Martinez* further recognized that if state habeas counsel fails to competently develop claims in initial-review collateral proceedings, it is likely that no state court “at any level” will hear the claim.<sup>128</sup> This inability to present claims is of “particular concern when the claim is one of ineffective assistance of [trial] counsel” because “‘any person haled into court, who is too poor to hire a lawyer, *cannot* be assured a fair trial unless counsel is provided for him.’ Indeed, the right to counsel is the *foundation for our adversarial system*.”<sup>129</sup>

As such, a petitioner who had incompetent trial *and* state habeas counsel has *never* had a “full and fair opportunity to develop the factual predicate” of any claims.<sup>130</sup> His habeas petition may be post-trial, but his prior proceedings lacked the bedrock guarantee of our adversarial system—competent counsel. In such circumstances, the fact of his conviction should be irrelevant. Like the prisoners in Guantanamo, he has been denied proceedings of proper adversarial character.<sup>131</sup> The privilege of the writ must cover the ability to supplement the record for claims—like ineffective assistance of trial counsel—which could only be heard on collateral attack.

Since it is unclear, however, that the Suspension Clause grants an affirmative right to federal review for state petitioners,<sup>132</sup> it seems unlikely that a lower court would grant a Suspension Clause challenge to § 2254(d)—even as applied to circumstances in which a petitioner has been denied effective counsel at every step of the proceedings. Scholars are skeptical that *Boumediene* could successfully challenge § 2254(d) in general.<sup>133</sup> The concern is that the Court went to great lengths “to distinguish . . . *Boumediene*

125. *See id.* at 1316–18.

126. *See Boumediene*, 553 U.S. at 791–92.

127. *Id.* at 790; *see also id.* at 786–87 (listing cases in which military courts “had an adversarial structure that is lacking here,” involving defense counsel who “‘demonstrated their professional skill and resourcefulness and . . . proper zeal’” (quoting *In re Yamashita*, 327 U.S. 1, 5 (1946))).

128. *Martinez*, 132 S. Ct. at 1316.

129. *Id.* at 1317 (emphases added) (citation omitted) (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

130. *Boumediene*, 553 U.S. at 790.

131. *See id.* at 791–92.

132. *See generally* Neuman, *supra* note 119, at 561–65.

133. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 839–42 (2009) (noting that the Court was careful to distinguish *Boumediene* from judicial review of detention based on a criminal conviction).

from judicial review of detention based on a criminal conviction.”<sup>134</sup> An as-applied challenge may engender less skepticism because *Boumediene*’s distinctions did not address systematic problems wrought by total denial of effective counsel. Without more guidance from the Supreme Court, lower courts would probably be dissuaded by the sweeping change such a challenge would wreak on habeas litigation under AEDPA. But this argument does provide incentive for a court to look more seriously at other arguments as a matter of avoiding the constitutional question.<sup>135</sup>

B. *Avoiding 28 U.S.C. § 2254’s Trigger:  
Arguing that the Claim Has Not Been “Adjudicated on the Merits”*

Both 28 U.S.C. § 2254(d) and *Pinholster*’s command to limit review to the state record are triggered by claims that have been “adjudicated on the merits in State court.”<sup>136</sup> Prior to *Pinholster* several circuits found that deference should not be given to states when they foreclosed development of the factual record.<sup>137</sup> Although the logic of these cases remains—it might be inappropriate to defer to a materially incomplete record—courts have rejected this approach in light of *Pinholster*.<sup>138</sup> Post-*Pinholster*, petitioners must argue that § 2254(d) is inapplicable because their claims have not been adjudicated on the merits. These arguments have been met with varying degrees of success across the circuits.

The most obvious textual argument to avoid the § 2254(d) trigger is that the claim was dismissed for procedural reasons and therefore not adjudicated “on the merits.” The petitioner would then need to show cause and prejudice to override the procedural default of his claim. If the failure to present evidence was due to incompetent state habeas counsel, a *Martinez* showing of cause could allow the federal court to hear this claim, and the petitioner could be allowed to expand the record with new evidence. Although most courts have held that *Martinez* is not a routine exception to *Pinholster*, the analysis in those cases has emphasized that *Martinez* does not apply when claims have been adjudicated on the merits in state court.<sup>139</sup>

---

134. *Id.* at 840.

135. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (applying the constitutional-avoidance canon and the related clear-statement rule to interpret a statute that potentially raised Suspension Clause issues).

136. 28 U.S.C. § 2254(d) (2012).

137. *See, e.g.*, *Winston v. Kelly*, 592 F.3d 535, 555–56 (4th Cir. 2010) (“If the record ultimately proves to be incomplete, deference to the state court’s judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for the purposes of § 2254(d).”); *Wilson v. Workman*, 577 F.3d 1284, 1291 (10th Cir. 2009) (“A claim is more than a mere theory on which a court could grant relief; a claim must have a factual basis, and an adjudication of that claim requires an evaluation of that factual basis.”).

138. *See, e.g.*, *Atkins v. Clarke*, 642 F.3d 47, 49 (1st Cir. 2011); *Aytch v. Legrand*, No. 3:10-cv-00767-RJ-WGC, 2013 U.S. Dist. LEXIS 45638, at \*6 n.5 (D. Nev. Mar. 29, 2013) (noting that the continuing viability of this line of cases is “subject to substantial question”).

139. *See* cases cited *supra* note 99.

These cases would impose no bar to a petitioner who could successfully argue that his state court dismissal was for procedural reasons.

Petitioners may have difficulty with this argument if the state court was silent as to the rationale for its denial of the habeas petition. Courts look to the last-reasoned state court decision to determine whether a state decision rested on the merits or on a procedural ground.<sup>140</sup> Absent any indication to the contrary, it is presumed that state courts adjudicated the claim on the merits.<sup>141</sup> This “presumption may be overcome when there is reason to think some other explanation for the state court’s decision is more likely.”<sup>142</sup> Without such a clear procedural explanation, a federal court will not find that the case was decided on procedural grounds, and *Martinez* could not apply.

This argument is strongest, then, when it is clear from the face of the state’s last-reasoned opinion that the dismissal is a procedural ruling, not a merit-based one. A petitioner might overcome this presumption if he can show that state courts have, in similar circumstances, specifically invoked a procedural rule, or if he can show that the state made no attempt to allow him to present the evidence.

Alternatively, and perhaps more viably, a petitioner can argue that his claim has not been adjudicated on the merits because the evidence that his habeas counsel failed to present to the state courts renders his claim unexhausted. *Pinholster* left open the possibility that, in certain circumstances, significant new evidence (evidence not presented to the state court) would render a claim sufficiently new such that it was unadjudicated for the purposes of § 2254(d).<sup>143</sup> Exhaustion is only satisfied when the petitioner has presented courts with the “same” claim raised on habeas.<sup>144</sup> This requirement has been read with “extraordinary rigidity”; courts have deemed claims not exhausted based on narrow and discrete distinctions between the claim as originally presented to the state court and the claim presented to the federal court.<sup>145</sup>

A petitioner’s argument in this situation would have the following structure: (1) the claim presented before the federal court is somehow different from the claim presented in state court, and this “new” claim is therefore unexhausted, and (2) because this claim was not exhausted, it cannot possibly have been adjudicated on the merits. If a claim was not exhausted, and the petitioner can no longer bring the claim (either because of the state’s

---

140. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

141. *Harrington v. Richter*, 131 S. Ct. 770, 784–85 (2011).

142. *Id.* at 785.

143. This possibility is left open as the result of a disagreement between the majority and the dissent in *Pinholster*. In dissent, Justice Sotomayor noted the anomaly between the ability for a petitioner to obtain de novo review of a claim with new evidence that was never raised in the state court, but less searching review if there is new evidence of a claim already heard by the state court. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1418 (2011) (Sotomayor, J., dissenting). The majority responded that such a petitioner “may well [have] a new claim.” *Id.* at 1401 n.10 (majority opinion).

144. *Picard v. Connor*, 404 U.S. 270, 276 (1971).

145. See *Yackle*, *supra* note 48, at 371–72.

statute of limitations, a ban on successive petitions, or some other bar) petitioners will need to show cause to excuse this procedural default.<sup>146</sup> As described earlier, to make a *Martinez* showing for cause based on the ineffective assistance of habeas counsel, the petitioner must establish a “substantial” underlying claim of ineffective assistance of trial counsel.<sup>147</sup> Petitioners can therefore introduce evidence of ineffective assistance of trial counsel to the federal court to show cause under *Martinez*, even when that evidence had not been presented to the state court. *Pinholster* would not foreclose the federal court from considering this evidence because the court is reviewing the evidence to determine if “cause” exists—not considering the merits of a claim raised in state court.<sup>148</sup> The additional limitations on the ability of a federal court to hold an evidentiary hearing would not apply here either; most courts have determined that 28 U.S.C. § 2254(e) does not bar evidentiary hearings to determine cause.<sup>149</sup>

Since *Pinholster*, several courts have found that the development of key facts before the state court could affect whether a claim was exhausted.<sup>150</sup> The Ninth Circuit has explicitly taken this approach to allow the petitioner

---

146. See *supra* Section I.B.

147. *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012).

148. See *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 2662 (2014).

149. 28 U.S.C. § 2254(e)(2) (2012) bars evidentiary hearings when the applicant “has failed to develop the factual basis of a claim,” but as many courts have explained, an evidentiary hearing to show cause is not a “claim.” See, e.g., *Henry v. Warden, Georgia Diagnostic Prison*, 750 F.3d 1226, 1231–32 (11th Cir. 2014) (“When a petitioner asks for an evidentiary hearing on cause and prejudice, neither section 2254(e)(2) nor the standard of cause and prejudice that it replaced apply.”); *Detrich*, 740 F.3d at 1247–48; *Cristin v. Brennan*, 281 F.3d 404, 412–13 (3d Cir. 2002) (“[T]he plain meaning of § 2254(e)(2)’s introductory language does not preclude federal hearings on excuses for procedural default at the state level . . . .”); *Ford v. McCall*, No. 8:12-cv-02266-GRA-JDA, 2013 U.S. Dist. LEXIS 114874, at \*47–50 (D.S.C. Apr. 23, 2013), *appeal dismissed*, 560 F. App’x 179 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 249 (2014); *Richardson v. McCann*, 653 F. Supp. 2d 831, 850 (N.D. Ill. 2008) (“Determination of whether to hold an evidentiary hearing on an issue of cause for a procedural default is not subject to the limitations on evidentiary hearings in habeas corpus cases imposed by 28 U.S.C. § 2254(e)(2).”).

150. See *Reed v. Stephens*, 739 F.3d 753, 780 (5th Cir. 2014) (“AEDPA’s exhaustion requirement is ‘not satisfied if the petitioner presents new legal theories or factual claims in his federal habeas petition.’” (quoting *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003))), *cert. denied*, 135 S. Ct. 435 (2014); *Watts v. Coursey*, 534 F. App’x 603, 603 (9th Cir. 2013) (“Proper exhaustion in state court requires a specific statement of operative facts supporting a claim. A claim is not exhausted merely because the facts relied on by a petitioner in federal court were in the state-court record.” (citations omitted)); *Wood v. Ryan*, 693 F.3d 1104, 1119–20 (9th Cir. 2012) (“To fairly present a claim in state court, a petitioner must describe the operative facts supporting that claim. . . . [A]s with . . . claims of prosecutorial conduct . . . , a general allegation of ineffective assistance of counsel is not sufficient to alert a state court to separate specific instances of ineffective assistance.”); *Herrera v. Stephens*, No. H-13-2432, 2014 U.S. Dist. LEXIS 97687, at \*12–13 (S.D. Tex. July 18, 2014) (“A petitioner fails to meet the exhaustion requirement if he presents new factual allegations in support of a previously asserted legal theory.”); *Aytch v. Legrand*, No. 3:10-cv-00767-RCJ-WGC, 2013 U.S. Dist. LEXIS 45638, at \*17–19 (D. Nev. Mar. 29, 2013) (“General appeals to broad principles . . . do not exhaust any specific federal constitutional claim . . . . Liberal construction [even of pro se

to expand the record.<sup>151</sup> In *Detrich v. Ryan*, the Ninth Circuit held that a petitioner's ineffective assistance of trial counsel claim was procedurally defaulted when the petitioner raised an ineffective assistance of trial counsel claim on different grounds before the state court.<sup>152</sup> The Ninth Circuit allowed an evidentiary hearing to prove that the petitioner met the *Martinez* standard.<sup>153</sup> In that hearing, the petitioner was allowed to present evidence of the underlying ineffective assistance of trial counsel claim—even though that evidence had not been presented to the state court.<sup>154</sup>

*Detrich*, however, involved easily distinguishable grounds for ineffective assistance of trial counsel. *Detrich* raised several allegations about his trial counsel's ineffectiveness before the state court, including failure to present mitigating evidence, failure to present expert witnesses, and failure to preserve constitutional challenges for appeal.<sup>155</sup> Before the federal court, *Detrich* raised additional ineffective assistance of trial counsel claims resting on different grounds.<sup>156</sup> In a case like *Detrich*, it is easy to argue that the defendant brought two entirely different claims, and that the latter claim is “new” and therefore not exhausted. That same logic might not readily apply to a situation in which the only meaningful distinction between the claims raised in state and federal court is additional evidence.

For a petitioner who is unable to draw a significant distinction between the claims raised in state and federal court, the success of this argument entirely depends on how rigidly his circuit has applied the exhaustion requirement. Although all courts articulate the standard in the same way, its application differs from circuit to circuit. Some courts, like the Fifth Circuit, have traditionally applied the exhaustion principle so rigidly that it might encompass situations in which the only difference from the claim before the state court was the presentation of new evidence.<sup>157</sup> This trend has persisted even after *Pinholster*.<sup>158</sup> Other courts have also recognized that “the required

---

pleadings] cannot satisfy the exhaustion requirement where the petitioner has not presented the operative facts and legal theory of the federal claim to the state courts.” (emphasis added).

151. *Detrich*, 740 F.3d 1237.

152. *Id.* at 1254.

153. *See id.* at 1248–49.

154. *Id.* at 1248.

155. *Id.* at 1241.

156. *Id.*

157. *See, e.g., Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003) (finding that a new affidavit and evidentiary support rendered the ineffective assistance of trial counsel claim unexhausted); *Anderson v. Johnson*, 338 F.3d 382, 386–87 (5th Cir. 2003) (“[D]ismissal is not required when evidence presented for the first time in a habeas proceeding supplements, but does not fundamentally alter, the claim presented to the state courts.” (quoting *Caballero v. Keane*, 42 F.3d 738, 741 (2d Cir. 1994))); *id.* (“[But] evidence that ‘places the claims in a significantly different legal posture must first be presented to the state courts.’” (quoting *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997))); *Graham v. Johnson*, 94 F.3d 958, 969 (5th Cir. 1996) (per curiam) (finding that new offerings of affidavits and reports rendered claims unexhausted).

158. *See, e.g., Reed v. Stephens*, 739 F.3d 753, 780 (5th Cir. 2014) (“AEDPA’s exhaustion requirement is ‘not satisfied if the petitioner presents new legal theories or factual claims in his

inquiry is fact-specific and requires the court to determine whether a petitioner has presented only ‘bits’ of new evidence to the federal court or evidence that places the claims in such a significantly different posture so that it must first be presented to the state court.”<sup>159</sup> After *Martinez*, the Ninth Circuit has been particularly receptive to arguments that new evidence renders claims unexhausted.<sup>160</sup> Tellingly, all versions of this standard leave room for a victim of ineffective assistance of habeas counsel to argue that his undeveloped claim has not been exhausted. Even when the basis for the legal claim remains the same, if habeas counsel has left the claims completely undeveloped or significantly underdeveloped, the proof for the claim would do much more than merely add color to the original claim.<sup>161</sup> And of course, petitioners can argue that their claims are new because “[a] claim without any evidence to support it might as well be no claim at all.”<sup>162</sup>

*Pinholster* erected a substantial barrier to petitioners vindicating claims that have been left underdeveloped by ineffective assistance of state habeas counsel, but as the foregoing discussion details, it did not foreclose all means by which such petitioners can supplement the record on review. Petitioners should make these meritorious arguments to avoid the hostile mandate of *Pinholster* and vindicate their constitutional rights. What courts should do in these circumstances, however, remains in question.

---

federal habeas petition.’” (quoting *Anderson*, 338 F.3d at 386)), *cert. denied*, 135 S. Ct. 435 (2014); *Sells v. Stephens*, 536 F. App’x 483, 492 (5th Cir. 2013) (new evidence of childhood abuse rendered previous ineffective assistance for failure to investigate mitigating evidence claim unexhausted); *Ibarra v. Thaler*, 691 F.3d 677, 681 (5th Cir. 2012) (new expert reports and affidavits rendered previous claim unexhausted).

159. *Gore v. McDaniels*, No. CIV S-08-448 JAM KJM P, 2009 U.S. Dist. LEXIS 75503, at \*10 (E.D. Cal. Aug. 21, 2009), *report and recommendation adopted*, No. CIV S-08-0448 JAM KJM P, 2009 U.S. Dist. LEXIS 110061 (E.D. Cal. Nov. 24, 2009); *see also Boyko v. Parke*, 259 F.3d 781, 788 (7th Cir. 2001) (“A petitioner may reformulate his claims somewhat, so long as the substance of his argument remains the same. ‘[M]ere variations in the same claim rather than a different legal theory will not preclude exhaustion.’ However, a petitioner’s reformulation of his claim should not place the claim in a significantly different legal posture by making the claim stronger or more substantial.” (alteration in original) (citations omitted) (quoting *Wilks v. Israel*, 627 F.2d 32, 38 (7th Cir. 1980))); *Davis v. McNeil*, No. 4:06cv534/MMP/EMT, 2009 U.S. Dist. LEXIS 103463, at \*34 (N.D. Fla. Nov. 6, 2009) (holding that petitioner’s “inclusion of new facts . . . fundamentally alter[ed] the claim” and rendered it unexhausted), *report and recommendation adopted*, No. 4:06-cv-00534-MP-EMT, 2010 U.S. Dist. LEXIS 21191 (N.D. Fla. Mar. 9, 2010); *Irving v. Metrish*, No. 1:03-CV-506, 2007 U.S. Dist. LEXIS 1385, at \*10–11 (W.D. Mich. Jan. 8, 2007) (holding that petitioner failed to exhaust claim when he presented new statistical evidence to challenge the method by which the grand jurors were chosen).

160. *Dickens v. Ryan*, 740 F.3d 1302, 1318–19 (9th Cir. 2014) (new factual allegations of mitigating circumstances rendered previous ineffective assistance of sentencing counsel claim unexhausted).

161. *See Fairchild v. Workman*, 579 F.3d 1134, 1148–51 (10th Cir. 2009); *cf. Weaver v. Thompson*, 197 F.3d 359, 364–65 (9th Cir. 1999) (finding a claim exhausted when the legal claim was “rooted in the same incident” as consistently alleged by the petitioner, only rephrasing the legal basis).

162. *Gallow IV*, 133 S. Ct. 2730, 2731 (2013) (Breyer, J., concurring in denial of certiorari).

### III. THE WAY FORWARD: ABEYANCE AND ADEQUACY

When faced with a claim left underdeveloped due to the ineffectiveness of state habeas counsel, courts should stay proceedings to give state courts the first opportunity to consider new evidence. This procedure would ensure that a petitioner has an adequate adversarial process with which to fully develop the factual basis of his claim, and it encourages channeling these claims through the state courts. It also produces a mechanism with which to monitor rogue state court procedures. If state courts refuse to consider the new evidence, there is a strong argument that the state's procedures are systematically hostile to and inadequate to vindicate federal rights. In such a case, the state's procedural rules have denied the claim, and federal courts could hear the evidence *de novo*. The precedential effect of such a decision would provide a needed push for states to reform their procedural systems, provide better habeas counsel, and provide meaningful opportunities for petitioners to supplement their records on habeas review.

Justice Breyer first suggested in his *Pinholster* concurrence that petitioners with underdeveloped claims could return to the state court to “present[ ] new evidence not previously presented.”<sup>163</sup> If the state refuses to hear the evidence and again denies relief, however, the petitioner may not be able to file again in federal court due to AEDPA's one-year statute of limitations and limitations on successive petitions.<sup>164</sup> In that situation, a petitioner would be entirely without recourse for his constitutional grievances. To prevent this procedural dead end, courts should issue a stay and abeyance, returning the petitioner to the state court to present the evidence his ineffective state habeas counsel failed to develop, but holding the federal case open.

District courts usually have discretion to issue a stay and abeyance, but AEDPA circumscribes this power because, “if employed too frequently, [it] has the potential to undermine [the] twin purposes” of AEDPA's statute of limitations: finality and channeling cases through state court.<sup>165</sup> To avoid stay and abeyance from interfering with these purposes, courts utilize the four-part test described in *Rhines v. Weber* before granting a stay for a prisoner to return to state court with an unexhausted claim. Such a prisoner must show (1) good cause for failure to exhaust (in these circumstances, ineffective assistance of state habeas counsel—which *Martinez* recognizes as cause), (2) that the underlying claim is not “plainly meritless,” (3) that there are “reasonable time limits” on the request for a stay, and (4) that the prisoner has not “engage[d] in abusive litigation tactics or intentional delay.”<sup>166</sup> As *Rhines* recognized, however, if there is good cause, the underlying claims

---

163. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1412–13 (2011) (Breyer, J., concurring in part).

164. *See* 28 U.S.C. § 2244(b), (d) (2012).

165. *Rhines v. Weber*, 544 U.S. 269, 276–77 (2005).

166. *Id.* at 277–78.

have merit, and there is no indication that the prisoner engaged in dilatory litigation tactics, courts *should* stay the petition.<sup>167</sup>

Ordinarily, *Rhines* is used to stay so-called “mixed petitions” in which some of a petitioner’s claims, but not others, have been exhausted.<sup>168</sup> Although the Supreme Court has not defined “good cause” for failure to exhaust under *Rhines*, circuit courts have utilized the same standard as that for cause and prejudice.<sup>169</sup> Therefore, a *Martinez* showing of ineffective assistance of state habeas counsel on an initial-review collateral proceeding would be good cause.<sup>170</sup> If a victim of ineffective habeas counsel with a meritorious underlying claim can successfully make the argument that the new evidence he presents substantially revises his claim from the claim presented to the state court,<sup>171</sup> there would be a clear basis for a *Rhines* stay and abeyance. The more complicated question is whether a *Rhines* stay and abeyance is appropriate when the court does not believe the new evidence renders the claim “new” and unexhausted. Put differently, it is unclear whether a court can issue a stay and abeyance based on unexhausted facts rather than unexhausted claims.

Courts have had mixed opinions on this question.<sup>172</sup> There is a clear tension, exemplified in these cases, between the desire for a petitioner to have some forum to present unexhausted evidence when he has good cause for the failure to present the evidence to the court, and the desire for there to be an end to litigation.

The only circuit court to have directly addressed the question allowed for the stay and abeyance of a claim based on unexhausted evidence. In

---

167. *Id.* at 278.

168. *See, e.g.,* *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014).

169. *See id.* at 980–82. The cause and prejudice standard is explained *supra* in notes 57–59 and accompanying text.

170. *See Blake*, 745 F.3d at 983–84.

171. *See supra* Section II.B.

172. *Compare* *Gonzalez v. Wong*, 667 F.3d 965, 978–80 (9th Cir. 2011) (allowing a stay and abeyance on a claim that was previously raised when there was new evidence), *and* *Cook v. Anderson*, No. 1:96-cv-424, 2011 U.S. Dist. LEXIS 148541, at \*10–11 (S.D. Ohio Dec. 22, 2011) (“Whether Petitioner’s claims are recast as ‘new claims’ by virtue of their reliance on evidence never presented to the state courts or whether they are regarded as existing claims supported by new evidence, the fact remains that what this Court is presented with are unexhausted issues.” (citation omitted)), *with* *Carter v. Mitchell*, No. 1:98-cv-853, 2013 U.S. Dist. LEXIS 86200, at \*6 (S.D. Ohio June 19, 2013) (“To permit stays, perhaps on a repeated basis, pending exhaustion of new evidence would turn the exhaustion doctrine into a mechanism for indefinite delay of finality.”), *report and recommendation adopted*, No. 1:98-cv-853, 2013 U.S. Dist. LEXIS 90572 (S.D. Ohio June 27, 2013), *and* *Waddy v. Robinson*, No. 3:98-cv-084, 2013 U.S. Dist. LEXIS 85300, at \*7 (S.D. Ohio June 18, 2013) (“[N]o court had adopted the rule for which Petitioner contends, to wit, that a habeas case may be stayed so that an exhausted claim may be re-litigated in the state courts on the basis of new evidence.”). *See also* *Wellons v. Warden, Georgia Diagnostic & Classification Prison*, 695 F.3d 1202, 1212–13 (11th Cir. 2012) (“[I]t is unclear how federal courts should treat newly discovered evidence presented for the first time in federal court.”).

*Gonzalez v. Wong*, the petitioner raised, and the state court explicitly rejected, a *Brady* claim.<sup>173</sup> The petitioner brought significant new evidence—psychological reports withheld by the state—to the federal court.<sup>174</sup> The petitioner unsuccessfully argued before the Ninth Circuit that *Pinholster* should not apply because the psychological reports significantly altered his *Brady* claim such that it was a “new claim” not decided on the merits by the state court.<sup>175</sup> The court, however, held that dismissal of the claim was not appropriate because the prisoner had good cause (the evidence had been suppressed), his *Brady* claim was not clearly meritless, and he had not engaged in dilatory tactics.<sup>176</sup> Over a vocal dissent,<sup>177</sup> the court remanded and instructed the district court to stay the proceedings to allow Gonzalez to present the subsequently disclosed materials to the state court.<sup>178</sup> The court allowed this, despite finding that the petitioner’s claim was not a “new claim,” because the new materials “strengthen[ed] [the relevant] claim to the point that [the petitioner’s] argument would be potentially meritorious—that is, that a reasonable state court might be persuaded to grant relief on that claim.”<sup>179</sup>

This approach advances the policies advanced by AEDPA and the balancing approach in *Rhines*. The *Rhines* Court was concerned that if district courts dismissed unexhausted claims, rather than held them in abeyance, AEDPA’s one-year statute of limitations would bar the federal court from hearing the claim upon the petitioner’s return.<sup>180</sup> This concern is just as applicable to a petitioner whose habeas counsel failed to develop facts as it is to a petitioner who failed to raise claims before the state court. In both situations, the case will be dismissed: in the former, because *Pinholster* bars consideration of additional evidence; in the latter, because the claim is not exhausted. In both cases, AEDPA’s statute of limitations and bars on successive petitions might prevent a litigant from returning to federal court after attempting to exhaust his state remedies.

In an attempt to avoid this result, *Rhines* specifically authorized the use of stay and abeyance, but curtailed its use to balance the competing interests in comity and finality. A petitioner must have good cause, there must be reasonable time limits on the stay, the petitioner must not have engaged in intentional dilatory tactics, and there must be a substantial underlying claim so that staying the case is not a waste of time.<sup>181</sup> This balance can apply with

173. *Gonzalez*, 667 F.3d at 978.

174. *Id.* at 978–80.

175. *Id.* at 979. In a concurring opinion, Judge Fletcher wrote that the evidence the petitioner raised in federal court was sufficiently distinct from the claim raised in state court to constitute a new claim. *Id.* at 1016 (Fletcher, J., concurring in part).

176. *Id.* at 979–80 (majority opinion).

177. *Id.* at 1017–21 (O’Scannlain, J., dissenting).

178. *Id.* at 980 (majority opinion).

179. *Id.* at 972.

180. See *Rhines v. Weber*, 544 U.S. 269, 275 (2005).

181. *Id.* at 277–78.

equal force to petitioners whose ineffective state habeas counsel failed to produce key evidence. If the petitioner has a meritorious underlying claim, the ineffective assistance of his state habeas counsel provides cause for the failure to adequately develop the record.<sup>182</sup> So long as the petitioner has not engaged in intentional delay, *Rhines* should allow for the petitioner to return to state court.

Certainly, this process might lead to longer litigation than merely dismissing the claim.<sup>183</sup> Other considerations, however, mitigate concern about this disruption. First, the same concern for finality is present for petitioners who have not exhausted claims before the state court, and *Rhines* specifically authorizes the delay so long as the district court places reasonable limits on the stay.<sup>184</sup> Moreover, this process furthers AEDPA's policy of channeling claims through state court and helps correct the incentive to "sandbag" caused by the intersection of *Pinholster* and *Martinez*.<sup>185</sup> Most important, because of the strict requirements of a *Rhines* showing, finality will only be disturbed when a petitioner can show that (1) he has a meritorious underlying claim, and (2) he has good cause for failing to present key evidence to the state court. When ineffective assistance of state habeas counsel forms the basis for that good cause, that petitioner has been denied adversarial process.<sup>186</sup> Staying the case will allow the petitioner, for the first time, to present a fully developed claim to the court—furthering the equitable principles advanced by *Martinez*.<sup>187</sup>

Of course, there remains a risk that the state court will refuse to hear the evidence once the case is stayed. Certainly, in some cases—for example, where state procedural rules prohibit reopening the habeas proceedings or prohibit successive petitions—staying the case may appear futile. In such cases, however, the petitioner has a powerful argument to challenge the adequacy of state procedural rules. Adequacy challenges, described in far greater detail by Professor Brensike Primus,<sup>188</sup> assert that the state's procedural scheme has the effect of preventing petitioners from vindicating their federal rights.<sup>189</sup> For state procedural rules to be adequate, the underlying rule must be "firmly established," "consistently followed," and "not . . . applied in ways that unduly burden the defendant's exercise of her constitutional rights."<sup>190</sup> Since adequacy challenges often "raise broad questions about the operation

---

182. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1320–21 (2012).

183. See *Carter v. Mitchell*, No. 1:98-cv-853, 2013 U.S. Dist. LEXIS 86200, at \*6 (S.D. Ohio June 19, 2013), *report and recommendation adopted*, No. 1:98-cv-853, 2013 U.S. Dist. LEXIS 90572 (S.D. Ohio June 27, 2013).

184. See *Rhines*, 544 U.S. at 277–78.

185. See *Gonzalez v. Wong*, 667 F.3d 965, 978–80 (9th Cir. 2011).

186. See *supra* Section II.A.

187. See *Martinez*, 132 S. Ct. at 1316–19.

188. See generally Primus, *supra* note 54.

189. See *id.* at 2624.

190. *Id.* at 2620.

of a state's procedural rules," a successful adequacy challenge has the benefit of setting precedent and providing a powerful incentive for state reform.<sup>191</sup>

For example, in *Trevino v. Thaler*, the state sought to prohibit Trevino from using ineffective assistance of habeas counsel as cause to excuse his procedural default.<sup>192</sup> Unlike the situation in *Martinez*, in Texas, criminal defendants were permitted to raise ineffective assistance of trial counsel claims on direct appeal—before the habeas proceedings.<sup>193</sup> As the Supreme Court held, however, there was no realistic mechanism for criminal defendants to expand the trial record on direct appeal.<sup>194</sup> As a “systematic matter” Texas did not afford “meaningful review” for claims of ineffective assistance of trial counsel on direct appeal.<sup>195</sup> Under an adequacy theory, this procedure unduly limited petitioners’ ability to adjudicate their claims on the merits in state court.

The same logic should apply when a state forecloses a petitioner’s ability to present the evidence that his ineffective state habeas counsel failed to develop. The equity concerns motivating *Martinez* illustrate that when a state procedural scheme de facto prevents petitioners from correcting the errors of their ineffective state habeas counsel, those procedures are inadequate. When the petitioner’s first practical opportunity to raise a claim is on an initial-review collateral proceeding, effective counsel is necessary to ensure that the petitioner receives fair process.<sup>196</sup> As *Martinez* recognized—at least regarding claims of ineffective assistance of trial counsel—an attorney is crucial for extra-record investigation and proper development of the petitioner’s claims.<sup>197</sup> Adequacy doctrine “is designed to address state practices that place precisely this type of undue burden on the exercise of a federal right.”<sup>198</sup> States that prevent petitioners from supplementing the record where that record has been left incomplete by ineffective habeas counsel—indeed, often state-appointed counsel—are not giving petitioners a meaningful opportunity to present their claims. These procedures are just as preclusive as those in *Trevino*.

Gallow’s case is an illustrative example. There, Gallow first raised ineffective assistance of trial counsel on collateral attack.<sup>199</sup> His habeas counsel, Adebamiji, entirely failed to present any evidence to the court necessary to

---

191. *Id.* at 2623, 2625.

192. *See Trevino v. Thaler*, 133 S. Ct. 1911, 1916 (2013).

193. *See id.*

194. *Id.* at 1918–21.

195. *Id.* at 1919.

196. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1316–17 (2012).

197. *Id.* at 1317.

198. Primus, *supra* note 54, at 2623.

199. *Gallow I*, No. 04-1905, 2010 U.S. Dist. LEXIS 90576, at \*3–\*4 (W.D. La. July 30, 2010), *report and recommendation adopted*, *Gallow II* No. 6:04-cv-1905, 2010 U.S. Dist. LEXIS 90570 (W.D. La. Aug. 31, 2010), *aff’d*, *Gallow III* 505 F. App’x 285 (5th Cir. 2012) (*per curiam*).

carry his burden of proof.<sup>200</sup> Later, Gallow himself attempted to correct this procedure by filing several pro se motions for collateral relief and reopening his earlier proceedings to include additional evidence.<sup>201</sup> The state's procedural rules prohibited him from ever correcting his state habeas attorney's errors.<sup>202</sup> As an equitable matter, the state's procedural scheme—like the scheme in *Trevino*—systematically discriminated against Gallow's Sixth Amendment right to an effective trial attorney “by failing to afford [him] a reasonable opportunity to ever challenge [his] trial attorney[’s] performance.”<sup>203</sup>

In short, when a petitioner's claims have been un- or underdeveloped by state habeas counsel, stay and abeyance best balances the interest in a meaningful opportunity for petitioners to vindicate their constitutional rights with AEDPA's competing interests of comity, federalism, and finality. As an equitable matter, courts should stay cases when petitioners make a successful *Rhines* showing, regardless of whether the presentation of new evidence creates a “new” unexhausted claim, or whether the petitioner merely has unexhausted, but material, evidence. If state court procedures fail to allow petitioners to correct the failures of prior ineffective counsel, there is a strong argument that the state procedures are systematically hostile to federal rights. For the immediate petitioner, a finding of such inadequacy would allow the federal court to hear his constitutional claim. In the long run, recognizing state procedures as inadequate would open the door to numerous other claims that can only be raised on initial-review collateral proceedings. This might provide the necessary push for states to begin much-needed systematic reform of the chronic problems in indigent defense.<sup>204</sup>

#### CONCLUSION

*Cullen v. Pinholster's* command that federal courts may not look beyond the record presented to the state court for claims adjudicated on the merits forecloses federal habeas review to many petitioners, but it has a particularly harsh effect on those petitioners who have had incompetent state habeas counsel. *Martinez v. Ryan's* discussion of the importance of effective habeas counsel in initial-review collateral proceedings highlights the severity of this problem—without effective habeas counsel to develop extra-record facts, full review of important constitutional rights is effectively foreclosed. This issue could be solved if and when the Supreme Court declares a Sixth Amendment right to habeas counsel, but until such time, petitioners need a way to vindicate their meritorious claims. Stay and abeyance provides a

---

200. See *Gallow III*, 505 F. App'x 285, 287–88 (5th Cir. 2012) (per curiam).

201. See *Gallow I*, 2010 U.S. Dist. LEXIS 90576, at \*3–12, \*3 n.1; see also *Gallow III*, 505 F. App'x at 287–88.

202. See *Gallow III*, 505 F. App'x at 288.

203. Primus, *supra* note 54, at 2620.

204. See *id.* at 2625 (describing how the adequacy doctrine can be used to ensure that state courts begin to address the underlying issue and “breathe life” into the constitutional requirement of effective representation).

means for courts to allow the development of these petitioners' claims while upholding AEDPA's principles of comity and federalism. In order to avoid *Pinholster's* harsh results on victims of ineffective state habeas counsel, courts should utilize stay and abeyance when a petitioner shows that his state habeas counsel failed to present material evidence to the state court. A state that refuses to consider new evidence after a stay opens itself up to a challenge to the adequacy of its procedures. In the end, finding a means to consider evidence left undeveloped by state habeas counsel may provide a much-needed incentive for states to reform chronic and systematic problems in indigent defense.





