No. ____

In the Supreme Court of the United States

DAVID SHINN, *et al.*,
Petitioners,
v.
DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASES

QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e)(2), precludes a federal court from considering evidence outside the state-court record when reviewing the merits of a claim for habeas relief if a prisoner or his attorney has failed to diligently develop the claim's factual basis in state court, subject to only two statutory exceptions not applicable here. In the cases below, the Ninth Circuit concluded that AEDPA's bar on evidentiary development does not apply to a federal court's merits review of a claim when a court excuses that claim's procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012), because the default was caused by post-conviction counsel's negligence. The question presented, which drew an eight-judge dissent from the denial of en banc rehearing in each case, is:

Does application of the equitable rule this Court announced in *Martinez v. Ryan* render 28 U.S.C. § 2254(e)(2) inapplicable to a federal court's merits review of a claim for habeas relief?

PARTIES TO THE PROCEEDING

The petitioner (the respondent-appellee below) in *Ramirez* is David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry. The respondent (the petitioner-appellant below) is David Martinez Ramirez.

The petitioners (the respondents-appellants below) in *Jones* are David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry; and Walter Hensley, Warden of the Arizona State Prison Complex-Eyman. Pursuant to Rule 35.3, Rules of the United States Supreme Court, Mr. Hensley is substituted for his predecessor Stephen Morris, who was a party to the proceeding below. The respondent (the petitioner-appellee below) is Barry Lee Jones.

STATEMENT OF RELATED PROCEEDINGS

A. Cases related to *Ramirez*

Ramirez v. Shinn, No. 10–99023 (United States Court of Appeals for the Ninth Circuit) (order denying rehearing filed on August 24, 2020; opinion reversing in part and affirming in part district court's judgment filed on September 11, 2019).

Ramirez v. Ryan, No. CV–97–01331–PHX–JAT (United States District Court for the District of Arizona) (judgment denying petition for writ of habeas corpus after remand filed on September 15, 2016; initial judgment denying petition for writ of habeas corpus filed on September 28, 2010).

State v. Ramirez, No. CR–07–0177–PC (Arizona Supreme Court) (order denying petition for review of lower court's order denying successive post-conviction relief petition involving intellectual-disability claim filed on December 4, 2007).

State v. Ramirez, No CR 89–005726 (Superior Court of Arizona in and for the County of Maricopa) (order denying successive petition for post-conviction relief involving intellectual-disability claim filed April 4, 2007).

State v. Ramirez, No. CR–05–0243–PC (Arizona Supreme Court) (order denying petition for review of lower court's order dismissing successive post-conviction notice raising ineffective assistance of counsel and other claims dated November 30, 2005).

State v. Ramirez, No. CR 89–05726 (Superior Court of Arizona in and for the County of Maricopa) (order dismissing successive notice of post-conviction relief raising ineffective assistance of counsel and other claims filed May 6, 2005).

State v. Ramirez, No. CR–96–0464–PC (Arizona Supreme Court) (order denying petition for review of lower court's order denying first petition for post-conviction relief dated May 22, 1997).

State v. Ramirez, No. CR 89–05726 (Superior Court of Arizona in and for the County of Maricopa) (order denying first petition for post-conviction relief filed February 20, 1996).

Martinez Ramirez v. Arizona, No. 94–5673 (United States Supreme Court) (order denying petition for writ of certiorari filed October 31, 1994).

State v. Ramirez, No. CR–90–0359–AP (Arizona Supreme Court) (opinion affirming convictions and sentences on direct appeal filed March 24, 1994).

State v. Ramirez, No. CR 89–05726 (Superior Court of Arizona in and for the County of Maricopa) (judgments of guilt and sentences entered on December 18, 1990).

B. Cases related to *Jones*

Jones v. Shinn, No. 18–99006 (United States Court of Appeals for the Ninth Circuit) (order denying rehearing filed on August 24, 2020; opinion reversing in part and affirming in part district court's judgment filed on November 29, 2019).

Jones v. Ryan, No. 08–99033 (United States Court of Appeals for the Ninth Circuit) (appeal from denial of habeas relief; order of dismissal filed August 21, 2018, after relief granted on remand).

Jones v. Ryan, No. CV–01–00592–TUC–TMB (United States District Court for the District of Arizona) (judgment on remand granting petition for writ of habeas corpus filed on July 31, 2018; original

judgment denying petition for writ of habeas corpus filed September 29, 2008).

State v. Jones, No. CR–01–0125–PC (Arizona Supreme Court) (order denying petition for review of lower court's order denying post-conviction relief filed November 1, 2001).

State v. Jones, No. CR–45587 (Superior Court of Arizona in and for the county of Pima) (order denying post-conviction relief dated October 11, 2000).

Jones v. Arizona, No. 97–6413 (United States Supreme Court) (order denying petition for writ of certiorari filed January 12, 1998).

State v. Jones, No. CR–95–0342–AP (Arizona Supreme Court) (opinion affirming convictions and sentences on direct appeal filed April 29, 1997).

State v. Jones, No. CR–45587 (Superior Court of Arizona in and for the County of Pima) (judgments of guilt and sentences entered on July 6, 1995).

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PETITION FOR WRIT OF CERTIORARI

Petitioners David Shinn, *et. al*, (hereinafter "Arizona") respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in two capital cases. Pursuant to Rule 12.4, Rules of the Supreme Court, Arizona files a single petition for writ of certiorari because the judgments at issue are from the same court and "involve identical or closely related questions."

OPINIONS BELOW

The Ninth Circuit's opinion reversing in part the district court's denial of habeas relief to David Martinez Ramirez is reported at *Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019). App. 213–61. The Ninth Circuit's order denying rehearing and rehearing en banc is reported at *Ramirez v. Shinn*, 971 F.3d 1116 (9th Cir. 2020). App. 349–76. The district court's orders denying habeas relief are unpublished. App. 262–348.

The Ninth Circuit's opinion affirming in part and reversing in part the district court's order granting habeas relief to Barry Lee Jones is reported at *Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019). App. 1–51. The Ninth Circuit's order denying rehearing and rehearing en banc is reported at *Jones v. Shinn*, 971 F.3d 1133 (9th Cir. 2020). App. 185–212. The district court's order granting habeas relief is reported at *Jones v. Ryan*, 327 F. Supp. 3d 1157 (D. Ariz. 2018). App. 52–184.

STATEMENT OF JURISDICTION

The Ninth Circuit denied rehearing in both Jones's and Ramirez's cases on August 24, 2020. App. 185–

212, 349–76. This petition is being filed within 150 days of that date. *See* 589 U.S. __ (order dated March 19, 2020). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defence.

The Anti-terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e), provides, in pertinent part:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) 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.

INTRODUCTION

This petition presents the question this Court left open in *Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018): whether AEDPA, 28 U.S.C. § 2254(e)(2), bars evidentiary development on a procedurally defaulted habeas claim that passes through the *Martinez v. Ryan*, 566 U.S. 1 (2012), gateway to merits review. The *Ramirez* and *Jones* cases are ideal vehicles for this Court to answer that question in the affirmative and to clarify that § 2254(e)(2) imposes an independent bar to evidentiary development, unaffected by *Martinez*, that applies to all habeas claims reviewed on the merits.

In *Martinez*, this Court held that a prisoner may, in certain circumstances, invoke post-conviction counsel's ineffectiveness as cause to excuse the procedural default of a substantial trial-ineffectiveness claim. 566 U.S. at 9, 14, 18. If a prisoner carries his burden under *Martinez*, that accomplishment "merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Id.* at 17. *Martinez* thus operates as a gateway to merits review—nothing more, nothing less. Once a default is excused, *Martinez*'s work is done, its relevance ends, and the rules generally applicable to merits review take over and govern the availability of habeas relief.

One of those rules—imposed by Congress through AEDPA—bars federal evidentiary development for prisoners who did not diligently develop their claims in state court. *See* 28 U.S.C. § 2254(e)(2). The rule is

subject to two narrow, statutorily defined exceptions, neither of which have been invoked here. *Id.* Post-conviction counsel's ineffectiveness is not one of these exceptions, *see id.*; to the contrary, a prisoner is bound by his attorney's negligence in failing to develop the state-court record and such negligence activates the statutory bar. *See Holland v. Jackson*, 542 U.S. 649, 653 (2004); *Williams v. Taylor*, 529 U.S. 420, 432–33, 438–40 (2000).

Here, two separate Ninth Circuit panels concluded that § 2254(e)(2) does not apply to a merits review conducted after a claim has passed through *Martinez*'s narrow gateway. In *Jones*, the panel held that enforcing the statute would frustrate this Court's concern in *Martinez* that trial-ineffectiveness claims receive review by one court, because such claims often require expanded records to resolve. App 4–5, 17–20. And in *Ramirez*, the panel concluded—without mention or acknowledgement of § 2254(e)(2)—that the prisoner was "entitled" to additional factual development of his claim's merits solely because he had excused that claim's procedural default under *Martinez*. App. 248. The panel reasoned that the prisoner had been "precluded" from state-court factual development "because of his post-conviction counsel's ineffective representation." *Id.* (citing *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) (plurality opinion of Fletcher, J.)).

Judge Daniel Collins, joined by seven other Ninth Circuit judges, dissented from the denial of en banc rehearing in each case. App. 185–212, 349–76. Judge Collins faulted the panels for overlooking the fact that procedural default and § 2254(e)(2) are separate and unrelated obstacles to habeas relief;

engrafting an equitable rule onto a statute intended to limit judicial authority; and ignoring this Court's governing precedent in *Holland* and *Williams*, which hold that post-conviction counsel's ineffectiveness triggers § 2254(e)(2)'s statutory bar. *Id.* Judge Collins concluded that *Holland* and *Williams* cannot be reconciled with the panels' use of that same ineffectiveness to excuse compliance with the statute. *Id.*

Judge Collins and his seven colleagues were correct. The *Ramirez* and *Jones* panels declined to follow § 2254(e)(2) because they considered the statute an impediment to effectuating *Martinez*. The panels thus elevated a court-created equitable rule over a statute that Congress adopted specifically to restrict judicial discretion and to abolish pre-AEDPA equitable exceptions. *See Williams*, 529 U.S. at 433–34. Permitting a court to decide whether it will or will not comply with Congressional limitations on its power affronts separation-of-powers principles. And the decisions jeopardize other provisions of AEDPA, such as 28 U.S.C. § 2254(d)(1), by serving as precedent for invoking equitable principles to bypass important statutory restrictions on the power to grant habeas relief.

Further, as *Ayestas* shows, the § 2254(e)(2)/*Martinez* relationship is a recurring matter of national concern. This Court's intervention is critical at this juncture, as the panel decisions threaten irreparable harm to the interests in comity, finality, and federalism AEDPA was meant to protect. *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

This Court should thus grant certiorari to address the important question presented. This Court should reaffirm that procedural default and § 2254(e)(2) are separate and distinct bars to habeas relief, clarify that a claim excused from procedural default under *Martinez* is still subject to the *separate* § 2254(e)(2) bar, and remind lower courts that they are not free to disregard binding provisions of AEDPA merely because they believe those provisions reduce a court-created doctrine's effectiveness.

STATEMENT

Ramirez and Jones committed the murders that led them to Arizona's death row in 1989 and 1994, respectively. The district court denied habeas relief to Ramirez in 2010, *see* App. 345, and to Jones in 2008, *see* App. 62. After *Martinez*, however, the Ninth Circuit gave each inmate the opportunity to seek reconsideration of ineffective-assistance claims previously dismissed as procedurally defaulted. *See* App. 225–26 (Ramirez); App. 13 (Jones). Now, absent this Court's intervention, Ramirez will receive a federal evidentiary hearing on one such claim, despite not meeting § 2254(e)(2)'s standards. Worse still, Jones will be retried—decades after his crimes—after being awarded habeas relief based on evidence the district court should have never considered.

A. Facts and procedural history of *Ramirez*

Ramirez murdered Mary Ann Gortarez and her 15-year-old daughter, C.G., in their west Phoenix apartment. *State v. Ramirez*, 871 P.2d 237, 240 (Ariz. 1994). A bystander saw Ramirez outside the victims' apartment, speaking to Mary Ann, during the early morning hours of May 25, 1989. *Id.*

Around 5:00 a.m., neighbors heard screaming, banging, and sounds of a struggle coming from the victims' residence and alerted police. *Id.* Responding officers gained entry and encountered Mary Ann's dead body, along with a bloody knife. *Id.* at 241. Ramirez was also in the apartment, covered in blood and bearing cuts on his fingers. *Id.* Among other admissions, he explained that his girlfriend and her daughter were in the apartment and that "they're hurt pretty bad. We're all hurt pretty bad." *Id.* Officers subsequently found C.G.'s nude body in her bedroom. *Id.*

The victims' apartment was awash in blood. *Id.* at 241–42. Various weapons, including knives, box cutters, and scissors, were strewn about. *Id.* Autopsies revealed that both Mary Ann and C.G. had been stabbed repeatedly and had sustained blunt-force injuries. *Id.* at 242. In addition, semen was found in C.G.'s vaginal area, and Ramirez could not be excluded as the donor. *Id.* Ramirez later admitted that he had had sex with 15-year-old C.G. the night of the murders, as well as on four prior occasions. *Id.*

A jury found Ramirez guilty of both murders. *Id.* at 239. After an aggravation/mitigation hearing, the sentencing judge found three aggravating circumstances. *Id.* at 242; *see* A.R.S. §§ 13–703(F)(2) (1989) (prior violent felony), (F)(6) (cruel, heinous or depraved), (F)(8) (multiple homicides). The judge found various statutory and non-statutory mitigating factors, but considered them insufficient to warrant leniency and sentenced Ramirez to death on each count. *Id.* at 239, 242–43. The Arizona Supreme Court affirmed Ramirez's convictions on direct appeal and, after independently reviewing the

aggravating and mitigating circumstances, agreed with the sentencing judge that the mitigation was not sufficiently substantial to call for leniency. *Id.* at 253.

Ramirez thereafter filed a first state petition for post-conviction relief raising an ineffective-assistance claim. *See* App. 298, 244–45 & n.6. However, he did not claim that counsel was ineffective for failing to present evidence of Ramirez's intellectual disability and provide certain documents to the psychologist retained for sentencing, or for relying on a psychological report that other evidence contradicted. *See* App. 298; App. 217; App. 224–25 & n.6. The post-conviction judge denied relief, and the Arizona Supreme Court summarily denied Ramirez's petition for review. *See* App. 224.

Ramirez then filed a federal habeas petition ultimately alleging, as relevant here, that trial counsel was ineffective in failing to present intellectual-disability evidence, failing to provide relevant information to the sentencing expert, and relying on an expert report that the facts contradicted. App. 225. While that petition was pending, Ramirez returned to state court to exhaust various claims, including the sentencing-ineffectiveness claim at issue here, in successive state post-conviction proceedings. *See* App. 225 & n.6; App. 299. The state court found the ineffective-assistance claim untimely under Arizona Rule of Criminal Procedure 32.4(a) (2005). *See State v. Ramirez* state-court record, Minute Entry filed 5/6/05.

On return to federal court, the district court found the sentencing-ineffectiveness claim procedurally defaulted and further found that Ramirez could not, under then-existing law, invoke his first post-conviction counsel's ineffectiveness as cause to excuse the default. App. 294–310; *see Coleman v. Thompson*, 501 U.S. 722, 755–57 (1991) (holding that post-conviction counsel's ineffectiveness cannot constitute cause to excuse a procedural default). While Ramirez's appeal from that decision was pending in the Ninth Circuit, this Court issued *Martinez*, recognizing a limited exception to *Coleman* and permitting post-conviction counsel's ineffectiveness to constitute cause in certain circumstances. 566 U.S. at 9. The Ninth Circuit remanded Ramirez's case to the district court to reconsider his ineffective-assistance-of-sentencing-counsel claim in light of *Martinez*. *See* App. 262.

On remand, Ramirez asked for an evidentiary hearing on whether his post-conviction counsel was ineffective under *Martinez*. *See* App. 191. Relying on the Ninth Circuit's decision in *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc), Ramirez argued that such a hearing was permissible because whether cause and prejudice exists is not a "claim" for purposes of § 2254(e)(2). *See* App. 191. Ramirez admitted, however, that § 2254(e)(2) bars evidentiary development on the merits of a claim not developed in state court. *See id.* Arizona argued that the underlying ineffective-assistance claim's lack of merit showed that post-conviction counsel was not ineffective for omitting it, and that Ramirez therefore could not excuse his sentencing-ineffectiveness claim's procedural default. *See* App. 269.

The district court expanded the record to include Ramirez's newly proffered documentary evidence but otherwise denied evidentiary development because the ineffective-assistance claim failed on the existing record. App. 291. The court compared counsel's penalty-phase presentation with Ramirez's post-sentencing evidence and determined that the sentencing-ineffectiveness claim lacked merit. App. 281–92. As a result, the court concluded, post-conviction counsel was not ineffective for failing to raise the claim and Ramirez had failed to show cause and prejudice to excuse the procedural default. *Id.*

On appeal, a three-judge panel of the Ninth Circuit reversed the judgment of the district court in part, concluding that the court applied the incorrect standard in determining cause and prejudice under *Martinez*. App. 231–48. The panel specifically faulted the district court for skipping to the sentencing-ineffectiveness claim's merits and "conducting a full merits review … on an undeveloped record." App 232. This procedure, the panel opined, held Ramirez to a higher standard for excusing procedural default than does *Martinez*, which does not require a prisoner to show that he would prevail on the merits but instead requires him to show that his claim is substantial, that post-conviction counsel deficiently failed to raise it in state court, and that there is a reasonable probability that raising the claim would have changed the post-conviction proceeding's outcome. *Id.*; *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2013) (articulating formula for reviewing cause and prejudice under *Martinez*).

Under the correct standard, the panel continued, Ramirez had excused the procedural default of his

ineffective-assistance-of-counsel claim. App. 236–48. The panel remanded for additional consideration of the claim's merits, holding that Ramirez was "entitled" to further evidentiary development to litigate the claim because his post-conviction counsel's ineffectiveness precluded state-court evidentiary development. App. 248.

B. Facts and procedural history of *Jones*

Barry Lee Jones murdered his live-in girlfriend's child, 4-year-old R.G. *See State v. Jones*, 937 P.2d 310, 313 (Ariz. 1997). R.G. had spent most of the day before her death in Jones's care and had accompanied him on multiple trips in his van. *Id.* During one of those trips, two neighborhood children saw Jones striking R.G. as he drove. *Id.* Later, Jones stopped at a convenience store to obtain ice for a head injury R.G. had suffered. *Id.*

R.G.'s condition deteriorated rapidly in the ensuing hours, and Jones did nothing to help her. *See id.* In the afternoon, a neighbor encountered R.G. wandering the trailer park where her family lived, appearing pale and sick. *See* R.T. 4/7/95, at 164–73. As the evening wore on, R.G. lay on the couch with her mother, bleeding from the head and crying in pain as Jones looked on. *See Jones*, 937 P.2d at 313; R.T. 4/11/95, at 44–51. Some friends visited the home and expressed concern about R.G.'s condition; Jones told them that paramedics had examined and released R.G. *Jones*, 937 P.2d at 313. This statement was false. *Id.*

R.G. died overnight. *Id.* In the morning, Jones drove R.G.'s mother and R.G.'s lifeless body to a hospital and left them there. R.T. 4/11/95, at 146. He fled to a friend's desert encampment; en route, he

repeated his false statement that he had obtained medical care for R.G. the day before. R.T. 4/11/95, at 143–46. He admitted that he did not want to return to the hospital because the doctors were likely to suspect that R.G. had been abused. R.T. 4/12/95, at 18.

A medical examiner subsequently opined that R.G. had died of peritonitis—an infection of the abdominal organs—as a consequence of blunt-force trauma to the abdomen. *Jones*, 937 P.3d at 313. Based on injuries to R.G.'s vagina, the medical examiner opined that she had also been sexually assaulted. *Id.* at 313, 318–19. Additionally, R.G. had suffered a laceration to the head. R.T. 4/12/95, at 36. At trial, the medical examiner testified that R.G.'s injuries were all consistent with having been inflicted the day before her death (when Jones was observed striking her), while her head injury could be one or two days old. *Id.* at 117, 133, 148–49; *see Jones*, 937 P.2d at 313, 319–20.

The jurors found Jones guilty of first-degree murder, sexual assault, and three counts of child abuse, and a judge later found two death-qualifying aggravating factors. *Jones*, 937 P.2d at 313; *see* A.R.S. §§ 13–703(F)(6) (1994) (especially cruel, heinous, or depraved), (F)(9) (age of victim). Finding no mitigation sufficient to warrant leniency, the judge sentenced Jones to death for the murder conviction and to various terms-of-years sentences for the child-abuse and sexual-assault convictions. *Id.*

The Arizona Supreme Court affirmed Jones' convictions and sentences on direct appeal, including his death sentence after independently reviewing the

aggravating and mitigating evidence. *Id.* at 314–23. Jones thereafter sought state post-conviction relief. App. 10–11. Although he raised ineffective-assistance claims, he did not argue that counsel was ineffective for failing to investigate and present evidence, including independent medical experts, to challenge the timeline of R.G.'s injuries and, by extension, Jones's identity as the perpetrator. *Id.* The post-conviction judge denied relief after an evidentiary hearing and the Arizona Supreme Court summarily denied review. *Id.*

Jones then filed a federal habeas petition, in which he raised for the first time his attorneys' failure to sufficiently investigate and challenge the medical evidence and the timeline of R.G.'s injuries. App. 11. The district court found the ineffective-assistance claim procedurally defaulted and, applying *Coleman*, rejected Jones's argument that post-conviction counsel's ineffectiveness excused the default. *See* App. 12. The court further concluded that the evidence supporting Jones's ineffective-assistance claim was not sufficient to excuse the claim's procedural default based on a fundamental miscarriage of justice. *Id.*

Jones appealed to the Ninth Circuit. *See* App. 13. While his appeal was pending, this Court decided *Martinez* and Jones moved to remand his case to district court for that court to reconsider its dismissal of his trial-ineffectiveness claim. *Id.* The Ninth Circuit granted the motion, making a threshold finding that the defaulted claim was substantial under *Martinez*. *See* App. 172–73. That finding left the district court to only resolve the issue of post-conviction counsel's ineffectiveness in

omitting the claim.[1] *See Clabourne*, 745 F.3d at 377. That question, in turn, depended in part on the strength of the defaulted trial-ineffectiveness claim. *See id.*; *see also Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) ("If trial counsel was not ineffective, then [the prisoner] would not be able to show that [post-conviction] counsel's failure to raise claims of ineffective assistance of trial counsel was such a serious error that [post-conviction] counsel was not functioning as the counsel guaranteed by the Sixth Amendment.") (quotations and citation omitted).

In response to Jones's subsequent request for an evidentiary hearing, Arizona argued that Jones could not prove his ineffective-assistance claim on the state-court record and that, while the district court possessed authority to conduct a cause-and-prejudice hearing under *Dickens*, any evidence developed at that hearing would be inadmissible to resolve the trial-ineffectiveness claim's merits under § 2254(e)(2). *See* Dist. Ct. No. CV–01–00592–TUC–TMB, Dkt. 175, at pp. 64, 70–75. The district court disagreed, reading *Martinez* to create an equitable exception not only to the procedural-default doctrine but also to § 2254(e)(2). *See* App. 19; Dist. Ct. No. CV–01—00592–TUC–TMB, Dkt. 185, pp. 31–34.

Following a 7-day hearing at which, among other witnesses, multiple medical experts testified and expressed varying opinions about the potential time period for R.G.'s injuries, the district court found

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[1] The Ninth Circuit also remanded a sentencing-ineffectiveness claim; the district court bifurcated the proceedings on remand and did not reach the sentencing-ineffectiveness claim after granting relief on the trial-ineffectiveness claim. *See* App. 14 n.4; App. 56 n.3.

cause and prejudice and excused Jones's ineffective-assistance claim's procedural default under *Martinez*. App. 59–182. The court then reviewed the claim's merits de novo, considering the new evidence developed at the federal hearing. *Id.* Based largely on its credibility assessment of the various medical experts, the court concluded that Jones had proven his claim and granted conditional habeas relief, directing that Jones be released from custody if Arizona fails to retry him within a short time period.[2] *Id.*

Arizona appealed, arguing, as relevant here, that the district court erred by concluding that § 2254(e)(2) did not apply and that the court's order granting relief violated that statute. *See* App. 15–20. Arizona argued that § 2254(e)(2) restricts evidentiary development on a claim for habeas relief and *Martinez* does not affect its application. *Id.* The panel disagreed, "explicitly hold[ing]" that "*Martinez*'s procedural-default exception applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court." App. 17. It would be illogical and contrary to *Martinez*, the panel reasoned, to bind a prisoner whose claim had passed through *Martinez*'s gateway to a state-court record developed by ineffective counsel. App. 17–20. The panel relied heavily on the plurality decision in *Detrich*, 740 F.3d at 1246–47 (Opinion of Fletcher, J.), as well as portions of *Martinez* observing that ineffective-assistance claims often require expanded records, to

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[2] The Ninth Circuit has stayed the district court's judgment until the appellate mandate issues. *See* Ninth Cir. No. 18–99006, Dkt. 78. The mandate has, in turn, been stayed pending this petition. *See* Ninth Cir. No. 18–99006, Dkt. 89.

support its conclusion. App. 17–20 (citing *Martinez*, 566 U.S. at 11). And the panel considered it inefficient and burdensome to conduct a cause-and-prejudice hearing only to exclude the resulting evidence on merits review.[3] App. 18–19.

C. Denial of en banc rehearing and eight-judge dissent

Arizona sought panel and en banc rehearing in each case. The court denied each motion. *See* App. 185–212 (Jones), 349–76 (Ramirez). Judge Collins, however, authored a dissent from the denial of en banc rehearing, which he filed in each case and which seven additional judges joined. *Id.* Judge Collins brought into focus the two separate obstacles to habeas relief Ramirez and Jones faced: the equitable procedural-default doctrine, which, when applicable, bars merits review unless the default is excused, and the statutory prohibition on federal evidentiary development, which controls whether evidence outside the state-court record may be considered on merits review. *Id.*

Judge Collins concluded that the *Ramirez* and *Jones* panels had "disregard[ed] controlling Supreme Court precedent by creating a new judge-made exception to the restrictions imposed by [AEDPA] on the use of new evidence in habeas corpus proceedings." App. 188. While Judge Collins disagreed with each panel's decision, he found

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[3] The panel rejected Arizona's argument that, even if the district court correctly considered the new federal evidence to grant relief, it incorrectly decided the claim on the merits, with the exception of vacating the district court's remedy on one of Jones's convictions and ordering that court to amend its judgment. App. 30–51.

Ramirez to be a "particularly stark violation of § 2254(e)(2)" because, while Jones permitted already-developed cause-and-prejudice evidence to be considered on merits review, *Ramirez* determined that, "even after the *Martinez* exception had been established with new evidence, the petitioner was entitled to keep going and to develop even *more* evidence as if § 2254(e)(2) did not exist at all." App. 189–90.

Judge Collins reasoned that the panels lacked authority to extend the *Martinez* exception to a statute. App. 203–12. He further observed that the panels' decisions not only violated AEDPA, but also could not be reconciled with this Court's opinions in *Williams* and *Holland*, which hold that a prisoner is bound by counsel's state-court negligence for § 2254(e)(2)'s purposes. *Id.*

Finally, Judge Collins opined that, even if § 2254(e)(2) would bar relief in most cases after *Martinez* enabled a default to be excused, that outcome did not allow the majority to contravene the statute. App. 208 ("To the extent that it seems unfair that a potentially meritorious claim might escape federal habeas review, that feature is inherent in the restrictions that AEDPA imposes on the grant of federal habeas relief."). And he faulted the district court in Jones for holding a potentially wasteful cause-and-prejudice hearing without first "consider[ing] up front *both* of the *separate* obstacles" to relief: procedural default and § 2254(e)(2). App. 207. "There is no point in conducting a *Martinez* hearing to discover 'cause' to excuse a procedural default if the defaulted claim will inevitably fail on the merits because (due to the *other* procedural

obstacle) evidence outside the state record cannot be considered in any event." App. 207–08.

REASONS FOR GRANTING THE PETITION

The *Ramirez* and *Jones* panels determined that 28 U.S.C. § 2254(e)(2) does not apply when a court reviews the merits of an ineffective-assistance claim that has passed though Martinez's gateway around procedural default. But the panels were not empowered to pick and choose which provisions of AEDPA to apply, and their decision to prioritize a court-created equitable rule over a statute limiting judicial authority intrudes into Congress's realm. The interaction (or lack thereof) between § 2254(e)(2) and *Martinez* is an important and recurring issue that this Court should resolve now, before the panel decisions opinions strip § 2254(e)(2) of all force in the ineffective-assistance context; spill over onto other provisions of AEDPA; and irreparably harm the comity, finality, and federalism interests Congress intended to safeguard. *See Pinholster*, 563 U.S. at 185.

I. The Ninth Circuit contravened AEDPA by using the judge-made equitable doctrine of *Martinez v. Ryan* to override 28 U.S.C. § 2254(e)(2)

The *Ramirez* and *Jones* panels effectively rewrote § 2254(e)(2) to include an equitable exception that relieves a federal court of that provision's limitations when adjudicating a claim that has passed through *Martinez*'s gateway to merits review. The panels, however, had no authority to disregard any provision of AEDPA. Further, their decision to cast aside § 2254(e)(2) is especially problematic because Congress intended that statute to abolish pre-

AEDPA equitable exceptions to a prisoner's failure to develop his claim in state court.

A. Section 2254(e)(2) generally bars federal evidentiary development where a prisoner failed to develop a claim's factual basis in state court

Before AEDPA, federal courts analogized the failure to develop a claim in state court to procedural default, and applied equitable principles to determine whether a prisoner could receive a federal evidentiary hearing. *See, e.g., Keeney v. Tamayo-Rayes*, 504 U.S. 1, 8–10 (1992). State-court counsel's negligence was attributable to a prisoner in determining whether the prisoner had failed to develop his claim. *See id.* at 3–11 (prisoner had failed to develop claim based on "the negligence of postconviction counsel"). And a court could excuse a prisoner's failure to develop his claim in state court, and thereby conduct a hearing, if the prisoner showed cause for and prejudice from his lack of state-court development. *Id.*

Congress subsequently enacted § 2254(e)(2) as part of AEDPA. Through the statute's opening clause, which generally bars evidentiary development where a prisoner has "failed to develop" his claim's factual basis in state court, *see* 28 U.S.C. § 2254(e)(2), Congress codified the pre-AEDPA definition of those words. *See Williams*, 529 U.S. at 433–34 ("[T]he opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney*'s test for excusing the deficiency in the state-court record prior to AEDPA are now controlled by § 2254(e)(2)."). Under § 2254(e)(2), a prisoner fails to develop a claim

when "there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Id.* at 432 (emphasis added).

But Congress made the consequences of a prisoner's failure to develop his claim far more severe. *See Williams*, 529 U.S. at 433 ("Congress raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings."). Congress eliminated *Keeney*'s cause-and-prejudice avenue for excusing a lack of state-court factual development and replaced it with § 2254(e)(2)'s narrow statutory exceptions, which apply if the claim rests on a retroactively applicable new constitutional rule or a factual predicate that could not have been discovered earlier despite diligence, *and* the facts underlying the claim establish actual innocence. *Id.* Thus, once a prisoner's (or his attorney's) lack of diligence triggers § 2254(e)(2)'s opening clause, a federal court may not receive new evidence to resolve the prisoner's claim unless a statutory exception applies. *See generally* 28 U.S.C. § 2254(e)(2) (if prisoner has failed to develop claim's factual basis in state court a federal court "*shall not* hold an evidentiary hearing on the claim *unless*" the prisoner satisfies a statutory exception) (emphasis added); *Holland*, 542 U.S. at 653 (applying § 2254(e)(2) to documentary evidence submitted in lieu of a hearing).

Accordingly, "Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take new evidence in an evidentiary hearing." *Pinholster*, 563 U.S. at 185–86. And it specifically "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Id.* The statute's limitations effectuate AEDPA's

overall intent "to strongly discourage" prisoners from offering new evidence in federal court. *Id.*

Here, Ramirez and Jones failed to diligently develop their claims in state court and both inmates blamed their post-conviction counsel for that failure. This lack of state-court diligence triggers § 2254(e)(2)'s opening clause. *See Holland*, 542 U.S. at 653; *Williams*, 529 U.S. at 432–34. Neither inmate claimed, and neither Ninth Circuit panel found, that § 2254(e)(2)'s exceptions applied. *See* App. 188. As a result, § 2254(e)(2) categorically bars a federal court from considering new evidence to resolve Ramirez's and Jones's claims for habeas relief.

B. A statutory command such as § 2254(e)(2) cannot be overridden merely to advance a judge-made equitable doctrine

Because the procedural-default doctrine is equitable in nature and court-created, it is subject to equitable, court-created exceptions. *See Martinez*, 566 U.S. at 13–14. The doctrine generally precludes merits review where a state court imposed a procedural bar to avoid adjudicating a claim on the merits, or a prisoner failed to raise the claim in state court and has no remaining state-court remedies. *See id.* at 9–10; *Coleman*, 501 U.S. at 735 n.1.

Martinez concerns the cause-and-prejudice excuse for procedural default. The decision creates a narrow exception to the general rule that post-conviction counsel's ineffectiveness cannot serve as cause to excuse a procedural default. *See Coleman*, 501 U.S. at 755–57. Under *Martinez*, when a prisoner's initial-review post-conviction counsel ineffectively omits a substantial trial-ineffectiveness claim,

resulting in a procedural default, the prisoner may rely on state counsel's ineffectiveness to excuse the default. *Martinez*, 566 U.S. at 16–17. This Court's "chief concern" in crafting the *Martinez* exception was "that meritorious claims of trial error receive review by at least one state or federal court." *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017); *see Martinez*, 566 U.S. at 11, 14.

The *Ramirez* and *Jones* panels declined to apply § 2254(e)(2) because, in their view, the statute prevented *Martinez* from being fully effectuated. The *Jones* panel expressly concluded that limiting a post-*Martinez* merits review to the state-court record would render *Martinez* "'a dead letter'" because, when *Martinez* applies, the defaulted claims generally were not developed in state court due to post-conviction counsel's failures. App. 17–20 (quoting *Detrich*, 740 F.3d at 1447 (opinion of Fletcher, J.)). And the *Ramirez* panel found the prisoner "entitled" to evidentiary development on his claim's merits merely because the claim had passed through *Martinez*'s gateway. App. 248 (citing *Detrich*, 740 F.3d at 1247 (opinion of Fletcher, J.)). In effect, the panels concluded (contrary to *Martinez*'s plain language, *see* § I(C), *infra*) that the *Martinez* procedural-default exception created a right to a thorough merits review on a well-developed record, and that this right was superior to and therefore trumped the statute.

But as Judge Collins explained, a court cannot ignore a statutory command like § 2254(e)(2) merely to effectuate a judge-made equitable doctrine like *Martinez*. App 189, 203–12. And allowing a court to decline at will to comply with a statute limiting its authority presents a stark separation-of-powers

violation. *See Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (courts have authority to create exceptions to "judge-made … doctrines" but, with statutory provisions, "courts have a role in creating exceptions only if Congress wants them to"); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315 (1981) (court cannot "judicially decree[] what accords with common sense and the public weal when Congress has addressed the problem") (quotations omitted); *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981) ("[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.").

This is particularly true where § 2254(e)(2) is concerned. As previously discussed, Congress enacted § 2254(e)(2) in part to abolish the pre-AEDPA *Keeney* cause-and-prejudice standard, which is coterminous with the cause-and-prejudice standard at issue in *Martinez*. *See Williams*, 529 U.S. at 433. The decisions here effectively restore the pre-AEDPA standard that Congress eliminated. Even worse, the decisions *expand* the pre-AEDPA standard to include a basis for excusing a lack of factual development that even *Keeney* did not contemplate: state counsel's ineffectiveness. *See Keeney*, 504 U.S. at 3–11. The panels' reasoning on this point cannot be reconciled with *Holland*, 542 U.S. at 434–34, and *Williams*, 429 U.S. at 432–34, which recognize that the very fact that establishes the *Martinez* exception (post-conviction counsel's negligence) triggers § 2254(e)(2)'s general bar.[4]

[4] For this reason, the *Jones* panel's reliance on *Sasser v.*

"Where, as here, Congress has specifically modified and limited pre-existing equitable doctrines that otherwise would have applied, [a court has] no authority to ignore those limitations." App. 206 (Collins, J., dissenting) (citing *McQuiggin v Perkins*, 569 U.S. 383, 395–96 (2013)); *see also Ross*, 136 S. Ct. at 1857; *Nw. Airlines Inc.*, 451 U.S. at 97. This maxim applies with special force where an exhaustion statute like § 2254(e)(2) is involved. *See* App. 206–07 (Collins, J., dissenting) (citing *Ross*, 136 S. Ct. at 1857); *Williams*, 529 U.S. at 436–37. The Ninth Circuit's invocation of an equitable rule applicable to procedural default to free itself from a statute governing evidentiary development on the merits warrants certiorari.

C. *Martinez* does not address § 2254(e)(2), let alone purport to override the statute

Martinez "says literally nothing whatsoever about § 2254(e)(2)," federal evidentiary hearings on the merits, or this Court's precedent interpreting AEDPA (specifically *Williams* and *Holland*). App. 207 n.3 (Collins, J., dissenting). Rather, *Martinez* addressed only procedural default and is, by its plain terms, a "limited" and "narrow" decision. 566 U.S. at

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Hobbs, 735 F.3d 833 (8th Cir. 2013), and *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000), is unavailing. *See* App. 20. These cases, which permit post-conviction counsel's ineffectiveness to excuse a failure to develop a claim's factual basis, are "based on a clear misreading of … *Williams*," which precludes that outcome. App. 209 (Collins, J., dissenting). Moreover, the Eighth Circuit has since questioned *Sasser* and suggested that it contributes to "tension in the case law" on the interaction between § 2254(e)(2) and *Martinez*'s progeny, *Trevino v. Thaler*, 569 U.S. 413 (2013). *See Thomas v. Payne*, 960 F.3d 465, 473 n.7 (8th Cir. 2020). And *Barrientes* predates *Martinez* and is thus of little relevance.

5, 9, 15, 16; *see Davila*, 137 S. Ct. at 2066 (describing *Martinez* decision as "highly circumscribed"). A prisoner who satisfies *Martinez*'s standards gains only merits review of an otherwise barred claim. *Martinez*, 566 U.S. at 17. "On its face," *Martinez* therefore "provides no support for extending its narrow exception" to § 2254(e)(2), which does not even come into play until merits review is authorized. *See Davila*, 137 S. Ct. at 2065 (declining to extend *Martinez* exception to defaulted appellate-ineffectiveness claims).

Nor do *Martinez*'s equitable underpinnings justify ignoring the statute. The *Jones* panel cited this Court's intent that a prisoner receive an opportunity to vindicate a substantial ineffective-assistance claim, which, according to the panel, cannot occur within § 2254(e)(2)'s limitations because the state-court record is necessarily inadequate. App. 18 (citing *Martinez*, 566 U.S. at 11, 13). Although the *Ramirez* panel did not acknowledge the statute, behaving as though it "did not exist at all," App. 190 (Collins, J., dissenting), it remarked that a prisoner should not be bound by a state-court record created by ineffective counsel. App. 248.

As a preliminary matter, contrary to the Ninth Circuit's impression, the state-court record is not necessarily devoid of evidence supporting a defaulted ineffective-assistance claim. In some cases, for example, the claim may have been presented in state court in a successive petition, precluding a finding of state-court diligence but still generating a reviewable documentary record. *See Williams*, 529 U.S. at 437 (diligence requires that prisoner seek state-court hearing in a procedurally appropriate manner); *Apelt v. Ryan*, 878 F.3d 800, 814–16, 825–34 (9th Cir.

2017) (excusing procedural default under *Martinez* and reviewing merits of claim based on state-court record created during second post-conviction proceeding in which procedural bar was imposed).

Ramirez's case illustrates this point. Ramirez presented his ineffective-assistance claim in a successive post-conviction notice, which the state court quickly dismissed on timeliness grounds. *See* App. 225 & n.6; App. 299; *State v. Ramirez* state-court record, Notice of Post-Conviction Relief filed 4/28/05 & Minute Entry filed 5/6/05. However, he separately presented an intellectual-disability claim with overlapping evidence, which resulted in an 8-day evidentiary hearing in state court. *See* App. 281–83 (district court relying on evidence presented in state intellectual-disability hearing to find that Ramirez had not carried his burden under *Martinez*); App. 317–41 (district court summarizing evidence from intellectual-disability hearing in assessing existence of fundamental miscarriage of justice sufficient to excuse procedural default of ineffective-assistance claim). In *Ramirez*, therefore, the state-court record contains significant factual development relevant to his ineffective-assistance claim.[5]

In any event, as Judge Collins also recognized, egregious claims of counsel error—such as, for example, failing to object to extraordinarily prejudicial evidence or failing to object to an illegal

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[5] The fact that the district court has already found this evidence, along with Ramirez's newly proffered federal evidence, insufficient to grant relief on the ineffective-assistance claim's merits makes the Ninth Circuit's remand for *additional* evidentiary development all the more inappropriate. In effect, the Ninth Circuit has given Ramirez a second chance to prove a claim he was unable to prove in the first instance.

sentence—will be apparent from and resolvable on the trial record. *See* App. 205 (Collins, J., dissenting). And even if some meritorious claims "might escape federal habeas review, that feature is inherent in the restrictions that AEDPA imposes on the grant of federal habeas relief." App. 208 (Collins, J., dissenting). Upon a failure of diligence and the absence of statutory exceptions, § 2254(e)(2) mandates new evidence's exclusion even if that evidence is highly probative—or even dispositive—of a claim. *See id.* (noting that evidence proffered to excuse a procedural default under *Martinez* "stands on no different footing" than evidence deemed inadmissible in *Holland*).

In this way, § 2254(e)(2)'s operation is no different than, for example, the rule of *Pinholster*, which also requires the exclusion of potentially case-dispositive evidence presented for the first time in federal court unless § 2254(d)(1)'s threshold is met, even if the state-court record was minimally developed. *See Pinholster*, 563 U.S. at 179–87 (excluding evidence erroneously developed at federal hearing, on which district court relied to grant relief); *see generally Davis v. Ayala*, 576 U.S. 257, 276 (2015) ("The role of a federal habeas court is to guard against extreme malfunctions in the state criminal justice systems, not to apply de novo review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge.") (quotations and citations omitted). And in any case AEDPA controls against fundamental unfairness by permitting evidentiary development when a claim rests on new evidence that could not have been discovered earlier and that proves actual innocence. *See* 28 U.S.C. § 2254(e)(2).

Nor do the *Jones* panel's concerns about efficiency (which are absent from *Ramirez* because the district court there did not expend time and resources on a futile cause-and-prejudice hearing) justify overriding § 2254(e)(2). *See* App. 19. Even though the Ninth Circuit has held that § 2254(e)(2) does not limit district courts' discretion to conduct cause-and-prejudice hearings, *see Dickens*, 740 F.3d at 1321–22, courts may—and should—deny cause-and-prejudice hearings that would be futile because a *separate* rule bars habeas relief. *See generally Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."). If no exception to § 2254(e)(2) applies, and a defaulted trial-ineffectiveness claim fails on the state-court record, there is no reason to receive new evidence relating to post-conviction counsel's performance or the strength of the defaulted claim. As Judge Collins put it: "There is no point in conducting a *Martinez* hearing to discover 'cause' to excuse a procedural default if the defaulted claim will inevitably fail on the merits because (due to the *other* procedural obstacle [of § 2254(e)(2)]) evidence outside the state record cannot be considered in any event." App. 207–08 (Collins, J., dissenting).

II. The issue is an important and recurring one

The relationship—or lack thereof—between *Martinez* and § 2254(e)(2) is a recurring issue of nationwide importance. *See Ayestas*, 138 S. Ct. at 1095 (reserving question).[6] This Court intended

[6] The Fifth Circuit has left the question open despite it

Martinez to be a limited pathway around procedural default for substantial trial-ineffectiveness claims. 566 U.S. at 5, 9, 15, 16. This Court should now enforce these limits and ensure that *Martinez* remains confined to the procedural-default context and does not become a detour around AEDPA.

This Court predicted that *Martinez* would not "put a significant strain on state resources." *Id.* at 15. But this has proven not to be the case, and the Ninth Circuit's decisions here will compound the existing burden. Inmates, particularly in death-penalty cases, routinely invoke *Martinez* to excuse their ineffective-assistance claims' procedural defaults. For example, after this Court's decision, the Ninth Circuit stayed 18 capital habeas appeals, not including *Jones* and *Ramirez*, and remanded for the district court to reconsider ineffective-assistance claims previously dismissed as procedurally defaulted. *See Detrich v. Ryan*, No. 08–99001; *Djerf v. Ryan*, No. 08–99027; *Doerr v. Ryan*, No. 09–99026; *Gallegos v. Ryan*, No. 08–99029; *Greene v. Ryan*, No. 10–99008; *Hooper v. Shinn*, No. 08–99024; *Jones (Danny) v. Ryan*, No. 07–99000; *Kayer v. Shinn*, No. 09–99027; *Lee (Chad) v. Schriro*, No. 09–99002; *Lee (Darrel) v. Ryan*, No. 10–99022; *Lopez v. Ryan*, No. 09–99028; *Martinez v. Ryan*, No. 08–99009; *Reinhardt v. Ryan*, No. 10–99000; *Salazar v. Ryan*, No. 08–99023; *Schackart v. Ryan*, No. 09–99009; *Smith v. Ryan*, No. 10–99002; *Spears v. Ryan*, No.

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repeatedly having been presented. *See, e.g., Ibarra v. Davis*, 786 Fed. Appx. 420, 424 (5th Cir. 2019); *Norman v. Stephens*, 817 F.3d 226, 234–35 (5th Cir. 2016). The Eighth Circuit decided the issue consistent with the Ninth Circuit in *Sasser*, but has since called *Sasser* into question. *See n.* 4, *supra*; *Thomas*, 960 F.3d at 473 n.4; *Sasser*, 735 F.3d at 853–54.

09–99025; *Walden v. Ryan*, No. 08–99012. These remands resulted in significant delay, as the *Walden* case illustrates. There, briefing was initially completed on January 13, 2010, but the case was remanded before oral argument. *See* No. 08–99012, Dkt. 33. After remand, the case was re-briefed and not argued until December 15, 2020—nearly 11 years after briefing was initially complete. *Id.* at Dkt. 149.

Martinez is routinely invoked to attain merits review of multiple defaulted claims in nearly every capital habeas petition in Arizona.[7] *See, e.g., Boggs v. Shinn*, 2020 WL 1494491 (D. Ariz. Mar. 27, 2020) (16 procedurally defaulted subclaims). In one case, the district court relied on *Martinez* to allow record expansion on the merits of ineffective-assistance claims despite Arizona having affirmatively waived its procedural default defense to prevent *Dickens*/*Martinez* cause-and-prejudice litigation from occasioning delay. *Roseberry v. Ryan*, 289 F. Supp. 3d 1029, 1040–44 (D. Ariz. 2018).

Arizona's experience is not unique; the Ninth Circuit's expansive application of *Martinez* has detrimentally affected other Ninth Circuit jurisdictions. *See, e.g., McLaughlin v. Laxalt*, 665 Fed. Appx. 590, 593 (9th Cir. 2016) (citing, in Nevada

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[7] Further complicating matters is the Ninth Circuit's holding that a prisoner may, without limitation from § 2254(e)(2), offer new evidence in federal court for the sole purpose of "fundamentally altering" an exhausted habeas claim, rendering it procedurally defaulted and subject to *Martinez* and freeing the reviewing court of *Pinholster*'s limitations. *See Dickens*, 740 F.3d at 1320. Dickens died shortly after the Ninth Circuit issued its opinion and Arizona was unable to seek certiorari from this Court. *See Dickens v. Ryan*, 744 F.3d 1147, 1147–48 (9th Cir. 2014).

case, *Detrich* plurality opinion to conclude that "although a state habeas lawyer's errors normally are imputed to a habeas petitioner for purposes of determining whether the petitioner has been diligent under § 2254(e)(2), such imputation makes no sense in the context of a claim rescued from procedural default by *Martinez*") (citations omitted); *Hill v. Glebe*, 654 Fed. Appx. 294, 295 (9th Cir. 2016) (Mem.) (determining in Washington case that state cannot prevent application of *Martinez* simply by declining to assert a procedural bar and that federal courts may assert bar *sua sponte* because, otherwise, "[t]he government could opt never to raise the procedural bar, effectively preventing a petitioner from ever developing a factual record to support his ineffective assistance claim"). The Ninth Circuit's application of *Martinez* has therefore already had an onerous impact in Arizona and elsewhere.

The panel opinions here, however, are of a different character. For the first time in published opinions, the panel decisions break *Martinez* free of procedural default and into merits review, nullifying § 2254(e)(2) for claims that have passed through *Martinez*'s gateway. *Ramirez* is of particular concern in this respect because it holds that a prisoner who has passed through the *Martinez* gateway based on documentary evidence is "entitled" to an evidentiary hearing, regardless of his compliance with § 2254(e)(2). If every similarly situated prisoner is so "entitled," Arizona (and other Ninth Circuit jurisdictions) will quickly become inundated by resource-intensive litigation, resulting in still more delay and expense which, at least in Arizona, impedes state constitutional rights afforded to crime victims. *See* Ariz. Const. Art. II, § 2.1(A)(10). In all

affected jurisdictions, these complicated hearings will "put a significant strain on state resources." *Martinez*, 566 U.S. at 15.

Congress intended AEDPA to safeguard comity, finality, and federalism, *Pinholster*, 563 U.S. at 185; to enshrine state courts as the primary forum for adjudicating state prisoners' challenges to their convictions, *Harrington v. Richter*, 562 U.S. 86, 103 (2011); to reduce delay in capital cases, *Rhines v. Weber*, 544 U.S. 269, 276 (2005); and to provide justice for crime victims, *see* Pub. L. No. 104–132, 110 Stat. 1214, 1214 (1996). This Court was acutely aware of these interests in crafting *Martinez*'s rule. *See Davila*, 137 S. Ct. at 2068–70; *Martinez*, 566 U.S. at 15; *see generally Wright v. West*, 505 U.S. 277, 293 (1992) ("[C]osts [to state sovereignty, the state's interests in repose, and society's interest in punishing offenders,] as well as the countervailing benefits, must be taken into consideration in defining the scope of the writ.").

Section 2254(e)(2) furthers AEDPA by encouraging prisoners to develop their claims in state court. *Pinholster*, 563 U.S. at 185–86. The Ninth Circuit's decisions here accomplish precisely the opposite (particularly in light of *Dickens*, *see* n.7, supra) by encouraging prisoners to *withhold* evidence in state court in the hope of receiving a more favorable federal forum, or at least significant delay. And the Ninth Circuit's conclusion that equitable principles permit it to override § 2254(e)(2) creates a dangerous precedent that could easily spill over into AEDPA's other limitations, such as § 2254(d)(1). In fact, *Dickens* has laid the groundwork for this expansion.

"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." *Williams*, 529 U.S. at 437. And "[i]f [§ 2254(e)(2)'s] standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102. This Court has repeatedly reminded the Ninth Circuit of its obligation to comply with AEDPA's mandatory requirements. *See, e.g., Shinn v. Kayer*, 592 U.S. __ , No. 19–1302, p. 1 (Dec. 14, 2020); *Richter*, 562 U.S. at 104. Certiorari is warranted on this important question.

CONCLUSION

This Court should grant the petition for writ of certiorari.

January 20, 2021

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