No. 20-1009

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 A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Jon M. Sands
Federal Public Defender
District of Arizona
Timothy M. Gabrielsen*
Cary Sandman
Assistant Federal Public Defenders
407 West Congress Street
Suite 501
Tucson, Arizona 85701
(520) 879-7614
Tim_gabrielsen@fd.org

**Counsel of Record*
Counsel for Respondents

QUESTIONS PRESENTED

In each of these two separate habeas cases, a different panel of the Court of Appeals determined that, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), the habeas petitioner's procedural default of claims of ineffective assistance of trial counsel was excused by the ineffectiveness of appointed state postconviction counsel. In *Ramirez v. Shinn*, the Court of Appeals remanded to permit evidentiary development of the ineffective assistance of trial counsel claim. In *Jones v. Shinn*, the Court of Appeals did not remand for additional evidentiary development but held that evidence already introduced to excuse the default of the ineffective assistance of trial counsel claim could be considered in evaluating the merits of that claim.

1. The question presented in *Ramirez* is: When a habeas petitioner has established that he may proceed with a previously defaulted ineffective assistance of trial counsel claim under *Martinez*, does 28 U.S.C. § 2254(e)(2) permit development of evidence to support the claim on its merits?

2. The question presented in *Jones* is: When a habeas petitioner has established that he may proceed with a previously defaulted ineffective assistance of trial counsel claim under *Martinez*, does 28 U.S.C. § 2254(e)(2) require a federal court to ignore evidence already developed during the *Martinez* proceedings when considering the merits of the claim?

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INTRODUCTION

Arizona tries to manufacture a problem where none exists. The state bundles two separate cases into one petition, but neither presents the question the state asks the Court to consider. Neither the question the state puts forward nor the holdings of either case implicate a circuit conflict. And both cases were decided correctly and straightforwardly. Each is an exceptionally poor candidate for review.

Petitioners' real complaint is with this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez* addressed a narrow band of cases in which a habeas petitioner has a substantial claim of ineffective assistance of trial counsel, but procedurally defaulted that claim because he received ineffective assistance of counsel in state postconviction proceedings. This Court held that the ineffective assistance of postconviction counsel excuses the procedural default of the ineffective assistance of trial counsel claim. *Id.* at 9. A federal district court may then adjudicate the ineffective assistance of trial counsel claim on its merits. *Id*. at 17-18.

Almost by definition, and as *Martinez* itself recognized, presenting that trial counsel claim after its default is excused will require introducing evidence beyond the state court record. A prisoner who received ineffective postconviction representation was "in no position to develop" the evidence bearing on the claim in state court proceedings. *Id*. at 12. And by their nature, "[i]neffective-assistance claims often depend on evidence outside the trial record," *id.* at 13, and "often require investigative work," *id.* at 11.

The state's contention in its petition for certiorari that 28 U.S.C. § 2254(e)(2) bars consideration of such new evidence has no merit. The state's position misreads section 2254(e)(2) and contravenes the very premise of *Martinez*, as the only circuits to have considered the issue have held. As this Court has established, section 2254(e)(2) bars the development of additional evidence only when the prisoner is deemed to be at fault for not developing the claim in state court proceedings. *Williams v. Taylor*, 529 U.S. 420, 433 (2000). And *Martinez* explained that a habeas petitioner is not at fault where he was prevented from developing his claim because his state postconviction counsel was constitutionally ineffective. 566 U.S. at 10-11, 16.

Neither *Ramirez* nor *Jones* presents the question, as framed by the state, of whether *Martinez* "render[s] 28 U.S.C. § 2254(e)(2) inapplicable." Pet. i. In *Ramirez*, the state did not raise an argument based on section 2254(e)(2) in its panel appeal briefs or at oral argument in the Court of Appeals. The state thus deprived the court of the opportunity to consider the statute's application, and it is no surprise that the Court of Appeals did not address it. The case involves no preserved question regarding section 2254(e)(2).

In *Jones*, the Court of Appeals did not rule on the permissibility of additional evidentiary development on the merits of the ineffective assistance of trial counsel claim. The court simply held that section 2254(e)(2) permitted the district court to consider evidence *already introduced* at a hearing to determine whether petitioner was entitled to proceed under *Martinez* in the first place. Pet. App. 4-5. And that

evidence turned out to be critical: It revealed that Mr. Jones is likely innocent. The district court then granted relief and ordered him released or retried, and the Court of Appeals unanimously affirmed.

Each case, for its own reasons, provides an exceptionally poor vehicle for review of the state's question presented. And all else aside, the question is undeveloped in the lower courts and does not present a pressing matter meriting the Court's review.

The petition should be denied.

STATEMENT OF THE CASES

David Ramirez

A. David Ramirez was convicted of murder and sentenced to death in 1989. He is severely mentally handicapped. Pet. App. 229. At trial, Mr. Ramirez was represented by a single state-appointed lawyer with no "previous capital experience." Pet. App. 228. That lawyer later admitted being "unprepared to represent someone 'as mentally disturbed' as Ramirez." Pet. App. 218. At the critical sentencing phase, as the Court of Appeals later found, Mr. Ramirez's attorney "failed to present evidence of intellectual disability, brain damage, and 'the myriad mitigating circumstances in his background.'" Pet. App. 236. Counsel acknowledged having had "no strategic reason for not presenting all the mitigation information available." There was no explanation other than inexperience. Pet. App. 229.

Mr. Ramirez also received ineffective assistance in state postconviction proceedings, as the state conceded. Pet. App. 245. Among other errors, Mr. Ramirez's postconviction attorney did not raise or develop a claim that trial counsel was ineffective for failing to present significant mitigating evidence at sentencing, even though postconviction review is the only forum in Arizona for making an ineffective assistance claim. Pet. App. 246.

B. In 1997, Mr. Ramirez filed a federal habeas petition, which raised the ineffective assistance of trial counsel claim.[1] Pet. App. 225. The district court found the claim procedurally defaulted because Mr. Ramirez did not raise it during state postconviction review. *Id.* The Court of Appeals, however, remanded for the district court to consider whether to excuse the procedural default under *Martinez*. Pet. App. 226.

On remand, Mr. Ramirez filed a supplemental brief to the district court explaining that his ineffective assistance of trial counsel claim was "substantial," as *Martinez* requires, 566 U.S. at 17, and that his state postconviction counsel rendered ineffective assistance in failing to present it in state court. Pet. App. 226.

As support, Mr. Ramirez's new counsel attached evidence of his intellectual disability and brain damage, and declarations from Mr. Ramirez's family

[1] The district court appointed the Federal Public Defender for the District of Arizona to represent Mr. Ramirez, "due to concerns regarding the quality of representation" Mr. Ramirez previously received. Pet. App. 225.

members that "reveal[ed] the extent of abuse, poverty, and neglect that Ramirez suffered as a child." Pet. App. 226-27. Mr. Ramirez also submitted evidence not included in the state court record, including the report of a newly retained expert concluding that both trial and postconviction counsel were ineffective under applicable professional norms. Pet. App. 291; *Ramirez*, No. 2:97-CV-01331 (D. Ariz. May 4, 2015), Doc. 256-2, at 13-14, Ex. S; *see also* Doc. 256, Exs. Q, R, W.

The district court skipped to the merits of the underlying ineffective assistance of trial counsel claim and ruled that Mr. Ramirez's trial counsel's "performance at sentencing was neither deficient nor prejudicial." Pet. App. 292. In reaching this conclusion, the district court considered the new "evidence presented by Ramirez in his supplemental *Martinez* brief." Pet. App. 291.

The state did not object to the court's consideration of the new evidence, and had urged the court to reject the ineffective assistance claim on its merits with the enlarged record. Pet. App. 269, 291; *Ramirez*, No. 2:97-CV-01331 (D. Ariz. July 6, 2015), Doc. 257, at 49-52.

C. The Court of Appeals unanimously reversed and remanded. Pet. App. 248, 254-55. The state argued in its appellate brief that the court should affirm the district court's denial of habeas relief, with full consideration of the enlarged record. *See Ramirez v. Ryan*, No. 10-99023 (9th Cir. Mar. 9, 2018), Doc. 37, at 58. But the court concluded that the district court erred in bypassing the threshold *Martinez* inquiry

and skipping to the merits of the ineffective assistance claim. Pet. App. 235. The court held that the district court should have limited its analysis to whether Mr. Ramirez could overcome the procedural default. *Id*. In regard to that issue, the Court of Appeals then ruled that Mr. Ramirez was indeed entitled to proceed with his claim under *Martinez*, because his postconviction counsel performed ineffectively, as the state conceded, and his ineffective assistance of trial counsel claim was "substantial." Pet. App. 217. The court therefore remanded the case.[2]

Given that Mr. Ramirez "was precluded from" evidentiary development of his claim in state court "because of his postconviction counsel's ineffective representation," Pet. App. 248, the Court of Appeals instructed that he should be "allow[ed] a chance" for such development on remand. Pet. App. 235. The state did not raise any argument that section 2254(e)(2) barred additional evidentiary development in its appellate briefing or in its oral argument to the panel.

The state petitioned for rehearing en banc. In its petition, the state for the first time on appeal contended that section 2254(e)(2) precluded evidentiary

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[2] Mr. Ramirez had requested before the district court and in his appellate briefing further evidentiary development, beyond what he attached to his *Martinez* brief, to show that he met the requirements to excuse his procedural default. *See* Pet. App. 291; *Ramirez v. Ryan*, No. 10-99023 (9th Cir. Nov. 9, 2017), Doc. 30, at 46-48. The Court of Appeals accepted the state's concession of postconviction counsel's ineffectiveness and remanded on the underlying claim of ineffective assistance of trial counsel without further evidentiary development on the *Martinez* question.

development. *See Ramirez v. Ryan*, No. 10-99023 (9th Cir. Oct. 17, 2019), Doc. 79, at 7. The Court of Appeals denied the petition, with eight judges dissenting. Pet. App. 187.

Barry Jones

A. Barry Jones was convicted of felony murder and sentenced to death in 1995. Pet. App. 9. As the district court and Court of Appeals described, Mr. Jones's state-appointed attorney failed to perform a competent pretrial investigation and failed to uncover substantial exculpatory evidence. Pet. App. 30, 161. "[C]ounsel's deficient investigation pervaded the entire evidentiary picture presented at trial, resulting in a breakdown in the adversary process." Pet. App. 161. "[T]he police investigation was colored by a rush to judgment and a lack of due diligence and thorough professional investigation; effective counsel would have brought this to the jury's attention, casting further doubt on the strength of the State's case." *Id*.

Yet on state postconviction review, Mr. Jones's state-appointed counsel did not raise an ineffective assistance of trial counsel claim based on counsel's failure to conduct an adequate investigation. Pet. App. 12. That was because postconviction counsel "lacked the experience to satisfy Arizona's requirements for the appointment of capital post-conviction counsel," Pet. App. 173, and decided "to forego any investigation into the State's strongest evidence of guilt," Pet. App. 177.

B. Mr. Jones filed a habeas petition in federal court. Pet. App. 11. The petition asserted ineffective

assistance of trial counsel, among other claims. *Id.* The district court determined that the claim was procedurally defaulted because it was not presented in state court. Pet. App. 12. Mr. Jones maintained, however, that the default was excused under *Martinez* because his postconviction counsel rendered ineffective assistance in failing to raise it. Pet. App. 13.

The district court held a hearing to determine whether to excuse the default. Pet. App. 13. Evidence introduced at the hearing revealed just how ineffectively Mr. Jones's trial counsel had performed, and, by extension, how ineffectively postconviction counsel had performed by failing to raise a claim of ineffective assistance of trial counsel.

The prosecution's case against Mr. Jones had rested on its theory that the injury that caused the 4-year-old victim's death occurred when she was in his care during a short window of time the previous day. Pet. App. 20-22. But the evidence presented at the *Martinez* hearing showed that if trial counsel had performed a minimally adequate pretrial investigation, the investigation would have established that:

- The victim's injury "occurred at least 48 hours (and probably many more hours) before her death," Pet. App. 118, undermining any inference that Mr. Jones was responsible.

- Bloodstains found in Mr. Jones's van—a cornerstone of the prosecution's case—did not result from any violence against the victim. Pet. App. 130-31.

- Eyewitness testimony was markedly unreliable. Pet. App. 131-37.

- Multiple other suspects may have beaten and abused the victim before her death, including her mother. Pet. App. 140-44.

The district court concluded that Mr. Jones's ineffective assistance claim easily qualified as "substantial," and that state postconviction counsel was ineffective in failing to raise it. The court held that Mr. Jones was therefore entitled to proceed with the claim under *Martinez*. Pet. App. 181.

The district court then examined the evidence already developed and granted relief on the merits of the ineffective assistance of trial counsel claim. Pet. App. 181-82. The court concluded that Mr. Jones "demonstrated that trial counsel performed constitutionally deficiently when he failed to perform an adequate pretrial investigation, leading to his failure to uncover key medical evidence [regarding the timing of events], as well as his failure to impeach the state's other physical and eyewitness testimony with experts who could support the chosen defense." Pet. App. 181. "[C]ounsel's deficient investigation," the court further concluded, "pervaded the entire evidentiary picture" and "render[ed] the result [of Petitioner's trial] unreliable." Pet. App. 161. "Had [Mr. Jones's] counsel adequately investigated and presented medical and other expert testimony to rebut the State's theory that [he] beat and sexually assaulted [the victim] on the afternoon of May 1, 1994, there is a reasonable probability that the jury would not have unanimously convicted

[Mr. Jones] of any of the counts with which he was charged." Pet. App. 167.

The court therefore granted relief and ordered Mr. Jones released (after 25 years on Arizona's death row), unless the state promptly retries him with competent counsel. Pet. App. 182.

C. The state moved to stay that order in district court and argued that the court erred by considering evidence developed at the *Martinez* hearing. *Jones v. Ryan*, No. CV-01-00592 (D. Ariz. Sept. 12, 2018), Doc. 308. It contended that section 2254(e)(2) barred the consideration of that evidence. *Id*. at 3. As the district court described it, the state's position was that "under *Martinez*, a petitioner may conduct extensive lengthy and expensive discovery, be permitted a full hearing on the substantiality of an [ineffective assistance] claim, and successfully demonstrate the ineffectiveness of both [postconviction] and trial counsel, only to have the claim itself denied because the Court's discretion to hold an evidentiary hearing to resolve disputed issues of material fact is circumscribed by § 2254(e)(2)." *Jones v. Ryan*, No. CV-01-00592, 2018 WL 5066494, at *2 (D. Ariz. Oct. 17, 2018).

The district court rejected that argument and denied the stay, explaining that "it is simply illogical, and extraordinarily burdensome to the courts and the litigants, in a post-*Martinez* world, for a court to allow full evidentiary development and hearing on the *Martinez* 'claim,' but not allow consideration of that very same evidence as to the merits of the underlying trial-counsel [ineffectiveness] claim because his

constitutionally ineffective [postconviction] counsel failed to raise that claim." *Id.* at *4.

D. The Court of Appeals unanimously affirmed the district court's grant of habeas relief. Pet. App. 5-6. The court agreed that, had trial counsel performed competently by uncovering the ample exonerating evidence then in existence, "there is a reasonable probability that the jury might have arrived at a different conclusion on the question of whether Jones had inflicted the injuries or knowingly failed to seek care [for the victim]." Pet. App. 5.

The court rejected the state's argument that section 2254(e)(2) barred the district court from considering evidence of trial counsel's ineffectiveness that was developed during the *Martinez* proceedings. Writing for the court, Judge Clifton "conclude[d] that 28 U.S.C. § 2254(e)(2) does not prevent a district court from considering new evidence, developed to overcome a procedural default under *Martinez v. Ryan*, when adjudicating the underlying claim on de novo review." Pet. App. 20. Therefore, "the district court properly considered evidence adduced at the *Martinez* hearing to determine whether Jones's [ineffective assistance] claim was excused from procedural default when determining the merits of Jones's underlying [ineffective assistance] claim even though this evidence was not before the state court." Pet. App. 51.

As in *Ramirez*, the Ninth Circuit denied rehearing, with eight judges dissenting. Pet. App. 187.

REASONS FOR DENYING THE WRIT

I. The Cases Do Not Present The Same Issue And Are Inappropriate Vehicles For Review.

The State of Arizona has filed a single cert petition in these two separate cases, asserting that they jointly present the question whether the "equitable rule this Court announced in *Martinez v. Ryan* render[s] 28 U.S.C. § 2254(e)(2) inapplicable to a federal court's merits review of a claim for habeas relief." Pet. i. Neither case, however, presents that question, and each case has significant vehicle problems strongly counseling against the Court's review.[3]

A. In *Ramirez*, the state waived the argument it now makes regarding the application of section 2254(e)(2). The state never raised the statutory argument it makes here in its panel briefs or at oral argument in the Court of Appeals. *See Ramirez v. Ryan*, No. 10-99023 (9th Cir. Mar. 9, 2018), Doc. 37. Amici assert that "[t]he *Ramirez* panel… chose simply to blind itself to section 2254(e)(2)." Amicus Br. 13. But the state presented no such issue for the appellate panel to consider. The state only later raised an argument based on section 2254(e)(2) in its petition for rehearing en banc. *See Ramirez v. Ryan*, No. 10-99023 (9th Cir. Oct. 17, 2019), Doc. 79, at 7-16. As a result of the state's own litigation position, the Court of Appeals' opinion did not mention the statute, rule on its

[3] Given the cases' significant legal and procedural differences, there is a substantial question as to whether the petition is proper under Supreme Court Rule 12.4. The petition should be denied regardless, for the reasons set forth in this brief.

application, or in any way address the statutory question the petition now seeks to raise.[4]

The state not only failed to press its current statutory argument; it made arguments directly contrary to its current position. Without objecting to the expansion of the record to include key evidence introduced for the first time in federal court, which was attached to Mr. Ramirez's supplemental *Martinez* brief, the state told both the district court and the Court of Appeals panel that they should rule on the merits of Mr. Ramirez's habeas petition. *Supra* 5-6; Pet. App. 269, 291; *Ramirez v. Ryan*, No. 10-99023 (9th Cir. Mar. 9, 2018), Doc. 37, at 58. At oral argument in the Court of Appeals, the state's counsel, in response to a question, represented that the "State was content with the state of the record." Oral Arg., 2019 WL 1405619, at 43:55. Yet the state now argues in the petition that section 2254(e)(2) should have barred the district court from consulting the evidence not previously

[4] While the state made no argument based on the statute in its panel appeal briefs, the state cited section 2254(e)(2) in the "standard of review" section of its opening brief, noting uncontroversially that "[h]abeas petitioners may introduce new evidence in federal court only for claims that are outside the constraints of § 2254(d) and reviewed *de novo*, unless inhibited by § 2254(e)(2)'s requirements." *Ramirez v. Ryan*, No. 10-99023 (9th Cir. Mar. 9, 2018), Doc. 37, at 40. But the state never argued in its brief that those requirements "inhibit" evidentiary development here. To the contrary, the state contended that "evidentiary development [was] not warranted" only because further development would not, in its view, assist the court in adjudicating the ineffective assistance claim—not because of any statutory prohibition. *Id.* at 58.

introduced in state court. The state has forfeited that position by virtue of its actions in the case.

B. *Jones* also does not present the question the state poses for review. The Court of Appeals in *Jones* did not approve a new evidentiary hearing or evidentiary development on the merits of Mr. Jones's habeas claim. Instead, it merely concluded that section 2254(e)(2) did not bar the district court from considering the evidence *already presented* in the *Martinez* hearing when subsequently considering the merits of Mr. Jones's habeas claim. Pet. App. 4-5 ("[w]hen a district court holds an evidentiary hearing to determine whether a petitioner's claim is excused from procedural default under *Martinez*," section 2254(e)(2) does not prohibit the district court from "consider[ing] *that same evidence*" when reviewing the underlying claim on its merits (emphasis added)). That modest holding poses, at most, a side issue, and does not present the primary question the state raises in its petition.

Moreover, if the Court were to grant review in *Jones*, it would have to consider whether the fact-bound circumstances of the case implicate the text of section 2254(e)(2) at all. Section 2254(e)(2) provides that if the petitioner "failed to develop the factual basis of a claim in State court proceedings," the district court "shall not hold an evidentiary hearing on the claim," subject to exceptions not relevant here. 28 U.S.C. § 2254(e)(2).[5] In *Jones*, however, the district

[5] This Court has interpreted this language to preclude not just formal evidentiary hearings, but also the new introduction of other forms of evidence for the purposes of supporting the

court merely consulted evidence already before the court from the undoubtedly proper *Martinez* phase of the proceedings. It did not "hold an evidentiary hearing" to develop the factual basis for Mr. Jones's ineffective assistance of trial counsel claim or accept any other evidence for the purpose of supporting the claim. *See Holland v. Jackson*, 542 U.S. 649, 652-53 (2004).

Moreover, *Jones* is a paradigm example of *Martinez* operating exactly as this Court envisaged, within its confined limits. Mr. Jones suffered egregiously deficient postconviction representation that prevented him from developing a meritorious ineffective assistance of trial counsel claim that, as the district court and Court of Appeals recognized, raises grave doubts about his guilt. *See* Pet. App. 5, 167. The opportunity *Martinez* affords to present the claim in federal court may prevent the execution of an innocent person.

II. There Is No Circuit Conflict On The State's Question Presented.

A. Not only is the state's question not properly presented by either of these cases, but it also implicates no conflict of authority in the circuit courts. Indeed, the two other courts of appeals that have

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claim. *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004). That makes no difference here, where the evidence at issue was already properly introduced during the *Martinez* proceedings to excuse the procedural default.

addressed the interaction between *Martinez* and section 2254(e)(2) have rejected the state's position.

The Eighth Circuit holds that if "postconviction counsel's alleged ineffectiveness" establishes "cause for any procedural default" under *Martinez*, then "the district court is authorized under 28 U.S.C. § 2254(e)(2) … to hold an evidentiary hearing on the claims." *Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013). And the Sixth Circuit has likewise held that section 2254(e)(2) permits a habeas petitioner who overcomes a default under *Martinez* to pursue "full reconsideration of the claims," with the possibility of further evidentiary development, because he "has not yet been able to develop a factual record in support of his ineffective-assistance claim." *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 279 (6th Cir. 2019). These conclusions accord with the Ninth Circuit's decisions here.

Neither the petition nor petitioners' amici allege a circuit conflict. And their vague insinuations of "perplex[ity]," Amicus Br. 21, and "tension in the caselaw," Pet. 24, cannot withstand scrutiny. Amici note that the Fourth, Seventh, and Eleventh Circuits have allowed evidentiary development of a claim whose default is excused under *Martinez*, without analyzing section 2254(e)(2). Amicus Br. 21-22 (collecting cases). Those results are entirely consistent with the decisions here in *Jones* and *Ramirez*.

Beyond the *Martinez* context, which is the exclusive focus of the petition, "every" court of appeals to have considered the matter agrees that section 2254(e)(2) does not prevent evidentiary development

if "an applicant's claim went 'undeveloped in state court' because of something other than his own neglect." *Thompson v. Lumpkin*, No. 20-5941, 2021 WL 1072284, at *1-2 (U.S. Mar. 22, 2021) (Kagan, J., concurring in the denial of certiorari on a separate question and noting the uniformity in the circuit courts). For example, analyzing claims relating to prosecutorial misconduct, the Fifth Circuit held that if a petitioner "establishes cause for overcoming" the procedural default, "he has certainly shown that he did not 'fail to develop' the record under § 2254(e)(2)," because the "undeveloped record is [not] a result of his own decision or omission." *Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000).

B. Moreover, the relevant issues have not percolated in the courts of appeals such that this Court's review would be appropriate at this time. In the nearly ten years since the decision in *Martinez*, only three circuits have directly considered the relationship between *Martinez* and section 2254(e)(2).[6] The theory pressed by the state simply has not been sufficiently aired in the courts of appeals, and ancillary questions and collateral consequences that the

[6] The state is therefore incorrect when it asserts that *Jones* and *Ramirez* are the "first time in published opinions" that courts have held that section 2254(e)(2) does not bar additional evidentiary development after a default has been excused under *Martinez*. Pet. 31. *Sasser* and *White*, *supra* 16, do just that (and *Ramirez* said nothing about the statute at all). In any event, the state's accounting that these cases are the "first" only underscores that the issue is insufficiently developed and does not warrant this Court's review.

position, if adopted, might pose have not even been identified, much less fully analyzed.

The amici prove the point. When they note that the Fourth, Seventh, and Eleventh Circuits have also allowed evidentiary development of a claim whose default is excused under *Martinez*, they admit that those opinions do not even "referenc[e]" section 2254(e)(2). Amicus Br. 21-22. Those courts have simply not considered the issue that the petition now raises. [7]

[7] Amici assert that an Eleventh Circuit panel held in an unpublished decision "that a district court's discretion to allow evidentiary development about a *Martinez* claim is limited by section 2254(e)(2)." Amicus Br. 22. The cited decision does not support any claim of "tension" in the caselaw. In that case, the district court determined that the procedural default was attributed to the habeas petitioner under *Martinez* because the ineffective assistance of trial counsel claim was not "substantial." *Lucas v. Fla. Dep't of Corr.*, No. 19-14394, 2021 WL 71625, at *3 (11th Cir. Jan. 8, 2021). The decision's brief reference to section 2254(e)(2) occurs in, and is limited to, the context in which *Martinez* does *not* excuse a default. *See id.* at *5-6. The decision therefore does not address the issues relevant here, which pertain to merits consideration of ineffective assistance of trial counsel claims once *Martinez* does excuse a default. The Eleventh Circuit panel also ruled that the district court did not abuse its discretion in reaching its conclusion without an evidentiary hearing because the evidence the petitioner wished to develop was categorically irrelevant to the elements of an ineffective assistance claim. *Id.* at *5. The Eleventh Circuit's precedent thus properly permits "federal evidentiary development in conjunction with *Martinez*," though the court has not issued precedential opinions on section 2254(e)(2) in this context, as amici note. Amicus Br. 21.

The amici also list habeas cases in which district courts within the Fifth Circuit have conducted or considered conducting evidentiary hearings. Even though the Fifth Circuit broadly permitted such hearings in *Barrientes*, 221 F.3d at 771, amici contend that there is "tension" among district courts on related issues after *Martinez*. Amicus Br. 19-20. At most, that assertion shows that the issue has not even been conclusively resolved within the Fifth Circuit. This only highlights the need for further percolation.

The *Ramirez* and *Jones* cases underscore why this Court's review of the question presented would be premature. In *Ramirez*, as shown above, there was no discussion of section 2254(e)(2) because the state failed to press its statutory argument in its briefs on appeal.[8] *Supra* 5-6. And *Jones* involved the separate question of whether evidence already properly introduced in a *Martinez* hearing may subsequently be considered on the merits, not whether a new evidentiary hearing is permitted or further development allowed. Thus, even the Ninth Circuit has not had occasion to evaluate the full contours of the state's theory or develop a unified holding.

The insufficient development of the issues—in addition to the lack of a circuit split and the state's forgoing its key arguments below—makes the Court's

[8] The same was true in *White*, in which the Sixth Circuit held that section 2254(e)(2) permits a *Martinez*-postured petitioner to develop the previously defaulted claim. 940 F.3d at 279. The State of Ohio did not raise section 2254(e)(2) in its panel appeal brief, and the Court of Appeals addressed the issue only briefly.

review at this time premature and unwarranted. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (citing the Court's usual practice of "permitting several courts of appeals to explore" an issue and "waiting for a conflict to develop" before granting review).

III. The Decisions Below Are Correct.

Review is also unwarranted because both *Jones* and *Ramirez* were correctly decided.

A. The state in its petition variously asserts that the Court of Appeals "cast aside" or held "inapplicable" section 2254(e)(2) and "concluded that [the statute] does not apply to a merits review conducted after a claim has passed through *Martinez*'s narrow gateway." Pet. i, 4, 18; *see* Amicus Br. 3. The petition further paints the Court of Appeals as having in each case improperly held that an equitable rule overrides a statute. *See* Pet. 18-24. But all of these descriptions of the decisions below are unmoored from reality. In *Ramirez*, the Court of Appeals did not opine on the statute because the state had not raised it. *Supra* 5-6. And in *Jones*, the Court of Appeals correctly and narrowly held that the statute does not bar the consideration of evidence already presented. *Supra* 11. The court did not ignore the statute, cast it aside, or find that it was displaced by an equitable exception.

B. Putting the two actual cases to the side, the state's broader proposition—that section 2254(e)(2) categorically bars evidentiary development of an ineffective assistance of trial counsel claim whose default *Martinez* does not attribute to the prisoner—is without merit. The state's argument is based on

misreading the language of section 2254(e)(2) and this Court's precedents interpreting it. And adopting the state's misreading would lead to absurd results.

Section 2254(e)(2) provides generally that the district court "shall not hold an evidentiary hearing" on a claim if a habeas petitioner "has failed to develop the factual basis of [the] claim in State court proceedings." The Court has interpreted this language to mean that evidentiary development is foreclosed only if a habeas petitioner is deemed *at fault* for not developing the claim in state court. *Williams*, 529 U.S. at 433.

This holding followed from the plain text of the statute. The Court explained in *Williams* that the word "'fail' connotes some omission, fault, or negligence on the part of the person who has failed to do something." *Id.* at 431. The Court determined that "Congress used the word 'failed' in the sense just described" in crafting section 2254(e)(2). *Id.* at 432. "Had Congress intended a no-fault standard, it would have had no difficulty in making its intent plain. It would have had to do no more than use, in lieu of the phrase 'has failed to,' the phrase 'did not.'" *Id.* The Court therefore concluded that section 2254(e)(2) bars an evidentiary hearing only where the habeas petitioner is at fault for the lack of development in state court. *Id.*; *see also Holland*, 542 U.S. at 652-53 (section 2254(e)(2) permits evidentiary development "if [the prisoner] was not at fault in failing to develop that evidence in state court").

Ordinarily in the habeas context, a prisoner bears responsibility for not raising claims in state court

proceedings. And this responsibility normally extends to decisions made by counsel, because counsel's decisions are usually imputed to the prisoner. *See Coleman v. Thompson*, 501 U.S. 722, 755 (1991). In most cases, therefore, a prisoner who does not develop a claim in state court will be deemed at fault for the lack of development and thus barred from presenting further evidence in federal court under section 2254(e)(2).

But in the narrow circumstance addressed in *Martinez*, the prisoner is not deemed at fault for not raising or developing his claim in state court. That is because his state postconviction lawyer was constitutionally ineffective. As the Court explained in *Martinez*, *Coleman*'s holding that a prisoner ordinarily "bears the risk of negligent conduct on the part of" his attorney does not extend to the case of "attorney errors in initial-review collateral proceedings" so serious that they violate the *Strickland* standard for minimally competent performance. *Martinez*, 566 U.S. at 10, 16. A prisoner who fails to present or develop a claim due to ineffective state postconviction representation was, in the Court's words, "obstructed in complying with the State's established procedures." *Id*. at 13. A habeas petitioner in this setting is not responsible for the "omission, fault, or negligence on the part of" his ineffective counsel, *Williams*, 529 U.S. at 431, and is not deemed at fault for the failure to develop the claim.

As state amici observe, section 2254(e)(2)'s "evidentiary limitation requires habeas petitioners to present their *best* case before the state courts, not to sandbag in favor of bringing their best evidence in a

later-in-time federal forum." Amicus Br. 3. But by definition, a *Martinez*-postured habeas petitioner was not "sandbag[ging]" in state court—he was prevented from presenting his "best case" in state court because his state-appointed counsel fell below *Strickland's* baseline for minimally competent performance. Section 2254(e)(2) accordingly does not preclude evidentiary development of the claim in federal court, because the petitioner is not at fault for "fail[ing] to develop" the claim in state court within the meaning of the statute. *Williams*, 529 U.S. at 433.

The petition acknowledges that section 2254(e)(2) forecloses evidentiary development only when the petitioner is deemed at fault for failing to develop the claim in state court. Pet. 19-20. But the state then erroneously suggests that the statute bars development anytime a lawyer fails to develop a claim, regardless of whether the lawyer's errors are properly imputed to the prisoner. Pet. 20. In so arguing, the state relies (at Pet. 19-20) on a passage from *Williams* that reads, "failure to develop the factual basis of a claim is not established unless there is [a] lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." 529 U.S. at 432. But *Williams* is clear that section 2254(e)(2) does not penalize a prisoner for errors committed through "no fault of his own." *Id.* at 429.

As this Court explained in *Williams*, Congress intended section 2254(e)(2) to foreclose evidentiary development only when the prisoner is *deemed* at fault, either directly or constructively, for the failure to develop the claim. *See id.* at 431-35. The state's quoted passage simply reflects the "well settled principle[] of

agency law," that a prisoner ordinarily "bears the risk" of counsel's errors. *Coleman*, 501 U.S. at 754. In a *Martinez*-postured case, unlike an ordinary case, the prisoner is not properly deemed at fault for counsel's errors, and by definition there has not been a failure to develop the claim through acts attributable to the prisoner. *See Martinez*, 566 U.S. at 10, 16.

C. The state's misreading of section 2254(e)(2) and this Court's precedents would lead to absurd results. It would mean that *Martinez* is nothing but a time-consuming Catch-22. In the state's view, a habeas petitioner who can overcome a procedural default of a claim (with newly developed evidence), is then prohibited from proving the underlying claim (whether with the evidence already developed or additional evidence). Preventing the district court from considering evidence not in the state court record in evaluating the merits of such a claim would mean that the claims will almost always fail, no matter their merit, because the claims at issue in *Martinez* cases almost always do not have developed state court records.[9]

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[9] Amici surmise that "there are many record-based ineffective-assistance claims for which *Martinez* will still do work" under the state's position, such as claims involving a failure to request proper jury instructions and per se ineffectiveness. Amicus Br. 16. But the vast majority of ineffective assistance claims cannot be resolved on the trial record alone, as *Martinez* itself repeatedly acknowledged. *See* 566 U.S. at 13 ("Ineffective-assistance claims often depend on evidence outside the trial record."); *see also Trevino v. Thaler*, 569 U.S. 413, 424 (2013) ("[T]he inherent nature of most ineffective assistance of trial counsel claims means that the trial court record will often fail to contain

Judge Clifton captured this point succinctly at oral argument in *Jones*. He asked the state's counsel: "Are you aware of the concept of Catch-22, because this seems like exactly that. You're saying OK, we're opening the door to the court to consider a claim that has never been developed so once you get there, there will be nothing for you actually to consider and act on." *Jones* Oral Arg., 2019 WL 8192898, at 1:09:35.

The state's position would mean that there would be no forum in which the prisoner ever has a fair opportunity to present and develop his ineffective assistance of trial counsel claim. The trial and direct appeal by definition offered no fair opportunity to do so because state procedural rules require that ineffective assistance claims be brought for the first time in postconviction proceedings. *Martinez*, 566 U.S. at 11. State postconviction proceedings similarly offered no fair opportunity because counsel's state-provided representation was so deficient that it "impeded or obstructed" the presentation of the issues. *Id*. at 13. The only remaining opportunity is federal habeas. And there, if the state's position were adopted, the prisoner would "be looking at a vacuum, basically," because he would be stuck with the empty record he never had a chance to develop, because of his lawyer's dereliction. *Jones* Oral Arg., 2019 WL 8192898, at 1:09:25 (Judge Rawlinson).

That result cannot be squared with this Court's reasoning in *Martinez*. *Martinez* was animated by the principle that a prisoner must have some court where

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the information necessary to substantiate the claim.") (internal quotation marks omitted).

he can fairly present the full merits of a substantial ineffective assistance of trial counsel claim. *See* 566 U.S. at 11-12. And it cannot be squared with the Court's actual disposition in *Martinez*. The Court's ruling left open Mr. Martinez's ineffective assistance of trial counsel claim—the type of claim that "often turns on evidence outside the trial record." 566 U.S. at 12, 18.

The state's misreading of section 2254(e)(2) would also put district court judges in nonsensical positions. It would make no sense to call upon the district court to determine whether an ineffective assistance claim is sufficiently "substantial" as a threshold matter, if the claim would not then be subject to further evidentiary development before being actually adjudicated on the merits. *Martinez*, 566 U.S. at 14. And the state's position would mean that a district court would have to do the work of conducting a *Martinez* hearing, only for the proceeding to be a largely empty charade and for the underlying ineffectiveness claim to reach a near-automatic dead end.

Jones provides a particularly graphic example of that absurdity. The state's position would require the district court judge to learn of Mr. Jones's likely innocence through a hearing he was authorized to conduct, but then would also require the judge to pretend that this exculpatory evidence does not exist and, as a result, to deny deserved habeas relief in a capital case. That view of how the statute is meant to function is wholly untenable.

IV. The Asserted Nationwide Importance Of The Issue Does Not Support Review.

In the end, the only ground for granting review that the state invokes is its assertion that "[t]he relationship—or lack thereof—between *Martinez* and § 2254(e)(2) is a recurring issue of nationwide importance." Pet. 28. But the state's decision in *Ramirez* not even to raise the issue in its panel brief to the Court of Appeals belies its importance and thoroughly debunks the state's claim of sovereign injury, Pet. 31-32. *Supra* 5-6, 12-14. So does the infrequency with which the issue has arisen—reflecting that other states have been applying *Martinez* in a straightforward manner. *Supra* 17-19.

The cases the state cites for its assertion of nationwide importance do not support this Court's intervention. First, the state cites this Court's opinion in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), and incorrectly asserts that it "left open" the question the state presents here. Pet. 3. *Ayestas* concerned an entirely different issue of whether the Fifth Circuit erred in affirming a denial of a request for reasonable litigation expenses under 18 U.S.C. § 3599(f) for a prisoner trying to prove a *Martinez* claim. Realizing that the Court "might not accept the Fifth Circuit's reading of § 3599(f), respondent devote[d] a substantial portion of her brief to an alternative ground for affirmance that was neither presented nor passed on below." 138 S. Ct. at 1095. That "alternative ground" was that the request for expenses under section 3599(f) was futile because section 2254(e)(2) would bar the use of any newly developed evidence in federal court. *Id.* This statutory issue, which the state now asserts demands

this Court's immediate attention, had not even been presented in the courts below, and the Court "decline[d] to decide in the first instance whether respondent's reading of § 2254(e)(2) is correct." *Id*.

Similarly, the state's unfiltered laundry list of 18 *Martinez* remands in the decade since *Martinez* was decided does not support review. *See* Pet. 29-30. The state does not even purport to isolate cases where new evidence was considered after a *Martinez* remand—or where an evidentiary hearing was actually held. An analysis of the cases the state cites shows just how little support they provide for the state's arguments or its claim of exceptional importance:

- In nine of the cases, there was no *Martinez* evidentiary hearing and the district court denied *Martinez* relief. These cases therefore do not implicate "[t]he relationship—or lack thereof—between *Martinez* and § 2254 (e)(2)." Pet. 28. *Djerf v. Ryan*, No. 08-99027; *Hooper v. Shinn*, No. 08-99024; *Jones (Danny) v. Ryan*, No. 07-99000; *Kayer v. Shinn*, No. 09-99027; *Lee (Chad) v. Ryan*, No. 09-99002; *Lee (Darrel) v. Ryan*, No. 10-99022; *Martinez v. Ryan*, No. 08-99009; *Smith v. Ryan*, No. 10-99002; *Walden v. Ryan*, No. 08-99012.

- Six of the cases remain pending in district court, but have had no evidentiary hearing at this time. *Detrich v. Ryan*, No. 08-99001; *Doerr v. Ryan*, No. 09-99026; *Greene v. Ryan*, No. 10-99008; *Rienhardt v. Ryan*, No. 10-99000; *Schackart v. Ryan*, No. 09-99009; *Spears v. Ryan*, No. 09-99025.

- In one case, the petitioner died before a previously granted *Martinez* evidentiary hearing could be held, *Lopez v. Schriro*, No. 09-99028, and, in another, the petitioner died after the hearing and before any ruling on the claims, *Salazar v. Ryan*, No. 08-99023.

- In the remaining case the state cites—*Gallegos v. Ryan*, No. 08-99029—the consideration of new evidence of trial counsel's ineffectiveness, developed during and after *Martinez* proceedings, led directly to a grant of habeas relief; *i.e.*, the exact circumstances that *Martinez* envisioned. After the Ninth Circuit remanded for the district court to consider whether Mr. Gallegos could proceed under *Martinez*, the court found that postconviction counsel performed ineffectively by failing to raise a claim that trial counsel failed to investigate and present mitigating evidence at sentencing. *Gallegos v. Shinn*, No. CV-01-01909, 2020 WL 7230698, at *1 (D. Ariz. Dec. 8, 2020). After excusing the procedural default of the claim based on postconviction counsel's misfeasance, the court in December 2020 granted Mr. Gallegos habeas relief in the form of resentencing. *Id*. at *28. Abandoning any argument that section 2254(e)(2) barred the district court from considering Mr. Gallegos's new evidence, Arizona did not appeal the decision.

In sum, not a single one of the 18 cases on the state's list supports the state's central assertion that the question in the petition is of exceptional importance. In addition, the state's claim that these

cases show that *Martinez* remands are causing undue delays in habeas litigation is unsupported. Pet. 30. In many of the cases the state cites, delays were related to additional proceedings pursuant to this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and the Ninth Circuit's decision in *McKinney v. Ryan*, 813 F.3d 798, 802 (9th Cir. 2013) (en banc) (holding that the Arizona Supreme Court had violated *Eddings* over the course of 15 years by applying a "causal nexus test for nonstatutory mitigation that forbade as a matter of law giving weight to mitigating evidence … unless the background or mental condition was causally connected to the crime"). *E.g.*, *Detrich v. Ryan*, No. 08-99001; *Doerr v. Ryan*, No. 09-99026; *Greene v. Ryan*, No. 10-99008; *Smith v. Ryan*, No. 10-99002; *Walden v. Ryan*, No. 08-99012.

Amici, meanwhile, represent that the issue of how section 2254(e)(2) interacts with *Martinez* "has perplexed courts nationwide." Amicus Br. 21. But amici then proceed to cite case after case where the issue was not even mentioned, much less decided. *Id.* at 21-22; *supra* 18. Amici proffer a list of Fifth Circuit cases that they say shows the importance of the question presented, Amicus Br. 17-20, but they acknowledge that "[t]he Fifth Circuit has passed on numerous … opportunities to resolve this issue." *Id.* at 18. In short, states have not deemed the issue important enough to raise it with any regularity, and lower courts have not deemed the issue important enough to decide it where it has been raised.

Ultimately, the undifferentiated listing of *Martinez* cases by the state and its amici lays bare the target of the petition: *Martinez* itself. No sound basis

exists, however, to revisit this Court's settled precedent. The state makes no effort even to argue it meets the stringent standards for asking this Court to overrule its own decision.

Moreover, curtailing *Martinez* would resurface the very constitutional issues regarding the right to counsel in postconviction proceedings that *Martinez* was carefully calibrated to resolve. Indeed, the cases cited by the state and amici show that *Martinez* has been working exactly as this Court prescribed. In cases where there are no credible underlying claims of ineffective assistance of trial counsel, no time-intensive evidentiary hearings are taking place. And in cases where the underlying claims are "substantial," the additional evidentiary development is properly revealing the extent of trial counsel's ineffective performance.

No case illustrates that point better than *Jones*. Mr. Jones's situation fell within the narrow circumstances encompassed by *Martinez*. And the limited inquiry that *Martinez* allows yielded compelling evidence that had trial counsel performed a minimally competent investigation of the underlying facts, that investigation would have established that Mr. Jones could not have committed the acts that led to the victim's death. Now, after spending 25 years on death row, he has been ordered released or retried. Were it not for *Martinez*, Mr. Jones would have had no recourse.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jon M. Sands
Federal Public Defender
District of Arizona
Timothy M. Gabrielsen*
Cary Sandman
Assistant Federal Public Defenders
407 West Congress Street
Suite 501
Tucson, Arizona 85701
(520) 879-7614
Tim_gabrielsen@fd.org

**Counsel of Record*
Counsel for Respondents

March 29, 2021