NO. 20-1009

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID SHINN, ET AL.,

Petitioner,

v.

DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,

Respondents.

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

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BRIEF OF THE ARIZONA CAPITAL REPRESENTATION PROJECT & ARIZONA CENTER FOR DISABILITY LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Arizona Capital Representation Project (ACRP) is a statewide non-profit legal services organization dedicated to improving the quality of representation afforded to Arizona capital defendants. ACRP serves its mission through direct representation, *pro bono* training and consulting services, data collection, and education. ACRP tracks and monitors every Arizona capital case, from pretrial through clemency or execution.

ACRP has a particularized and informed perspective on how the death penalty operated during the relevant time period and how it currently operates in the State of Arizona.

The Arizona Center for Disability Law (ACDL) is the federally-mandated Protection and Advocacy ("P&A") agency for people with disabilities in Arizona. 42 U.S.C. §10801 et seq.; 42 U.S.C. §15041 et seq. The P&A mandate grants ACDL authority to "pursue administrative, legal, and other appropriate remedies" to ensure the protection of, and advocacy for, individuals with [intellectual and other] developmental disabilities in the State. 42 U.S.C. §15043(2)(A)(I).

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[1] Pursuant to Rule 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amicus curiae made a monetary contribution to the preparation or submission of this brief. The parties have provided a blanket written consent to the filing of this brief.

Amici ACDL has an informed perspective on the unique needs of individuals with intellectual disabilities and how their disabilities may impact the ability to process information, communicate, meaningfully participate, and challenge a complex legal system.

SUMMARY OF ARGUMENT

Arizona's post-conviction mechanism plays a unique and critical role in upholding the right to counsel. As such, post-conviction litigation in Arizona demands expert work by high-quality counsel, and even more so in a capital case where the defendant's life is on the line. As summarized by two experienced Arizona capital attorneys:

> PCR [post-conviction] relief is the linchpin between and among the three types of capital review. It is the only opportunity to review non-record issues from the trial and direct appeal stage and it determines what issues can be further reviewed at the federal habeas stage. This fact, combined with consistent court rulings that there is no constitutional right to effective assistance of counsel at the PCR stage, and, therefore, no right to challenge the quality of representation at that stage, makes PCR representation uniquely significant in the field of capital law.

John A. Stookey & Larry A. Hammond, *Arizona's Crisis in Indigent Capital Representation*, 34 Ariz.

Att'y 16, 36-37 (March 1998). When post-conviction counsel fails, there is no other backstop to safeguard the rights to counsel. Where, as in Mr. Ramirez' and Mr. Jones' cases, post-conviction counsel fail in their obligation to investigate and present evidence in support of constitutional claims for relief, *Martinez v. Ryan* acts as the only safety net.

Post-conviction counsel's obligation to investigate and present claims for relief is not new. Since 1989, the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases have detailed counsel's duty to thoroughly investigate her client's case and preserve all potentially meritorious claims for relief. The duty of counsel to investigate and present claims in state post-conviction has been exhaustively covered in scholarship and in continuing legal education for defense counsel because the consequences of failing in those obligations are dire. When facts and claims are not included in a post-conviction petition, the claim is unsubstantiated and unlikely to be found meritorious. Further, the passage of time makes it more difficult to develop facts and claims later, and the strict rules of federal habeas proceedings make it highly unlikely that a federal court would consider untimely developed facts or claims.

This Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012) offers an important safeguard for habeas petitioners to have their claims of ineffective assistance of trial counsel heard, even where post-conviction counsel was ineffective in failing to raise or develop facts in support of such claims. Should this Court accept Petitioner's arguments on the

intersection of *Martinez* and 28 U.S.C.A. §2254(e)(2), *Martinez* will be rendered meaningless.

ARGUMENT

I. ARIZONA LACKS A FUNCTIONING SYSTEM FOR THE APPOINTMENT OF QUALIFIED POST-CONVICTION COUNSEL

Respondents Ramirez and Jones are before this Court today because they were represented in post-conviction proceedings by unqualified counsel who failed to fulfill their basic obligations, including investigating and presenting evidence of Mr. Ramirez' intellectual disability and Mr. Jones' innocence. Unfortunately, Arizona has long struggled to appoint qualified counsel in post-conviction, despite that post-conviction is a critical proceeding in this state as it offers the first and only opportunity to present extra-record evidence and litigate trial counsel's ineffectiveness. *Martinez v. Ryan*, 566 U.S. 1, 6 (2012). Arizona has periodically appeared to recognize what would be necessary to ensure adequate capital post-conviction representation, but it has never successfully fulfilled those needs. Faced with the inability to meet its own standards, the State has repeatedly lowered those standards or appointed counsel who expressly do not meet them.

A. Arizona's Appointment Standards are Inadequate

In 1996, Congress enacted the Anti-terrorism and Effective Death Penalty Act (AEDPA), "intended to 'streamline Federal appeals for convicted criminals sentenced to the death penalty' but not to make

substantive changes in the standards for granting the writ." Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 111 (4th ed. 2001) (quoting Statement of the President of the United States upon Signing the Antiterrorism Bill, 32 Weekly Comp. Pres. Doc. 719 (White House, April 24, 1996)). AEDPA's "opt-in" provisions allowed states that offered certain procedural benefits to post-conviction petitioners to take advantage of abbreviated deadlines for filing and resolving federal habeas proceedings. Briefly, after the passage of AEDPA and in the interest of benefiting from the opt-in provisions, the Arizona Legislature passed a bill that would have created a state-wide capital defense office, but Governor Symington vetoed it. S.B. 1349, 42nd Leg., 2d Reg. Sess. (Ariz. 1996); *see also* Larry Hammond & Robin Maher, *The ABA Guidelines: The Arizona* Experience, 47 Hofstra L. Rev. 137, 139 (2018). Without a capital defense office, the Arizona Supreme Court was left to administer capital post-conviction appointments. Ariz. Rev. Stat. Ann. § 13-4041(B) (2014). The court adopted Rule 6.8 of the Arizona Rules of Criminal Procedure, which lays out minimum standards for capital trial, appellate, and post-conviction counsel.

The Arizona Supreme Court initially created minimum standards and a committee of capital defense experts to screen attorneys seeking capital post-conviction appointments. *In re Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases*, No. 96-63 (Ariz. 1996). The committee was tasked with maintaining and screening applicants for a list of qualified post-conviction lawyers. The committee sent hundreds of letters

soliciting applications, received 16 applications and approved only four. Stookey & Hammond, 34 Ariz. Att'y at 16, 19.

When the screening process did not yield nearly enough qualified attorneys, neither the legislature nor the Arizona Supreme Court took any action to recruit qualified capital lawyers, such as increasing the pay rate (which was a flat rate of $7,500 at the time), or offering training. Rather, the court abandoned the standards it promulgated and instead appointed unqualified lawyers. Stookey & Hammond at 16, 19; Hammond & Maher at 140. It also disbanded the screening committee. *In re Disbanding of the Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases*, No. 2001-55 (Ariz. May 9, 2001).

Recognizing serious problems with the administration of Arizona's death penalty, the Arizona Attorney General formed a commission to make recommendations. That commission called for the creation of a state-wide public defender office to handle capital post-conviction cases. Office of the Att'y Gen., State of Ariz., Capital Case Comm'n Final Report (2002), at 14. The State Legislature briefly established an Office of the State Capital Post Conviction Defender. But the office was so severely underfunded[2] that it employed just three attorneys—

[2] In 2009, the Post Conviction Defender filed a notice informing the post-conviction court that the legislature had sufficiently reduced their budget that every staff member, except a legal assistant, had to reduce their hours. State v. Cromwell,

only one of whom was qualified to serve as lead counsel—and accepted only a handful of the growing backlog of capital post-conviction cases. The Legislature cut the office's budget so severely that it was forced to lay off staff, reduce existing staff salaries, and eliminate all training.[3] When the sole capitally qualified attorney resigned in April 2011, the capital post-conviction petitioners were left in limbo for years waiting for qualified counsel. *See, e.g.*, *State v. Cromwell*, CR2001-095438, Maricopa County (approximately one year, four months wait); *State v. Glassel*, CR2000-006872, Maricopa County (approximately one year, three months wait). The failed office was closed within five years.

Nearly a decade ago, in July 2012, the Maricopa County Office of the Legal Advocate[4] absorbed the statewide capital post-conviction office. The Office of the Legal Advocate currently represents only six of 36

CR2001-095438, Notice of Budget Reduction (12/28/2009). The lawyers in the office had to reduce their hours by 25-33%.

[3] During this period, the ABA identified Arizona as a jurisdiction in "dire" need of assistance. ABA Death Penalty Representation Project, Jurisdiction in Need: Arizona, https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2009/summer/jurisdiction_in_needarizona/ (June 1, 2009).

[4] Maricopa County, which includes the Phoenix metro area, has three dedicated offices to manage indigent defense cases and conflicts: the Office of the Public Defender, the Office of the Legal Defender, and the Office of the Legal Advocate. Maricopa County also maintains a panel of private lawyers through the Office of Public Defense Services. All four of these entities appoint counsel in capital cases.

capital post-conviction petitioners on their original petitions.

B. Arizona's Funding for Capital Post-Conviction Review is Inadequate

The effective representation of a post-conviction client requires an extraordinary combination of skills and experience. Nevertheless, Arizona capital post-conviction counsel are grossly underpaid compared to their colleagues in other jurisdictions. They are also significantly undercompensated relative to Arizona appointed capital trial counsel, and to private criminal defense lawyers with comparable experience. The rate capital post-conviction counsel are paid—$100/hour—was set by statute 22 years ago. Stookey & Hammond, at 16; Ariz. Rev. Stat. § 13-4041(G) (1999).[5] At the time, that rate was intended to incentivize accepting appointments in capital post-conviction cases as the statute had previously set a presumptive cap of $7,500 for a capital post-conviction case. Stookey & Hammond at 18. This enticement was necessary because there were "no qualified attorneys in Arizona who ha[d] agreed to accept appointment in a state post-conviction relief proceeding ('PCR') in a death case" under the existing terms. *Id*. at 17. Indeed, the defense bar recognized that the presumptive cap created "a substantial ethical burden on an attorney either not to take [capital post-conviction] cases or to obtain an 'up front' agreement from the judge that additional funds will be made available…" John A.

[5] The statute also capped payment at 200 hours.

Stookey, Larry A. Hammond, *New Rules on Indigent Representation*, 33 Ariz. Att'y 21, 30 (Feb. 1997).

In the 22 years since the adoption of the hourly rate, the Legislature has *never* increased that rate. Nearly 15 years ago, in 2007, Arizona's Capital Case Task Force recommended an increase to $125/hour,[6] recognizing that the hourly rate was far below the then-current federal capital Criminal Justice Act ("CJA") rate at that time of $153/hour and that an increase was necessary "to attract more private counsel to represent defendants in capital case post-conviction relief proceedings." Arizona Supreme Court Capital Case Task Force, Report of Recommendations to the Arizona Judicial Counsel, at 21 (September 2007), *available at* http://www.azcourts.gov/Portals/74/CCTF/FinalRpt092007.pdf.[7] Meanwhile, the hourly rate for federal CJA

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[6] California began paying $125/hour for capital post-conviction cases in 1998. Stookey & Larry A. Hammond, *Arizona's Crisis in Indigent Capital Representation*, at 39.

[7] In 2007, the Arizona Supreme Court established the Capital Case Task Force "to address capital cases then awaiting trial in Maricopa County." The task force reported findings and recommendations to the Arizona Judicial Counsel, including that the Court create a standing committee "to monitor capital caseload reduction efforts." The court then created the Capital Case Oversight Committee to "continue to study and recommend measures to facilitate capital case reduction efforts, make recommendations for adequate notice to the Supreme Court to assist the Court in making the necessary modifications to its staffing levels and judicial assignments to ensure the timely processing of appeals, and develop recommendations for any formal policies deemed necessary."

lawyers in capital cases has continued to rise on a regular basis—the current rate is $197/hour. http://www.azd.uscourts.gov/attorneys/cja/rates (last visited August 20, 2021).

Because the $100 rate is a ceiling, the Arizona Superior Court has held that the law precludes increasing the hourly rate paid to capital post-conviction counsel in individual cases, regardless of the circumstances.[8] By contrast, there is no statutory limit on the payment of capital trial lawyers, who make a minimum of $140/hour for lead counsel in Maricopa County, and in some cases courts have ordered significant increases to their hourly rates.[9] The discrepancy relative to pay earned by private defense counsel is even more significant. In 2016, the median hourly rate for criminal defense lawyers in private practice in Arizona was $259, O. Onisile & R.

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https://www.azcourts.gov/cscommittees/CapitalCaseOversightCommittee.aspx (last accessed July 21, 2020).

[8] Although funding litigation is sealed, ACRP is aware of such litigation through its direct representation and consulting capacities.

[9] *See e.g.* Rubin, *Money Pit: Andy Thomas' Death-Penalty-Laden Years as Maricopa County Attorney*, Phoenix New Times, www.phoenixnewtimes.com/news/money-pit-andy-thomas-death-penalty-laden-years-as-maricopa-county-attorney-6452600 (3/15/12) ($300/hour for lead counsel and $250/hour for co-counsel in *State v. Martinson*, Maricopa CR2004-124662); "Kirk Nurmi, Jodi Arias' Attorney, Could Make Extra $200,000 for Efforts During Trial," Huffington Post, https://www.huffingtonpost.com/2013/05/22/kirk-nurmi-jodi-arias-attorney-200000_n_3320906.html (5/22/13) ($225/hour for lead counsel in *State v. Arias*, Maricopa CR2008-031021); *State v. Redondo*, Maricopa CR2010-106178, Minute Entry (8/17/16) ($200/hour for lead counsel, $140/hour for co-counsel).

DeBruhl, *Attorney Survey: Arizona Lawyers Report on Economics of Practice*, 53 Ariz. Att'y 20, 25 (Sept. 2016), making the prospect of capital post-conviction appointment especially unappealing to panel attorneys. Arizona's compensation thus violates the ABA Guidelines' requirement that "[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation." Guideline 9.1(B), 31 Hofstra L. Rev. at 981. The Arizona Attorney General concluded that capital defense, specifically in post-conviction matters, was "woefully underfunded and understaffed in Arizona." Office of the Att'y Gen., State of Ariz., Capital Case Comm'n Final Report (2002) at 29.

In addition to the extremely low rate paid to post-conviction counsel, Arizona's failure to provide adequate compensation for other key defense team members, such as mitigation specialists, investigators, and experts, creates an additional hurdle to providing high quality representation in capital post-conviction proceedings. Contract mitigation specialists appointed in Maricopa County and Pima County—Arizona's two largest jurisdictions that account for the vast majority of capital cases—currently receive $60/hour, and those jurisdictions currently offer $40/hour for contract investigators. By contrast, the presumptive federal capital rates in Arizona are $125/hour for mitigation specialists and $100/hour for investigators. http://www.azd.uscourts.gov/sites/default/files/cja/CJA%20Service%20Provider%20Rates.pdf (8/15/2020).

Such policies compromise capital post-conviction counsel's ability to recruit the competent team members required by the multi-disciplinary approach to capital defense. 2003 ABA Guideline 4.1, The Defense Team and Supporting Services & Comment (discussing "The Team Approach to Capital Defense"; "National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate "supporting services [including] secretaries[,] investigators[, and] . . . expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencings.") (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992). Although Maricopa County will appoint experts for capital post-conviction matters, they do not fully compensate experts for their travel expenses, such as meals. Maricopa OPDS Billing Guidelines, https://www.maricopa.gov/DocumentCenter/View/58252/OPDS-Billing-Guidelines (last accessed 9/16/21).

In sum, inadequate funding for post-conviction counsel and core defense team members has contributed to the poor quality of representation afforded to Arizona's capital post-conviction petitioners. *Martinez* offers such petitioners, in some circumstances, to raise their claims in federal habeas proceedings, despite the procedural default of those claims due to post-conviction counsel's ineffectiveness. If Arizona is correct in arguing that §2254(e)(2) bars evidentiary development where post-conviction counsel was not diligent, then federal habeas

petitioners are in no better position than they were before *Martinez*. A capital habeas petitioner—even one that is innocent or intellectually disabled—will pay the ultimate consequence for counsel's errors. Res. Br. At 17, 35.

II. ARIZONA'S DEFICIENT APPOINTMENT MECHANISM ROUTINELY RESULTS IN SUBSTANDARD REPRESENTATION

Arizona's ever-evolving—yet ever-deficient—mechanism for appointing and providing resources for post-conviction counsel has led to a long history of atrocious representation in capital post-conviction cases, including in the cases of Mr. Ramirez and Mr. Jones.

Arizona Rule of Criminal Procedure 6.8(d)(2), as written and as applied, does not guarantee the appointment of competent post-conviction counsel. As a result, Arizona petitioners are routinely denied federal habeas review of their claims because post-conviction counsel did not investigate and provide collateral evidence in support of their claims, federalize their claims, or exhaust their claims in petitions for review to the Arizona Supreme Court. *See, e.g., Gonzalez v. Ryan*, 551 F. App'x 909, 916 (9th Cir. 2014) (three claims were not fairly presented to the state court because the petitioner "did not provide a grounds for relief under federal law"); *Cook v. Schriro*, 538F.3d 1000, 1029 (9th Cir. 2008) (petitioner waived claim "by failing to fairly present it as a federal claim on direct appeal"); *Wood v. Ryan*, 693 F.3d 1104, 1117 (9th Cir. 2012) (incorporating claims by reference to the post-conviction petition in the petition

for review is not sufficient to fairly present the claims); *Rienhardt v. Schriro*, D. AZ., CV-03-290-TUC-DCB, Dkt. 80, Order (9/28/05) (finding most factual bases of the IAC claims procedurally defaulted because they had not been presented in post-conviction); *Detrich v. Ryan*, D. AZ., CV-03-229-TUC-DCB, Dkt. 93, Order (9/23/05) (majority of ineffective assistance of counsel allegations defaulted for failure to raise in post-conviction); *Salazar v. Ryan*, D. AZ. CV-96-85-TUC-FRZ, Dkt. 121, Order (3/31/00) (factual bases of ineffective assistance of counsel claim related to trial counsel's failure to investigate procedurally defaulted for failure to raise in post-conviction). Ultimately, post-conviction counsel's failure to develop and present factual support for post-conviction claims has deadly consequences for Arizona's capital defendants. *See, e.g., Stokley v. Ryan*, 659 F.3d 802, 806-810 (9th Cir. 2011) (PCR lawyer filed a cursory petition and then argued *against* the merits of a more substantial brief raised by second PCR lawyer. IAC claims were held procedurally barred in federal habeas proceedings; client executed); *Cook v. Schriro*, 538 F.3d 1000 (9th Cir. 2008), *cert denied* 129 S. Ct. 1033 (2009) (federal habeas court rejected the argument that post-conviction counsel's failure to raise trial IAC claim may serve as cause to overcome procedural default; client executed); *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curium) (post-conviction counsel not diligent in developing mitigation evidence in support of IAC claim; client executed).

Arizona's constrained reading of §2254(e)(2) would undermine the ability of *Martinez* to protect capital defendants like those cited above, who would

otherwise be prevented from having their IAC claims heard in any court. Res. Br. At 41-44.

III. ARIZONA HAS NO STATE MECHANISM TO CHALLENGE THE INEFFECTIVENESS OF POST-CONVICTION COUNSEL

Martinez v. Ryan provides a critical safeguard for Arizona's capital habeas petitioners because there is no mechanism in Arizona for litigating post-conviction counsel's ineffectiveness. Pursuant to Arizona Rule of Criminal Procedure 32.5, the Superior Court "must appoint counsel for the defendant" when the defense requests it and is indigent. This right to counsel is critically important because post-conviction is the first opportunity for a criminal defendant to allege ineffective assistance of counsel at trial. *Martinez*, 566 U.S. at 6; *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). To be entitled to evidentiary development of his IAC and other collateral claims, a petitioner must raise "colorable claims," which allege "facts which, if true, would *probably* have changed the verdict or sentence." *State v. Amaral*, 368 P.3d 925, 298 (Ariz. 2016). Facts are presented in the post-conviction petition through "affidavits, records, or other evidence currently available to the defendant." Ariz. R. Crim. P. 32.7(e). Where post-conviction counsel fails in their duty to investigate and present evidence and raise colorable claims, the petitioner risks losing any opportunity to have a court hear his claim of ineffective assistance of counsel.

Although *Martinez* is essential for protecting the Sixth Amendment rights of criminal defendants in Arizona, the *Martinez* decision has not opened the

floodgates of habeas petitioners being permitted to raise defaulted IAC claims in federal court. Pet.Br. at 38. This is because the protection that *Martinez* offers is not necessary in many states, which provide state remedies for post-conviction counsel's ineffectiveness. *See, e.g. Grinols v. State*, 74 P.3d 889 (Alaska 2003) (due process right to effective assistance of counsel in initial-review collateral proceeding); *In re Clark*, 855 P.2d 729, 748 (Cal. 1993) ("In limited circumstances, consideration may be given to a claim that prior [state] habeas corpus counsel did not competently represent a petitioner."); *Silva v. People*, 156 P.3d 1164, 1167 (Colo. 2007) (recognizing existence of a limited statutory right to post-conviction counsel arising from sections 21–1–103 and 21–1–104, C.R.S., which can excuse untimely filing); *Lozada v. Warden*, 613 A.2d 818 (Conn. 1992) (right to effective post-conviction assistance based on right counsel in Conn. Gen. Stat. 51-296); *Allison v. State*, 914 N.W.2d 866, 889-90 (Iowa 2018) (second post-conviction filed alleging ineffectiveness of first post-conviction counsel); *Breese v. Comm.*, 612 N.E.2d 1170, 1171 n. 4 (Mass. 1993) (defendant filed a second appeal alleging ineffectiveness of first appellate counsel); N.J. R.3:22-4(b)(2)(C) (allowing the filing of a successor post-conviction petition to assert the ineffectiveness of prior post-conviction counsel).Arizona could avoid *Martinez* litigation in state court by allowing ineffective assistance of counsel claims to be raised on direct appeal or by permitting successive petitions on otherwise precluded ineffective assistance of trial counsel claims waived by the ineffectiveness of initial post-conviction counsel. In fact, Arizona's post-conviction statute includes several exceptions to preclusion for other extenuating circumstances. *See*

Ariz. R. Crim. Pro. 32.1 (c) (illegal sentence), (e) (newly discovered evidence), (g) (significant change in the law), (h) (innocence of the crime or death penalty). Arizona should not be permitted to both evade *Martinez*'s narrow constitutional safeguard and prohibit successive post-conviction petitions on ineffective assistance of counsel claims regardless of the circumstances.

IV. CONTINUING LEGAL EDUCATION HAS LONG EMPHASIZED FACTUAL DEVELOPMENT AND CLAIM PRESERVATION IN CAPITAL POST-CONVICTION

Petitioner has argued throughout that post-conviction petitioners are "incentivized" or "encouraged" to withhold claims from post-conviction petitions in order to raise those claims in the district court. Pet.Br. at 20, 21, 28, 37, 38. This is simply untrue.

ACRP has been the state's death penalty resource center since 1988. Our mission is to "improve the quality of representation afforded to capital defendants in Arizona." *See* https://azcapitalproject.org/about/ (last visited 9/16/21). Over the last thirty-three years, ACRP has presented hundreds of hours of continuing legal education for capital defense teams in Arizona and across the nation, emphasizing the professional standard of care. ACRP trainings have always emphasized the factual development and exhaustion of every potentially meritorious claim for relief. This principle has been explicit in the professional guidelines for at least 32 years, informing ACRP's and other professional training seminars. 1989 ABA

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.3, "Duties of Postconviction Counsel" ("counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases."; "Postconviction counsel should seek to present to the appropriate court...all arguably meritorious issues..."); 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.15.1, "Duties of Post-Conviction Counsel" ("Post-conviction counsel should seek to litigate all issues...that are arguably meritorious..."; Post-conviction counsel should "Continue an aggressive investigation of all aspects of the case.").

Scholarship also contradicts Petitioner's suggestion that post-conviction counsel intentionally withhold claims to gain an advantage in federal habeas proceedings. In 1999, The Champion, the magazine of the National Association of Criminal Defense Lawyers (NACDL) published an article on *Post-Conviction Investigation in Death Penalty Cases*. 23-Aug Champion 41 (1999). The article, by Russell Stetler,[10] the then-Director of Investigation and Mitigation at the Capital Defender Office in New York City, urges defense counsel to develop new facts "new facts" and constitutional claims "to meet the requirements of *McCleskey v. Zant*, the Antiterrorism

[10] Russell Stetler is one of the most influential mitigation specialists and educators in the capital defense community. He served as the National Mitigation Coordinator for federal death penalty projects, served as a lecturer and trainer at hundreds of capital defense trainings, and authored dozens of articles informing the standard of care for capital mitigation investigations.

and Effective Death Penalty Act of 1996, and their state-court analogues." (footnote omitted). Indeed, there exists an abundance of scholarship urging post-conviction counsel to thoroughly investigate their client's case. *See, e.g.* Mark E. Olive, Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 36 Hofstra L. Rev. 1067, 1076 (2008) (the ABA Guidelines "require that post-conviction counsel investigate and/or reinvestigate the entire case"); Kathryn E. Miller, *The Attorneys are Bound and the Witnesses are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 Calif. L. Rev. 135 (Feb. 2018) ("Success for [post-conviction] claims requires demonstrating both that a legal error occurred outside of the courtroom and that the error prejudiced the criminal defendant by having a likely impact on the outcome of their case—hence, the need to investigate.") (citations omitted); Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WLLR 839 ("[I]neffectiveness claims almost always require the kind of extra-record investigation and development that can only be accomplished by collateral counsel and resources for investigation.") (citation omitted); 2003 ABA Guidelines, Guideline 10.7 (detailing the extensive investigation required "at every stage."). Investigating mitigating evidence is so critical to capital work that in 2008 the ABA published Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, which lays out the professional obligations of defense teams. *See, e.g.,* Supplementary Guideline 10.11, "The Defense Case: Requisite Mitigation Functions of the Defense Team" ("The defense team must conduct an ongoing, exhaustive,

and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death.")

There are also practical reasons why competent post-conviction counsel would not refrain from investigating and presenting facts in support of her client's constitutional claims for relief. By the time a capital defendant reaches federal habeas proceedings, much of his evidence has gone stale. Memories fade, witnesses die or become difficult to locate, and records are destroyed. Mr. Jones was tried in 1995 and his evidentiary hearing in the district court was not held until 2017—more than twenty years later. *Jones v. Ryan*, 327 F.Supp.3d 1157 (D. Ariz. 2018). Mr. Ramirez was arrested in 1989 and permitted to amend his habeas petition with his trial IAC claim in 2007. JA 498. By the time a capital defendant reaches federal habeas proceedings, the evidence supporting his trial IAC claims may be thinner, or gone entirely.

Before this Court's decision in *Martinez*, post-conviction counsel would have no conceivable reason to refrain from developing facts or withhold constitutional claims for relief from a post-conviction petition, as neither this Court nor the Ninth Circuit or Arizona's district court found post-conviction counsel's ineffectiveness to serve as cause to overcome the default of a claim in federal habeas proceedings. *See, e.g., Cook v. Schriro*, *supra*. Historically, and certainly since the passage of AEDPA, there have been greater barriers to obtaining relief in federal habeas proceedings than on state collateral review. Since *Martinez*, most of these barriers remain. In *Cullen v. Pinholster*, 563 U.S. 170 (2011), this Court held that

review under 28 U.S.C.A. §2254 is limited to the record that was before the state court. Any evidence not developed in post-conviction may forever be excluded from being offered in support of a capital defendant's claims. It would be incredibly risky and unethical for post-conviction counsel to hold back evidence in an attempt to gain an uncertain and unlikely "advantage" in federal habeas proceedings. Moreover, any attempt to hold back meritorious claims or helpful facts until federal habeas proceedings would result in a client remaining in the torturous conditions of death row[11] and living under the dark cloud of a death sentence for years longer than necessary. Plainly put, this would be unethical, implicating capital defense counsel's duties to her client, the tribunal, and opposing counsel.

In the near decade since the *Martinez* decision, the capital defense bar has continued to emphasize that competent representation in post-conviction proceedings requires a thorough investigation of the case, the presentation of new facts, and the preservation of constitutional claims for relief. Shortly after *Martinez* was decided, ACRP hosted multiple training seminars for post-conviction defense teams in Arizona, emphasizing the investigation and development of mitigating evidence, obtaining adequate resources and time to investigate and present claims, and presenting new facts to the state court in order to properly exhaust all claims. Arizona

[11] Until very recently, Arizona's death row inmates lived in solitary confinement, with few opportunities for recreation, work, or socialization.

Capital Representation Project, *Training*, http://azcapitalproject.org/training.

V. PETITIONERS WITH INTELLECTUAL DISABILITY ARE UNIQUELY VULNERABLE TO THE ERRORS OF INEFFECTIVE COUNSEL

As demonstrated above, Arizona has, for decades, failed to establish a system of appointing well-qualified counsel to represent capital post-conviction petitioners. As a result, petitioners routinely find their facts and claims precluded in federal habeas proceedings due to post-conviction counsel's failure to develop and present evidence in support of constitutional claims for relief. Because death row inmates are nearly always lacking a college degree, or even a high school diploma, and are confined to prison, it would be essentially impossible for capital petitioners to raise their own post-conviction claims. For a person with intellectual disabilities, such as Respondent Mr. Ramirez, it is an even greater challenge than for the average petitioner to identify or help develop claims, or ensure their team is fulfilling their professional obligation to thoroughly litigate and preserve claims for federal review.

Intellectual disability experts have noted that individuals with even the mildest form of intellectual disability have difficulty understanding their rights and the seriousness of their charges. Karen L. Salekin, *et al.*, *Offenders with Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3 J. Mental Health Research in Intellectual Disabilities 97, 103-04 (2010). Their suggestibility and tendency to acquiesce makes them prone to involuntary confessions and make it

challenging for them to collaborate with defense counsel to put on a defense. *Id.* at 97, 111 ("deficits in reasoning and judgment make offenders with ID particularly vulnerable to becoming involved in the criminal justice system and can seriously impede their ability to negotiate the adversarial system successfully.") This Court recognized in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), that intellectually disabled defendants "may be less able to give meaningful assistance to their counsel" and "in the aggregate face a special risk of wrongful execution."

Arizona's long history of failing to ensure the appointment of qualified post-conviction counsel is especially devastating to intellectually disabled defendants, whose execution is absolutely prohibited by *Atkins*. The Eighth Amendment cannot tolerate the execution of individuals, such as Mr. Ramirez, who are not eligible for a death sentence and would not be on death row but for the failures of their post-conviction counsel. *See Gilbert Martinez v. Shinn*, CV-20-00517 (D. Ariz.), Habeas Petition at 17 (2/22/21) (Post-conviction counsel failed to assert trial counsel's ineffectiveness for failing to investigate and present evidence that Martinez is intellectually disabled); *see also Gallegos v. Shinn*, 2020 WL 7230698 (D. Ariz. 2020) (Procedural default of trial counsel IAC claim was excused under *Martinez v. Ryan;* trial and post-conviction counsel failed to develop and present evidence of Gallegos' low IQ and learning disability).

The substandard representation of intellectually disabled capital clients—who should be completely ineligible for the death penalty—illustrates the unacceptably harsh outcomes that flow from Arizona's failures to provide competent capital

post-conviction counsel. *Martinez* provides a critical safeguard for such vulnerable indigent defendants.

CONCLUSION

For the above reasons, Amicus Curiae urge this Court to affirm the judgements of the Court of Appeals.

Respectfully submitted,

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