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**In the
Supreme Court of the United States**

Joaquin Hernandez-Ayala,

Petitioner,

v.

Rene Baker, Warden, et al.

Respondent.

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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QUESTION PRESENTED

Whether the Ninth Circuit clearly erred in denying Hernandez-Ayala's request for a certificate of appealability because reasonable jurists would find it debatable whether Hernandez-Ayala could show cause and prejudice under *Martinez v. Ryan* to overcome the procedural default on the claim that trial counsel was ineffective for failing to investigate and discover critical impeachment against one of the State's primary witnesses?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

LIST OF RELATED PROCEEDINGS

State v. Hernandez-Ayala, C227313 (8JDC Nev.) (Judgment of Conviction, entered Dec. 14, 2007)

Hernandez-Ayala v. State, No. 50720 (Nev. Sup. Ct.) (Order of Affirmance, issued Aug. 5, 2009).

Hernandez-Ayala v. State, No. 59657 (Nev. Sup. Ct.) (Order of Affirmance, issued Feb. 2, 2013).

Hernandez-Ayala v. State, No. 68705 (Nev. Sup. Ct.) (Order of Affirmance, issued June 22, 2016).

Hernandez-Ayala v. Baker, No. 3:13-cv-00134-MMD-WGC (Dist. Nev.) (order denying 28 U.S.C. § 2254 petition and denying certificate of appealability issued March 16, 2020)

Hernandez-Ayala v. Baker, No. 20-15472 (9th Cir.) (order denying request for a certificate of appealability on Oct. 28, 2020)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joaquin Hernandez-Ayala respectfully requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability. *See* Appendix A.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit filed an unpublished order on October 28, 2020, denying Hernandez-Ayala's request for a certificate of appealability. *See* Appendix A.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case, pursuant to 28 U.S.C. § 2254. The district court denied a certificate of appealability. *See* Appendix B at App.24. The Ninth Circuit denied Hernandez-Ayala's request for a certificate of appealability. *See* Appendix A at App.1. This Court has statutory jurisdiction under 28 U.S.C. § 1254 because, by order issued March 19, 2020, this Court extended the deadline for filing petitions to 150 days from the lower court decision. *See also* Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees the right to the assistance of counsel in a criminal prosecution.

STATEMENT OF THE CASE

Trial counsel was ineffective for failing to investigate and discover critical impeachment evidence against one of the State's main witnesses. Hernandez-Ayala was accused of sexually abusing two young children. However, the evidence against

him was weak. One child witness was found to be incompetent and the other did not provide particularly reliable testimony. As a result, the State relied heavily on the testimony of the children's out-of-court statements, including those made to their aunt, Blanca Zaragosza, to whom the children first reported the touching. However, counsel failed to investigate Zaragosza. Had he done that, he would have learned that she had an extreme dislike of Hernandez-Ayala and for years had been out to get him. An investigation would have shown that numerous people could have testified about that bias and the reasons why she wanted to harm Hernandez-Ayala.

In an amended information, Hernandez-Ayala was charged with one count of Sexual Assault with a Minor Under Fourteen Years of Age and three counts of Lewdness with a Child Under the Age of 14 based on allegations that, between January 2006 and August 2006, he digitally penetrated the vagina, and fondled the butt of, four-year-old J.F. and fondled the penis of three-year-old G.F.

At the jury trial, G.F. was found incompetent to testify. J.F. testified that Hernandez-Ayala penetrated her vagina with his finger, but that testimony was inconsistent with prior statements in which she said he only touched the outside of her vagina.

Because there were questions with J.F.'s testimony, the State relied on her out-of-court statements indicating digital penetration occurred. One of these statements was made to Blanca Zaragoza, the aunt of J.F. and G.F. Upon questioning from Blanca, J.F. made her initial allegation of digital penetration against Hernandez-Ayala.

Blanca testified that, on August 26, 2006, she was taking care of the kids because the children's mother, Betel, was at work. In the late afternoon, Blanca was giving a bath to J.F. and G.F. She was washing J.F.'s vagina with a soft cloth when J.F. said "Ouch." Blanca asked her what was wrong. J.F. told her not to tell her mother. J.F. then said that Hernandez-Ayla had put his hands on her vagina. Blanca then turned to G.F. and asked him if Hernandez-Ayala had done anything to him. G.F. demonstrated that Hernandez-Ayla had stroked his penis. Blanca later testified that J.F. said that Hernandez-Ayala had put his finger in her private part.

Counsel engaged in a limited cross-examination of Blanca. During cross-examination, defense counsel asked Blanca whether it was true that she never liked Hernandez-Ayala. She said that she had no reason to dislike or like him. She acknowledged that she told a detective that she never liked him. She explained that she meant that she did not like what he had done to her on that day. She denied being unhappy with her sister's relationship with Hernandez-Ayala. She acknowledged telling a detective that she was always asking J.F. whether her private parts were being touched, but she explained that she really meant to say that she always asked her everything was fine.

This sparse cross-examination was the result of a lack of investigation. In fact, a reasonable investigation would have uncovered critical information to severely impeach Blanca's testimony, namely Blanca's extreme dislike for Hernandez-Ayala led to her encouraging or misleading J.F. into making sexual abuse allegations against Hernandez-Ayala.

Evidence uncovered during an investigation conducted by federal post-conviction counsel established that it was well-known among Hernandez-Ayala's family and friends that Blanca had exceedingly strong feelings against Hernandez-Ayala. Maria Hernandez ("Maria"), Hernandez-Ayala's sister and a friend of Betel, stated Blanca did not like Hernandez-Ayala. Hernandez-Ayala would confide in Maria about his concerns about Blanca and her obvious dislike of him. He told her on multiple occasions that J.F. would tell him, after she came home from spending time with Blanca, that "her aunt Estella (Blanca) is going to fuck [him] over." This happened up until the day that Hernandez-Ayala was accused of touching J.F.

Maria also stated that Blanca told others about her dislike of Hernandez-Ayala as a husband for Betel. Blanca was upset about Betel and Hernandez-Ayala getting married because they did not tell anyone beforehand. Blanca was upset and angry that Betel had offered to help Hernandez-Ayala with his "immigration papers" through their marriage.

Wilber Martinez ("Wilber"), a friend of Hernandez-Ayala and Betel, stated Betel, Hernandez-Ayala, J.F. and G.F. shared a house with him and his family, which included two young children, in Las Vegas. They lived together in the weeks before Hernandez-Ayala was arrested. Wilber stated that Blanca never liked Hernandez-Ayala. She was the only member of Betel's family who had a problem with him. Wilber stated that Betel told him Blanca "lied to the police to 'get rid of Joaquin.'"

Betel's sister-in-law, Christina Zaragoza ("Christina"), stated that Blanca never liked Hernandez-Ayala. They didn't speak to each other. She stated that Blanca

was very angry at Betel for leaving the kids alone with Hernandez-Ayala after just meeting him. Christina explained that Blanca meant well but was very “over-protective”; she had been that way her whole life. She would constantly ask J.F. and G.F., “How did he (Joaquin) treat you today?, Did you get fed today?, Are you ok?, Anything happen?” Blanca had an obvious distrust of Hernandez-Ayala.

Post-conviction counsel did not raise an ineffectiveness claim based on the failure to investigate Blanca’s bias in the initial collateral proceeding. It was raised for the first time in the amended petition filed in federal court. The state court defaulted this claim when it was presented in a second post-conviction petition. *See* Appendix C. The federal district court concluded that Hernandez-Ayala could not establish cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012). Appendix B. Both the district court and the Ninth Circuit denied a certificate of appealability. *See* Appendix A & B.

REASONS FOR GRANTING THE PETITION

In *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), this Court had occasion to construe the language of 28 U.S.C. § 2253 through a post-AEDPA lens and concluded that Congress intended to employ the same test that was used in *Barefoot v. Estelle*, 463 U.S. 880 (1983). The *Slack* court concluded to obtain a certificate of appealability (“COA”) under § 2253(c), a habeas prisoner must make “a substantial showing of the denial of a constitutional right,” which was equivalent to “showing that reasonable jurists could debate” whether the petition “should have been resolved in a different

manner” or that the issues presented were “adequate to deserve encouragement to proceed further.” *Id.* (internal citation omitted).

Several years later this Court, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), provided additional guidance to the lower federal courts concerning the proper standards to be applied when reviewing a COA application. A petitioner does not need to show “the appeal will succeed.” *Id.* at 338. Nor should a court decline a COA “merely because it believes the applicant will not demonstrate an entitlement to relief.” *Id.* The Court emphasized, “It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief.” *Id.* At the COA stage, a court of appeals should “limit its examination to a threshold inquiry into the underlying merits of the claims” and ask only if the District Court decision was debatable. *Id.* at 327; *accord Buck v. Davis*, 137 S. Ct. 759, 774 (2017).

When a petitioner seeks a certificate of appealability on a procedural issue, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 84.

This Court’s precedent establishes a COA request does not require the applicant to demonstrate a winning case. In fact, the bar is set much lower than that. A petitioner need only present good reasons for allowing him to continue his challenge to an appellate court.

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The Ninth Circuit's decision was clearly erroneous as Hernandez-Ayala easily met this standard. Reasonable jurists could disagree as to whether Hernandez-Ayala received ineffective assistance of post-conviction counsel based on his attorney's failure to raise an ineffective assistance of counsel for his attorney's failure to investigate Blanca's bias against Hernandez-Ayala. The underlying ineffectiveness claim states a valid constitutional claim. This Court should grant the petition and order the Ninth Circuit to grant the request for a certificate of appealability.

I. The Ninth Circuit clearly erred in denying Hernandez-Ayala's request for a certificate of appealability because reasonable jurists would find it debatable whether Hernandez-Ayala could show cause and prejudice under *Martinez v. Ryan* to overcome the procedural default on the claim that trial counsel was ineffective for failing to investigate and discover critical impeachment against one of the State's primary witnesses

Counsel was ineffective in failing to conduct an adequate investigation. The record does not show that counsel investigated whether Blanca's motive in potentially encouraging or misleading the children into making sexual abuse allegations against Hernandez-Ayala. Indeed, counsel's cross-examination of Blanca was brief and did not delve into the evidence of Blanca's bias uncovered in the post-conviction investigation.

It was obviously imperative to investigate grounds for impeachment of the State's witnesses. However, the cross-examination at trial demonstrates counsel failed in obtaining necessary information to challenge Blanca's testimony. His cross-examination failed to establish her significant bias and how that could have impacted

the allegations here. This was unreasonable. There is no strategic justification for failing to conduct this necessary investigation.

Further, this lack of investigation severely prejudiced Hernandez-Ayala. Due to the numerous inconsistencies in J.F.'s statements, Blanca's testimony was crucial to the State. J.F. made her initial allegations to Blanca. Blanca specifically confirmed J.F.'s testimony that Hernandez-Ayala had digitally penetrated her vagina. However, Blanca was a biased witness. An investigation would have shown she had an extreme dislike of Hernandez-Ayala. Many people were aware of this. She was willing to lie to the police to get rid of Hernandez-Ayala.

As a result of this bitter dislike of him, Blanca was repeatedly questioning the children in a way to suggest to them that Hernandez-Ayala was doing something wrong to them. These were young children, vulnerable to suggestive behavior. There was every reason to believe she either encouraged the children to accuse Hernandez-Ayala or strongly suggested to them that he had done something wrong to them. It could have been argued these allegations were simply made to satisfy their aunt's constant pursuit of a way to harm Hernandez-Ayala.

There is a reasonable probability that, had the jury heard this critical impeachment material, the outcome of the proceedings would have been different.

The state court concluded this claim was procedurally defaulted. See Appendix C. However, Hernandez-Ayala can overcome this default because, under *Martinez v. Ryan*, 566 U.S. 1 (2012), he can establish cause based on his post-conviction counsel's ineffectiveness in failing to raise it.

In *Martinez*, this Court held that the “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial” where “collateral proceedings . . . provide the first occasion to raise a claim of ineffective assistance at trial.” *Martinez*, 566 U.S. at 9; *see also Trevino v. Thaler*, 569 U.S. 413, 428-29 (2013). *Martinez* applies here because in Nevada, courts “will not entertain claims of ineffective assistance of counsel on direct appeal.” *Corbin v. State*, 892 P.2d 580, 582 (Nev. 1995).

The cause prong in *Martinez* is met “where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial” or where counsel was ineffective under *Strickland*. *Martinez*, 566 U.S. at 14. The Ninth Circuit has held that the ineffectiveness showing under the cause prong requires a petitioner to show that post-conviction counsel’s performance was deficient and this deficient performance had an impact on the result of the post-conviction proceedings. *Clabourne v. Ryan*, 745 F.3d 362, 376 (9th Cir. 2014).¹ The prejudice prong of the procedural default standard is met by showing that the underlying ineffective assistance of trial or appellate counsel claim is substantial because it has at least “some merit.” *Martinez*, 566 U.S. at 14.

Hernandez-Ayala can establish cause and prejudice under *Martinez*. Post-conviction counsel was ineffective for failing to raise this lack of investigation claim

¹ This Court has yet to determine whether as part of the cause prong, a petitioner needs to make this showing. For the purposes of this application in the Ninth Circuit, Petitioner did need to establish this.

in state post-conviction. This was a necessary investigation. The information available from this investigation was critical impeachment evidence, which would have supported a compelling defense. There is a reasonable probability that, had post-conviction counsel raised this claim, the outcome of the post-conviction proceedings would have been different. For the same reasons, the underlying ineffective assistance of trial counsel claim has “some merit.”

In denying a certificate of appealability, the Ninth Circuit provided no analysis. Looking through this summary decision to the district court’s analysis, it is clear that there was no justification for denying a certificate of appealability. The district court rejected this claim, concluding that counsel was no ineffective for failing to further explore Blanca’s bias because it would have led to the introduction of evidence as to why Blanca did not like Hernandez-Ayala. Appendix B at 5. This reasoning is purely speculative. Moreover, Hernandez-Ayala provided that evidence in his allegations in federal court. He explained the basis of the bias: Blanca did not think Hernandez-Ayala was the right person for her sister and had been taking advantage of her.

Hernandez Ayala met the standard of a certificate of appealability. Reasonable jurists could disagree as to whether Hernandez-Ayala had established cause and prejudice under *Martinez* to overcome the procedural default on his ineffective assistance of counsel claim. That ineffectiveness claim states a valid constitutional claim. The Ninth Circuit’s denial of the motion was clearly erroneous and justifies summary reversal.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and order the Ninth Circuit to issue an order granting a certificate of appealability.

Dated March 12, 2021

Respectfully submitted,

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