THIS IS A CAPITAL CASE

No. 20-7480

In the Supreme Court of the United States

MICKEY THOMAS,

Petitioner

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,

Respondent

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Under Rule 44.2, Petitioner respectfully seeks rehearing of the Court's order denying his petition for a writ of certiorari, entered on October 4, 2021.

GROUNDS FOR REHEARING

Petitioner Mickey Thomas filed his petition for a writ of certiorari on March 12, 2021. On May 17, 2021, the Court granted certiorari in *Shinn v. Ramirez*, No. 20-1009. For the reasons discussed below, the Court's opinion in *Shinn*, which will be argued on December 8, 2021, is likely to bear directly on the questions Thomas asked the Court to consider. There are thus "intervening circumstances of a substantial or controlling effect" sufficient to grant rehearing under Rule 44.2.

Because the issues in *Shinn* are closely related to the issues here, the Court should hold this rehearing petition pending its decision in *Shinn* and then either (1) grant certiorari for consideration of the questions presented or (2) grant, vacate, and remand to the Eighth Circuit for further consideration in light of *Shinn*.[1]

I. This case, like *Shinn*, concerns the important question of whether *Martinez* provides an effective remedy for trial-ineffectiveness claims that postconviction counsel failed to develop.

This case and *Shinn* concern the same question: if a prisoner's state postconviction counsel unreasonably failed to present evidence of trial counsel's ineffectiveness, does *Martinez v. Ryan*, 566 U.S. 1 (2012), allow the prisoner to

[1] The Court followed a path similar to the second option in *Melson v. Allen*, No. 09-5373 (June 21, 2010). There, the Court held a petition for rehearing pending decision in *Holland v. Florida*, 560 U.S. 631 (2010), vacated its earlier denial of the petition for a writ of certiorari, granted certiorari, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *Holland*.

develop that evidence in federal court? In the opinion below, the Eighth Circuit answered "no" in the common scenario in which state postconviction counsel articulates a boilerplate ineffectiveness claim without developing facts to support it. But in *Shinn* the Court may well answer "yes," thus undercutting the Eighth Circuit's opinion and creating a strong basis for rehearing in Thomas's case.

Shinn asks the Court to delineate the relationship between *Martinez* and 28 U.S.C. § 2254(e)(2), which restricts evidentiary hearings in federal habeas if the petitioner has "failed to develop the factual basis of a claim in State court proceedings." Is an ineffective state postconviction lawyer's evidentiary default chargeable to his client? Or does the state postconviction lawyer's ineffectiveness mean that the client is not to blame for the default and thus did not "fail to develop" evidence concerning his trial-ineffectiveness claim?

The answer has broad implications for federal habeas practice. As the Court acknowledged in *Martinez*, trial-ineffectiveness claims require investigative work concerning facts outside the trial record—work that a prisoner is ill-equipped to perform and that "likely needs an effective attorney." *Martinez*, 566 U.S. at 11–12. When postconviction counsel fails to develop evidence needed to support a trial-ineffectiveness claim, federal court is the only remaining venue for vindication of the "bedrock principle" that a defendant is entitled to effective trial counsel. *Id.* at 12. A federal hearing is necessary "to ensure that proper consideration [is] given to a substantial claim" of trial ineffectiveness that postconviction counsel failed to develop. *Id.* at 14.

Shinn nevertheless invites the Court to deem such hearings excessively burdensome and contrary to habeas principles. *See, e.g.*, *Shinn*, Petitioners' Br. at 36–38. Should the Court reject this invitation and reaffirm its commitment to allowing one full and fair review of trial-ineffectiveness claims, its opinion will bear directly on this case, in which Thomas's state postconviction counsel, much like the *Shinn* respondents', "introduced no evidence in support of" the trial-ineffectiveness claims. App. 59a–60a.

There is only one distinction between *Shinn* and *Thomas*, and it is not a meaningful one. In *Shinn*, state postconviction counsel said absolutely nothing about trial counsel's ineffectiveness. *Shinn*, Respondents' Br. at 10–11, 18. Here, Thomas's state postconviction counsel performed no investigation but filed a petition with fact-free claims that trial counsel "was ineffective for failing to properly investigate and present mitigation evidence" and "was ineffective for failing to properly investigate and present mental health issues." App. 95a. But "[a] claim without any evidence to support it might as well be no claim at all." *Gallow v. Cooper*, 570 U.S. 933, 934 (2013) (statement of Breyer, J.). In both scenarios, full review of a trial-ineffectiveness claim depends upon whether the prisoner may present a federal habeas court with evidence that his ineffective state postconviction counsel failed to develop in state court.

The Eighth Circuit found that the mere utterance of an ineffectiveness claim—even in boilerplate and unsupported by investigation—mattered because it amounted to a presentation of the claim in the initial-review proceeding. "The

weakness of support for the claims in the [state postconviction] petition and hearing has no bearing on whether the claims were actually presented," the court said. App. 10a. So, by the court's reasoning, when the state postconviction attorney failed to appeal the claim that he had failed to develop in the first place, he created a procedural default that is outside the reach of the *Martinez* remedy, which by its terms does not apply to "appeals from initial-review collateral proceedings." *Martinez*, 566 U.S. at 16; App. 10a–11a.

The upshot of the Eighth Circuit's opinion is that *Martinez* is dead in the Eighth Circuit so long as state postconviction counsel offered a generic ineffectiveness claim unsupported by a factual investigation. While Eighth Circuit precedent holds that § 2254(e)(2) does not forbid an evidentiary hearing in the *Martinez* context—*see Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013)—the panel "note[d] the tension in the case law revealed by the district court's decision to hold a [*Martinez*] hearing." App. 11a n.7.[2] The panel resolved this tension by transferring the weight of the analysis to the technically separate question of procedural default—in the process offering an excessively crabbed view of what it means to "fairly present" the claim. If *Shinn* reinforces the need for federal-court factual development when state postconviction counsel was ineffective, the Court's order will be dead on arrival in many cases in the Eighth Circuit—that is, unless the Court grants rehearing here.

[2] The *Shinn* petitioners and their amici seize on this comment in their presentations to the Court. *Shinn*, Pet. for Writ of Cert. at 23 n.4, 28 n.6; Br. Amici Curiae of the States of Texas et al. at 26.

Rehearing is especially warranted given how far the Eighth Circuit strayed from the basic rules of the fair-presentation requirement. This Court has held that fairly presenting a claim requires presentation of facts—something more than a "general appeal to a constitutional guarantee." *Gray v. Netherland*, 518 U.S. 152, 163 (1996). As illustrated in the petition for a writ of a certiorari, the courts of appeals require prisoners to present at least **some** facts supporting their constitutional claims. *See* Pet. 16–23. It is decidedly not common practice to conclude that the absence of factual support for a claim in state court "has no bearing on whether the claims were actually presented." App. 10a.

A prisoner whose postconviction attorney failed to investigate trial counsel's ineffectiveness has not had an initial-review collateral proceeding "sufficient to ensure that proper consideration was given to a substantial claim." *Martinez*, 566 U.S. at 14. If *Shinn* reaffirms the right to a federal hearing to vindicate an undeveloped but substantial trial-ineffectiveness claim, the lower courts should not be permitted to roadblock that hearing by characterizing the claim as "fairly presented"—and thus impervious to *Martinez* analysis—if merely articulated in boilerplate in state court.

Such a result would be unjust for prisoners saddled with counsel reckless enough to plead a generic ineffectiveness claim without proof. Those prisoners, no less than the prisoners in *Shinn*, would be denied their "one and only appeal as to an ineffective-assistance claim." *Id.* at 8 (internal quotations omitted).

Such a result would also be detrimental to rational development of habeas law. As amici for the *Shinn* respondents show, the Court has historically aligned its assessment of procedural default and evidentiary default. *See Shinn*, Br. Amici Curiae of Habeas Scholars Lee Kovarsky et al. at 15 ("This Court has always maintained parallel doctrines for excusing a procedural default or an underdeveloped evidentiary record."). This alignment makes sense, because whether a claim is procedurally defaulted often depends upon whether the prisoner has given the state court a "statement of the facts that entitle [him] to relief." *Gray*, 518 U.S. at 163.

> Exhaustion means more than notice. . . . Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.

Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

As this Court has explained, it is "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim." *Id.* at 8. It would likewise be irrational to hold that § 2254(e)(2) permits development of defaulted facts in a *Martinez* hearing, but that a weak or nonexistent factual showing in state court of trial counsel's ineffectiveness "has no bearing" on whether the claims were defaulted and thus susceptible to *Martinez*. App. 10a. An ineffectiveness claim is defined by its facts. If state postconviction counsel ineffectively failed to present those facts in state court, no

court will have the opportunity to hear the claim unless a federal court permits the neglected factual development. The Court's holding in *Shinn* should apply regardless of whether new evidence is characterized as raising a § 2254(e)(2) question or a procedural-default question.

The *Shinn* briefing speaks further to how the specific technical issues in these cases are intertwined. For example, the *Shinn* petitioners highlight the question of whether new evidence offered in federal court fundamentally alters a state claim such as to have resulted in a procedural default of the federal claim. *Shinn*, Pet. for Writ of Cert. at 30 n.7, 32; Petitioners' Br. at 35 n.9, 37–38; *see also* Br. Amici Curiae of the States of Texas et al. at 28–29 (arguing that prisoners should not be able to "repackage new facts into a 'new' *Strickland* claim in federal court"). As this briefing suggests, reaffirmation of the *Martinez* right in *Shinn* would likely move the battle to the arena of procedural default, with States arguing, as the Eighth Circuit found *sua sponte* here, that articulation of a fact-free ineffectiveness claim in state court fairly presented the claim. Nipping this evasion in the bud is a compelling reason for the Court to grant rehearing if it affirms the Ninth Circuit in *Shinn*.

In sum, Thomas is in the same position as the *Shinn* respondents. His state postconviction counsel failed to develop any facts to support his trial-ineffectiveness claim, and he sought a federal forum in which to develop those facts and present his claim. Should the Court in *Shinn* reaffirm that federal habeas hearings are available to develop defaulted evidence supporting substantial trial-ineffectiveness

claims, then Thomas, as a similarly situated petitioner, should benefit from the renewed vigor behind that rule.

II. *Shinn* appears likely to address the waiver question at issue here.

The parties' briefs in *Shinn* raise a second question that is relevant to Thomas's case: whether the State waives a procedural defense concerning evidentiary default by permitting the record to be developed or otherwise failing to object to the default in the proper court.

The Eighth Circuit's holding in this case is especially problematic because the State sought full merits review of the district court's order vacating the death sentence. Rather than acting in "the role of neutral arbiter of matters the parties present[ed]," *Greenlaw v. United States*, 554 U.S. 237, 243 (2008), the Eighth Circuit ruled on a procedural defense that the State consciously abandoned (without seeking Thomas's input, to boot).

Shinn raises a similar problem in that petitioner there appears, like the State in Thomas's case, to have acquiesced in federal-court factual development and to have sought merits review of the ineffectiveness claim. As the respondents' brief characterizes the situation, in respondent Ramirez's case, "Arizona urged the district court to proceed to the merits and, taking into account the enlarged record, reject the ineffective assistance of trial counsel claim on its merits." Respondents' Br. at 58. When Ramirez sought additional factual development on appeal, "Arizona did not raise any argument in its appellate briefing to the panel, or in its oral argument, that additional evidentiary development was inconsistent with §

2254(e)(2)." *Id.* at 59. Relying on this Court's precedent in *Day v. McDonough*, 547 U.S. 198 (2006), Respondents argue that the defense was thus waived:

> Arizona's decision not to invoke § 2254(e)(2) reflects a determination that its interests were better served by seeking the denial of Mr. Ramirez's habeas petition on the merits, taking into account new evidence submitted in federal court. . . . That strategic choice not to invoke § 2254(e)(2) must be respected and cannot properly be overridden by the courts.

Id. at 62 (citing *Day*, 547 U.S. at 202); *see also id.* at 61 n.10 (quoting *Day*, 547 U.S. at 202).

Thomas's case is much the same. After acquiescing in an evidentiary hearing in the district court, the State belatedly suggested at a post-hearing argument that the new evidence was irrelevant, then dropped that suggestion in the Eighth Circuit, devoting its advocacy instead to full merits review of the trial-ineffectiveness claim. Should the Court embrace Ramirez's waiver argument, thus affirming the rule it articulated in *Day*, Thomas should receive a similar benefit. The State waived the procedural defense by failing to assert it on appeal, and the Eighth Circuit did not have "authority to resurrect" it—regardless of whether it offered Thomas an opportunity to be heard on it. *Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012).

III. Thomas's case deserves review.

Thomas presents an especially compelling case of injustice in habeas procedure. He convinced a federal district court that "[t]he result of trial counsel's lack of investigation and preparation was an entirely unconvincing case in mitigation." App. 72a. The district court found that Thomas presented a "compelling" case in mitigation at a *Martinez* hearing to which the State did not object. App. 69a.

Despite having articulated in the district court that it *could* have objected to the hearing on procedural grounds, the State appealed the district court's ruling on the merits alone. Without seeking a brief from Thomas or asking him about the issue at oral argument, the Eighth Circuit *sua sponte* dismissed the petition on the procedural ground under review here.

Perhaps the Court denied certiorari because, as Justice Sotomayor suggested in her statement, "Thomas' claim does not satisfy this Court's traditional criteria for granting certiorari." 595 U.S. ___ (Oct. 4, 2021) Thomas respectfully suggests that it does—but even if it does not, it is no less deserving of review, particularly in light of *Shinn*.

Thomas has two specific bases for certiorari under Rule 10. First, the Eighth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Specifically, by *sua sponte* asserting a procedural defense that the State knowingly abandoned on appeal, the Eighth Circuit contradicted *Wood* and *Day*. Even if the State merely forfeited the defense, rather than waiving it, the Eighth Circuit still violated those precedents by *sua sponte* asserting the defense without giving Thomas notice or an opportunity to be heard. Second, Thomas illustrated that the Eighth Circuit's decision was "in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). The Eighth Circuit is unique in concluding that the failure to offer facts in state court to support federal claims "has no bearing on whether the claims were actually presented." App 10a.

But even if Thomas's petition does not meet any Rule 10 criterion, that should not stop the Court from granting rehearing here. The Court routinely grants certiorari in cases that engage in straightforward error-correction and that do not appear to meet the Rule 10 criteria. *See, e.g.*, *City of Tahlequah v. Bond*, 595 U.S. ____ (Oct. 18, 2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 595 U.S. ____ (Oct. 18, 2021) (per curiam). Indeed, it is unclear that *Shinn* itself has a greater claim to meeting the Rule 10 criteria than Thomas's case, as the petitioners there identified no circuit disagreement on the question presented and as the Ninth Circuit's decision below is consistent with the holding in *Martinez*. Thomas is equally deserving of a hearing from this Court.

CONCLUSION

The Court should grant the petition for rehearing, vacate its order denying the petition for a writ of certiorari, and either review the questions presented or remand to the Eighth Circuit for reconsideration in light of the eventual opinion in *Shinn*.

OCTOBER 28, 2021

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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