No. 21-6151
(CAPITAL CASE)

IN THE
Supreme Court of the United States

GARY DUBOSE TERRY,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections, and KENNETH NELSEN, Deputy Warden, Broad River Correctional Institution,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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This Court should grant certiorari or, at a minimum, hold Terry's case pending the outcome of *Shinn v. Ramirez*, No. 20-1009, 141 S. Ct. 2620 (mem.) (May 17, 2021), because Terry's case is in a nearly identical procedural posture as David Ramirez's case. In both cases, trial counsel presented some evidence related to the abuse and neglect the habeas petitioner had suffered as a child. *See Ramirez v. Ryan*, 937 F.3d 1230, 1236-37 (2019), *cert. granted sub nom. Shinn v. Ramirez*, No. 20-1009, 141 S. Ct. 2620. In both cases, state "post-conviction counsel did not raise the ineffective assistance of trial counsel claim [involving mitigation evidence]." *Id.* at 1238. In both cases, federal habeas counsel, for the first time, "submitted evidence, including declarations not submitted earlier," that "reveal[ed] the extent of abuse, poverty, and neglect that [the habeas petitioner] suffered as a child." *Id.* In both cases, the new evidence was not contained in the state-court record and was the kind of evidence that any reasonably competent attorney would have uncovered and presented to the jury. *Id.* at 1239. And in both cases, the habeas petitioner lost in the district court—not because the district court refused to consider the extra-record evidence, but because the district court, having considered that evidence, "conduct[ed] a full merits review of [the habeas petitioner's] underlying ineffective assistance of trial counsel claim on an undeveloped record" and concluded that the habeas petitioner could not prove prejudice. *Id.* at 1242. If, as David Ramirez has argued before this Court, he is entitled to a remand so that the lower federal courts may, for the first time, review his claim of trial counsel ineffectiveness with the benefit of a complete record, Gary Terry should be entitled to the same. *See* Br. for Resp'ts at 58, *Shinn v. Ramirez*, No. 20-1009 (Sept. 13, 2021).

I. THE COURTS BELOW COMMITTED THE SAME ERROR AS THE DISTRICT COURT IN *RAMIREZ*.

Respondents attempt to distinguish this case from *Shinn* by relying on the fact that the courts below ruled on the question of whether Terry's underlying claim of trial counsel ineffectiveness was substantial. That argument, however, misses the point that in *Ramirez*, a panel of the Ninth Circuit also ruled on the question of substantiality. Simply put, the fundamental issue at play in both cases is the same: what showing must a habeas petitioner make to receive an evidentiary hearing on a claim raised through the *Martinez* gateway and whether, at such a hearing, the habeas petitioner is barred from presenting evidence outside the state-court record. *Compare Ramirez*, 937 F.3d at 1247 ("[W]ithout Ramirez receiving the benefit of full evidentiary development, we cannot conclude that Ramirez's ineffective assistance of trial counsel claim 'is insubstantial.'" (quoting *Martinez v. Ryan*, 566 U.S. 1, 16 (2012))) *with* Pet. App. 37a-38a (holding that Terry was not entitled to an evidentiary hearing because, in the panel's view of the incomplete record, "the aggravating circumstances . . . were too much to overcome"). If this Court affirms the Ninth Circuit in *Ramirez*, the petitioners there will get what Terry also deserves: "an evidentiary hearing" on the question of "the procedural default of the ineffective assistance of counsel claim." *Ramirez*, 937 F.3d at 1251. The fact that the two cases, with parallel facts, procedural histories, and basic arguments, produced opposite outcomes in the federal courts of appeals is evidence that this Court should grant the Petition—or, at a minimum, hold the case until *Shinn* is decided.

Moreover, the State's own arguments in its Brief in Opposition, and as an amicus curiae in *Shinn*, highlight the extent to which the two cases are linked. Specifically, the State in this case argues that to grant Terry (and, by extension, David Ramirez) an evidentiary hearing would "needlessly expand *Martinez* to ensure hearings in every case, especially every capital case" and "[a]n evidentiary hearing is not categorically required to assess an ineffective assistance claim."

BIO at 13, 14. But where, as here, the habeas petitioner has not received a "fully and fair evidentiary hearing in state court" and "the facts are in dispute," the federal court "*must* hold an evidentiary hearing." *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (emphasis added), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

The State's only response is that evidentiary development in habeas proceedings cannot stand because it "collapse[s] the distinction of a prejudice showing under *Martinez* with the merits of a claim on habeas review, eliminating section 2254(e)(2) altogether." Brief for the States of Texas, Alabama, Arkansas, Florida, Indiana, Kentucky, Mississippi, Missouri, Nebraska, Ohio, Oregon, South Carolina, and Utah as Amici Curiae in Support of Petitioners at 16, *Shinn v. Ramirez*, No. 20-1009 (July 22, 2021); *see also* BIO at 16 ("If the default is not excused, a petitioner is barred from an evidentiary hearing on the underlying claim as he would be responsible for the failure to develop a factual basis." (citing 28 U.S.C. § 2254(e)(2))). This assertion is wrong for the reasons highlighted by the *Shinn* Respondents,[*] but it is also wrong because it ignores the fact that *Martinez* assumed that the lower courts would apply different evidentiary burdens to the cause-and-prejudice question and the underlying merits of the ineffective assistance claim at issue. *See Martinez*, 566 U.S. at 14, 17 ("A finding of cause and prejudice"—assessed under the "some merit" standard—does not entitle the prisoner to habeas relief. It merely allows a federal court to

[*] Specifically, the *Shinn* Respondents' primary argument is that "a claimant cannot be deemed at fault for a failure to factually develop a claim under § 2254(e)(2) when the same federal court finds that he was not at fault for failing to raise that claim in the first place." Brief for Respondents at 22, *Shinn v. Ramirez*, No. 20-1009 (Sept. 13, 2021). A claimant is not "at fault" for a failure to develop a claim "when the failure is due to 'the conduct of another or happenstance,'" and in the *Martinez* context, this means that a habeas petitioner is excused from "bear[ing] the consequences of his attorney's failures" when the "failure" in question is that postconviction counsel improperly raised an ineffective trial counsel claim in state court. *Id.* at 22-24 (quoting *Williams v. Taylor*, 529 U.S. 420, 432 (2000)).

consider"—on *de novo* review—"the merits of a claim that would otherwise have been procedurally defaulted.").

Here, the lower courts committed the same error as the district court in *Ramirez*. On an undeveloped factual record, they assessed Terry's claims not under the "some merit" standard, but instead under the standard that applies only after the record is complete. In Terry's case, the record is incomplete because, as the State's own arguments make plain, there are factual questions in dispute that can and should be resolved at an evidentiary hearing. Specifically, the State questions the credibility of Terry's proffered mitigation witnesses, BIO at 23 n.11, 26; fights the sole inference that Terry's proffers support—that trial counsel failed to review their own file and for that reason failed to pursue the evidence of abuse it documented—based in part on the fact that "there is no record of what [Terry's second trial attorney] may [have] recalled of why further evidence of abuse was not presented," BIO at 18-30, 29 n.12; and dismisses to irrelevance the nature of the new evidence Terry attempted to present in federal habeas because "the aggravating circumstances . . . were too much to overcome," BIO at 29-33 (quoting Pet. App. at 37a-39a). Although the State may be correct that an evidentiary hearing is not be necessary to assess *all* ineffectiveness claims, the State is wrong that an evidentiary hearing is not necessary to assess Terry's ineffectiveness claim.

To prevent Terry from developing the factual record before a court considers his trial counsel ineffectiveness claim would subvert *Martinez* to the same extent, and in the same way, as if this Court were to prevent David Ramirez from obtaining a ruling on his claims with the benefit of a complete record. Until this Court rules on *Shinn*, it should hold Terry's case to prevent two procedurally and factually parallel cases from producing directly opposite outcomes.

CONCLUSION

The Court should grant the petition or, at a minimum, hold the case pending the resolution of *Shinn v. Ramirez*.

Respectfully submitted,

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December 14, 2021