

No. 22-7693

IN THE
Supreme Court of the United States

JANDIN RAUL MUNOZ,

Pro Se Petitioner,

V.

STATE OF ARIZONA,

Respondent.

Supreme Court, U.S. FILED
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On Petition For A Writ Of Certiorari
To The Court Of Appeals For the State
Of Arizona Division One

PETITION FOR A WRIT OF CERTIORARI

JANDIN RAUL MUNOZ

ADC # 286407

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QUESTION(S) PRESENTED

1) Whether a non-pleading trial defendant ("Prisoner") has a Constitutional right to effective-assistance of Counsel in initial-review Collateral proceedings which provide the First occasion to raise a claim of ineffective assistance at trial.

2) Whether the Fundamental Fairness required by the Due process clause or the Fourteenth Amendment's equal protection guarantee of the U.S. Constitution require that indigent non-pleading trial defendants ("Prisoners") be entitled to effective-Counsel in the First post conviction proceeding providing the First opportunity to raise an ineffective-assistance of trial Counsel claim.

3) Whether a non-pleading trial defendant ("Prisoner") is entitled to raise a cognizable Constitutionally ineffective-assistance claim against First Post-Conviction Counsel for failing to raise ineffective-assistance of trial Counsel claims in the initial-review Collateral proceeding where it is the only Forum in which a defendant can pursue a claim of ineffective-assistance of Counsel at trial.

TABLE OF CONTENTS

	Page
QUESTION(S) PRESENTED	i
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
I. AN EXCEPTION SHOULD BE ESTABLISHED TO THE CONSTITUTIONAL RULE THAT THERE IS NO RIGHT TO COUNSEL IN COLLATERAL PROCEEDINGS...	17
[A] Equal Protection Clause - claims available for first time in state postconviction proceedings...	17
II. THIS CASE IS AN IDEAL VEHICLE	32
CONCLUSION	34
APPENDIX A : Opinion of the Arizona Court of Appeals, Division one (July 26, 2022)	35(a)
APPENDIX B : opinion of the Maricopa County Superior Court (November 9, 2021)	35(b)
APPENDIX C : opinion of the Arizona Supreme Court (January 5, 2023)	35(c)
APPENDIX D : opinion of the Maricopa County Superior Court (December 17, 2020)	35(d)

TABLE OF AUTHORITIES

CASES	Page(s)
Martinez v. Ryan,	
566 U.S. 1 (2012).....	4, 14, 15, 16, 17, 22, 23, 24, 25, 27, 28, 29, 30, 32, 34
Coleman v. Thompson,	
501 U.S. 722 (1991).....	11, 12, 14, 15, 21, 22, 29, 30, 32, 33, 34
Douglas v. California,	
372 U.S. 353 (1963).....	8, 10, 17, 18, 19, 21, 22, 23, 25, 26, 27
Pennsylvania v. Finley, 481 U.S. 551 (1987).....	8, 10, 11, 12, 13, 14, 30
Ross v. Moffitt, 417 U.S. 600 (1974).....	8, 10, 21, 30
Murray v. Giarratano, 492 U.S. 1 (1989).....	9, 10, 11, 12, 22
Halbert v. Michigan, 545 U.S. 605 (2005).....	18, 25, 26, 27
Evitts v. Lucey, 469 U.S. 387 (1985).....	21, 22, 26, 27, 30
Davila v. Davis, 137 S.Ct. 2058 (2017).....	24, 27, 29, 30
Trevino v. Thaler, 569 U.S. 413 (2013).....	23, 30
Gideon v. Wainwright, 372 U.S. 335 (1963).....	8, 10
Griiffin v. Illinois, 351 U.S. 12 (1956).....	8, 10
Fay v. Noia, 372 U.S. 391 (1963).....	8
Powell v. Alabama, 287 U.S. 45 (1932).....	10
United States v. MacCallum, 426 U.S. 317 (1976).....	9
Johnson v. Avery, 393 U.S. 483 (1969).....	10
Price v. Johnston, 334 U.S. 266 (1984).....	11
McFarland v. Scott, 512 U.S. 1256 (1994).....	12
Robert v. LaVallee, 389 U.S. 40 (1967).....	19
Coppedge v. United States, 369 U.S. 438 (1962).....	19
Smith v. Bennett, 365 U.S. 708 (1961).....	19, 20
Goeke v. Branch, 514 U.S. 115 (1995).....	21

TABLE OF AUTHORITIES

CASES	(continued)	Page(s)
Gallow V. Cooper, 570 U.S. 933 (2013)		24
Strickland V. Washington, 466 U.S. 668 (1984)		17
Lafler V. Cooper, 566 U.S. 156 (2012)		31
Missouri V. Frye, 566 U.S. 134 (2012)		31
Williams V. Martin, 618 F.2d 1021 (4th Cir. 1988)		10
Giaccatano V. Murray, 668 F.Supp. 511 (E.D.Va. 1986)		10
Nichols V. State, 425 P.2d 247 (Alaska 1967)		10
People V. Shipman, 397 P.2d 993 (Cal. 1965)		10
Honore V. Washington State Bd., 466 P.2d 485 (Wash. 1970) ..		10
Gibson V. Jackson, 443 F. Supp. 239 (M.D. Ga. 1977)		10
Meeks V. Cabana, 845 F.2d 1319 (5th Cir. 1988)		10
Jones V. Estelle, 722 F.2d 159 (5th Cir. 1983)		10
Robinson V. Fairman, 704 F.2d 368 (7th Cir. 1983)		10
Laclair V. United States, 374 F.2d 486 (7th Cir. 1967)		10
Heath V. United States Parole Comm'n, 788 F.2d 85 (2nd Cir. 1986) ..		11
Kitt V. Clarke, 931 F.2d 1246 (8th Cir. 1991)		12
Bonin V. Vasquez, 999 F.2d 425 (9th Cir. 1993)		12
State V. Mata, 185 Ariz. 319 (1996)		5, 15
State V. Krum, 183 Ariz. 288 (1995)		15
Osterkamp V. Browning, 226 Ariz. 485 (App. 2011)		15, 16
State V. Armstrong, 176 Ariz. 470 (App. 1993)		15
State V. Escareno-Meraz, 232 Ariz. 586 (App. 2013)		15
State V. Spreitz, 202 Ariz. 1 (2002)		16
State V. Pruett, 185 Ariz. 128 (App. 1995)		16
State V. Petty, 225 Ariz. 369 (App. 2010)		16

TABLE OF AUTHORITIES

(Continued)

Page(s)

Constitutional And Statutory Authorities

U.S. Constitution, amend. VI	1, V, 8, 21
U.S. Constitution, amend. XIV	1, V, 8, 18
28 U.S.C. § 1257 (a)	1
28 U.S.C. § 2101 (c)	1
28 U.S.C. § 2255	9
Ariz. R. Crim. P. 31.2	2
Ariz. R. Crim. P. 32.3	2, 3, 9
Ariz. R. Crim. P. 33.1	4, 16
Ariz. R. Crim. P. 32.1	3

OTHER AUTHORITIES

Arizona Appellate Handbook § 14.3 (A)	9
Federal Habeas Corpus Practice and Procedure	9
Tennessee Post Conviction Procedure Act, TENN. CODE ANN § 40-30-101 (2012)	9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jandin Raul Munoz respectfully petitions for a writ of certiorari to review the Judgment of the Arizona Court of Appeals, Division one in this case.

OPINIONS BELOW

The Arizona Court of Appeals opinion is unpublished but its available at 2022 WL 2934621. The trial court's opinion denying petitioners Notice requesting postconviction relief appears at Appendix B, State v. Munoz, CR2016-137390 (Nov. 9, 2021).

JURISDICTION

The Arizona Supreme Court entered Judgment on January 5, 2023. An extension of time to file the petition for a writ of certiorari was granted to and including June 5th, 2023, on April 13, 2023, in Application No. 22A897. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (a); 28 U.S.C. § 2101 (c).

RELEVANT CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment, provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the... equal protection of the laws."

STATEMENT OF THE CASE

1. In 2017, petitioner was convicted of one count of Criminal damage, a misdemeanor, two counts of assaults both misdemeanors, Unlawful Imprisonment, as a lesser-included offense of kidnapping, a class 6 Felony, and Sexual assault, a class 2 Felony. All were Domestic Violence offenses. As a result of these convictions, petitioner's probation in the 2015 case was revoked. See Cause No. CR2016-137390-001.

2. Petitioner Filed a timely notice of Appeal on April 24, 2017, pursuant to Ariz. R. Crim. P. 31.2. On June 5, 2018, the Arizona Court of Appeals affirmed in 1 CA-CR 17-0283, and this Court is respectfully referred to it for an overview of the Facts.

3. On May 8, 2017, pursuant to Ariz. R. Crim. P. 32.4. — While the direct appeal was pending — petitioner Filed his First Rule 32 notice Requesting Post-Conviction Relief. The trial Court initiated the initial-review Collateral proceeding and appointed Counsel. Petitioner's post-conviction Counsel Subsequently moved to extend the time in which to File a petition for post-conviction Relief, while the direct appeal was pending. The trial Court granted the motion, extending the deadline until 30 days after the Arizona Court of Appeals issued its Mandate.

4. The Arizona Court of Appeals did so on July 23, 2018. One week later, on July 30, 2018, postconviction Counsel Filed the petition for PCR, in which he raised only one ground for relief: "that the Petitioner's trial Counsel

was ineffective in Cause number CR2016-137390-001 for failing to properly communicate and discuss the full details of the States last plea offers." (Despite the petitioner's request's First post-conviction Counsel had neglected and failed to investigate and present other non-frivolous ineffective-assistance of trial Counsel claims in the initial Rule 32 Post-Conviction-relief-Petition). On January 27, 2020 the post-conviction trial Court denied the petition for post-conviction Relief.

5. On April 3, 2020, PCR Counsel Filed a Petition For Review in the Arizona Court of Appeals, and on September 29, 2020, the Court granted review but denied relief. See, (1CA-CR-0195-PRPC). Petitioner then appealed to the Arizona Supreme Court, and on February 16, 2021, the Court denied review. See, (NO. CR-20-0348-PR). The Arizona Court of Appeals, issued its Mandate on March 17, 2021.

6. On July 20, 2020 - While the Petition For Review from the denial of the First Petition for post-conviction relief was Pending in the Az Court of Appeals - Petitioner Filed a timely Successive Notice Requesting post-conviction Relief, pursuant to Ariz. R. Crim. P. 32, arguing that his First postconviction Relief Counsel rendered 'ineffective assistance' in the First post-conviction proceeding.

Nevertheless, on December 22, 2020, the trial Court issued a order and dismissed the Petitioner's timely Successive Notice Requesting post-conviction Relief.

The trial Court, Specifically Found that, " Defendant Claims his Counsel in his First post-Conviction Claim was ineffective. Defendant is not entitled to raise this claim.

Claims of ineffective assistance of Post-conviction Counsel arise under Rule 33. This rule applies when a Defendant pled guilty or no contest to a criminal offense, admitted a probation violation, or had an automatic probation violation based on a plea of guilty or no contest. Ariz. R. Crim. P. 33.

1. In CR2016-137390, Here, Defendant was convicted after trial. [] Therefore, any post-Conviction relief is governed by Rule 32, and Defendant does not have the [R]ight to bring a Successive Claim for ineffective-assistance of post-conviction Counsel. Further, Defendant had the right to appeal (and did appeal) both his conviction and automatic revocation of probation. [] As a result, Defendant did not have the [R]ight to effective assistance of Counsel in his First post-Conviction proceeding." See (Appendix - D).

Petitioner had filed other Rule 32 Notices Requesting post-conviction Relief raising similar claims against First PCR Counsel, and listed several IAC claims that he sought to raise in his First post-conviction proceeding but for the ineffectiveness of First post-Conviction Counsel, however, they to were also summarily dismissed.

7. On September 22, 2021, nine months later, after coming across Martinez v. Ryan, 566 U.S. 1 (2012), Petitioner filed a Subsequent ("Fifth") Notice Requesting post-conviction Relief, raising the same ineffectiveness claim against

his First Rule 32 Counsel, arguing that post-conviction relief Counsel had neglected and failed to raise all aspects and claims of ineffective assistance of trial Counsel in the First Petition For PCR, where he was required to do so. See, (Notice of PCR, dated 9-22-2021). Petitioner argued that, "It was not the defendants Fault For Filing an untimely notice of PCR, and that it was due to the ineffectiveness of First PCR Counsel, and that he should have been permitted to proceed forward with his prior timely successive - notice requesting post-conviction relief of July 20, 2020, and to bring a claim of ineffectiveness against First PCR Counsel for failing to raise [A]ll underlying ineffective - assistance of trial Counsel Claims in the First Petition For PCR.

Nevertheless, On November 9, 2021, the trial Court had dismissed the Notice Requesting post-conviction relief (as it was bound to do). The trial Court, Specifically found that: "Martinez fails to support his claim and there was nothing misleading about the Courts prior order" and "Specifically, Defendant claims to have received ineffective assistance from Rule 32 Counsel. It is settled law, however, that Defendant has no cognizable ineffective assistance claim against prior Rule 32 Counsel. State v. Mata, 185 Ariz. 319 (1996)." See, (Appendix - B).

8. On November 16, 2021, Petitioner Filed a Motion For Rehearing arguing that, "it is unconstitutional for a non-pleading defendant to not have a constitutional right

to effective assistance of counsel in the First Post-Conviction proceeding, where it is the First place to raise an ineffective-assistance of counsel claim, and that non-pleading defendants should have a Cognizable Claim of ineffectiveness against First Post-Conviction Counsel for failing to raise all ineffective assistance of trial Counsel claims in the initial-review collateral proceeding." However, the Motion for Rehearing was denied but an extension of time to file a Petition for Review was granted.

9. On January 28, 2022, Petitioner Filed a Petition For Review in the Arizona Court of Appeals and presented two questions: "1) Whether the Equal protection and Due process clauses of the 14th Amendment U.S. Constitution demand that indigent non-pleading trial defendants be entitled to effective assistance of counsel to raise ineffective assistance of trial counsel claims on appeal, even in an initial-review collateral proceeding (Rule 32 PCR) providing the First opportunity to raise ineffective-assistance of trial counsel claims; and 2) Whether trial defendants have a Cognizable ineffective assistance claim against First Rule 32 PCR Counsel for neglecting and failing to raise ineffective assistance of trial-counsel claims, which are constitutional errors." However, on July 26, 2022, the Arizona Court of Appeals had granted review but denied relief. See, (Appendix-A).

10. Petitioner then Filed a Motion for reconsideration on August 5, 2022, which was also denied on

August 17, 2022. The Petitioner then sought review in the Arizona Supreme Court and filed a Petition for Review on October 4th, 2022, which was later denied on January 5, 2023. See (AZ Supreme Court NO. CR-22-0221-PR, at Appendix-C)

11. Petitioner then Filed in this U.S. Supreme a Motion For Extension of time to File the Petition for a Writ of Certiorari on March 27, 2023, which was granted to and including June 5th, 2023, on April 13, 2023, in Application No. 22A897. Thus, this here Petition For A Writ of Certiorari to the Arizona Court of Appeals, Division One, is timely filed and presented to the Honorable Justices of the United States Supreme Court.

This Petition Followed.

REASONS FOR GRANTING THE PETITION

The constitutional rule that there is no right to counsel in collateral proceedings should be overruled, and an exception to the rule should be established. This is an issue of Nationwide importance which goes beyond the particular Facts and parties involved, it is of great importance to the public of the issue, and it will impact many indigent non-pleading defendants ("Prisoners") across the nation whom are prohibited from raising claims of ineffective assistance on direct appeal where Counsel is guaranteed but instead are expressly required to raise ineffective -

assistance of trial Counsel claims in the First post-conviction proceeding, where there is no Constitutional Right to Counsel, at all.

Indeed, In *Finley* the Court held that "neither the Due process clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" required the state to appoint counsel for indigent prisoners seeking state post-conviction relief. The Sixth and Fourteenth Amendments to the Constitution assure the right of an indigent defendant to Counsel at the trial stage of Criminal proceeding, *Gideon V. Wainwright*, 372 U.S. 335 (1963), and an indigent defendant is similarly entitled as a Matter of right to counsel for an initial appeal from judgment and sentence of the trial Court. *Douglas V. California*, 372 U.S. 353 (1963); *Griffin V. Illinois*, 351 U.S. 12 (1956). *Pennsylvania V. Finley*, 481 U.S. 551 (1987). However, the court held in *Ross V. Moffit*, 417 U.S. 600 (1974), "that the right to Counsel at these earlier stages of a Criminal procedure did not carry over to a discretionary appeal... []". Thus, this Court held in *Finley* that the logic of *Ross V. Moffit* required the conclusion that there was no Federal Constitutional right to counsel for indigent prisoners seeking state post conviction relief: "Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay V. Noia*, 372 U.S. 391, 423-424 (1963)... States have no obligation to provide this avenue of relief,

CF. *United States v. MacCollam*, 426 U.S. 317, 323 (1976), and when they do, the Fundamental Fairness mandated by the Due process clause does not require that the state supply a lawyer as well." 481 U.S., at 556-557. (Citing *Murray v. Giarratano*, 492 U.S. 1; 109 S.Ct. 2765; 106 L.Ed.2d 1 (1989)).

However, "the courts statement is an overgeneralization because - as is also true of the Federal postconviction remedy for federal prisoners, 28 U.S.C. § 2255; see Federal Habeas Corpus Practice and Procedure CH.41 - Some State postconviction procedures are statutorily defined as Criminal in nature, part of the original criminal proceeding, and subject to Criminal rules of procedure. See, e.g., Tennessee Post-conviction Procedure Act, TENN. CODE ANN. §§ 40-30-101 to 40-30-122 (2010). See also, Rules 1, 12 of the Rules Governing Section 2255 proceedings for the United States District Courts; Advisory Committee Notes." See Federal Habeas Corpus practice and Procedure § 25.6 nn. 15-18 and accompanying text; See 1 Federal Habeas Corpus practice and Procedure § 7.1 nn. 3 "Full and Fair" proceedings. Moreover, "A post-conviction proceeding Filed pursuant to Rule 32 is Considered part of the Original Criminal action." See Arizona Appellate Handbook § 14.3 (A) Nature of Proceedings; See also, Ariz. R. Crim. P. 32.3. (a) Generally. "A post-conviction proceeding is part of the original Criminal action and is not a ... Seperate action."

In general, other cases involving the right to Counsel have been categorical holdings as to what the Constitution

requires with respect to a particular stage of a criminal proceeding. See *Powell v. Alabama*, 287 U.S. 45 (1932); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Ross v. Moffitt*, 417 U.S. 600 (1974); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989).

Prior to 1987, a few state and lower federal court decisions had found a Constitutional right to counsel or financial assistance in state or federal post conviction proceedings under at least some circumstances. See *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980); *Giarratano v. Murray*, 668 F. Supp. 511 (E.D. Va. 1986), *aff'd*, 847 F.2d 1118, 1122 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989); *Nichols v. State*, 425 P.2d 247 (Alaska 1967); *People v. Shipman*, 397 P.2d 993 (Cal. 1965); *Honore v. Washington State Bd.*, 466 P.2d 485 (Wash. 1970). See also *Gibson v. Jackson*, 443 F. Supp. 239 (M.D. Ga. 1977), *vac'd* on other grounds, 578 F.2d 1045 (5th Cir.), *Cert. denied*, 439 U.S. 1119 (1978) (right to counsel in most capital cases). Cf. *Johnson v. Avery*, 393 U.S. 483 (1969) (reserving question)... And a few other courts have concluded, at least in dicta, that no such right existed. See, e.g., *Meeks v. Cabana*, 845 F.2d 1319, 1322 (5th Cir. 1988) (5th Circuit has "long held" that state not required to appoint counsel for indigents in all post conviction and collateral proceedings); *Jones v. Estelle*, 722 F.2d 159, 167 (5th Cir. 1983) (en banc), *Cert. denied*, 466 U.S. 976 (1984) (dicta); *Robinson v. Fairman*, 704 F.2d 368, 371 (7th Cir. 1983) (dicta) (citing *Laclair v. United States*, 374 F.2d

486 (7th Cir. 1967) (Section 2255 Case)). See also *Price v. Johnston*, 334 U.S. 266, 292 (1948) ("Prisoners... act... often as their own counsel in [federal] habeas corpus proceedings"); *Heath v. United States Parole Comm'n* 788 F.2d 85, 88 (2d Cir. 1986).

Beginning in 1987, the Supreme Court announced three decisions concluding that the particular Constitutional provisions before the Court did not provide a right to counsel or effective assistance of counsel in state post-conviction proceedings. In the first decision, *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Court noted that it had... "never held that prisoners have a Constitutional right to counsel when mounting collateral attacks to their convictions" in the state courts, and the Court "decline[d] to so hold today." In *Murray v. Giarratano*, 492 U.S. 1 (1989), a four-person plurality opinion read *Finley* as having concluded that there is "no right to postconviction counsel," *Id.* at 7-8, 9-10 (plurality opinion), although a majority of the Court either avoided the issue or questioned the extent to which *Finley* finally resolved it. And in *Coleman v. Thompson*, 501 U.S. 722 (1991), in 1991, a capital case, a six-person majority read "Finley and Giarratano [to] establish [] that there is no right to counsel [or, thus, to effective assistance of counsel] in state collateral proceedings," except, possibly, "where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755.

As did the Supreme Court plurality in *Giarratano* and Majority in *Coleman*, a number of lower courts have now treated *Finley* as having fully and negatively resolved the question: Whether the United States Constitution provides a right to counsel in some or all state post conviction proceedings. See, e.g., *Kitt v. Clarke*, 931 F.2d 1246 (8th Cir. 1991). See also, *Bonin v. Vasquez*, 999 F.2d (9th Cir. 1993).

A more accurate summary of the courts treatment of the issue, however, is Justice Blackmun's conclusion in his last opinion before retiring - that the Court "thus far has declined to hold that indigent capital defendants have a right to counsel." *McFarland v. Scott*, 512 U.S. 1256, 1261 (1994) (Blackmun, J. dissenting from denial of certiorari).

Therefore, the bases for considering the issue open are, First, that none of the courts three opinions that have touched on the subject has discussed a number of provisions of the Constitution that bear directly on the matter, including 1) the "Meaningful access" component of the Due Process clause (A plurality of the Court did discuss this aspect in *Giarratano*, but the issue was not presented in *Finley* and *Coleman*); 2) the Suspension clause; and 3) the Equal Protection Clause. In addition, *Coleman* left open the question whether there is a Constitutional right to counsel in the not uncommon situation in which state post conviction proceedings are, in essence, the prisoner's "one and only appeal" of an issue within the state courts. Finally, *Finley*, which provides the single

citation in support of the Court's subsequent discussion of the Matter, did not actually present, nor did it decide, the question whether there is a Constitutional right to appointment of counsel in some or all state post conviction proceedings. See Finley, 481 U.S. at 559 (Blackmun, J., Concurring in the Judgment).

Accordingly, although Chief Justice Rehnquist's Majority opinion in Finley reveals his and four other Justice's ... "think[ing]" on the right to counsel in state post conviction proceedings, the Court's actual holding in the case did not resolve that question. Indeed, even the Majority's less than conclusional phrasing of its dictum - which merely "declin[ed] to ... hold," Finley, 481 U.S. at 555 (emphasis added), that the Constitution requires counsel in state post conviction cases - bespoke an understanding that the issue remains [o]pen for the day (such as this day) when the facts, the lower court opinions, and the parties actually have presented the issue and have thereby enabled interested parties, in the context of post conviction proceedings actually pursued without counsel, or even with ineffective counsel, to provide the Court with the considered analyses of the question. Because Giarratano also did not resolve the issue - given the absence of a Majority opinion, and given that a Majority of Concurring and dissenting Justices suggested that a right to post conviction counsel does exist in capital cases and because Coleman only rejected the weakest of the

Various legal theories for a right to Counsel, namely, a 6th Amendment theory. See *Coleman v. Thompson*, 501 U.S. 722, 752-57 (1991) (addressing question whether ineffective assistance of appellate Counsel in state post conviction proceedings violated 6th Amendment), and expressly reserved the possibility that a right to Effective post conviction Counsel might exist in limited circumstances under an alternative "Equal Protection Theory," the Finley dictum remains a dictum that cannot be said to have resolved the issue. Thus, the question remains open whether the United States Constitution affords indigent prisoners a right of some sort to Counsel and necessary financial assistance in post conviction proceedings. And the way is open, therefore, for a fuller and more conclusive treatment of the issue than the Court has yet provided.

Indeed, in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court acknowledged that under Arizona law, a non-pleading defendant does not have the right to effective representation in post-conviction proceedings and "Because there is no constitutional right to an attorney in state post conviction proceedings, see, e.g., *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539, a petitioner cannot claim constitutionally ineffective assistance of Counsel in such proceedings" based on Counsel's alleged deficiencies in presenting claims in the post-conviction proceeding. See, *Coleman v. Thompson*, 501 U.S. 722, 725-

726 (1991); See also *State v. Mata*, 185 Ariz. 319, 336, 916 P.2d 1035, 1052-53 (1996). But the Court addressed a very narrow question in *Martinez*, stating: "Given that the precise question here is whether ineffective assistance in an initial-review collateral proceeding on an ineffective assistance-at-trial claim may provide cause for a procedural default in a Federal habeas proceeding." *Martinez*, U.S. at ___, 132 S.Ct. at 1315. The Court further stated: "This is not the case, however, to resolve" whether a defendant is Constitutionally entitled to effective-assistance of counsel in the first post-conviction-collateral proceeding in which the defendant may assert (for the first time) a claim of ineffective assistance of trial counsel, a question the court had left open in... *Coleman v. Thompson*, 501 U.S. 722, 755 (1991).

Arizona Courts consistently have stated that, "For non-pleading defendants like [Petitioner], there is no constitutional right to counsel in post conviction proceedings and, thus, despite the existence of state rules providing counsel, a claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding." See, *State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052 (1996); *State v. Krum*, 183 Ariz. 288, 291-92, 903 P.2d 8 n.5, 183 Ariz. 288, 903 P.2d 596, 599-600 & n.5 (1995); *Osterkamp v. Browning*, 226 Ariz. 485 ¶ 18, 250 P.3d 351, 556 (App. 2011); *State v. Armstrong*, 176 Ariz. 470, 474-75, 862 P.2d 230, 234-235 (App. 1993); *State v. Escarena-Mera*, 232 Ariz. 586, 307 P.3d

1013 (App. 2013). Thus, nothing in *Martinez* alters this established law.

In Arizona non-pleading defendants cannot raise claims of ineffective assistance of trial counsel on Direct Appeal, where they have a guaranteed constitutional right to effective appellate counsel. Rather, all ineffective assistance claims must be, for the first time raised in their Rule 32 postconviction proceeding, where they have no right to counsel, at all. See, *State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525-527 (2002). However, pleading defendants get to enjoy the right to effective assistance of counsel in their First Rule 33 postconviction proceeding to represent their claims of ineffective assistance of counsel, and that "of-right" proceeding is considered the "equivalent to a direct appeal." See *State v. Petty*, 225 Ariz. 369, 372 ¶18 (App. 2010); *State v. Pruett*, 185 Ariz. 128 (App. 1995); *Osterkamp v. Browning*, 226 Ariz. 485 ¶18 (App. 2011). See also, Ariz. R. Crim. P. 33.1 "To challenge the effectiveness of counsel in the First post-conviction proceeding, a defendant may file a Second notice requesting post conviction relief."

Therefore, not only as an equitable matter but as a constitutional matter, non-pleading trial defendants should also enjoy that same right to effective assistance of counsel in their First Rule 32 postconviction proceeding, [IRCP] at least as to the 'ineffective assistance of trial counsel claim'. Since the First Rule 32 post conviction proceeding is the first opportunity and "one and only appeal" to raise an ineffective assistance of trial counsel claim, and because that "collateral proceeding is the equivalent of a prisoner's

direct appeal as to that claim because the state [post-conviction] court decides the claim's merits." See *Martinez v. Ryan*, 566 U.S. 1 ¶ 6-12 (2012). As this court has noted "By deliberately choosing to move trial-ineffectiveness claims outside of the direct appeal process, where Counsel is Constitutionally guaranteed, the state significantly diminishes prisoner's ability to file such claims." See *Martinez, supra*. Thus, the Honorable Justices of this U.S. Supreme Court should recognize not only a Constitutional right to Counsel but to effective assistance of Counsel for non-pleading defendants in their "initial-review collateral proceeding," as to ineffective assistance of trial Counsel claims, and should hold First post-conviction Counsel to the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

I. AN EXCEPTION SHOULD BE ESTABLISHED TO THE CONSTITUTIONAL RULE THAT THERE IS NO RIGHT TO COUNSEL IN COLLATERAL PROCEEDINGS.

[A]. Equal Protection Clause - Claims available for First time in state post conviction proceedings.

In *Douglas v. California*, 372 U.S. 353 (1963), the Supreme Court held that the Equal Protection Clause requires the states to provide appointed Counsel for indigents pursuing First appeals as of right. The Court concluded that... "Where the merits of the one and only appeal an indigent

has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.* at 357 (emphasis in original). Accord - *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("Due Process and Equal Protection Clauses require the appointment of Counsel for defendants, convicted on their pleas, who seek access to First-tier review in the Michigan Court of Appeals").

In that situation,

"[t]here is lacking that equality demanded by the [14th] Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." See *Douglas v. California*, 372 U.S. at 357-58. See also *Halbert v. Michigan*, 545 U.S. at 620-21 ("indigent prisoners are particularly handicapped as self-representatives... '[Sixty-eight percent] of the state prison population did not complete high school, and many lack the most basic literacy skills'... '[S]even out of ten inmates fall in the lowest two out of five levels of literacy-Marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a

lengthy newspaper article. . . . Many, Halbert among them, have learning disabilities and mental impairments. See, U.S. Dept. of Justice, Bureau of Justice Statistics, A. Beck & L. Marcuschak, Mental Health Treatment in State prisons, 2000, pp. 3-4 (July 2001), <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf> (identifying as mentally ill some 16% of state prisoners and noting that 10% receive psychotropic medication). Navigating the appellate-process without a lawyer's assistance is a perilous endeavor for a lay-person, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments"); Robert V. LaVallee, 389 U.S. 40, 42 (1967) ("differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."); Coppedge v. United States, 369 U.S. 438, 446-47 (1962).

Even earlier, in *Smith v. Bennett*, 365 U.S. 708, 713-14 (1961), the Court recognized that the Equal Protection Clause applies to state postconviction proceedings, holding that states may not constitutionally deny indigents access to state postconviction remedies by charging them filing fees they cannot pay. Douglas did not address the question whether appointed counsel or other necessary financial assistance must be provided for a prisoner seeking postconviction review. See Douglas, 372 U.S. at 356. Its reasoning supports a right to counsel in some

postconviction proceedings, however, because, as to certain kinds of (IAC) claims, such proceedings are the ... Equivalent of a First State appeal as of right. Thus, Smith independently supports an equal protection right to state post conviction Counsel, given that, in many or most post conviction proceedings, the denial of Counsel is likely to be as preclusive of meaningful habeas Corpus review as the procedure voided in Smith, namely, denying indigent prisoners the financial ability to file in the first place.

As noted above, in many situations, whether as a matter of state law or fact, postconviction proceedings provide the first and only available state court forum in which prisoners may raise certain kinds of constitutional claims - including claims of 'ineffective-assistance of Counsel,' suppression of evidence, and improper contacts between jurors and third parties, and the like. State postconviction review also is likely to be the first meaningful state court review of any sort in situations in which actions by state judges or other state officials or of incompetent defense attorneys have previously blocked access to state trial and direct appellate forums for presenting constitutional claims. In such circumstances, the convicted inmate whom state law, the facts, the trial court, the prosecution, or defense counsel has denied a meaningful opportunity to advance constitutional claims at trial or on appeal

"has not previously had 'an adequate opportunity to present his claims fairly in the context of the state's appellate process.'" *Evitts v. Lucey*, 469 U.S. 387, 402 (1985) (quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)). See *Goeke v. Branch*, 514 U.S. 115, 120 (1995) (per curiam) (under *Evitts v. Lucey*, although "'convicted criminal has no Constitutional right to an appeal,'" he does have "Due Process Clause [...] guarantee [...]... effective assistance of counsel on his first appeal as of right" (citation omitted)). Accordingly, state post conviction proceedings in which the prisoner is raising claims that are then available for the first time in any state court are the 'functional equivalent' of a... first appeal as of right. In such circumstances, the right to counsel and essential financial assistance recognized in *Douglas*... should apply.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court recognized that the Equal Protection Clause might afford a right to meaningful representation in state post conviction proceedings whenever, practically speaking, those proceedings serve as the prisoner's "'one and only appeal'" as of right in the state courts. See *Coleman*, 501 U.S. at 755-57 (quoting *Douglas v. California*, 372 U.S. 353, 357 (1963)). [The same argument might be made directly under the 6th Amendment right to counsel "[i]n all criminal prosecutions," on the theory that direct appeal, and post conviction substitutes for direct appeal, are parts of the criminal

prosecution.]. Under Coleman, when practical or state law reasons make "state collateral review... the first place a prisoner can present a challenge to his conviction," the equal protection rules of "Douglas v. California," that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in a state court" and of "Evitts v. Lucey, 469 U.S. 387 (1985), that this right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right" should give the state postconviction petitioner a right to counsel in "his 'one and only appeal,' if that is what a state collateral proceeding may be considered." Coleman, 501 U.S. at 755-57. See Murray v. Giarratano, 492 U.S. 1, 24 (1989) (Steven, J., dissenting).

In its decision in Martinez v. Ryan, 566 U.S. 1 (2012), the Supreme Court described this aspect of the Coleman opinion as follows :

Coleman v. Thompson... left open... a question of Constitutional law: Whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. These proceedings can be called, for purposes of this opinion, "initial-review collateral proceedings." Coleman had suggested, though without holding, that the Constitution may require states to provide counsel in initial-review collateral proceedings because "in [these] cases... state collateral review is

the first place a prisoner can present a challenge to his conviction." *Id.*, at 755. As Coleman noted, this makes the initial-review collateral proceeding a prisoner's "one and only appeal" as to an ineffective assistance claim, *id.*, at 756 (emphasis deleted; internal quotation marks omitted), and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings. See *id.*, at 755; *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding states must appoint counsel on a prisoner's first appeal). *Id.*, at 8-9.

In *Martinez v. Ryan*, the Court returned to the issue of "ineffective assistance of counsel in an initial-review collateral proceeding on a claim of ineffective assistance at trial," *id.* at 9, but only for the limited purpose of holding - in what the court called an "equitable ruling," not "a constitutional ruling" *id.* at 16. - that ineffective assistance in an initial-review collateral proceeding "may provide cause for a procedural default in a Federal habeas proceeding," *id.* at 9, at least in those states like Arizona, where "claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding." *Martinez v. Ryan*, 566 U.S. at 17. Subsequently, in *Trevino v. Thaler*, 569 U.S. 413 (2013), the Court ruled that the holding in *Martinez* applies as well to states like Texas, in which the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a

typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 429. See also, *Gallow v. Cooper*, 570 U.S. 933 (2013) (mem) (Statement of Breyer J., joined by Sotomayor J., respecting denial of certiorari). Thereafter, in *Davila v. Davis*, 137 S.Ct. 2058 (2017), the Court took up the question whether to extend *Martinez* to "allow Federal Courts to consider a different kind of defaulted claim—ineffective assistance of appellate counsel"—but the court had... "decline[d] to do so." *Id.* at 2063.

The reasoning that led the court to adopt the rule in *Martinez*, and also the court's explanation for declining to extend the rule in *Davila*, both support the recognition of a Constitutional right to counsel and to the effective assistance of counsel in initial-review state post conviction proceeding that provide the first occasion to raise a claim of ineffective assistance at trial. In announcing the rule in *Martinez*, the court stated:

To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a post conviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inad-

equate 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. *Martinez v. Ryan*, 566 U.S. at 9.

The Court explained that, when it comes to the ineffective assistance claims that must be raised in an initial-review collateral proceeding, such a proceeding is "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim" and that denial of Counsel at the proceeding thus raises the concerns the Court found to exist in *Douglas v. California*, when indigent defendants must fend for themselves in their one and only appeal of right:

Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the claim" of ineffective assistance, no other court has addressed the claim, and "defendants pursuing first-tier review are generally ill equipped to represent themselves" because they do not have a brief from Counsel or an opinion of the Court addressing their claim of error. *Halbert v. Michigan*, 545 U.S. 605, 617 (2005); see *Douglas*, 372 U.S., at 357-358.

As Coleman recognized, an attorney's errors during an

appeal on direct review may provide cause to excuse a procedural default; For if the attorney appointed by the state to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claims. See 501 U.S., at 754; *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Douglas*, *Supra*, at 357-358. Without help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim [in an initial-review state postconviction proceeding]. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert*, 545 U.S., at 619. To present a claim of ineffective assistance at trial in accordance with state's procedures, then, a prisoner likely needs an [E]ffective attorney.

The same would be true if the state did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the state's procedural rules or may misapprehend the substantive details of federal constitutional law. Cf., e.g., *id.* at 620-621 (describing the

educational background of the prison population). While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record. *Id.* at 11-12.

As is evident in the above-quoted passage from *Martinez*, the Court's entire reasoning on the question of "cause" is based on the logic of its ruling in *Douglas*, *Evitts*, and *Halbert* as to when the assistance, and the effective assistance, of counsel are constitutionally essential.

Accordingly, when the Constitutional question is properly before the Court (as it is today), its reasoning in *Martinez* would seem to compel this Court's recognition of a United States' Constitutional right to counsel and to the effective assistance of counsel in initial-review state postconviction proceedings that provide the first occasion to raise a claim of ineffective assistance at trial.

In *Davila v. Davis*, 137 S.Ct. 2058 (2017), the Supreme Court declined to extend *Martinez* to defaulted claims of ineffective assistance of appellate counsel, emphasizing that such an extension is "not required to ensure that meritorious claims of trial error receive review by at least one state or federal court - the chief concern identified by th[e]... Court in *Martinez*." 137 S.Ct. at 2067. (emphasis added). "Claims of ineffective assistance of appellate counsel," Justice Thomas wrote for the 5-4 Majority, - "do not pose the same risk that a trial

error - of any kind - will escape review altogether, at least in a way that could be remedied by [the] petitioner's proposed rule. This is true regardless of whether trial Counsel preserved the alleged error at trial. If trial Counsel preserved the error by properly objecting, then that claim of trial error "will have been addressed by... the trial court."... A claim of appellate ineffectiveness premised on a preserved trial error thus does not present the same concern that animated the Martinez exception because at least "one court" will have considered the claim on the merits... If trial Counsel failed to preserve the error at trial, then petitioner's proposed rule ordinarily would not give the prisoner access to Federal review of the error, anyway. Effective appellate Counsel should not raise every non-frivolous argument on appeal, but rather only those arguments most likely to succeed... Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court... In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors... Thus, in most instances in which the trial court did not rule on the alleged trial error (because it was not preserved), the prisoner could not make out a substantial claim of ineffective assistance of appellate Counsel and therefore could not avail himself of petitioner's expanded Martinez exception...

Adapting petitioner's proposed rule would be unnecessary to ensure review of a claim of trial error even when a prisoner has a legitimate claim of ineffective assistance of appellate counsel based on something other than a preserved trial error. If an unpreserved trial error was so obvious that appellate counsel was constitutionally required to raise it on appeal, then trial counsel likely provided ineffective assistance by failing to object to it in the first instance. In that circumstance, the prisoner likely could invoke *Martinez* or *Coleman* to obtain review of trial counsel's failure to object. Similarly, if the underlying, defaulted claim of trial error was ineffective assistance of trial counsel premised on something other than the failure to object, then *Martinez* and *Coleman* again already provide a vehicle for obtaining review of that error in most circumstances. Petitioner's proposed rule is thus unnecessary for ensuring that trial errors are reviewed by at least one court." *Id.* at 2067-68.

As the dissent pointed out, Davila's reasoning will at times deny prisoners a fair and meaningful opportunity to raise claims of ineffective assistance of counsel on appeal in at least one court. See *id.* at 2073. In so ruling, however, the emphasis the court placed on assuring the effective representation in state postconviction proceedings to safeguard the right to fair and meaningful judicial review by at least one court of alleged trial error does not undermine - and instead tends to reinforce - the

argument for a Constitutional right to Counsel in the state postconviction proceedings challenging trial error that could not fairly or meaningfully have been challenged prior to that point.

Evitts, Coleman, Martinez, Trevino, and Davila thus tend to reveal the irrelevance in the situation contemplated here in which claims are available for state court review for the first time in state postconviction proceedings - of the Court's analysis in *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Addressing a state postconviction pleading "rais[ing] the same issues that the Supreme Court of Pennsylvania had rejected on the merits" on direct appeal, the *Finley* Majority refused to draw an analogy between direct appeals as of right and redundant state postconviction proceedings. Instead the Court drew an analogy between state postconviction proceedings and discretionary appeals following a first appeal as of right - in the latter of which, under *Boss v. Moffitt*, 417 U.S. 600 (1974), there is no right to Counsel, *Finley*, 481 U.S. at 555. But as Evitts, Coleman, Martinez, Trevino, and Davila reveal, in circumstances different from those actually presented in *Finley* - 'For example, when substantial claims cognizable for the first time in any state court are presented' - *Boss* does not control. See Evitts, 469 U.S. at 402.

Moreover, Petitioners proposed exception would "not put a significant strain on state resources" or "impose significant systemic costs" given the fact that the 1)

Conviction rate for trial defendants across the United States is only about 9%. See *Lafler v. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012) ("The state's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-Seven percent of federal convictions and Ninety-Four percent of state convictions are the result of guilty pleas"); 2) not all states are like Arizona which expressly require ineffective assistance of trial Counsel claims be brought in the first state post conviction proceeding, and 3) not all prisoners who were convicted after trial appeal in state post conviction proceedings. Thus, the states impacted by this proposed exception would be minuscule given the fact that most states already provide Counsel in post conviction proceedings. However, Failure to provide effective-assistance of First post conviction Counsel in initial-review collateral proceedings which provides the first forum to raise ineffective-assistance of trial Counsel claims, will continue to result in a "Fundamental Miscarriage of Justice" for all non-pleading trial defendants ("Prisoners") who experience the same issue across the U.S. of America.

Here, in Petitioner's case, he has been attempting to argue that his First post conviction Counsel provided ineffective assistance in the initial-review collateral proceeding by neglecting and failing to investigate and raise numerous ineffective assistance of trial Counsel (errors) claims,

but for the constitutional rule that "there is no right to counsel in state postconviction proceedings," petitioner has had no success due to the fact, that, that is not a Cognizable ground for relief. Petitioner's is, again, a case in point. And "This is [] the case, however, to resolve whether that exception exists as a constitutional matter." That is "the question left open in Coleman: Whether a prisoner has a [United States] Constitutional right to effective counsel in initial-review collateral proceedings." *Martinez v. Ryan*, 566 U.S. 1 (2012).

Under the United States Constitution an indigent non-pleading trial defendants ineffective-assistance of trial Counsel claim should be given much more respect. The fact that the "right to effective assistance of counsel at trial is a bedrock principle in our Nation's justice system," and the "Foundation for our adversary system," should move this court to establish and recognize a right to counsel in initial-review collateral proceedings." *Martinez, supra*.

II. THIS CASE IS AN IDEAL VEHICLE.

1. This case is as clean a vehicle as the court will ever get for taking up this question(s). Petitioner raised this issue in his successive postconviction proceeding. When the state court denied petitioner's successive Notice Requesting post conviction relief, the Petitioner expressly preserved his right to raise this issue on appeal. He then duly raised it on appeal before the AZ Court of Appeals,

Division One. The Petitioner then sought review in the Arizona Supreme Court on this specific issue, but the state trial Court was the last court of reason to rule on the merits. Neither the Az Court of Appeals or the Az Supreme Court ever hinted that any procedural bar or other substantive issue impacted (or could have impacted) their decisions, or that there is any basis for maintaining petitioner's denied successive Notice of Rule 32 requesting postconviction relief if this Court overrules the ... Constitutional rule that there is no right to counsel in collateral proceedings. If ever there were a clean vehicle for revisiting the Constitutional rule and the question left open in Coleman, this is it.

2. It is not every day that this court is presented with a clean vehicle on this issue. Petitioner is unaware of any other cases presenting the same questions and Petitioner believes it is time to revisit and for reconsideration of the issue. (If the Court grants certiorari in any other case presenting this question, it should hold this case). If the Court proceeds to reject the constitutional rule of no right to counsel in postconviction collateral proceedings, it should grant this petition, vacate the decision below, and remand for further proceedings.

Here, Petitioner pro se, preserved the question(s) presented at every turn, and the questions here are undeniably outcome determinative. He has no other

defense; proceedings are otherwise complete; and neither court below suggested any alternative ground, procedural or substantive, for denying his successive notice requesting post conviction relief. In short, Petitioner is sitting in prison unable to raise "trial errors" that First post conviction Counsel failed to present in the "initial-review collateral proceeding"; Overruling the Constitutional rule that there is no right to Counsel in collateral proceedings would "ensure that meritorious claims of trial error" be represented by an effective attorney to be presented to the state court for review, and to receive an adjudication on the merits of the claims, and possibly set the Petitioner Free. This is the appropriate case that Justice Kennedy suggested, however, to address... "Whether that exception exists as a Constitutional Matter" and to resolve the question "left open" in *Coleman v. Thompson*, 501 U.S. 722 (1991); *Martinez v. Ryan*, 566 U.S. 1 (2012). The Court should not pass it up.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully Submitted,

Jardin R. Munoz #286407

x *Jardin R. Munoz*
Pro Se Petitioner

Date: May 25th, 2023.

INDEX OF APPENDICES

- 1) APPENDIX A : Opinion of the Arizona Court of Appeals, Division One (July 26, 2022).
- 2) APPENDIX B : Opinion of the Maricopa County Superior Court (Nov. 9, 2021).
- 3) APPENDIX C : opinion of the Arizona Supreme Court (Jan. 5, 2023).
- 4) APPENDIX D : opinion of the Maricopa County Superior Court (Dec. 17, 2020).