No. _____

In the Supreme Court of the United States

Michael McLaughlin,

Petitioner,

v.

William Hutchings, 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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QUESTIONS PRESENTED

In his petition for writ of habeas corpus before the district court, Petitioner Michael McLaughlin raised the claim that his trial counsel ineffectively failed to investigate and present a voluntary intoxication defense. In 2016, the Ninth Circuit held that McLaughlin established cause and prejudice under *Martinez* to overcome the procedural default of this claim based on new declarations McLaughlin presented to the state courts in a second postconviction proceeding. The case was remanded to the district court, which held an evidentiary hearing. At the hearing, McLaughlin presented new evidence to establish deficient performance and prejudice. Despite this showing, the district court denied the petition.

After McLaughlin filed his opening brief with the Ninth Circuit and before Respondents filed their answering brief, this Court decided *Shinn v. Ramirez*, 142 596 U.S. 366 (2022). The Ninth Circuit held, based on *Ramirez*, that McLaughlin failed to properly develop the factual basis of his claim in state court, and, as a result, the federal court could not consider his new evidence to excuse the procedural default in state court or to consider the merits of the underlying claim.

The questions presented are:

1. In *Michael Williams v. Taylor*, 529 U.S. 420, 435 (2000), this Court held diligence requires a petitioner to make a "reasonable attempt" to develop the factual basis of a claim in state court; however, diligence "does not depend . . . upon whether those efforts could have been successful." Does the Court's decision in *Ramirez* change the *Michael Williams* inquiry for diligence such that a petitioner

must do more than make a "reasonable attempt" to develop the factual basis of a claim in state court in a procedurally barred petition?

2. Did the Ninth Circuit err in concluding, contrary to other courts of appeals that have decided the question and this Court's precedent, that a court may not consider new evidence when deciding whether a petitioner has established cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012)?

List of Parties

Petitioner Michael McLaughlin is an inmate at Southern Desert Correctional Center. Respondent Ronald Oliver is the warden of Southern Desert Correctional Center.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael McLaughlin respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit. *See* Appendix A.

OPINIONS BELOW

The March 19, 2024, decision of the Ninth Circuit Court of Appeals is reported at 95 F.4th 1239 (9th Cir. 2024). *See also* App. A. The order of the district court denying his petition for writ of habeas corpus under 28 U.S.C. § 2254 is unpublished, but available at *McLaughlin v. Gentry*, 2021 WL 1298921 (D. Nev. Apr. 7, 2021). *See also* App. C.

The Ninth Circuit originally vacated the district court's denial of McLaughlin's habeas petition and remanded for further proceedings, which is reported at *McLaughlin v. Laxalt*, 665 Fed. Appx. 590 (9th Cir. 2016). *See also* App. D. The original order of the district court denying his habeas petition is unpublished, but available at *McLaughlin v. Williams*, 2015 WL 1471362 (D. Nev. Mar. 31, 2015). *See also* App. E.

The opinion of the Nevada Supreme Court denying relief is unpublished, but available at *McLaughlin v. State*, 130 Nev. 1216, 2014 WL 4639770 (Table) (Nev. Sept. 16, 2014). *See also* App. F. The order of the Seventh Judicial District Court of Nevada denying relief is unreported. *See* App. G.

JURISDICTION

The judgment of the Ninth Circuit was entered on March 19, 2024. App. A. A timely petition for en banc and panel rehearing was denied on July 1, 2024. App. B.

This Court has statutory jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

In his original petition for writ of habeas corpus, McLaughlin presented a claim that trial counsel rendered ineffective assistance by failing to investigate and present a voluntary intoxication defense. Federal postconviction counsel presented new evidence in support of the claim to the state court in a second state postconviction petition, which was denied as procedurally barred. App. F & G. The federal district court then denied relief, finding this claim to be procedurally defaulted and McLaughlin could not show prejudice under *Martinez v. Ryan*, 566

U.S. 1 (2012), to overcome the default. App. E. On his first appeal to the Ninth Circuit in 2016, a panel of the court reviewed the new evidence federal postconviction counsel uncovered and concluded that state postconviction counsel was ineffective for failing to independently investigate and fully present the claim. The panel concluded that the new evidence was sufficient to undermine confidence in the outcome of the state postconviction proceedings. The 2016 panel concluded that 28 U.S.C. § 2254(e)(2), which requires a petitioner to develop the factual basis of a claim in state court, did not bar an evidentiary hearing because McLaughlin proffered this new evidence to the state courts and sought an evidentiary hearing. App. D.

The Ninth Circuit remanded the case to the district court, which held an evidentiary hearing, after which it denied McLaughlin's petition on the merits. After McLaughlin filed his opening brief in his second appeal before the Ninth Circuit, but before Respondents filed their answering brief, this Court decided *Shinn v. Ramirez*, 596 U.S. 366 (2022), interpreting § 2254(e)(2)'s requirement that a petitioner diligently develop, or attempt to develop, the factual basis of a claim in state court. The 2024 panel of the Ninth Circuit held that pursuant to 28 U.S.C § 2254(e)(2) and *Ramirez*, McLaughlin failed to develop the factual basis of his claim of ineffective assistance of trial counsel in state court–even after he presented the new evidence in support of the claim to the state courts. As a result, the panel ruled it could not consider the evidence McLaughlin presented in support of his claim for a merits determination or for assessing whether McLaughlin had shown

cause and prejudice to overcome procedural default under *Martinez*. *See* App. A.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for writ of certiorari because the Ninth Circuit misapplied this Court's precedent, creating a conflict with other courts of appeals on an important area of federal law. S. Ct. R. 10(a), (c).

I. The Ninth Circuit misinterpreted "diligence" for purposes of § 2254(e)(2), conflicting with this Court's authority.

The Ninth Circuit held that the district court was prohibited from reviewing new evidence in considering the merits of McLaughlin's ineffective assistance of trial counsel claim because McLaughlin failed to develop the factual basis of the claim in state court in "compliance with state procedural rules." App. A at 24 (citing *Ramirez*, 596 U.S. at 375–76) (internal quotation marks omitted). The court further held that presenting new evidence in a second state petition that the state courts find procedurally barred does not satisfy the requirement to present evidence "in compliance with state procedural rules" and counts as a "failure to develop the factual basis of a claim in State court proceedings." App. A at 24 (citing *Ramirez*, 596 U.S. at 375–76) (cleaned up). However, this holding takes the quoted passage from *Ramirez* out of context and conflicts with this Court's decision in *Williams v. Taylor*, 529 U.S. 420 (2000).

A federal court reviews the state proceedings where a federal claim was raised to determine whether a petitioner failed to diligently develop the facts of a claim under § 2254(e)(2). In determining McLaughlin was not diligent in presenting his claim to the state court, the 2024 panel of the Ninth Circuit relied upon

language from the section of *Ramirez* discussing the general rule of exhaustion and procedural default. *Ramirez*, 596 U.S. at 375–76. However, *Martinez* presents a situation where first state postconviction did not develop or raise an ineffective assistance of trial counsel claim. To address this situation, *Ramirez* mentions the procedure for obtaining a stay and abeyance to exhaust a federal claim in state court. *Id.* at 379. The panel's decision did not acknowledge this avenue for presenting a claim in state court, and therefore ignored McLaughlin's efforts in raising his claim in the second state postconviction proceeding.

In contrast, the 2016 panel of the Ninth Circuit held that McLaughlin properly presented his new evidence to the state courts, such that § 2254(e)(2) did not foreclose his eligibility for an evidentiary hearing. The court cited to *Michael Williams v. Taylor*, 529 U.S. 420, 437 (2000), where this Court stated: "If there has been no lack of diligence at the relevant stages of the state court proceedings," a petitioner "has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause." To show diligence, a petitioner must make a "reasonable attempt" to develop the factual basis of a claim; however, diligence "does not depend . . . upon whether those efforts could have been successful." *Id.* at 435. The requirements to show diligence as detailed in *Michael Williams* are not implicated by the *Ramirez* opinion. In fact, *Ramirez* repeatedly relies on *Michael Williams* in support of its reasoning. *See Ramirez*, 596 U.S. at 381—89.

Under *Michael Williams*, diligence requires a petitioner "at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.*

The 2016 panel of the Ninth Court found McLaughlin did just that. He presented his ineffective assistance of trial counsel claim to the state court and properly requested a hearing. Consequently, pursuant to this Court's precedent, McLaughlin diligently attempted to develop the facts of his claim under § 2254(e)(2). The Ninth Circuit's determination otherwise was in err.

II. The Ninth Circuit misapplied *Ramirez* in ruling courts cannot consider new evidence to assess cause and prejudice.

The Ninth Circuit's incorrect interpretation of *Ramirez* with respect to its application at the cause and prejudice stage conflicts with this Court's precedent. *Ramirez* did not impact prior circuit court authority on the question of presenting new evidence at the cause stage. Rather, *Ramirez* solely concerned consideration of evidence under § 2254(e)(2) at the merits stage. *Ramirez*, 596 U.S. at 384. As the Court itself acknowledged in *Ramirez*, it was not answering the question of whether new evidence can be considered at the cause stage to evaluate a *Martinez* argument, as that issue was not before the Court. *Id.* at 382–84; *see also Mullis v. Lumpkin*, 70 F.4th 906, 910 (5th Cir. 2023) (explaining the Supreme Court "did not reach—and indeed expressly reserved—resolution of the current situation: the use of evidence outside the state record in the *Martinez* context to establish cause and prejudice").

The Ninth Circuit expressly (and incorrectly) stated that *Ramirez* held that new evidence cannot be used to analyze cause and prejudice. But in reaching that conclusion, the panel was actually *extending* the *Ramirez* holding to a situation this Court found it did not "need [to] address." *Ramirez*, 596 U.S. at 389. Importantly,

the decision is inconsistent with a significant portion of this Court's decision in *Martinez*, which remains good law even after *Ramirez*. *Ramirez* did not affect the core principle of *Martinez*—ineffective assistance of postconviction counsel can establish cause. Indeed, one of the petitioners in *Ramirez* had done just that and this Court did not reverse on that basis. However, pursuant to the panel's decision in McLaughlin, in the Ninth Circuit a petitioner's ability to establish cause based on ineffective assistance of postconviction counsel is extinguished for any claim that relies on evidence outside the state court record.

III. This Court should resolve the circuit split in how federal courts apply *Ramirez*.

A. The Circuits are split on whether a federal court may consider new evidence to assess cause and prejudice under *Martinez*.

In 2012, this Court held that ineffective assistance from initial state postconviction counsel can establish cause and prejudice to excuse procedural default of certain claims in federal habeas proceedings. *Martinez*, 566 U.S. at 17. Ten years later, this Court ruled that 28 U.S.C. § 2254(e)(2) places limits on the evidence that a federal court can consider after a petitioner successfully establishes cause under *Martinez*. *Ramirez*, 596 U.S. at 389. Despite the limitation, *Martinez* remains good law. But in this case, the Ninth Circuit expanded the holding of *Ramirez* from the merits of the claim to the cause stage, effectively overruling a core element of *Martinez*.

The Ninth Circuit held that, pursuant to *Ramirez*, where § 2254(e)(2) applies and the petitioner cannot meet its requirements, federal courts cannot consider new

evidence in assessing cause and prejudice under *Martinez*. App. A at 26 (citing *Ramirez*, 596 U.S. at 389).[1] This holding deepens a jurisdictional split. Two of the circuits to consider the question, the Fifth Circuit and the Third Circuit, have concluded that *Ramirez* does not prevent federal courts from considering evidence outside the state court record to determine whether a petitioner has established ineffective assistance of postconviction counsel as cause to overcome procedural default.

The Fifth Circuit interprets a "claim" in "the narrower sense," such that in the habeas context a "claim" refers to the underlying merits claim. *Mullis*, 70 F.4th at 909. Therefore, the Fifth Circuit has not applied § 2254(e)(2)'s evidentiary bar to the decision of whether to excuse a procedural default. *Id.* at 910.

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[1] The panel took this quote out of context to support its holding, despite *Ramirez* not addressing this issue. The full paragraph from *Ramirez* reads:

> Respondents all but concede that their argument amounts to the same kind of evasion of § 2254(e)(2) that we rejected in *Holland*. They nonetheless object that *Holland* renders many *Martinez* hearings a nullity, because there is no point in developing a record for cause and prejudice if a federal court cannot later consider that evidence on the merits. While we agree that any such *Martinez* hearing would serve no purpose, that is a reason to dispense with *Martinez* hearings altogether, not to set § 2254(e)(2) aside. Thus, if that provision applies and the prisoner cannot satisfy its "stringent requirements," *Michael Williams*, 529 U.S. at 433, 120 S.Ct. 1479, a federal court may not hold an evidentiary hearing—or otherwise consider new evidence—to assess cause and prejudice under *Martinez*.

Ramirez, 596 U.S. at 389.

The Fifth Circuit explicitly ruled that *Ramirez* did not abrogate prior circuit case law to this effect. *Id*. The *Mullis* court noted that the issue in *Ramirez* was the use of new evidence developed at a *Martinez* hearing to assess the underlying merits of a claim of ineffective assistance of trial counsel. *Id*. (citing *Ramirez*, 596 U.S. at 382–84). Because the Supreme Court "reserved" ruling on whether new evidence in the *Martinez* context can be used to establish cause and prejudice, the Fifth Circuit did not extend *Ramirez*, as the panel in this case did.

The *Mullis* court held that it could "not violate our rule of orderliness" by extending § 2254(e)(2)'s evidentiary restrictions. *Id* at 911 (citing *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014)). "In the absence of any on-point intervening law, whether in a statute or Supreme Court opinion," the Fifth Circuit determined that it had to follow its "narrow construction of 'claim' in § 2254(e)(2)." *Mullis*, 70 F.4th at 911. Therefore, the Fifth Circuit continues to allow evidence outside of the state record for *Martinez* arguments for the purpose of establishing cause for procedural default. *Id*.

The Third Circuit has interpreted *Ramirez* similarly. Prior to the *Ramirez* decision, the Third Circuit held that a hearing for the purpose of excusing procedural default was not a hearing on a "claim" because the hearing was not for a claim for relief on the merits. *Cristin v. Brennan*, 281 F.3d 404, 417–18 (3d Cir. 2002).

After *Ramirez*, the Third Circuit held that *Ramirez* did not abrogate the court's prior "reading of the word 'claim' in *Cristin*." *Williams v. Superintendent*

Mahanoy SCI, 45 F.4th 713, 724 (3d Cir. 2022). *Williams* reaffirmed the holding in *Cristin* that "AEDPA's text does not forbid federal courts from developing the facts needed to excuse a procedural default." *Id.* (citing *Ramirez*, 596 U.S. at 388–89).

Of the circuits that have addressed the issue, the Fourth, Sixth, and Eighth Circuits expand the *Ramirez* decision to prohibit the introduction of new evidence in support of *Martinez* arguments. These circuits, like the Ninth Circuit in *McLaughlin*, did not address the Supreme Court's separate treatment of cause and prejudice arguments versus assessing the underlying merits of a claim. Instead, the courts failed to acknowledge that the *Ramirez* court was expressly referring to assessing the underlying merits of a claim. *Stokes v. Stirling*, 64 F.4th 131, 136 (4th Cir. 2023); *Rogers v. May*, 69 F.4th 381, 396–98 (6th Cir. 2023); *Marcyniuk v. Payne*, 39 F.4th 988, 998–99 (8th Cir. 2022). Nor did the courts acknowledge that the Supreme Court reserved ruling on cause and prejudice arguments and only addressed the issue in dictum.

The *Ramirez* Court did not answer the question of whether new evidence could be used to overcome procedural default; rather the Court specifically stated it did not need to answer the question and left it open. Despite the Court's declaration that it was not addressing the issue, these courts based their expansion of the *Ramirez* decision solely on *Ramirez* itself. The Fourth Circuit in *Stokes* interpreted *Ramirez* as "prohibit[ing] a petitioner from introducing evidence to support either their underlying constitutional claim or a *Martinez* claim that state PRC counsel were ineffective." *Id.* (citing *Ramirez*, 596 U.S. at 389–91). Unlike the Fifth and

Third Circuits that provided a statute-based explanation for their rulings, the Fourth, Sixth, and Eighth Circuits do not provide any basis for these holdings, and indeed there is none in the *Ramirez* decision.

As both the Fifth and Third Circuits agree, the Fourth, Sixth, and Eighth Circuits as well as the 2024 *McLaughlin* panel incorrectly interpreted the Supreme Court's decision in *Ramirez*. This expansive reading of *Ramirez* does not comport with the Supreme Court's actual decision.

IV. This case gives the Court an opportunity to clarify its decisions in *Martinez* and *Ramirez* and resolve a circuit split.

This case presents the Court with the opportunity to clarify its holdings in *Martinez* and *Ramirez* and resolve a split between the Third and Fifth and Fourth, Sixth, Eighth, and Ninth Circuits.

A. *Martinez* remains good law after *Ramirez*.

The *Ramirez* decision did not disturb the holding in *Martinez* that the ineffective assistance of postconviction counsel can excuse the failure to comply with a state procedural rule. Indeed, the Court relied on *Martinez* in demonstrating the distinction between the procedural default inquiry and the diligence inquiry under § 2254(e). *Compare Ramirez*, 596 U.S. at 380 (discussing *Martinez*) *with Ramirez*, 596 U.S. at 381 (discussing 2254(e)). However, if the Ninth Circuit's decision in *McLaughlin* stands, and the procedural default of a claim in state court results in a finding that petitioner was not diligent under 2254(e), the Ninth Circuit would effectively overrule this Court's decisions in *Martinez* and *Michael Williams*.

Martinez presents a situation where an ineffective assistance of trial counsel claim was not properly raised or developed during the first state postconviction proceeding due to the ineffective assistance of counsel. *Ramirez* reinforced that the facts supporting an ineffective assistance of counsel claim not raised by first state postconviction counsel must be presented to the state courts before a federal court may consider the evidence.

Considering the facts of *Ramirez*, it is clear that this Court did not intend to disturb the holding in *Martinez*. In the two consolidated cases, the claims were not developed or presented to the state court, but instead were first developed and presented in federal court. *See* 596 U.S. at 372–74. Petitioners were seeking to excuse the procedural default by demonstrating ineffective assistance of first state postconviction counsel. Rather than imposing a categorical bar to evidence that was not presented during the first postconviction proceeding, *Ramirez* requires a petitioner show diligence by not bypassing the state courts.

Because the Ninth Circuit improperly used *Ramirez* to effectively render *Martinez* a nullity, it is appropriate for this Court to grant certiorari to clarify its holdings in *Martinez* and *Ramirez*.

B. This Court should resolve the circuit split.

The circuit courts are split on the impact of *Ramirez* on a court's ability to consider new evidence at the cause and prejudice stage under *Martinez*. The Third and Fifth Circuits have not expanded the holding in *Ramirez*, but the Fourth, Sixth, Eighth, and Ninth Circuits have. In *Ramirez*, the Court did not address whether

new evidence can be considered at the cause stage to evaluate a *Martinez* argument since the question was not before the Court. *Id.* at 382–84. Because several circuits have expanded on the *Ramirez* holding to decide this question, it is appropriate for this Court to grant certiorari to resolve the deepening circuit split.

CONCLUSION

For the foregoing reasons, McLaughlin respectfully requests that this Court grant this petition for writ of certiorari.

Dated September 25, 2024

Respectfully submitted,

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