No. 24-

IN THE

Supreme Court of the United States

JONATHAN LEIGH SOSNOWICZ,

Petitioner,

vs.

RYAN THORNELL, Director of the Arizona Department of Corrections, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Between 1948 and 2022, this Court applied the same standard for excusing a state prisoner's procedural default of a claim for relief as it applied to allow factual development of that claim in federal habeas proceedings. But when this Court decided *Shinn v. Ramirez*, 596 U.S. 366 (2022), it decoupled those standards. Cause and prejudice, under the rubric of *Coleman v. Thompson*, 501 U.S. 722 (1991), and *Martinez v. Ryan*, 566 U.S. 1 (2012), remains the standard for excusing a procedural default of a state prisoner's claim if the default is based on an adequate and independent ground in state law. But whether factual development in federal habeas proceedings is allowed depends, to begin with, whether the prisoner has "failed to develop" the claim in state court. 28 U.S.C. § 2254(e)(2). And that depends on whether the prisoner has been diligent in developing the factual basis of the claim in state court proceedings. *Williams v. Taylor*, 529 U.S. 420 (2000).

Here, the Ninth Circuit relinked the two standards, and held that a state court's procedural-bar ruling forever barred factual development of the claim, no matter how diligent the prisoner's efforts were in state court. Did the Ninth Circuit correctly apply this Court's decision in *Ramirez*?

PARTIES TO THE PROCEEDING

The petitioner in this Court is Jonathan Leigh Sosnowicz. He was the appellant in the court below, and the petitioner in the district court.

The respondents in this Court are Ryan Thornell, Director of the Arizona Department of Corrections, and the Attorney General of the State of Arizona. They were the appellees in the court below, and the respondents in the district court.

RELATED PROCEEDINGS

- *Sosnowicz v. Thornell*, No. 22-16019 (9th Cir. filed Jul. 13, 2022)
- *Sosnowicz v. Shinn*, No. 2:20-cv-40-PHX-DGC (D. Ariz. filed Dec. 29, 2019)
- *State v. Sosnowicz*, No. CR-19-0374-PR (Ariz. filed Nov. 9, 2019)
- *State v. Sosnowicz*, Nos. 1 CA-CR 17-0593 PRPC; 2 CA-CR 2018-0058-PR (Ariz. Ct. App. filed Sept. 13, 2017)
- *State v. Sosnowicz*, No. CR-16-0177-PR (Ariz. filed May 12, 2016)
- *State v. Sosnowicz*, Nos. 1 CA-CR 14-0207 PRPC; 2 CA-CR 2016-0065-PR (Ariz. Ct. App. filed Mar. 13, 2014)
- *State v. Sosnowicz*, No. 1 CA-CR 10-0789 (Ariz. Ct. App. filed Oct. 5, 2010)
- *State v. Sosnowicz*, No. CR 2008-171268-001-SE (Maricopa Co. Super. Ct. filed Nov. 18, 2008)

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No. 24-_____

JONATHAN LEIGH SOSNOWICZ, PETITIONER,

v.

RYAN THORNELL, DIRECTOR OF THE ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

Jonathan Sosnowicz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals's decision affirming the district court's denial of Mr. Sosnowicz's habeas petition is unreported, but included in the appendix at 1a. The district court's order denying the petition is not reported, but is included in the appendix at page 5a. The district court's earlier order setting an evidentiary hearing and appointing counsel for Mr. Sosnowicz is likewise unreported, but is included in the appendix at page 14a. The magistrate judge's report and recommendation is also unreported, but is included in the appendix at page 41a.

JURISDICTION

The court of appeals issued its memorandum decision on February 12, 2024. (App. 1a) The court of appeals denied a timely filed petition for rehearing en banc on July 15, 2024. (App. 71a) This petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(e)(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

1. In the early morning hours of November 16, 2008, Jeremy Privett and some friends were leaving a bar in Mesa, Arizona, when a white Hummer abruptly stopped at an angle across a couple of handicapped parking spaces. *State v. Sosnowicz*, 270 P.3d 917, 919 (Ariz. Ct. App. 2012). Mr. Sosnowicz was driving the Hummer. One of Jeremy's friends made a disparaging remark about the endowment of men who drive Hummers, and Mr. Sosnowicz overheard it. Mr. Sosnowicz and Jeremy exchanged heated words. Then Mr. Sosnowicz got out of the Hummer, and the altercation became physical. Jeremy's friend Ryan Sawyer hit Mr. Sosnowicz in the side of the head. Mr. Sosnowicz fell back, and then Jeremy hit him in the face. Jeremy helped Mr. Sosnowicz up, telling him "it's over" and "get out of here." *Id.* Mr. Sosnowicz got back in the Hummer and drove away, but then turned around and sped toward Jeremy and Ryan. Jeremy's brother Justin was also standing next to Jeremy and Ryan. The Hummer ran over Jeremy, killing him. Mr. Sosnowicz drove away.

Mr. Sosnowicz's defense at trial was that the killing was accidental. *Id.* at 920. He did not realize that he had hit anyone with his Hummer; he thought he hit a curb, and after doing so drove away immediately.

2. A grand jury in Maricopa County, Arizona, indicted Mr. Sosnowicz on one count of second-degree murder, in violation of Ariz. Rev. Stat. § 13-1104, and three counts of aggravated assault, in violation of Ariz. Rev. Stat. §§ 13-

1203 and -1204. Before trial, the court made two efforts to reach a settlement in the case.

The first attempt at settlement took place on October 2, 2009, before Maricopa County Superior Court Judge David Talamante. At this hearing, Mr. Sosnowicz was represented by Ewa Lockard, a lawyer from the Maricopa County Public Defender's Office. The judge explained that the "the purpose of the settlement conference is simply to provide you with information, information that you can use to discuss with your attorney any plea offer that the State might make." (C.A. E.R. 69:19–22) He encouraged Mr. Sosnowicz to "compare what the consequences might be if you go to trial and if you are convicted of the offenses as charged by the prosecutor, by the State. And then you compare those consequences to whatever it is that the State is offering." (C.A. E.R. 70:21–25) "[I]f you believe and your attorney believes that there's a likelihood, a strong likelihood that you will be convicted at trial, and the consequences that flow from that are greater than whatever it is that the State is offering, that's a starting point, at least, for you to consider the plea." (C.A. E.R. 71:9–15)

The prosecutor explained that for the murder charge, the presumptive sentence was 16 years, and the statutory range was 10–22 years in prison. (C.A. E.R. 71:22–24) *See* Ariz. Rev. Stat. § 13-710(A) (2008). She added, "It's calendar years, which means the defendant would serve day for day. There's no good time credit release." (C.A. E.R. 72:2–4) For the aggravated assault counts, the presumptive term was 7½ years, with a statutory range of 5–15 years. (C.A. E.R. 72:9–11) *See* Ariz. Rev. Stat. § 13-604(I) (2008). Because each count involved a separate victim, she said, the sentences would presumptively run

consecutively by statute.[1] (C.A. E.R. 72:14–16) *See* Ariz. Rev. Stat. § 13-708(A) (2008). Thus the sentencing range that Mr. Sosnowicz faced after conviction on all counts at trial was 10–67 years.

The state had extended a plea offer under which Mr. Sosnowicz would plead guilty to all four counts in the indictment in exchange for a stipulation that the sentences would run concurrently. (C.A. E.R. 73:23 to 74:2) This stipulation would have limited his sentencing exposure to 10–22 years in prison.

Up to this point, there had been no discussion on the record about the elements of the second-degree-murder charge under Arizona law, or what an appropriate factual basis for the proposed plea might be. Nevertheless, the judge turned to Mr. Sosnowicz and asked "whether there's anything about what I've said or what the prosecutor has said that you don't understand or you want to have cleared up or more information." (C.A. E.R. 76:10–13) Mr. Sosnowicz replied, "I understand perfectly." (C.A.

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[1] This was not an accurate statement of the law. Under Arizona law, sentences imposed on multiple counts run consecutively by default. *See* Ariz. Rev. Stat. § 13-708 (2008); *State v. Garza*, 962 P.2d 898, 902 (Ariz. 1998). "This statute, however, does not use the word 'presumption' and creates no such presumption" that the sentences must be consecutive. *Id.* at 901; *see also State v. Perez-Gutierrez*, 548 P.3d 1102, 1106 (Ariz. 2024) ("There is no presumption favoring consecutive sentences rather than concurrent sentences.") (quoting Ariz. R. Crim. P. 26.13). Rather, a "trial court must choose, among concurrent and consecutive sentences, whichever mix best fits a defendant's crimes." *Garza*, 962 P.2d at 901 (quoting *State v. Fillmore*, 927 P.2d 1303, 1313 (Ariz. Ct. App. 1996)). Because § 13-708 "creates no presumption of consecutive sentences," it is error for an Arizona sentencing judge to rely on such a "non-existent presumption." *Garza*, 962 P.2d at 902. The statute instead gives the judge discretion to impose a total sentence that "is not excessive or unduly harsh and that fits the crime and the criminal." *Id.* at 903.

E.R. 76:14) The judge repeated, "So you understand what the sentencing range is if you go to trial and are convicted and what the sentencing range is under the plea?" (C.A. E.R. 76:15–17) Mr. Sosnowicz replied, "Yes, your Honor." (C.A. E.R. 76:18) The prosecutor clarified that the plea offer would expire if Mr. Sosnowicz did not accept it then and there. Ms. Lockard added, "Judge, I agree with everything the prosecutor said. And I just want to put on the record that I obviously did discuss—as my client's stated, he does understand the sentencing range. He understands the plea and he understands that the plea deadline is today. And he would like to exercise and choose his right to a jury trial." (C.A. E.R. 77:14–20) The judge confirmed with Mr. Sosnowicz that he understood that the plea offer would expire that day. (C.A. E.R. 77:21–24) The proceedings ended with scheduling a further status conference. (C.A. E.R. 78:5–7)

The second attempt at settlement took place on June 2, 2010, at the final pretrial conference, held before Maricopa County Superior Court Judge Maria Verdin. At this hearing, Mr. Sosnowicz was represented by George Gaziano, another lawyer from the Maricopa County Public Defender's Office. The judge began by explaining that she was aware there was no plea offer currently open to Mr. Sosnowicz, but added that "if there is a possibility to resolve the case, it is something that should seriously be considered." (C.A. E.R. 85:22–24) She rehashed the most salient feature of the plea offer—the stipulated concurrent sentences, and how that would likely mean the difference for Mr. Sosnowicz between eventual freedom and life in prison. (C.A. E.R. 86:3–15)

Mr. Sosnowicz explained that he would be willing to settle, but not if it meant admitting an intentional killing. "Your Honor, I've already made this decision with my counsel. The fact is I will say it was a terrible tragedy what

happened. The fact is I didn't do anything intentionally, so I can't sign for what they are asking for. I would be willing to settle, but not for something—I am a man and I understand that an accident happened, but I can't admit to something I didn't do." (C.A. E.R. 87:23 to 88:5) The prosecutor clarified that, under Arizona law, "the second degree murder is charged intentional or knowing or reckless, so a jury has three different options and can find, again, not perhaps what the State believes happened, but the jury could find that his actions were reckless and still come back as a second degree murder conviction." (C.A. E.R. 89:7–12) *See* Ariz. Rev. Stat. § 13-1104(A)(1)–(3); *State v. Whittle*, 752 P.2d 489, 493 (Ariz. Ct. App. 1985).

Mr. Sosnowicz immediately asked for clarification about the *mens rea* element. "I have a question about reckless. Is it a voluntary recklessness or involuntary recklessness?" (C.A. E.R. 89:15–17) The judge offered to "take a short recess and give you a statute book so that you can sit with your counsel and see it. If you look at the statute and you think that maybe you can make a factual basis for reckless, be it intentional or not intentional if it falls there, concurrent sentences are way better than consecutive sentences."[2] (C.A. E.R. 89:20 to 90:1) Then

[2] Mr. Sosnowicz's question about the difference between "voluntary" and "involuntary" recklessness reinforces the inference that his counsel had never explained the concept of criminal recklessness to him. Under Arizona law, recklessness is not divided into voluntary or involuntary versions. Rather, the term "recklessly is defined to include the requirement that a person is aware of and consciously disregards a substantial risk." *State ex rel. Thomas v. Duncan*, 165 P.3d 238, 242 (Ariz. Ct. App. 2007) (emphasis deleted); *see also Borden v. United States*, 593 U.S. 420, 427 (2021) (opinion of Kagan, J.) ("A person acts recklessly, in the most common formulation, when he consciously disregards a substantial and unjustifiable risk attached to his conduct, in gross deviation from accepted standards."). The concept of voluntary action *vel non* plays

Mr. Sosnowicz asked for clarification about the requirement for consecutive sentences after trial. "We are just getting started now, but before we get to the meat and potatoes of the case, you're already saying that I am going to have the charges stacked if I lose. Is that a jury decision or your decision?" (C.A. E.R. 90:5–8) The judge replied, "It's a presumption by the law, okay. I didn't make that up. I have to follow the law…. [I]f there are multiple victims they are stacked. The judge can't give concurrent unless there is some reason to give concurrent."[3] (C.A. E.R. 90:9–16)

The judge recessed the proceedings in order to give Mr. Sosnowicz time to discuss the elements of second-degree murder with Mr. Gaziano. (C.A. E.R. 93:12–23) When they reconvened, the prosecutor persisted in her decision not to reopen the plea offer. (C.A. E.R. 94:18 to 95:2)

The case thus proceeded to trial. Mr. Sosnowicz was convicted on all counts and sentenced to a total of 30½ years in prison. The Arizona Court of Appeals affirmed his conviction on direct appeal. *See State v. Sosnowicz*, 270 P.3d 917 (Ariz. Ct. App. 2012). Arizona law forbade Mr. Sosnowicz from raising a claim of ineffective assistance of counsel regarding plea negotiations on direct appeal. *See Martinez v. Ryan*, 566 U.S. 1, 6 (2012) (citing *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002)). Mr. Sosnowicz did not seek further direct review in either the Arizona Supreme Court or in this Court.

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no part in the definition of reckless conduct. The judge's response to Mr. Sosnowicz's question thus did not help clear up his confusion.

[3] The trial judge here repeated the mistake about imposing consecutive sentences that the prosecutor made at the October 2009 settlement conference.

3. Mr. Sosnowicz retained attorney Neal Bassett for his direct appeal, and then kept him on to handle his first round of postconviction proceedings. In a postconviction petition, Mr. Bassett raised two claims of ineffective assistance of counsel relating to presentation of witnesses at Mr. Sosnowicz's trial. The trial court summarily dismissed these claims. The Arizona Court of Appeals affirmed the dismissal of these claims. Mr. Sosnowicz sought and obtained multiple extensions of time to file a petition for review with the Arizona Supreme Court, but ultimately did not do so.

In a sworn declaration, Mr. Sosnowicz explained that Mr. Bassett "never discussed any potential claims in my PCR with me before filing the PCR petition and expressly told me that he would decide which claims he would raise." (C.A. E.R. 221) In particular, Mr. Bassett "never explained to me that my prior trial counsel's failure to advise me regarding the plea offer might be grounds for relief based on my receiving ineffective assistance of counsel." (C.A. E.R. 221) If, Mr. Sosnowicz said, Ms. Lockard or Mr. Gaziano had explained to him that "simply acting recklessly was enough to lead to a murder conviction," he would have accepted the plea offer while it was still available to him. (C.A. E.R. 221) Instead, Mr. Sosnowicz explained, Mr. Bassett "indicated that he would choose the issues and that he would thereby set up the next attorney to argue stronger claims" on his behalf. (C.A. E.R. 220)

After the superior court denied Mr. Sosnowicz's counseled postconviction petition, Mr. Bassett prepared an appellate petition for Mr. Sosnowicz to file, nominally *pro se*. "Do not be concerned that this is a pro per petition instead of a lawyer filed petition," Mr. Bassett wrote to Mr. Sosnowicz. (C.A. E.R. 223) "Arizona's appellate courts are tough on criminal cases, but I have seen over

the years that they often give extra consideration to pro per cases, probably in an attempt to show that they are fair even when defendants are representing themselves." (C.A. E.R. 223)

4. In 2017, with the assistance of newly retained counsel, Mr. Sosnowicz filed a second petition for postconviction relief. In this petition, he asserted for the first time that his trial counsel from the public defender's office rendered ineffective assistance during plea negotiations by failing to explain to him that a second-degree-murder conviction could be supported by reckless conduct, which led him to reject a concurrent-sentence plea offer. (C.A. E.R. 204–07) He also acknowledged that Arizona law imposes a procedural bar on any claim that "was waived at trial, on appeal, or in a prior collateral proceeding." (C.A. E.R. 200 (quoting Ariz. R. Crim. P. 32.2(a)(3) (2017))) But he also contended that he qualified for an exception to this procedural bar because Mr. Bassett was responsible for failing to "consult with Sosnowicz and investigate [this] claim[] and/or advise him that he had a conflict of interest in representing him in the PCR" by virtue of having handled the direct appeal as well. (C.A. E.R. 200–01) *See State v. Diaz*, 340 P.3d 1069, 1071 (Ariz. 2014) ("Rather, despite Diaz's efforts to assert an IAC claim, he was deprived of that opportunity through no fault of his own."). He also contended that he qualified for a different exception to the procedural bar because his plea-bargaining ineffective-assistance claim was of "sufficient constitutional magnitude" to require a personal knowing, voluntary, and intelligent waiver of the claim. (C.A. E.R. 201) *Stewart v. Smith* 46 P.3d 1067, 1071 (Ariz. 2002).

The superior court rejected Mr. Sosnowicz's reliance on these exceptions to the procedural bar. "Contrary to Defendant's representation," the court said, "*Diaz* does

not apply because Defendant has filed a previous and timely Rule 32 petition." (C.A. E.R. 319) And even if Mr. Sosnowicz's plea-bargaining ineffective-assistance claim were of "sufficient constitutional magnitude," that exception did not extend to relieving him of the fact that the claim was not timely raised. (C.A. E.R. 320 (citing *State v. Lopez*, 323 P.3d 1164, 1166 (Ariz. Ct. App. 2014))) It therefore denied Mr. Sosnowicz's plea-bargaining ineffective-assistance claim as procedurally barred.

The Arizona Court of Appeals affirmed. It agreed with the trial court that Mr. Sosnowicz's claim was time-barred. (C.A. E.R. 413) And it agreed with the trial court's conclusion that the *Diaz* exception was unavailable because "for a non-pleading defendant like Sosnowicz, a claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding." (C.A. E.R. 413 n.4 (quoting *State v. Escareno-Meraz*, 307 P.3d 1013, 1014 (Ariz. Ct. App. 2013))) The Arizona Supreme Court denied a timely filed petition for review without comment. (C.A. E.R. 638)

5. While his petition for review was pending with the Arizona Supreme Court, Mr. Sosnowicz filed with the district court a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Again he raised his claim that his public defenders rendered ineffective assistance by failing to explain to him that a second-degree-murder conviction could be supported by reckless conduct, resulting in his decision to reject a favorable plea offer. And, anticipating the state's argument that the claim was procedurally defaulted, Mr. Sosnowicz argued that Mr. Bassett's ineffective assistance in failing to raise the claim amount to cause to excuse the default under *Martinez v. Ryan*, 566 U.S. 1 (2012).

A magistrate judge recommended finding the claim procedurally defaulted and dismissing the petition. He concluded that the state courts had held the claim procedurally barred pursuant to an adequate and independent ground in state law. (App. 51a–52a) And he concluded that Mr. Sosnowicz's plea-bargaining ineffective-assistance claim was not "substantial," so as to qualify for an excuse from procedural default under *Martinez*. *See* 566 U.S. at 14. At the October 2009 settlement conference, the magistrate judge said, Mr. Sosnowicz's decision to reject the plea agreement was "fully informed," because when the judge asked him if he had any questions or wanted more information, Mr. Sosnowicz replied, "I understand perfectly." (App. 54a) And when, at the June 2010 conference, the *mens rea* alternative elements of second-degree murder were articulated, Mr. Sosnowicz asked, "Is it a voluntary reckless or involuntary reckless?" (App. 55a) To the magistrate judge, this indicated "familiarity with the concept of recklessness" rather than "surprise" regarding new knowledge. (App. 55a) Based on these statements made in open court, the magistrate judge concluded that Mr. Sosnowicz had not established that, "at the time he rejected the State's plea offer, did not understand, based on inadequate advice, that he could be convicted of second degree murder based on reckless conduct." (App. 57a)

6. The district judge rejected this aspect of the magistrate judge's recommendation. He concluded instead that Mr. Sosnowicz "may have rejected" the state's plea offer "at a time when he did not know of the recklessness standard. More evidence is needed on this point." (App. 33a n.8) "If, as Sosnowicz contends, he was unaware of the recklessness component of second-degree murder, he would have no reason to ask questions of the trial court or the government at the October 2009 hearing." (App. 34a) And at the June 2010 hearing, the

district judge noted that the principal feature of plea negotiations that was discussed was Mr. Sosnowicz's sentencing exposure. Once the prosecutor pointed out that reckless conduct was enough to support a conviction for second-degree murder, "Sosnowicz's immediate response was to express confusion: 'I have a question about reckless. Is it a voluntary recklessness or involuntary recklessness?'" (App. 36a) "This question suggests Sosnowicz did not understand the concept of recklessness." (App. 36a n.9) Although the judge then recessed the June 2010 conference to give time for Mr. Sosnowicz to clear up this misunderstanding with his public defender, the prosecution was ultimately unwilling to reopen the plea offer. "These events could support Sosnowicz's claim that he was unaware that a second-degree murder conviction encompassed reckless conduct when he rejected the original offer." (App. 37a) Because the district judge concluded that more evidence was required in order to adjudicate Mr. Sosnowicz's claim, he appointed counsel to assist him in accordance with 18 U.S.C. § 3006A(a)(2)(B) and Rule 8(c) of the Rules Governing Section 2254 Cases.

The district judge issued this order on June 30, 2021. (App. 40a) About a month and a half earlier, however, this Court had granted certiorari in *Shinn v. Ramirez*, No. 20-1009. The state accordingly asked the district court to stay proceedings to await this Court's decision in *Ramirez*. The district judge did so because, he said, *Ramirez* "will address whether district courts can conduct *Martinez* evidentiary hearings."

In the wake of this Court's decision in *Ramirez*, the district judge vacated the aspect of the June 2021 order that allowed evidentiary development on Mr. Sosnowicz's plea-bargaining ineffective-assistance claim, and denied it. It concluded that Mr. Sosnowicz had "failed" to develop

the factual basis of the claim in state-court proceedings, 28 U.S.C. § 2254(e)(2), because he "bears responsibility for" Mr. Bassett's "failure to bring the IAC claim." (App. 10a) The fact that his second postconviction proceeding presented the necessary factual basis to the state courts did not count. "As the government points out, accepting this argument would lead to an absurd result: Any petitioner could circumvent the constraints of § 2254(e)(2) merely by presenting an IAC claim in an untimely, successive PCR in state court and subsequently claim in federal habeas proceedings that because he acted diligently in the second proceeding, § 2254(e)(2) does not preclude an evidentiary hearing." (App. 10a–11a) The district court further declined to certify the denial of Mr. Sosnowicz's plea-bargaining ineffective-assistance claim for appeal.

7. The court of appeals certified Mr. Sosnowicz's claim for appeal. "After reviewing the underlying petition and concluding that it states at least one federal constitutional claim debatable among jurists of reason, namely whether trial counsel was ineffective in connection with the plea offer, we grant the request for a certificate of appealability (Docket Entry No. 2) with respect to the following issues: whether the procedural default of the above-mentioned claim is excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), including whether appellant is entitled to an evidentiary hearing."

The court of appeals ultimately affirmed the dismissal of Mr. Sosnowicz's habeas petition. It agreed with the district court that "Sosnowicz's untimely attempt to raise the claim was not in accordance with state procedural rules and is not diligent for purposes of [28 U.S.C.] § 2254(e)(2)." (App. 3a (citing *Schriro v. Landrigan*, 550 U.S. 465, 479 & n.3 (2007))) The court of appeals also found that Mr. Bassett was not ineffective, such that Mr.

Sosnowicz could establish cause to excuse the procedural default under *Martinez*. The court of appeals ruled that the "record does not establish" that Mr. Bassett "pursued a sandbagging strategy. Counsel was aware of Arizona's procedural requirements. Sosnowicz's hearsay description of his conversation with counsel is ambiguous, and equally can be construed as counsel explaining that he would assess and select the strongest claims to raise on postconviction relief to best position them for a federal habeas petition." (App. 3a–4a) Nor could Mr. Sosnowicz establish prejudice based on his public defenders' incomplete advice. "The plea offer referenced the indictment, requiring him to plead to its charges, and Sosnowicz assured the court he understood the plea discussions 'perfectly.'" (App. 4a)

The court of appeals denied a timely filed petition for rehearing. (App. 71a)

8. While Mr. Sosnowicz was preparing to file his petition for rehearing, the court of appeals decided *McLaughlin v. Oliver*, 95 F.4th 1239 (9th Cir. 2024). *McLaughlin* established, as law of the circuit, the rule on which the court of appeals relied in Mr. Sosnowicz's case to foreclose an evidentiary hearing. Under *Ramirez*, the court in *McLaughlin* ruled, "a failure to present evidence to the state courts in compliance with state procedural rules counts as a failure to develop the factual basis of a claim in State court." 95 F.4th at 1249 (quoting *Ramirez*, 596 U.S. at 375–76, and § 2254(e)(2)). A petition for certiorari is pending in *McLaughlin* as No. 24-5651.

REASONS FOR GRANTING THE WRIT

In *Shinn v. Ramirez*, 596 U.S. 366 (2022), this Court for the first time since 1948 decoupled the equitable doctrine of procedural default, which applies to *claims*

raised by state prisoners, from the rules relating to *factual development* of those claims. The court of appeals misapplied *Ramirez* in order to fuse those two sets of rules back together. This Court should grant review to correct the Ninth Circuit's misunderstanding of *Ramirez*.

1. The rules for excusing a state prisoner's procedural default and for allowing factual development in federal court were linked beginning in 1948 until this Court decoupled them in the 2022 decision in *Shinn v. Ramirez*.

If a state prisoner's habeas claim is "procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse. Likewise, if the state-court record for that defaulted claim is undeveloped, the prisoner must show that factual development in federal court is appropriate." *Ramirez*, 596 U.S. at 379. Under this Court's habeas jurisprudence, these two concepts were linked from 1948 until it decided *Ramirez* in 2022.

A. The procedural-default rules evolved to enforce most state procedural bars that rest on adequate and independent grounds in state law, but enforcement can be relaxed upon a showing of cause and prejudice.

In *Brown v. Allen*, 344 U.S. 443 (1953), this Court laid down some basic principles underlying the modern habeas corpus regime. "Failure to exhaust an available State remedy is an obvious ground for denying the application" for habeas relief. *Brown*, 344 U.S. at 502 (opinion of Frankfurter, J.).[4] At the same time, "federal habeas

[4] The leading federal courts casebook explains that "Justice Frankfurter's opinion reflects the way that *Brown v. Allen* has

corpus jurisdiction" does not "displace a State's procedural rule requiring that certain errors be raised on appeal," because "habeas corpus should not do service for an appeal." *Id.* at 503. And when it is proper to reach the merits of a state prisoner's claim, the habeas judge has discretion to convene a federal hearing in order to adjudicate it. *See id.* If there has been no state-court hearing on the claim, a federal habeas court may need to convene one. *See id.* at 504–05. Ultimately, though, "it is for the federal judge to assess on the basis of such historical facts" as may be found in the state-court record or established at a federal hearing "the fundamental fairness of a conviction" against the legal claim asserted by the prisoner. *Id.* at 507–08. "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Id.* at 508.

For almost the entirety of the seven decades following *Brown*, the doctrines of procedural default (when a federal habeas court may reach the merits of a state prisoner's claim) and factual development of a habeas claim evolved in tandem. Early in this period, this Court held that a federal habeas court may "deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts." *Fay v. Noia*, 372 U.S. 391, 433 (1963). *Noia* rejected the notion that a federal habeas court must respect a state-court procedural ruling that is supported by an adequate and independent ground in state law, on the thinking that this rule governs this Court's *appellate* jurisdiction, and not a federal district court's habeas

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subsequently been understood," even if "*Brown* no longer states the governing law" on the habeas principles it discusses. Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1276, 1275 (7th ed. 2015).

jurisdiction to inquire into the validity of a state judgment. *See Noia*, 372 U.S. at 429–32. Under *Noia*, when the petitioner "has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies," the "federal habeas judge may in his discretion deny relief." *Id.* at 438.

Fourteen years after *Noia*, however, the Court changed its view of how the adequate-and-independent-state-grounds rule should apply in federal habeas proceedings. In requiring federal habeas courts to enforce state-law contemporaneous-objection rules, this Court said that federal courts' refusal to honor such rules would deprive the state courts of any opportunity to weigh in on claims that are forfeited for lack of an objection at trial. *Wainwright v. Sykes*, 433 U.S. 72, 89–90 (1977). And 14 years after *Sykes*, this Court was even more explicit: "When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (citing *Noia*, 372 U.S. at 469 (Harlan, J., dissenting)). "The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Id.* at 732.

At the same time, this Court began to emphasize the equitable nature of habeas relief. A "federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991) (citing *Reed v. Ross*, 468 U.S. 1, 9 (1984)). This Court accordingly recognizes an "equitable exception to the bar when a habeas applicant

can demonstrate cause and prejudice for the procedural default." *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (citing *Sykes*, 433 U.S. at 87). The "existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Cause under this formulation can include ineffective assistance of counsel, in violation of the Sixth Amendment, because in that case "the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). Similarly, this Court has held that when a claim of ineffective assistance of trial counsel is defaulted in an initial-review state collateral proceeding, equitable principles call for relieving the default when ineffective assistance of postconviction counsel led to the forfeiture of a substantial trial-level ineffective-assistance claim. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012).

B. The rules for federal factual development evolved in tandem with the procedural-default rules to allow development of state prisoners' claims upon a showing of cause and prejudice.

Early in the post-*Brown* era, this Court took a generous view of factual development of state prisoners' claims in federal habeas proceedings. When an "applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Indeed, on the same day this Court decided *Noia*, it also held that where the "facts are in dispute, the federal court *must* hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a

collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend*, 372 U.S. at 312–13 (emphasis added).

One situation in which *Townsend* allowed an evidentiary hearing was when "the material facts were not adequately developed at the state-court hearing" on the claim. 372 U.S. at 313. "If, for any reason not attributable to the inexcusable neglect of petitioner, evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled." *Id.* at 317. Here the Court in *Townsend* borrowed the deliberate-bypass standard from *Noia*, thus equating the standard for reaching the merits of a defaulted claim with the standard for allowing federal factual development of that claim. "The standard of inexcusable default set down in *Fay v. Noia* adequately protects the legitimate state interest in orderly criminal procedure, for it does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures." *Id.*

But as the Court revised its view of how the adequate-and-independent-state-grounds doctrine applies to foreclose merits review of a state prisoner's habeas *claims*, it also reassessed its view of how the adequacy of state-court factfinding processes impacts the availability of federal-court *factual development*. After it replaced the *Noia* deliberate-bypass standard with the cause-and-prejudice test for excusing procedural default of a claim, the Court applied it to the habeas court's decision to excuse "a state prisoner's failure to develop material facts in state court." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992). "It is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a

petitioner has negligently failed to take advantage of opportunities in state-court proceedings." *Id.* at 9. The Court rejected a rule that would hold "a habeas petitioner to one standard for failing to bring a claim in state court and excus[e] the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum." *Id.* at 10. Thus in *Tamayo-Reyes* the Court held that in cases of "attorney error" that results in an undeveloped factual basis for a claim, *id.* at 10 n.5, only a showing of either cause and prejudice or a fundamental miscarriage of justice would allow for factual development of the claim in federal court, *id.* at 11–12—the same equitable reasons for excusing a procedural default of the claim itself.

In 1996, Congress altered this Court's rules for holding a federal habeas evidentiary hearing on a claim as to which the factual basis went undeveloped in state court. In section 104(4) of the Antiterrorism and Effective Death Penalty Act, Congress limited a federal habeas court's power to hold an evidentiary hearing on claims as to which "the applicant has failed to develop the factual basis… in State court proceedings" to two narrowly defined situations—where the claim relies on a retroactively applicable new rule of law or on newly discovered facts, and where the facts underlying the claim establish that "no reasonable factfinder would have found the applicant guilty of the underlying offense." Pub. L. No. 104-132, § 104(4), 110 Stat. 1214, 1219 (1996) (codified at 28 U.S.C. § 2254(e)(2)).

In its first foray into interpreting § 104(4), this Court held that a "failure to develop the factual basis of a claim," within the meaning of the opening clause of § 2254(e)(2), "is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432

(2000). In this way, the Court said, "Congress intended to preserve at least one aspect of [*Tamayo-Reyes*'s] holding: prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Id.* at 433. "The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of 'failed' is to ensure the prisoner undertakes his own diligent search for evidence." *Id.* at 435. Only "a prisoner who has neglected his rights in state court need satisfy" the narrow criteria set forth in § 2254(e)(2)(A)–(B) for holding a federal evidentiary hearing. *Williams*, 529 U.S. at 435. Requiring diligent efforts to present the factual basis of a claim to the state courts promotes the principles of comity and federalism that undergird all habeas doctrine, including the procedural-default rules. *See id.* at 436–37. The statutory limitation on federal fact development in the face of a "failure" to do so in state court thus mirrors the cause-and-prejudice rule's focus on factors external to the prisoner.

C. In 2012, this Court allowed postconviction counsel's ineffective assistance to count as cause to excuse a procedural default, and in the wake of that ruling the courts of appeals uniformly applied the same rule to factual development of state prisoners' claims.

Twelve years after this Court interpreted the new statute limiting the availability of federal evidentiary hearings for state prisoners who have "failed to develop" their claims in state court, it created an important qualification to the cause-and-prejudice rule articulated in cases like *Coleman*. In those jurisdictions where prisoners must bring trial-level ineffective-assistance claims for the first time in postconviction proceedings,

such as Arizona, *see State v. Spreitz*, 39 P.3d 525 (Ariz. 2002), "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). In these jurisdictions, the Court reasoned, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 11. "And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.* at 10–11. After all, the Court reiterated, the cause-and-prejudice rules "reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default." *Id.* at 13. "Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 14.

In the wake of *Martinez*, all the federal courts of appeals to consider the issue ruled that ineffective assistance of postconviction counsel meant that a state prisoner had not "failed to develop" the factual basis of a claim within the meaning of § 2254(e)(2), and accordingly allowed for federal factual development of defaulted claims. *See White v. Warden*, 940 F.3d 270, 279 (6th Cir. 2019) (citing *Woolbright v. Crews*, 791 F.3d 628, 637 (6th Cir. 2015)); *Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013) (citing *Williams*, 529 U.S. at 437); *Detrich v. Ryan*, 740 F.3d 1237, 1246–47 (9th Cir. 2013) (en banc) (opinion

of W. Fletcher, J.). Other courts of appeals appear to have relied on this Court's historical linkage of cause to excuse a procedural default and cause to allow for federal factual development to allow hearings on ineffective assistance of postconviction counsel and the underlying defaulted claim, without referring to § 2254(e)(2). *See, e.g.*, *Sigmon v. Stirling*, 956 F.3d 183, 198 (4th Cir. 2020) (citing *Detrich*, 740 F.3d at 1247); *Brown v. Brown*, 847 F.3d 502, 513–17 (7th Cir. 2017); *Sullivan v. Secretary*, 837 F.3d 1195, 1204–07 (11th Cir. 2016).

D. *Ramirez* reshaped habeas doctrine by delinking the cause-and-prejudice showing from the showing needed to establish that the prisoner had not "failed to develop" the factual basis of his claim.

In *Ramirez*, the Court reiterated the familiar cause-and-prejudice rules for excusing a procedural default. "With respect to cause, attorney negligence or inadvertence cannot excuse procedural default." 596 U.S. at 380 (quoting *Coleman*, 501 U.S. at 753). But if the default is the result of ineffective assistance of counsel, the Sixth Amendment violation "must be seen as an external factor to the prisoner's defense" that amounts to cause to excuse the default. *Id.* (quoting *Coleman*, 501 U.S. at 754). And, following *Martinez*, "ineffective assistance of state postconviction counsel may constitute cause to forgive procedural default of a trial-ineffective-assistance claim." *Id.*

But the Court decoupled the no-fault showing required by § 2254(e)(2) from the cause-and-prejudice showing. "There is an even higher bar for excusing a prisoner's failure to develop the state court record." *Ramirez*, 596 U.S. at 381. Although the Court said it was adhering to the gloss on the "failed to develop" language

in the opening clause of § 2254(e)(2) that it applied in *Williams*, *see Ramirez*, 596 U.S. at 382, it rejected the notion that ineffective assistance of postconviction counsel that is grave enough to excuse a procedural default under *Martinez* also shows that the lack of diligence must be external to the defense. The cause-and-prejudice rules ultimately flow from this Court's "equitable judgment and discretion." *Ramirez*, 596 U.S. at 384 (quoting *Martinez*, 566 U.S. at 9). But § 2254(e)(2) is a "statute that we have no authority to amend." *Id.* at 385. Under *Ramirez*, "attorney error" of any variety—including ineffective assistance grave enough to excuse a procedural default—must be attributed to the petitioner, and thus shows that the petitioner is responsible for the undeveloped state-court record on a particular claim. *Id.*

Thus the standard for factual development of a claim in federal habeas is higher than the cause-and-prejudice standard for excusing a procedural default. Now, after *Ramirez*, ineffective assistance of postconviction counsel will satisfy the latter, but not the former. After *Ramirez*, habeas doctrine no longer borrows from the procedural-default framework when deciding whether to allow federal factual development of a state prisoner's defaulted claims.

2. The Ninth Circuit wrongly faulted Mr. Sosnowicz for presenting the evidence of his public defenders' ineffective assistance in plea negotiations in a second round of state postconviction proceedings because Arizona provides exceptions to its procedural bars.

If the procedural-default rules no longer govern the question whether a state prisoner has "failed to develop" the factual basis of his claim in state court, then the Ninth Circuit's error is plain. Under *Williams*, a state prisoner

is not at fault for failing to develop the state-court record if he seeks an evidentiary hearing in state court in accordance with state law. 529 U.S. at 437. "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful." *Id.* at 435. Thus the propriety of allowing a federal evidentiary hearing cannot, after *Ramirez*, depend on whether the state court imposed a procedural bar to adjudicating a prisoner's claim on the merits. It merely depends on whether the prisoner made a reasonable effort to present the claim to the state courts using a vehicle that allows the state court to consider the claim on the merits.

Here, Mr. Sosnowicz did that. In an effort to recover from the incompetent representation he received in his first postconviction proceeding, Mr. Sosnowicz initiated a second round of postconviction proceedings, presenting all the evidence a state court would require to convene an evidentiary hearing if the evidence were treated as true. *See, e.g.*, *State v. Amaral*, 368 P.3d 925, 928 (Ariz. 2016) (explaining that an evidentiary hearing is required if the prisoner "has alleged facts which, if true, would probably have changed the verdict or sentence"). And he invoked two established exceptions to Arizona's procedural bar that would have allowed the court to reach the merits of his claim. First, he asserted that, despite his own efforts to raise the plea-bargaining ineffective-assistance claim in the first round of postconviction proceedings, he was "deprived of that opportunity through no fault of his own." *State v. Diaz*, 340 P.3d 1069, 1071 (Ariz. 2014). Second, he asserted that the right to effective assistance of counsel in plea negotiations was one of sufficient constitutional

magnitude that required his personal waiver. *See Stewart v. Smith*, 46 P.3d 1067, 1071 (Ariz. 2002).

In support of his efforts to qualify for these exceptions, Mr. Sosnowicz alleged that his prior postconviction counsel had pursued a sandbagging strategy. He recalled in an affidavit that prior counsel had refrained from raising certain postconviction claims in order to save them for later proceedings. *See generally Stern v. Marshall*, 564 U.S. 462, 482 (2011) (describing "sandbagging" as "remaining silent about [an] objection and belatedly raising the error only if the case does not come out" favorably). If that allegation were true, a state court could have excused his failure to bring the plea-bargaining ineffective-assistance claim in prior proceedings. Coupled with the district court's finding that Mr. Sosnowicz expressed confusion when he learned for the first time at a pretrial conference that second-degree murder could be supported by reckless conduct, prior counsel's sandbagging strategy could have led a state court to excuse the procedural bar in accordance with state law.

In this context, as in others where diligence is the standard, this Court expects only "reasonable diligence," not "maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010). But the Ninth Circuit held Mr. Sosnowicz to the wrong standard, in contravention of *Williams* and *Ramirez*. It was his burden to seek an evidentiary hearing in state court in the manner provided by state law. He did so. Just because the state courts concluded that he did not qualify for the exception does not mean that he did not act with reasonable diligence to present this claim to the state courts. *Cf. Fooks v. Superintendent*, 96 F.4th 595, 597 (3d Cir. 2024) (allowing a federal evidentiary hearing because the petitioner "sought an evidentiary hearing in the manner required by state law," but the "state court just refused"). By focusing

on the state court's express procedural bar rather than the diligence Mr. Sosnowicz demonstrated before the state courts, the Ninth Circuit applied the wrong standard to deny Mr. Sosnowicz a hearing on his claim.

CONCLUSION

The Ninth Circuit's misreading of *Ramirez* implicates a question of nationwide importance about state prisoners' less-than-perfect, but nevertheless reasonable, efforts to develop the factual bases of their habeas claims before the state courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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