No. 20-1009

IN THE

Supreme Court of the United States

DAVID SHINN, ET AL.,
Petitioners,

vs.

DAVID MARTINEZ RAMIREZ & BARRY LEE JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does application of the equitable rule this Court announced in *Martinez* v. *Ryan* render 28 U. S. C. § 2254(e)(2) inapplicable to a federal court's merits review of a claim for habeas relief?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves repeated collateral attacks on criminal judgments for atrocious murders, in at least one case with no genuine doubt of guilt. The delays in

1. All parties have filed blanket consents to *amicus* briefs. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

execution and the absence of finality caused by such relitigation is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

This case is consolidated from two Arizona capital murder cases, those of David Ramirez and Barry Jones.

Ramirez

David Ramirez murdered his girlfriend, Mary Ann Gortarez, and her 15-year-old daughter, Candie, 32 years ago.[2] J. A. 455. Witnesses heard one or both victims scream and called the police. The police arrived in minutes and found Ramirez in the apartment covered in blood. See *State* v. *Ramirez*, 178 Ariz. 116, 119-120, 871 P. 2d 237, 240-241 (1994). Ramirez later admitted repeatedly having sex with Candie. See *id*., at 121, 871 P. 2d, at 242. He also admitted, "We had a big fight." See *id*., at 124, 871 P. 2d, at 245.

The trial judge found, and the Arizona Supreme Court affirmed, that "[t]he victims in this case endured great pain and suffering over a prolonged period of time" and that Ramirez had prior convictions for aggravated assault and robbery. See *id*., at 129, 871 P. 2d, at 250. Rejecting his "residual doubt" argument, the Arizona Supreme Court expressly found there was no residual doubt. See *id*., at 132, 871 P. 2d, at 253. The judgment was affirmed on direct appeal. See *ibid*.

Ramirez filed a postconviction relief petition in the trial court. His attorney made allegations regarding the

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2. The minor victims in both cases are referred to by their initials in some of the documents in this case, but we see no need for anonymity for a deceased minor victim. See Fed. Rule Civ. Proc. 5.2(a) ("known to be a minor," present tense).

lack of a coherent mitigation strategy but did not make the more specific claims made later in the litigation. The trial court denied postconviction relief, and the Arizona Supreme Court denied review. See J. A. 401.

After filing a federal habeas corpus petition, Ramirez returned to state court to file an intellectual disability claim. The state postconviction court denied this claim on the merits. It also found that a claim for ineffective assistance based on allegedly inadequate investigation of mitigation was defaulted because it was not filed in the first petition. See J. A. 402-403.

The ineffective assistance claim is described by the federal court on remand after *Martinez* v. *Ryan*, 566 U. S. 1 (2012).

> "Ramirez alleges that [trial counsel] Siegel performed ineffectively under *Strickland* by failing to present mitigating evidence of Ramirez's mental retardation, brain damage, impaired intellectual functioning, childhood poverty, childhood neglect and abuse, *in utero* exposure to pesticides and alcohol, and the fact that he was the product of the rape of his 15-year-old mother by his uncle. He also contends that Siegel performed ineffectively in failing to provide [appointed expert] Dr. McMahon with additional information concerning Ramirez's low IQ scores and poor grades." J. A. 473.

The State argued that the new information has little additional value when considered with the evidence actually presented at sentencing. J. A. 462. The new evidence submitted in federal court consists of declarations from trial counsel and Ramirez's family members. J. A. 473-474. The district court addressed the merits of the ineffective assistance of trial counsel claim in response to the State's argument that the lack of merit precluded the claim that postconviction counsel was

ineffective for not making it. See J. A. 461; *Martinez* v. *Ryan*, 566 U. S., at 14. The court found that trial counsel's "performance was not deficient." J. A. 478. Further, there was no prejudice in that the weight of aggravating versus mitigating factors would not change substantially with the additional evidence. See J. A. 478-482. The district court further found that an evidentiary hearing was not warranted. J. A. 483.

The Ninth Circuit reversed, finding that Ramirez had established cause and prejudice under *Martinez*. See Brief for Petitioners 8-9. In a single paragraph with no mention of 28 U. S. C. § 2254(e)(2), the court also held that the trial court erred by denying an evidentiary hearing. J. A. 521.

Jones

In 1994, Barry Jones lived with his girlfriend, her 4-year-old child, Rachel Gray, and three other children. J. A. 159. Rachel died from a bowel laceration after neither Jones nor her mother took her to the hospital despite her obviously grave condition. Jones lied to concerned visitors, saying she had already been seen by paramedics. See Brief for Petitioners 9-10. Jones had been seen striking Rachel, and the evidence at trial indicated that the injury causing her condition likely occurred in that time period. See J. A. 162-163. The procedural history from direct appeal through the initial district court decision was similar to that in the Ramirez case, described above. See J. A. 163-165.

Evidence obtained later raised a controversy regarding the time of the injury that caused Rachel's fatal condition, see Brief for Petitioners 12, though it did not contradict the "ample evidence" that Jones intentionally or at least knowingly caused Rachel's death by failure to seek medical care. See J. A. 362. On the *Martinez* remand, the District Court followed Ninth

Circuit precedent that § 2254(e)(2) does not bar new evidence in a hearing on cause for default as distinguished from the merits. J. A. 145-146. The district court later held that this rule would bootstrap into a full hearing on the merits, despite the statute. See J. A. 335.

The Ninth Circuit affirmed, expressly holding that the *Martinez* rule allows evidence on the merits not presented to the state court. J. A. 334.

SUMMARY OF ARGUMENT

In this case, as in *Slack* v. *McDaniel*, this Court should effectuate the purpose of Congress by applying the AEDPA limit on a claim to both the merits and the procedural prerequisite. As applied to § 2254(e)(2), that means that a "hearing on the claim" should be understood to apply to a hearing on cause and prejudice to excuse the default of a claim just as it does to the merits of the claim.

The term "failed" in § 2254(e)(2) has already been definitively construed in *Michael Williams* v. *Taylor* to be a codification by Congress of the threshold condition for the rule of *Keeney* v. *Tamayo-Reyes*. In both of these cases, the term unambiguously referred to failures of state postconviction counsel, whether they amounted to ineffective assistance or not. The statutory term means what it meant when Congress employed it, and it cannot change later in response to developments in this Court's caselaw regarding a rule that is neither constitutional nor statutory.

Judgments about the scope of habeas corpus are normally for Congress to make. The *Martinez* rule is neither constitutional nor statutory. To the extent it

conflicts with a statute, then, *Martinez* must yield, and the statute must be enforced.

ARGUMENT

I. To effectuate Congress's purpose, "hearing on the claim" in § 2254(e)(2) is best understood as applying to both the merits and the prerequisites of the claim.

In *Slack* v. *McDaniel*, 529 U. S. 473 (2000), this Court addressed a question of interpretation of a habeas corpus reform in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The issue was analogous to the one in the present case. In both cases, a provision of AEDPA restricts when a procedural step in the process would be available—appeal in *Slack*, evidentiary hearing in this case. In both cases, Congress had taken a pre-existing limitation and made it more restrictive. See 28 U. S. C. § 2253(c)(3)[3] (limiting appeal to specific issue[s] certified); *Williams* v. *Taylor*, 529 U. S. 420, 433 (2000) (§ 2254(e)(2) "raised the bar") (*Michael Williams)*.[4] The claim in *Slack*, as in this case, was arguably defaulted, and the Court needed to address how the limitation applied to the procedural default as well as the merits.

In the appeal statute, the substantive requirement for a certificate of appealability is "a substantial showing of the denial of a constitutional right." § 2253(c)(2).

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3. All further section references are to 28 U. S. C. unless otherwise indicated.

4. The petitioner's first name is included in the short cite of *Michael Williams* to avoid confusion with another AEDPA case of the same name decided the same day, *Williams* v. *Taylor*, 529 U. S. 362 (2000) (*Terry Williams*).

That requirement on its face would seem to refer only to the merits. Even so, to "give[] meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims," the *Slack* Court interpreted the statute to also require at least a debatable argument that the district court's procedural default holding was incorrect. See *Slack*, 529 U. S., at 484-485.

The keystone for interpretation of AEDPA is the purpose of the statute to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003). That goal has not been achieved yet, obviously, for two reasons. One is a campaign of massive resistance by some judges of the district and circuit courts who consistently disregard the statute and this Court's precedents interpreting it. "Like clockwork, practically on a yearly basis since the Millennium, we [the Ninth Circuit] have forced the Supreme Court to correct our inability to apply the proper legal standards under [AEDPA]." *Kayer* v. *Ryan*, 944 F. 3d 1147, 1156 (CA9 2019) (Bea, J., dissenting from denial of rehearing en banc), rev'd *sub nom*. *Shinn* v. *Kayer*, 592 U. S. __, 141 S. Ct. 517, 520, 208 L. Ed. 2d 353, 356 (2020) (*per curiam*) ("clearly violated"). One of the most reversed circuit judges even adopted a "mantra" of "they [this Court] can't reverse them all." See Heather K. Gerken, in In Memoriam: Judge Stephen Reinhardt, 131 Harv. L. Rev. 2097, 2110 (2018).[5] And, tragically for the cause of justice, it can't.

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5. *Amicus* cites this article only for the factual confirmation that Judge Reinhardt did indeed say this, and often. Obviously, *amicus* does not endorse Professor Gerken's other comments in this passage.

The second reason is that this Court has poked multiple holes in AEDPA's gasket of finality, creating opportunities to drag out litigation that were intended to be rare but which have become routine. See *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005) (stay and abey, "limited circumstances"); *Gonzalez* v. *Crosby*, 545 U. S. 524, 534-535 (2005) (use of Rule 60(b)(6) to reopen final habeas denial, evading successive petition rule, with promise it "will not expose federal courts to an avalanche of frivolous postjudgment motions"); *Martinez* v. *Ryan*, 566 U. S. 1, 9 (2012) ("narrow exception"); *Bucklew* v. *Precythe*, 587 U. S. __, 139 S. Ct. 1112, 1134, 203 L. Ed. 2d 521, 544-545 (2019) (method-of-execution litigation exploited to drag out already excessively delayed execution). As the Court said in *Bucklew*, the people and the victims deserve better. See *id*., 139 S. Ct., at 1134, 203 L. Ed. 2d, at 544. In appropriate cases, this Court should reexamine the decisions that created pinhole leaks that have since widened into gushers. At a minimum, though, the Court should refrain from poking any more leaks.

This case is easier than *Slack*. The language of § 2253(c)(2), "a substantial showing of the denial of a constitutional right," provides a substantial argument that it is limited to the merits. The language of § 2254(e)(2), on the other hand, "evidentiary hearing on the claim," easily encompasses the procedural prerequisites along with the merits. The district court is correct to deny a claim if it is defaulted *or* if it lacks merit, see *Slack*, 529 U. S., at 484, and an "evidentiary hearing on the claim" naturally includes an evidentiary hearing on any ground that could result in denial of the claim.

If this Court were to approve the rule established by the Ninth Circuit in these cases, it would be sanctioning an end-run around the requirements of § 2254(e)(2). As described further in the next part, Congress intended

that provision to be an effective block against hearing new evidence that the petitioner *or his counsel* failed to develop in state court, subject only to the exceptions that Congress specified. That purpose is served by the straightforward interpretation of "evidentiary hearing on the claim" to include an evidentiary hearing on a procedural prerequisite to the claim.

II. "Failed" in § 2254(e)(2) has been definitively construed to include failures of counsel, and the meaning cannot change to conform to later developments in this Court's caselaw.

"Section 2254(e)(2) begins with a conditional clause, '[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings'...." *Michael Williams* v. *Taylor*, 529 U. S., at 431. In that case, this Court very clearly explained where this clause comes from and what it means. Regarding the scope of defaults that § 2254(e)(2) applies to, Congress codified *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992). See *Michael Williams*, *supra*, at 433-434. Once the paragraph applies, though, Congress "raised the bar" higher than the one *Keeney* set. See *id*., at 433.

"[T]here is no basis in the text of § 2254(e)(2) to believe Congress ... intended the statute's further, more stringent requirements to control the availability of an evidentiary hearing in a *broader* class of cases than were covered by *Keeney*'s cause and prejudice standard." *Id*., at 433-434 (emphasis added). Conversely, there is also no basis in the text to believe that Congress intended the new requirements to apply to a *narrower* class of cases. When we look beyond the text to the statutory purpose, the argument for narrowing the *Keeney* class of cases becomes even weaker than the argument for broadening it.

Every change made to chapter 153 of title 28 by AEDPA was for the purpose of reducing the repeated litigation of habeas corpus claims. See, e. g., § 2244(d) (statute of limitation); § 2253(c) (tightened certificate of appealability requirements); § 2254(d) (no relitigation of reasonable state decisions on the merits); § 2255 (similar changes for federal prisoners). Even § 2254(b)(2), while making an exception to the exhaustion rule, made it only for denying claims, not granting them, to reduce the number of proceedings needed to finally dispose of a meritless claim. In light of the clear and singular purpose of the habeas chapter of AEDPA, see *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003), there is no possibility that Congress intended to narrow the class of cases subject to § 2254(e)(2) to anything less than those the pre-existing *Keeney* limit applied to.

Michael Williams was specifically concerned with the meaning of the word "fail." By looking to *Keeney*, the *Williams* Court held that it referred to a lack of diligence. See 529 U. S., at 434. But diligence by whom? The habeas corpus petitioner personally or the petitioner and his counsel as a team? *Williams* says look to *Keeney*, and that case leaves no doubt. The court of appeals in that case had decided that "negligence of postconviction counsel" in failing to adequately develop the material facts in state court did not bar an evidentiary hearing under the "deliberate bypass" rule of the antiquated but not yet overruled precedent of *Townsend* v. *Sain*, 372 U. S. 293 (1963). This Court reversed, overruling *Townsend*. See *Keeney*, 504 U. S., at 4-5.

The facts of the case and the Court's decision on them establish that when *Keeney* referred to "[a] habeas petitioner's failure to develop a claim in state-court proceedings," *id*., at 12, it was including failures of postconviction counsel, not just the petitioner personally. Under *Keeney*, a petitioner's request for an

evidentiary hearing on the ground that "the material facts were not adequately developed at the state court hearing," *Townsend* v. *Sain*, 372 U. S., at 313, "will be unavailing where the cause asserted is attorney error." *Keeney*, 504 U. S., at 11, n. 5. The primary holding of *Michael Williams* is that when Congress used the same words it meant the same thing. See 529 U. S., at 434. "Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*." *Id*., at 432 (emphasis added).

A statute means what its words were understood to mean at the time it was adopted. "After all, if judges could freely invest old statutory terms with new meanings, [this Court] would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *New Prime Inc.* v. *Oliveira*, 586 U. S. __, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536, 544 (2019), quoting *INS* v. *Chadha*, 462 U. S. 919, 951 (1983).[6] Section 2254(e)(2) could allow new evidence in federal court on the ground that the state postconviction counsel who failed to develop it in state court was ineffective only if Congress intended that the provision would automatically sprout new exceptions to conform to later developments in this Court's case law. That proposition is unsupportable.

Statutes referring to external sources which may change after enactment do exist. See *New Prime*, 139 S. Ct., at 539, 202 L. Ed. 2d, at 544; see also *id*., at 544,

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6. The words of a statute are normally given their ordinary meaning at the time of enactment, see *ibid*., but sometimes they carry technical meanings or are terms of art. See, e. g., *Magwood* v. *Patterson*, 561 U. S. 320, 332 (2010) ("successive" in § 2244(b)).

202 L. Ed. 2d, at 549-550 (Ginsburg, J., concurring). AEDPA is certainly not one of them. Far from indicating a desire to conform to this Court's case law, the chapter 153 reforms of AEDPA are largely a determination by Congress that this Court's tightening of habeas corpus in the preceding two decades had not gone far enough. The successive petition bar restricted such petitions further than this Court had in *McCleskey* v. *Zant*, 499 U. S. 467 (1991). See *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). Section 2254(d) largely enacted the restriction that a majority of this Court declined to create in *Wright* v. *West*, 505 U. S. 277 (1992). See *Terry Williams* v. *Taylor*, 529 U. S. 362, 407-208 (2000). As noted above, § 2254(e)(2) "raised the bar" above where *Keeney* had placed it. *Michael Williams*, 529 U. S., at 433.

Nothing in AEDPA's habeas reforms is meant to be elastic. Its terms mean what they meant when they were enacted. *Martinez* v. *Ryan*, 566 U. S. 1 (2012), is precedent regarding which claims are procedurally defaulted, a rule Congress chose not to codify and insulate from judicial change. Even so, the propriety of hearing and finding new facts that petitioner and his counsel failed to develop in state court remains governed by the 1996 statute as its terms were understood in 1996. Courts should neither "invest old statutory terms with new meanings" nor authorize an end-run around them.

III. To the extent that the rule of *Martinez* v. *Ryan* conflicts with the statute, *Martinez* must yield.

Section 2254(e)(2), on its face, forbids holding an evidentiary hearing where it applies and its conditions are not met, but *Holland* v. *Jackson*, 542 U. S. 649

(2004) (*per curiam*), recognized that its implications went further. "Those same restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing. See, *e. g.*, *Cargle* v. *Mullin*, 317 F. 3d 1196, 1209 (CA10 2003), and cases cited." *Id*., at 653 (emphasis in original). Through the *Cargle* citation, *Holland* endorsed the proposition that "[w]hile § 2254(e)(2) refers only to evidentiary hearings, it governs as well '[w]hen expansion of the record is used to achieve the same end as an evidentiary hearing.' " *Cargle* v. *Mullin*, 317 F. 3d 1196, 1209 (CA10 2003), quoting *Boyko* v. *Parke*, 259 F. 3d 781, 790 (CA7 2001). Absent a finding that § 2254(e)(2) is inapplicable or satisfied, *Holland* held new evidence was not properly before the federal court, even if it came by some other route than an evidentiary hearing. See 542 U. S., at 653; see also *Bradshaw* v. *Richey*, 546 U. S. 74, 79 (2005) (*per curiam*); *Cullen* v. *Pinholster*, 563 U. S. 170, 184 (2011) (discussing *Holland* and *Bradshaw*).

Holland and *Bradshaw* deal with claims addressed on the merits by the state court and subject to the requirements of § 2254(d), but their evidentiary holdings are not based on that fact. That is, the rule their holdings are based on is *not* the rule subsequently announced in *Pinholster*, 563 U. S., at 181-182. Indeed, *Holland* assumed *arguendo* a rule contrary to *Pinholster* but held that the evidence would be barred by § 2254(e)(2) even if § 2254(d) did not apply. See 542 U. S., at 653.

Section 2254(e)(2), as construed in *Michael Williams*, *Holland*, and *Bradshaw*, comes into some tension with the later decision of *Martinez* v. *Ryan*, 566 U. S. 1 (2012), a case that does not even mention, much less consider or construe, § 2254(e)(2). The statute would close the door to effective consideration of many claims that would qualify for an exception to the

procedural default rule under *Martinez*. The *Martinez* rule, if given the scope the Ninth Circuit sought to give it in these cases, would open the federal habeas court to the kind of additional fact-finding that the statute was intended to block. So in a hierarchical system of laws, which one prevails?

The Constitution, of course, is at the top, but § 2254(e)(2) is far removed from any conceivable limit that the Suspension Clause might impose. See U. S. Const., art. I, § 9, cl. 2. Indeed, as originally understood, habeas corpus could not be used to attack final judgments of courts of general jurisdiction at all. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 209 (1830); *Montgomery* v. *Louisiana*, 577 U. S. 190, 232 (2016) (Thomas, J., dissenting); *Edwards* v. *Vannoy*, 593 U. S. __ (No. 19-5807, May 17, 2021) (slip op., at 3) (Gorsuch, J., concurring); Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 930-931 (1998). In addition, the First Congress had and exercised the power to completely forbid the use of *habeas corpus ad subjiciendum* for challenging the legality of state custody in federal courts. See Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82; *Ex parte Cabrera*, 4 F. Cas. 964 (No. 2278) (C.C.D. Pa. 1805); Scheidegger, *supra*, at 932. Partly codifying and partly strengthening the pre-existing *Keeney* rule, § 2254(e)(2) is well within any conceivable constitutional limit. Cf. *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996).

The case then turns on the status of the *Martinez* decision. If the exception created there is constitutionally compelled, it prevails over the statute. If it is not, the statute controls.

From the beginning of the federal judiciary, this Court has needed to fill gaps in the habeas corpus statutes. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 633 (1993). This process often involves the Court weighing

the costs and benefits itself. See *ibid*. The Court has that function, though, only "[i]n the absence of any express statutory guidance from Congress." *Ibid*. Once Congress speaks within its nearly unlimited authority in this area, the question is only one of interpreting the statute. "[J]udgments about the proper scope of the writ are 'normally for Congress to make.' " *Felker* v. *Turpin*, 518 U. S., at 664, quoting *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996).

Before *Martinez*, it was well established that the Sixth Amendment right to counsel does not extend to collateral review. *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987) (plurality opinion); *Murray* v. *Giarratano*, 492 U. S. 1, 7 (1989). *Martinez* expressly refrained from creating an exception to that rule. 566 U. S., at 9. Instead, *Martinez* poked a hole in one of the subsidiary rules of the procedural default doctrine, that ineffective assistance is not "cause" for a default unless the petitioner had a constitutional right to counsel in the proceeding where the default occurred. Compare *ibid*., with *Coleman* v. *Thompson*, 501 U. S. 722, 752-753 (1991).

The procedural default doctrine and its subsidiary rules are gap-filling rules subject to override by Congress. In *Michael Williams* there was no doubt that Congress had modified the *Keeney* rule or that it was within its power to do so. The question was merely what changes were intended. See 529 U. S., at 433-434. *Martinez* is not a constitutional rule, and it must yield when it conflicts with a statute.

The District Court in the Jones case made a correct observation but drew a backwards conclusion from it:

> "[I]t is simply illogical, and extraordinarily burdensome to the courts and the litigants, in a post-*Martinez* world, for a court to allow full eviden-

> tiary development and hearing on the *Martinez* 'claim,' but not allow consideration of that very same evidence as to the merits of the underlying trial-counsel IAC claim because his constitutionally ineffective PCR counsel failed to raise that claim."[7] J. A. 297.

That would be illogical and burdensome, but the premise that "full evidentiary development and hearing on the *Martinez* 'claim' " must go forward despite the statute is unsupported. The Court of Appeals took the backwards conclusion even further. "As we have previously recognized and now explicitly hold, *Martinez*'s procedural-default exception applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court." J. A. 334. Absent a constitutional requirement, where does a court get the authority to just declare a new exception to a statute in which Congress has already considered and specified the exceptions?

By putting quotes around "claim" in the block quote above, the District Court implicitly acknowledged that there really is no *Martinez* claim. The claim is ineffective assistance of trial counsel, and the *Martinez* question is a subsidiary issue in the adjudication of that claim. As explained in Part I, *supra*, the most consistent approach and the one that best fits with the intent of Congress in beefing up the *Keeney* rule is to understand that "evidentiary hearing on the claim" includes hearings on both the procedural default question and the merits question. The illogical and burdensome result is avoided by not holding the *Martinez* hearing unless the petitioner can satisfy § 2254(e)(2).

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7. There is no such thing as "*constitutionally* ineffective PCR counsel" because, as discussed above, there is no constitutional right to counsel in collateral review.

If the statute, properly understood, blocks most *Martinez* claims and returns the law in practice to roughly where it was before *Martinez*, that is the necessary consequence of respecting Congress's choice in weighing the importance of finality versus the value of having lower federal courts check the work of state courts. This Court has gone back and forth with this weighing from *Fay* v. *Noia*, 372 U. S. 391 (1963) to *Coleman* to *Martinez*. See *Coleman*, 501 U. S., at 750. But once Congress speaks on the subject, its weighing of the competing values is the one that counts. The *Martinez* exception was particularly ill-advised in cases such as the Ramirez case, where the defendant is clearly guilty of a horrible crime and the only question is which of the available penalties for that crime he will receive. See Pet. for Cert. 6-10. Neither outcome is a miscarriage of justice against Ramirez. See *Sawyer* v. *Whitley*, 505 U. S. 333, 345-346 (1992) (miscarriage of justice exception limited to actual ineligibility for the penalty). The most he can receive is a statutorily authorized punishment for the crime he chose to commit. Congress deliberately limited its miscarriage of justice exception to questions of guilt of the underlying offense, not penalty. See § 2254(e)(2)(B); see also § 2244(b)(2)(B)(ii) (similar exception to successive petition bar). If the evidentiary hurdle in subparagraph (B) is too high, the authority and responsibility for fixing it lies with Congress.

CONCLUSION

The decisions of the Court of Appeals for the Ninth Circuit in these cases should be reversed.

July, 2021

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