

No. 20-1009

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IN THE  
**Supreme Court of the United States**

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DAVID SHINN, ET AL.,

*Petitioners,*

*v.*

DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,

*Respondents.*

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

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**MOTION TO MODIFY OPINION**

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Pursuant to Rule 21 of the Rules of this Court, Respondents David Martinez Ramirez and Barry Lee Jones respectfully move to modify the opinion issued by this Court on May 23, 2022 in the above-captioned case to delete the following sentence: “Respondents do not dispute, and therefore concede, that their habeas petitions fail on the state-court record alone.” Slip Op. 5-6.<sup>1</sup>

1. To the extent that the Court in the sentence quoted above intended to convey that Respondents did not raise such an argument before this Court because it was not relevant to the issues presented by the petition, the sentence is accurate.

The issue of whether the state-court record by itself was sufficient was not passed on by the courts below. In *Ramirez*, neither the district court nor the Ninth Circuit Court of Appeals determined whether the state-court record alone merited relief because Arizona urged the courts to consider the enlarged record and reject the ineffective assistance of trial counsel claim on the merits. Resp. Br. 58; JA 461, 483; Opp. to Supp. Br., *Ramirez v. Ryan*, No. 2:97-CV-01331 (D. Ariz. July 6, 2015), Doc. 257, at 1-2, 44-46, 49-52; see also Oral Arg. at 43:37, *Ramirez v. Ryan*, No. 10-99023, 2019 WL 1405619 (9th Cir. 2019). As this Court’s opinion recognized, Arizona objected only to “further factfinding before the Ninth Circuit panel.” Slip Op. 6 n. Because Arizona never objected to the courts’ consideration of the combined

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<sup>1</sup> The Petitioner in *Ramirez* is David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry. The Petitioners in *Jones* are David Shinn and Walter Hensley, Warden of the Arizona State Prison Complex-Eyman. The Petitioners are collectively referred to as “Arizona.”

state- and federal-court record, the Respondents conceded nothing related to the state-court record alone.

Similarly, in *Jones*, the district court did not determine whether the state-court record on its own was sufficient on the merits of Mr. Jones’s habeas claim because it considered the evidence already presented in the *Martinez* hearing. Resp. Br. 14; JA241-75, 285. Arizona challenged that decision and the Ninth Circuit affirmed, holding that the state-court record combined with the evidence presented at the *Martinez* hearing demonstrated ineffective assistance of counsel requiring habeas relief. Resp. Br. 15-16; JA322, 368, 337.

Thus, neither court ruled on whether the state-court record alone merited relief. That question was therefore not before this Court.

Not only was the question about the adequacy of the state-court record on its own not ruled on below, but it also was not “fairly encompassed by the question presented to this Court.” *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1621 n.2 (2021); S. Ct. R. 14(1)(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”). Arizona’s question presented was exclusive to whether “28 U.S.C. § 2254(e)(2)[] precludes a federal court from considering evidence *outside* the state-court record when reviewing the merits of a claim for habeas relief.” Pet. Cert. i; Pet’r Br. i (emphasis added). Whether the state-court record on its own merited relief is a separate legal and factual question—one not discussed by the courts below and not briefed or argued by the parties because it is not a “predicate to an intelligent resolution” of the question presented. *Kasten v.*

*Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16-17 (2011) (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75, n. 13 (1996)).

Thus, it is correct to say that Respondent conceded that adequacy of the state record on its own was not before this Court and not relevant to the proceedings in this Court.

2. But if this Court intended to suggest a broader concession that would be inaccurate. Nothing Respondents argued to this Court represented a concession about the merits of their habeas petitions if reviewed based on the state-court record alone. To avoid any confusion in regard to the Court's intent in including the quoted sentence, Respondents request that the Court modify its opinion to exclude the sentence.

3. Pursuant to Rule 21.1, Respondents have conferred with counsel for Arizona, who stated that they have not yet taken a position on this motion.

## CONCLUSION

For the forgoing reasons, Respondents respectfully ask that this Court modify the opinion to omit the Court's statement that: "Respondents do not dispute, and therefore concede, that their habeas petitions fail on the state-court record alone." Slip Op. 5-6.

Respectfully submitted,

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