

In the
Supreme Court of the United States

John Bejarano,

Petitioner,

v.

Jeremy Bean,

Respondent.

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

Reply to Brief in Opposition to Petition for Writ of Certiorari

CAPITAL CASE

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TABLE OF CONTENTS

Introduction	1
I. The State implicitly acknowledges the presence of the circuit split, requiring this Court’s intervention.....	1
II. The State concedes the Ninth Circuit’s serious misapprehensions of the record, thereby underscoring the need for this Court’s review.....	3
III. Bejarano’s petition is not encumbered by any procedural impediments.....	6
IV. This Court should hold Bejarano’s petition until it decides the State’s petition for writ of certiorari in the <i>Hogan</i> case.....	8
Conclusion.....	10

TABLE OF AUTHORITIES

<i>Cavazos v. Smith</i> , 565 U.S. 1 (2011)	5
<i>Hammond v. Hall</i> , 586 F.3d 1289 (11th Cir. 2009)	2
<i>Hogan v. Bean</i> , 140 F.4th 1001 (9th Cir. 2025)	9
<i>Hogan v. Bean</i> , __ F.4 ___, 2026 WL 1175145 (April 30, 2026)	9
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	7
<i>Porter v. McCollum</i> , 558 U.S. 30 (2009)	4
<i>Roper v. Weaver</i> , 550 U.S. 598 (2007)	10
<i>Rosales-Mireles v. United States</i> , 585 U.S. 129 (2018)	5
<i>Taylor v. Riojas</i> , 592 U.S. 7 (2020)	5
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	4
<i>Wood v. Milyard</i> , 566 U.S. 463 (2012)	6, 7
Federal Statutes	
28 U.S.C. § 2254	6, 8
State Statutes	
Nev. Rev. Stat. § 34.810	6, 8

Rules

Fed. R. App. P. 40	9
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INTRODUCTION

In John Bejarano’s Petition for Writ of Certiorari, he raised two straightforward issues: whether courts must consider record evidence when determining the reasonableness of counsel’s actions under *Strickland*, and whether a court’s extensive and material misapprehensions of the record results in a prejudice analysis in conflict with this Court’s precedents. The State’s response implicitly recognizes the presence of a circuit split on the first issue, and it attempts to minimize the second without addressing the ways the Ninth Circuit’s decision flouts federal law. This case presents an ideal vehicle to address these issues unencumbered by procedural barriers, and this Court may dispose of the State’s belated and meritless argument to the contrary. Finally, because an inconsistent decision in *Hogan* would result in fundamental unfairness, Bejarano respectfully requests this Court hold his petition until it decides the State’s petition for writ of certiorari in that case.

I. The State implicitly acknowledges the presence of the circuit split, requiring this Court’s intervention.

As an initial matter, much of the State’s discussion of the first issue conflates decisions constrained by the “double deference” due under both *Strickland* and AEDPA with the decisions at issue here, requiring de novo review. See BIO at 21-22. But more importantly, the State implicitly acknowledges the presence of the split.

At first, the State argues “[t]his Court has already answered” the first question—whether courts are permitted to credit hypothetical reasons for trial

counsel's errors irrespective of the record, or whether courts must consider the record evidence in determining the reasonableness of trial counsel's actions. BIO at 21. The State purports to agree that a court cannot attribute a particular trial strategy to counsel "when the record shows that counsel's actions conflict with such a strategy," adding a court that does so is "applying the wrong test." BIO at 23.

But that is precisely what the Ninth and Eleventh Circuits have done. In those circuits, courts do not consider what the record reveals actual trial counsel did in a specific case, but instead imagine what a hypothetical reasonable lawyer could have done. *See, e.g., Hammond v. Hall*, 586 F.3d 1289, 1332 (11th Cir. 2009) ("Under the law of this circuit the question is not why Hammond's counsel failed to move for a mistrial because of the parole remark but whether a competent attorney reasonably could have decided not to move for one. . . . [I]t does not matter if the actual reason trial counsel did not move for a mistrial was inattention, misguided tactics, or unawareness of the code section.").

Here, the Ninth Circuit attributed a strategy to trial counsel that is affirmatively contradicted by the record. For example, the court imagined that the wealth of child welfare records—reflecting Bejarano's traumatic childhood spent shuffled between foster and group homes in between beatings at the hands of his alcoholic father—could have been omitted because they "paint a picture of Bejarano as . . . violent, emotionless, remorseless, and prone to violent assault and theft," App. 27. But as the State concedes, the records do not reflect any violence in Bejarano's youth, BIO at 24, and the Ninth Circuit's hypothesizing contradicts counsel's own testimony that he either did not know why he omitted the records, or

omitted them because they were “dated material.” 16-EOR-4443–44; 7-EOR-1901. Whatever test the State argues should apply, the test that these courts are in fact applying—and that the Ninth Circuit applied here—disregards the record evidence contradicting the reasonableness of counsel’s actions. This case implicates a well-entrenched circuit split regarding the proper application of *Strickland*’s reasonableness standard, and this Court’s intervention is warranted to ensure that the meaningfulness of the Sixth Amendment right to counsel does not vary based on geography.

II. The State concedes the Ninth Circuit’s serious misapprehensions of the record, thereby underscoring the need for this Court’s review.

As Bejarano argued in his Petition for Writ of Certiorari, the “critical question” of his second issue presented is: “Where a reviewing court makes material mistakes and misapprehensions of the record, can it truly be said to have assessed the ‘totality’ of the ‘entire evidentiary picture,’ as required by *Strickland* and its progeny?” The State’s Brief in Opposition lends further support to Bejarano’s position that the answer to this question must be no.

On more than one occasion, the State openly acknowledges that the Ninth Circuit panel seriously misapprehended key record facts. For example, the State concedes that the unrepresented juvenile records do not contain evidence of violence by Bejarano, despite the Ninth Circuit’s claims to the contrary. *See* BIO at 24 (“[T]he records from his youth reflect that he had not yet acted out violently.”). Similarly, the State admits that Bejarano was “periodically abused by his father,” BIO at 28—a key piece of mitigating evidence that the panel completely ignored.

Other examples of the Ninth Circuit’s material misapprehensions of the record are implicitly conceded by the State’s failure to address them. *See, e.g.*, Pet. at 29-30 (discussion of the panel’s mischaracterization of Bejarano’s alcoholism and positive response to treatment). By conceding that the Ninth Circuit failed to analyze this evidence, the State admits that the panel did not engage in the “totality” review required by this Court’s precedents. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (“In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.”).

The State engages in the same faulty analysis of Bejarano’s penalty phase testimony as the Ninth Circuit did, by analyzing whether Bejarano would have testified even if the missing evidence was presented to the jury. BIO at 29-30. However, the prejudice standard requires consideration of the totality of mitigating evidence actually presented and an assessment of whether there is a reasonable probability of a different outcome, *see, e.g., Porter v. McCollum*, 558 U.S. 30, 41 (2009), not speculation about whether Bejarano would have testified regardless (i.e., the same outcome). The record evidence is very clear that Bejarano testified specifically because of trial counsel’s failures and without a rational understanding of the negative impact it could have on the jury. *See, e.g.*, 5-EOR-1292-1296; 7-EOR-4062; 15-EOR-4062-63, 4065-4182. Without Bejarano’s testimony—induced by trial counsel’s failures—the prejudice analysis is fundamentally altered, resulting in a reasonable probability that one juror would have voted for life. And even if Bejarano would still have chosen to testify, it is unreasonable to presume that his testimony

would have remained the same after the unpresented evidence and testimony were heard by the jury.

The State derides Bejarano for “cherry-picking” these pieces of missing mitigating evidence but fails to understand that they provide the foundation for a complete understanding of who Bejarano is, and why denying the jury the opportunity to consider this evidence was so prejudicial. This misunderstanding is yet another example of the abject failure of the State or any trier of fact to accurately evaluate not just the totality, but the reality of the man they have condemned to die. The State argues that this Court should not engage in Bejarano’s “fanciful request for error correction,” but this issue—error-focused though it may be—presents the same concerns as others this Court has granted certiorari review. *See, e.g., Taylor v. Riojas*, 592 U.S. 7 (2020) (reversing the Fifth Circuit’s affirmance of summary judgment on the petitioner’s Eighth Amendment claim and acknowledging that while the Fifth Circuit applied the correct legal standards, the Court disagreed with its application of those standards to the facts of the case); *Cavazos v. Smith*, 565 U.S. 1 (2011) (reversing the Ninth Circuit’s error when it concluded that the evidence was not sufficient to support a conviction).

“In broad strokes, the public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction.” *Rosales-Mireles v. United States*, 585 U.S. 129, 141 (2018) (internal quotation marks omitted). Bejarano’s capital sentencing and postconviction proceedings have not met these essential standards.

However this issue is characterized, the extent of the Ninth Circuit's errors and its flagrant disregard for this Court's precedent warrant certiorari review.

III. Bejarano's petition is not encumbered by any procedural impediments.

The State argues this case presents a poor vehicle because, while the Ninth Circuit found Bejarano's claim was not barred on an adequate state law ground, this Court's "intervening decisions" reject the argument that Nevada's successive petition bar of Nev. Rev. Stat. § 34.810 is inadequate to bar federal review. BIO at 31. The State further argues, based on this premise, that Bejarano's evidence in support of his claim cannot be considered under 28 U.S.C. § 2254(e)(2). BIO at 2, 31. However, procedural default is not implicated in this case and therefore, the State's argument regarding the proper consideration of evidence is also misdirected.

The State expressly declined to assert Nev. Rev. Stat. § 34.810 as a procedural bar with respect to Bejarano's claim before the federal district court and did not raise the issue before the Ninth Circuit. The State's motion to dismiss did not assert Bejarano's IAC claim was procedurally barred as successive.¹ The State's reply to the motion expressly disclaimed reliance on the default bar, arguing "the successive petition procedural bar . . . is not relevant to this discussion."² *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (finding the State "intentionally relinquish[ed]

¹ *See Bejarano v. McDaniel*, Case No. 2:98-cv-01016-GMN-NJK, Motion to Dismiss Amended Petition for Writ of Habeas Corpus at 14–22 (filed January 16, 2008), Electronic Case File No. 114.

² *Bejarano v. McDaniel*, Case No. 2:98-cv-01016-GMN-NJK, Reply to Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus at 31 (filed June 16, 2008), Electronic Case File No. 131.

or abandon[ed]” a defense when it “deliberately steered the District Court away from the question . . .”). The State later argued that “none of the claims at issue were defaulted in federal court” and Bejarano’s “ineffective assistance at sentencing claim was denied on the merits.”³ The State strategically took this position to argue Bejarano should not receive the benefit of this Court’s decision in *Martinez v. Ryan*, 566 U.S. 1 (2012).⁴ Finally, the State did not argue the successive petition bar was adequate to bar federal review in its answering brief before the Ninth Circuit. Under these circumstances, this case does not present this Court with an opportunity to consider the adequacy of Nevada’s successive petition procedural bar. *See, e.g., Wood*, 566 U.S. at 474 (finding once a state “intentional[ly] relinquish[es] or abandon[s]” a known defense at the federal district court level—the defense is waived for review on appeal).

Similarly, the fact that Bejarano’s claim was decided on the merits by the federal court means this Court is not prevented from considering the evidence he proffered in state court in support of it. The State fails to address Bejarano’s argument as well as the authorities he cited establishing that a petitioner does not fail to develop the facts in state court when such development is prevented due to the state court’s imposition of an inadequate state procedural default rule. Petition

³ *Bejarano v. McDaniel*, Case No. 2:98-cv-01016-GMN-NJK, Response to Order Granting Limited Remand at 3 (filed February 17, 2015), Electronic Case File No. 183.

⁴ *Bejarano v. McDaniel*, Case No. 2:98-cv-01016-GMN-NJK, Response to Order Granting Limited Remand at 12 (filed February 17, 2015), Electronic Case File No. 183 (“*Martinez* provides Bejarano no relief because it is limited to a means of overcoming a procedural default, and this claim was not defaulted.”).

at 32–35 & n.8 (citing authorities). The State also acknowledges the federal district court and Ninth Circuit conducted *de novo* review of the claim. BIO at 12–13, 17. Therefore, this Court is not precluded under 28 U.S.C. § 2254(e)(2) from considering the evidence Bejarano proffered in state and federal court in support of his claim.

Bejarano’s petition is accordingly not encumbered by any procedural impediments to the consideration of the merits of his claim.

IV. This Court should hold Bejarano’s petition until it decides the State’s petition for writ of certiorari in the *Hogan* case.

The State argues this Court should not hold the instant petition while Bejarano’s second petition for rehearing remains pending before the Ninth Circuit. According to the State, “Bejarano is wrong that the [State’s] *Hogan* petition [for rehearing] asserted that a second state habeas petition is procedurally proper vehicle for raising ineffective assistance of counsel claims that could have been raised in a prior petition.” BIO at 33. However, as explained in the section above, it was appropriate under Nevada law to do so, and the State recognizes such because it intentionally refrained from arguing procedural default. The State does not further explain its argument, but instead directs the Court to the opposition it filed in the Ninth Circuit in response to Bejarano’s petition for rehearing. *See* BIO at 33 & n.9. However, Bejarano’s petition directly quotes from the State’s petition for rehearing where it argued, before 2001, Nevada courts did not consistently apply the successive petition procedural bar of Nev. Rev. Stat. § 34.810. Petition at 34. As the State argued there, a petitioner “could have raised his otherwise defaulted

ineffectiveness claims with a hope that—despite his default—the Nevada Supreme might exercise its discretion not to apply the procedural bars.”⁵

The State is correct that the Ninth Circuit denied the State’s petition for rehearing in *Hogan* on April 30, 2026. BIO at 34. However, on May 5, 2026, the State filed a motion to stay the Ninth Circuit’s mandate so it could seek review of the decision in *Hogan* with this Court.⁶ In the dissent from the denial of the State’s petition for rehearing, Judge Bress agreed with Judge Callahan’s dissenting opinion from the initial panel decision that “the *Martinez* exception is limited to petitioners who fail to raise trial IAC in their first state PCR petition, but who raise it in their *second* state petition.”⁷ In Judge Callahan’s dissent from the panel decision, she asserted “the Nevada Supreme court continues to consider claims of IAC of trial counsel on a first PCR petition when raised in successive PCR petitions.”⁸ Judge Callahan therefore concluded: “Hogan has not shown that if he had raised his trial counsel IAC claim in his second PCR petition, the Nevada courts would not have considered the claim.”⁹

⁵ *Hogan v. Bean*, No. 18-99004, Respondents-Appellees’ Petition for Panel and En Banc Rehearing under Fed. R. App. P. 40 (filed August 1, 2025), DktEntry 99-1 at 23 n.5.

⁶ *Hogan v. Bean*, No. 18-99004, Motion to Stay Mandate (filed May 5, 2026), DktEntry 107.

⁷ *Hogan v. Bean*, __ F.4th __, 2026 WL 1175145, at *6 (filed April 30, 2026) (Bress, J., dissenting from the denial of rehearing, joined by Callahan, Bennett, R. Nelson, Collins, Lee, Bumatay, VanDyke, and Tung, JJ.) (emphasis in original).

⁸ *Hogan v. Bean*, 140 F.4th 1001, 1057 (9th Cir. 2025) (Callahan, J., dissenting).

⁹ *Id.* at 1058.

If this Court granted the State’s anticipated petition for writ of certiorari and found in its favor, it would undermine the Ninth Circuit’s decision in Bejarano’s case that he was not entitled to further factual development in federal court, as he did exactly what the State and the dissenting judges in *Hogan* say the petitioner there should have done. It would be fundamentally unfair for Bejarano to suffer execution based on a rule the State later successfully argued against due to its shifting incentives in another capital case. *Cf. Roper v. Weaver*, 550 U.S. 598, 601–02 (2007) (dismissing petition for writ of certiorari because “we find it appropriate to exercise our discretion to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner”). Bejarano accordingly requests that this Court hold his petition until it decides the State’s petition in *Hogan*.

CONCLUSION

For the foregoing reasons and those included in his petition, Mr. Bejarano requests that this Court hold his petition for writ of certiorari pending the disposition of the State’s anticipated petition for writ of certiorari in *Hogan*. Bejarano further requests that this Court grant his petition and vacate the judgment of the Ninth Circuit.

Dated this 8th day of May, 2026.

Respectfully submitted,

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