
No.

In the
Supreme Court of the United States

SCOTT DRAKE CLABOURNE, Petitioner

v.

ARIZONA, Respondent

On Petition for Writ of Certiorari to the
Arizona Supreme Court

Petition for Writ of Certiorari

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CAPITAL CASE

Questions Presented For Review

- I Whether Arizona has ignored the *Strickland* prejudice prong in defaulting Mr. Clabourne's sentencing IAC claim by requiring counsel to have filed a PCR petition before the prejudice was evident, during the pendency of *Martinez* litigation and in the face of a previous dismissal of PCR litigation with prejudice in the trial court.
- II Whether Arizona's inconsistent application of its procedural default rules to successive PCR claims due to their simultaneous litigation in federal courts will render this procedural default inadequate to bar federal habeas review.
- III Whether Arizona's creation of a non-discretionary right of review of IAC claims followed by Arizona's appointment of inexperienced PCR counsel who provided concededly deficient representation was arbitrary and denied Mr. Clabourne Fourteenth Amendment Equal Protection under *Douglas v. California*.

Parties to the Proceeding

Scott Drake Clabourne, Defendant/Petitioner

State of Arizona, Plaintiff/Respondent

Related Proceedings

Appeal from *Martinez* Remand in *Scott Drake Clabourne, v. Ryan Thornell*, et al., Ninth Circuit Court of Appeals, No. 23-99000, pending briefing.

Petition for Review in *State v. Scott Drake Clabourne*, Arizona Supreme Court, CR-24-0267-PC, decided May 6, 2026.

Petition for Postconviction Relief in *State v. Scott Drake Clabourne*, Pima County Superior Court, No. CR-06824, decided September 5, 2024.

Martinez Remand in *Scott Drake Clabourne v. David Shinn*, United States District Court for the District of Arizona, CIV 03–00542–TUC–RCC, decided February 14, 2023.

Petition for Certiorari in *Scott D. Clabourne v. Charles L. Ryan*, United States Supreme Court, No. 17-7257, decided March 19, 2018.

Appeal from Petition for Habeas Corpus in *Scott D. Clabourne v. Charles L. Ryan*, Ninth Circuit Court of Appeals, No. 09-99022, decided August 1, 2017.

Petition for Habeas Corpus in *Scott Drake Clabourne v. David Shinn*, United States District Court for the District of Arizona, CIV 03–00542–TUC–RCC, decided September 29, 2009.

Petition for Review in *State v. Scott Drake Clabourne*, Arizona Supreme Court, No. CR-03-0043-PC, decided October 28, 2003.

Petition for Postconviction Relief in *State v. Scott Drake Clabourne*, Pima County Superior Court, No. CR-06824, decided January 3, 2003.

Petition for Certiorari in *Scott Drake Clabourne v. Arizona*, United States Supreme Court, No. 99-8107, decided March 20, 2000.

Direct Appeal from Resentencing in *State v. Scott Drake Clabourne*, Arizona Supreme Court, No. CR-97-0334-AP, decided September 21, 1999.

Resentencing in *State v. Scott Drake Clabourne*, Pima County Superior Court, No. CR-06824, decided August 8, 1997.

Appeal from Petition for Habeas Corpus in *Scott D. Clabourne v. Samuel A. Lewis*, Ninth Circuit Court of Appeals, Nos. 94-15587 and 94-15699, decided September 8, 1995.

Petition for Habeas Corpus in *Scott D. Clabourne v. Samuel Lewis*, United States District Court for the District of Arizona, No. CIV 91-465-TUC-RMB, decided February 24, 1994.

Petition for Review of Petition for Postconviction Relief in *State v. Scott Drake Clabourne*, Arizona Supreme Court, No. CR-89-0373-PC, decided September 26, 1990.

Petition for Postconviction Relief in *State v. Scott Drake Clabourne*, Pima County Superior Court, No. CR-06824, decided November 6, 1989.

Petition for Habeas Corpus in *Scott D. Clabourne v. Samuel Lewis*, United States District Court for the District of Arizona, No. CIV 88-205-TUC-RMB, decided January 27, 1989.

Petition for Review of Petition Postconviction Relief in *State v. Scott Drake Clabourne*, Arizona Supreme Court, No. CR-87-0237-PC, decided November 17, 1987.

Petition for Postconviction Relief in *State v. Scott Drake Clabourne*, Pima County Superior Court, CR-06824, decided August 3, 1987.

Direct Appeal from Trial and Conviction in *State v. Scott Drake Clabourne*, Arizona Supreme Court, No. 5807, decided October 31, 1984.

Petition for Postconviction Relief in *State v. Scott Drake Clabourne*, Pima County Superior Court, No. CR-06824, decided October 13, 1983.

Trial and Sentencing Proceedings in *State v. Scott Drake Clabourne*, Pima County Superior Court, CR-06824, decided January 24, 1983.

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In Chamber Under Advisement Ruling on Defendant's Motion for Rehearing, *State v. Clabourne*, No. CR06824-001 (Pima Cnty. Super. Ct. (Sept. 5, 2024)).

In Chambers Under Advisement Ruling on Defendant's Rule 32 Petition for Post-Conviction Relief, *State v. Clabourne*, No. CR06824-001 (Pima Cnty. Super. Ct. May 10, 2024).

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Direct appeal, *State v. Clabourne*, 142 Ariz. 335 (1984).

Statement of the Basis for Jurisdiction

The order of the Arizona Supreme Court denying Petitioner's Petition for Review was entered on May 5, 2026. This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

Constitutional and Federal Provisions Involved

U.S. CONST. amend. 14, § 1, provides in pertinent part:

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(b)(1) provides in pertinent part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(e)(2) provides in pertinent part:

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—

...

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Statement of the Case

Concise Facts

Mr. Clabourne remains sentenced to death based entirely, or at the very least overwhelmingly, on his *Edwards*¹-inadmissible confession. Mr. Clabourne's 1981 confession has been inadmissible, as a matter of settled law, since this Court clarified, in *Arizona v. Roberson*, 486 U.S. 675 (1988), that *Edwards* is not offense specific. The Ninth Circuit Court of Appeals pointed this out in 1995 and again in 2014. *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995); *Clabourne v. Ryan*, 745 F.3d 362, 379-380 (9th Cir. 2014).

¹ *Edwards v. Arizona*, 451 U.S. 477 (1981).

The State concedes that prior PCR counsel rendered deficient performance with regard to this issue at Mr. Clabourne's 2001 State Postconviction (PCR) proceeding following his 1997 resentencing. *Id* at 382. In 2003, the trial court dismissed Mr. Clabourne's PCR addressing other, unsupported, issues with prejudice.

Mr. Clabourne's confession-based claim has been Mr. Clabourne's primary claim in the United States District Court since 2003. In 2003, however, the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice prong of Mr. Clabourne's sentencing IAC claim was not yet evident until the Ninth Circuit ordered a remand pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), for a determination of *Strickland* prejudice.

In 2003, it was clear that there was a problem with Mr. Clabourne's *Edwards*-inadmissible confession having formed the basis for all of the aggravation in his case. But, in 2003, the medical examiner's trial testimony, if accepted at face value, would have prevented any finding of *Strickland* prejudice because it would have otherwise supported Arizona's cruelty aggravator on its own.

It was not until 2018, on *Martinez* remand to the district court, that Mr. Clabourne was able to obtain funds to retain Werner Spitz, M.D., as an expert to review Dr. Valerie Rao's trial testimony. Only in 2018, after the defense received Dr. Spitz's report, did it become apparent that Mr.

Clabourne's sentencing IAC claim had a *Strickland* prejudice leg upon which to stand. From 2003 until 2017, undersigned counsel was without funding, fighting procedural default in federal court.

Relevant Facts and Proceedings at Trial

On September 18, 1980, at approximately 11:45 p.m., the victim, Laura Webster, left the Green Dolphin Bar in the company of Larry Langston, Edward Carrico and Scott Clabourne. Her other friends in the bar noticed that she took a circuitous route through the bar as if to avoid them as she was leaving. Ms. Webster's body was found the next morning, at approximately 7:45 a.m., in the Santa Cruz riverbed under the 22nd Street bridge in Tucson wrapped in sheets. Acid phosphatase prostatic testing revealed that she had been sexually active within the preceding 12 hours. The medical examiner could not determine whether the sexual activity was consensual and the samples were lost before they could be blood typed or DNA matched to any suspects in the case. Ms. Webster had been ligature strangled with a blue bandana. Three stab wounds to her heart and lung were determined to have occurred shortly before death, while the victim was unconscious, when "she had just a few heart beats left," as there was relatively little bleeding into the chest cavity. (RT November 17, 1982, Day 2 of Trial, p.255, 271; Appendix to PCR 454, 470.) There were also bruises

to her arms and legs and to her hand and thumb, all sustained within 12 to 24 hours of the time of death. (RT November 17, 1982, pp.255-263; Appendix to PCR 454-462.)

On April 4, 1981, Mr. Clabourne, who was in custody in the Pima County Jail on an unrelated burglary charge in Pima County Superior Court case number CR-05715, provided the Pima County Attorney's Office a written request to remain silent and not to be interviewed on any case without the presence of his attorney. (Appendix to PCR 53.) Mr. Clabourne remained in custody on the burglary charge until Tucson Police Department (TPD) detectives eventually interviewed him on October 12, 1981, in his attorney's absence and in violation of his *Edwards* request, in connection with the murder investigation. (Appendix to PCR 54-60.)

Mr. Clabourne first became a suspect on August 21, 1981, when the chief of the Tucson International Airport Authority Police called TPD Detective Bustamante to tell him that an airport security guard wished to provide information anonymously. That guard, Shirley Martin, agreed later that day to cooperate and indicated that Scott Clabourne had told her that he had strangled a woman from the Green Dolphin Bar with his blue and white handkerchief and disposed of her body over the 22nd Street bridge. Ms. Martin had no knowledge of any sexual activity regarding Ms. Webster. (RT November 18, 1982, p.334; Appendix to PCR 533.)

On October 12, 1981, Detectives Bustamante and Rueter interviewed Mr. Clabourne at the Pima County Jail where he was incarcerated on the unrelated burglary charges. The detectives were aware that Mr. Clabourne was represented by attorney Lamar Couser on the burglary charges, but avoided contacting Mr. Couser before interviewing his client so as to avoid “impeding the investigation.” (RT August 11, 1982, Motion to Suppress, pp.13-14.) Mr. Clabourne confessed the murder in sufficient detail to support the sole aggravator, especial cruelty under A.R.S. § 13-703(F)(6). Mr. Clabourne also indicated in his confession that he had told Correctional Officer (CO) Scott Simmons at the jail about the murder. Detective Bustamante contacted CO Simmons later that day and asked him to write a report detailing Mr. Clabourne’s admission. (Appendix to PCR 63.)

Testimony in Mr. Clabourne’s case began on November 17, 1982. Rick Diaz testified that he drove Laura Webster and another coworker to the Green Dolphin bar where they met other friends and coworkers. He saw Ms. Webster talking to two white men and Mr. Clabourne, who is African-American. One of the white men told Ms. Webster that he had a friend who really wanted to meet her. She made a remark to Mr. Diaz about getting herself into situations, then later walked out of the bar with the three men, taking a circuitous route to avoid her friends as though she were embarrassed. (RT November 17, 1982, pp.172-210; Appendix to PCR

371-409.) Ms. Webster's wallet was later found by a dumpster. Ms. Webster's nude body was found in the Santa Cruz riverbed under the 22nd Street bridge wrapped in sheets.

Dr. Valerie Rao, a Pima County assistant medical examiner, testified that Ms. Webster had been ligature strangled with a blue bandana. She had been stabbed twice in the chest through the sheet, penetrating her heart two times and her lung once. Dr. Rao testified that the stab wounds occurred shortly before death, while the victim was unconscious, as there was relatively little bleeding into the chest cavity. There were also bruises to her hand, thumb, arms, legs and lip, all sustained within 12 to 24 hours of the time of death. Acid phosphatase prostatic testing revealed that she had been sexually active within the 12 hours preceding death, however, the medical examiner could not determine whether the sexual activity was consensual or was before or after death. The samples were lost before they could be blood typed or DNA matched to any suspects in the case. (RT November 17, 1982, pp.238-282; Appendix to PCR 437-481.)

On November 18, 1982, depositions of CO Simmons and CO Dale Stevenson were played for the jury at the guilt phase of the trial due to their unavailability. CO Simmons testified that Mr. Clabourne worked as a trustee at the jail and had a nice and friendly personality, was real pleasant and very polite, that he would babble and say strange things and behave strangely, and

that Mr. Clabourne would grab for objects in the air that were not there. He testified that, one day while Mr. Clabourne was cleaning his office, Mr. Clabourne began rambling that he “shouldn’t have killed her.” In response to further questioning, Mr. Clabourne said that he and another man had picked up a girl at a bar and that they had partied and had sex with the girl. Mr. Clabourne did not indicate whether the sex was consensual or not. He said the other man threatened him to get him to kill her. He also said that the girl had told him that she had been with the other man before and the other man had beat her and she asked him to keep the other man from hurting her. (RT October 18, 1982, Deposition of Scott Simmons, p.11; Appendix to PCR 179.) Mr. Clabourne said that he had strangled the girl. Then he started mumbling to himself again and walked away as he continued to sweep. Mr. Clabourne was chuckling and looking around and grabbing at things in the air and “laughing like a mental patient” the entire time so Officer Simmons had, at the time, put no credence in Mr. Clabourne’s rambling. (RT October 18, 1982, Deposition of Scott Simmons, pp.7-8, 14, 17; Appendix to PCR 175-176, 182, 185.)

CO Stevenson testified that he overheard Mr. Clabourne say to another inmate, regarding an unknown incident on an unknown date and regarding an unknown person, something along the lines of, “Yeah, I raped her. She didn’t want it but I know she liked it.” There was no indication as

to whom Mr. Clabourne was talking about having raped or any other context given to the conversation. (RT October 18, 1982, Deposition of Dale Stevenson; Appendix to PCR 149-167.)

Barbara Bailon, a secretary at the Salvation Army Halfway House, testified that when she attempted to share the gospel of Jesus Christ with Mr. Clabourne, he would rebuff her, saying he had done too many bad things to be saved. Once when she visited him at the jail, he told her he had strangled a girl because two other men made him do it. She also testified that he told her that he had been talking to Ms. Bailon telepathically. (RT November 18, 1982, pp.307-324; Appendix to PCR 506-523.)

Shirley Martin, a former girlfriend of Mr. Clabourne's, testified that Mr. Clabourne told her that two men he was with shot him up with drugs and forced him to strangle a girl from the Green Dolphin they knew who had messed something up for one of them. She also testified that Mr. Clabourne acted out of the ordinary, did and said crazy things and sometimes described seeing an 8-foot black man with a big afro who was his inner self. (RT November 18, 1982, Day 3 of Trial, pp.325-377; Appendix to PCR 524-576.)

Mr. Clabourne's confession was played and the transcripts provided to the jury. (RT November 18, 1982, p.382; Appendix to PCR 581.)

Dr. John LaWall testified that Mr. Clabourne was competent to stand trial and that he was *M’Naghten* sane at the time of the offense. He also testified that, as the jail psychiatrist, he had placed Mr. Clabourne on a “fairly high” dosage of Thorazine. (RT November 18, 1982, pp.384-445; Appendix to PCR 583-450.)

On November 19, 1982, Dr. Edward Gelardin testified that Mr. Clabourne was Rule 11 competent and that he was *M’Naghten* sane. He also testified that he had spent only an hour with Mr. Clabourne and had done no psychological testing. (RT November 19, 1982, pp.459-499; Appendix to PCR 658-698.)

Dr. Sanford Berlin testified, on November 19, 1982, for the defense, that he had treated Mr. Clabourne as a 14-year-old child at the in-patient psychiatric ward at the University of Arizona Medical Center. He had not administered any psychological tests or even examined Mr. Clabourne prior to trial and he had no opinion on Mr. Clabourne’s *M’Naghten* sanity at the time of the offense. He did confirm Mr. Clabourne’s lengthy history of grandiose delusions. (RT November 19, 1982, pp.500-547; Appendix to PCR 699-746.)

On November 23, 1982, the last day of trial, Dr. LaWall continued to testify about the effects of various street drugs as well as Thorazine and about the differences between psychotic and personality disorders. (RT

November 23, 1982, pp.561-609; Appendix to PCR 760-808.) The jury convicted Mr. Clabourne on all five counts – first-degree murder, kidnapping and three counts of sexual assault. (RT November 23, 1982, pp.610-686; Appendix to PCR 809-885.)

At sentencing, on January 24, 1983, Judge Richard Royston sentenced Mr. Clabourne to death on the murder count and concurrent 14-year terms on the other counts. (RT January 23, 1983, pp.19-21.) In its independent review, the Arizona Supreme Court upheld the trial court's finding of the F(6) aggravator of cruel, heinous or depraved. *State v. Clabourne*, 142 Ariz. 335, 347-48 (1984). Following a later resentencing, the Arizona Supreme Court stated that it need only find F(6) especial cruelty beyond a reasonable doubt and that it need not reach heinousness or depravity. *State v. Clabourne*, 194 Ariz. 379, 384 (1999). Thus, Mr. Clabourne is eligible for the death penalty based solely on F(6) especial cruelty under A.R.S. § 13-703(F)(6).

Procedural History of 1997 Resentencing

When Mr. Clabourne was resentenced in 1997, the Ninth Circuit, in 1995, had just pointed out, in its opinion affirming the District Court's grant of a conditional writ with respect to the death sentence, that Mr. Clabourne's confession was *Edwards*-inadmissible:

Unlike the sixth amendment right to counsel, *Edwards* is not offense-specific: Once a defendant has invoked his right to counsel under *Miranda*, the police may not interrogate him about his involvement in any crime outside the presence of his lawyer. *Arizona v. Roberson*, 486 U.S. 675, 682-85 (1988).

Clabourne v. Lewis, 64 F.3d 1373, 1378 (9th Cir. 1995).

Even after the Ninth Circuit pointed out in its 1995 opinion that Mr. Clabourne's *Edwards*-violative confession was no longer admissible in light of *Arizona v. Roberson*, 486 U.S. 675 (1988),² resentencing counsel failed to object to the State's use of Mr. Clabourne's *Edwards*-violative confession to prove the sole statutory aggravating factor when the State attached, as its only exhibit to its sentencing memorandum, Mr. Clabourne's *Edwards*-inadmissible confession. (Appendix to PCR 54-60.)

² *Arizona v. Roberson*, 486 U.S. 675 (1988), clarified that *Edwards* is not offense specific.

Procedural History of the 2001 Petition for Postconviction Relief

After a direct appeal, initial PCR counsel failed, in five attempts, to craft a petition that the trial court would accept for filing. When the Arizona Supreme Court first appointed initial PCR counsel, its September 4, 2001, order noted that initial PCR counsel lacked PCR experience:

Mr. Darby's application for appointment does not list experience in a Rule 32 post-conviction evidentiary hearing. The Court finds, however, that he has ample compensating experience as lead counsel in jury trials.

(Appendix to PCR 2451.)

Despite repeated warnings from both the court and the State, initial PCR counsel never did attach a certification required by Arizona Rule of Criminal Procedure 32.5 to any of his five attempts to file a petition, nor did he support any of the attempted petitions with any facts, let alone the required affidavits, records or evidence. (ROA 969, 970, 979, 980, 990, 995, 999, 1000; Appendix to PCR 244651-2538.) Eventually the trial court gave up and dismissed the petition for failure to comply with Rule 32.5, denying initial PCR counsel's *Ring*³ retroactivity argument in the alternative only. (ROA 995; Appendix to PCR 2521.)

³ *Ring v. Arizona*, 536 U.S. 584 (2002), which required that juries find aggravating circumstances, was ultimately decided June 24, 2002, and was not applied retroactively to defendants whose cases, like Mr. Clabourne's, were already final on direct appeal. See *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

Before the Ninth Circuit's 2014 opinion, the State conceded deficient performance by initial PCR counsel. *Clabourne v. Ryan*, 745 F.3d 362, 382 (9th Cir. 2014). The Ninth Circuit remanded to the District Court pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), on Mr. Clabourne's argument that IAC of PCR counsel constituted cause of the test for cause and prejudice to excuse Darby's failure to raise and support the claim of IAC of resentencing counsel. A prejudice investigation was completed in the United States District Court and the record there was supplemented with learned treatises, police and other reports, and expert and other affidavits.

Then, in *Shinn v. Ramirez*, 596 U.S. 366 (2022), the Court limited to the state court record the evidence that could be presented on IAC claims in federal court. Here, the state court record was never developed by initial PCR counsel, who never managed to file a petition in a manner that the trial court would accept. *Shinn*, explicitly suggested, however, that a federal habeas petitioner be permitted to return to state court under *Rose v. Lundy*, 455 U.S. 509 (1982), to adjudicate unexhausted claims. 596 U.S. at 379.

The Ninth Circuit stayed Mr. Clabourne's appeal so he could return to the Arizona state courts to exhaust this IAC claim that includes, with respect to *Strickland* prejudice, the claim of actual innocence of the death penalty based on newly discovered evidence that completely undermines the sole statutory aggravating factor in this case, especial cruelty under A.R.S. §

13-703(F)(6). See, Order granting *Rhines* stay, *Clabourne v. Thornell*, No. 23-99000 (Ninth Cir. Nov. 15, 2023), ECF No. 22.

Argument

I

Arizona's Preclusion of Mr. Clabourne's Confession-Based IAC Claim on PCR Review Ignores the *Strickland* Prejudice Prong Which Was Not Evident Until Mr. Clabourne Was Able to Support That Prong of His IAC Claim With Scientific, Medical, Academic and Expert Evidence Developed on *Martinez* Remand in the District Court⁴

Resentencing counsel's deficient performance under *Strickland* with respect to the admission of Mr. Clabourne's *Edwards*-inadmissible confession was plain enough for everybody to see. In fact, the State agreed in the Ninth Circuit that previous PCR counsel's handling of his appointment to represent Mr. Clabourne on PCR was deficient performance. *Clabourne v. Ryan*, 745 F.3d 362, 382 (9th Cir. 2014). But the prejudice prong of a *Strickland* IAC claim was not yet established or even investigated until the *Martinez* remand in 2017.

⁴ The *Strickland* prejudice prong of Mr. Clabourne's IAC claim was raised in the Petition for Post-Conviction Relief before the trial court at pp.73-77, in the Reply to Response to Petition for Post-Conviction Relief at pp.5-7, 11-12, 17, in the Motion for Rehearing at pp.2-7 and in the Petition for Review by the Arizona Supreme Court at pp.41-49.

In *Martinez v. Ryan*, Justice Kennedy noted the impossibility of proving the prejudice prong of an ineffectiveness claim without a lawyer and without evidence.

Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy.

...

While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

Martinez v. Ryan, 566 U.S. 1, 11-12 (2012).

From inside his cell, with no access to books or treatises, medical research or secondary sources, experts or investigators, and with no understanding of complicated legal issues such as Rule 703 limitations on substantive consideration of basis evidence or *Teague* retroactivity, Mr. Clabourne had no chance of detecting resentencing counsel's deficient performance in failing to suppress his *Edwards*-inadmissible confession or of proving resulting prejudice with actual evidence. In federal court, with no evidence outside the trial record prior to the 2017 *Martinez* remand, undersigned counsel was similarly unable to investigate the *Strickland* prejudice prong of Mr. Clabourne's *Edwards* IAC claim.

In 2001 when the trial court finally dismissed PCR proceedings with prejudice, it did so because, among other reasons, PCR counsel, "has not submitted any support for these claims," "has not provided any legal or

factual foundation for this [unrelated] claim,” “does not explain how [this unrelated claim] would have changed the outcome of the trial,” and “his factual allegations [must be] substantiated with supporting evidence in the form of affidavits, records or other evidence.” (ROA 995, 999; Appendix to PCR 2521, 2531.) In other words, 2001 PCR counsel had not supported the prejudice prong of any of his bare allegations of deficient performance. This was not an opportunity for habeas counsel, upon his appointment in the District Court, to file yet another bare and unsubstantiated IAC claim in the trial court, again with no affidavits, records or other evidence to support a *Strickland* prejudice prong. Habeas counsel litigated Mr. Clabourne’s *Edwards* IAC claim continuously since 2003 in the federal courts, however, until 2022 when *Shinn v. Ramirez*, 596 U.S. 366 (2022), made litigation impossible in that forum by excluding evidence that concededly deficient previous PCR counsel never introduced.

The prejudice investigation could not begin in federal court until funds became available in 2017, following the Ninth Circuit’s remand to the District Court for litigation under *Martinez*, to determine whether initial PCR counsel rendered ineffective assistance that constituted cause to excuse initial PCR counsel’s failure to raise the confession-based IAC claim premised on trial counsel’s failure to object to the admission at resentencing

of Mr. Clabourne's *Edwards*-inadmissible confession. Until 2017, however, as the Ninth Circuit noted, the prejudice prong was not as clear.

The answer to this question is not obvious to us on appeal. As to prejudice, for example, the evidence is mixed. ... It is not clear to us that a death sentence would have been imposed at resentencing (and affirmed by the Arizona Supreme Court on appeal) based on the evidence without Clabourne's confession.

Put in terms of *Strickland*'s second prong, we are not sure whether there was a reasonable probability that the exclusion of Clabourne's statement would have made a difference at resentencing.

Clabourne v. Ryan, 745 F.3d 362, 381 (9th Cir. 2014) (emphasis added).

On October 10, 2017, pursuant to the *Martinez* remand, the District Court added the Federal Public Defender's Office – Capital Habeas Unit as counsel for Mr. Clabourne. Order, *Clabourne*, No. CV 03-00542-TUC-RCC (D.Ariz. Oct. 10, 2017), ECF No. 56. With Federal Public Defender funds available, the defense was able to retain Dr. Werner Spitz, the author of the treatise *Medicolegal Causes of Death* cited in the underlying Petition for Postconviction Relief.

Dr. Spitz's report was completed on May 9, 2018. (Appendix to PCR 2623.) On June 5, 2018, less than a month later, Mr. Clabourne's Supplemental *Martinez* Brief on the prejudice prong of *Strickland* was filed in the District Court along with Dr. Spitz's report and exhibits supporting Dr. Spitz's report. *Clabourne*, No. CV 03-00542 (D.Ariz. June 5, 2018), ECF

No. 71. Prior to that, however, the factual predicate for Mr. Claborne's confession-based ineffectiveness claim lacked a *Strickland* prejudice leg to stand upon.

And so to have the factual predicate for a habeas petition based on ineffective assistance of counsel, a petitioner must have discovered (or with the exercise of due diligence could have discovered) facts suggesting both unreasonable performance and resulting prejudice.

Hasan v. Galaza, 254 F.3d 1150, 1154 (9th Cir. 2001) (emphasis added).

Briefing in the District Court was complete on January 23, 2019.

(ECF No. 86.) Dr. Spitz's expertise, scholarship and opinion are unassailable. The State has yet to indicate, however, whether it ever intends to contest Dr. Spitz's opinion. From 2019 until February 14, 2023, the District Court had the matter either under advisement or under a Motion to Alter Judgment. (ECF No. 99.) After the decision in *Shinn v. Ramirez*, 596 U.S. 366 (2022), it became clear that evidentiary development in the federal courts was an impossibility. For that reason, briefing in the Ninth Circuit was stayed from November 15, 2023, until recently. Order, *Clabourne v. Thornell*, No. 23-99000 (Ninth Cir. Nov. 15, 2023), ECF No. 22.

This decision of a state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this Court regarding the necessity of a prejudice prong on any *Strickland* IAC claim.

II

Arizona’s Inconsistent and Arbitrary Application of Its Procedural Default Rules to Successive PCR Claims Filed After Federal Litigation Will Render This Procedural Default Inadequate to Bar Federal Habeas Review⁵

In *State v. Traverso*, 576 P.3d 97 (Ariz. 2025), the Arizona Supreme Court recently clarified that successive IAC claims are not automatically precluded under Arizona Rule of Criminal Procedure 32.2 and held that Traverso had “provided ‘good reasons’ for the timing of his successive petition [ten years after the denial of his initial PCR] based on the timeline of his initial state PCR and federal habeas proceedings” which habeas proceeding had concluded fully two years before Traverso brought his successive IAC claim.

In another similar case involving a successive capital PCR, Pima County Superior Court Judge Stephen Villareal similarly held that, “it would be unjust to require a defendant to litigate simultaneously in two jurisdictions when the federal case is dependent upon the rulings and findings of the state case and when the two cases involve the same set of facts. Therefore, the Court finds that Petitioner has provided a meritorious reason for delay.” *See Order, State v. Miles*, No. CR 04038 (Dec. 14, 2015),

⁵ Adequacy of an inconsistently followed state procedural rule to bar federal habeas review was raised in the Petition for Review by the Arizona Supreme Court at pp.46-51 and in a five-page Supplemental Citation of Legal Authority filed in the Arizona Supreme Court.

attached as Exhibit 1 to Mr. Clabourne's Motion for Rehearing filed in the trial court.

In yet another similar case involving a successive PCR, this time non-capital and without intervening federal litigation, the Arizona Supreme Court allowed a successive IAC claim in a PCR filed nineteen years after the most recent PCR, this time because "the then-pervasive confusion about parole availability in Arizona" prevented the defendant, the attorneys and the courts from recognizing the error. *State v. Anderson*, 257 Ariz. 226, 230 (2024). The deficient performance prong of *Strickland* was not immediately apparent in *Anderson* due to confusion about the abolition of parole in Arizona. Similarly, the prejudice prong of *Strickland* was not immediately apparent in Mr. Clabourne's case as medical training and expertise was necessary to recognize the medical error in the testimony of Dr. Rao, the medical examiner who testified at trial. Until that *Strickland* prejudice prong became evident thanks to FPD-CHU resources, neither Mr. Clabourne nor his counsel could be aware that there was a *Strickland* IAC claim based around the State's use of Mr. Clabourne's *Edwards*-inadmissible confession at resentencing.

The split between the trial court decision in Clabourne and the Arizona Supreme Court decision in *State v. Traverso* and the trial court decision in *State v. Miles* regarding the impracticability of litigating,

especially, as here, the same issue, simultaneously in federal courts and in state courts render this inconsistently-applied rule inadequate to bar habeas review of claims found to be defaulted by the state courts. *See, James v. Kentucky*, 466 U.S. 341, 348-349 (1984) (only a “firmly established and regularly followed state practice” may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim.) The Court granted certiorari in *James* “to determine whether petitioner’s asserted procedural default supports the result below. We now reverse.” *Id.* At 344.

Moreover, the Superior Court’s invocation of a new rule of preclusion in Mr. Clabourne’s case, where a different division of the same Superior Court failed to announce such a rule in a prior, virtually identical case, will allow the federal courts to reach the merits of Mr. Clabourne’s IAC claim, including his new supporting evidence, because the Superior Court’s inconsistent rulings do not constitute an adequate state ground of decision. *Ford v. Georgia*, 498 U.S. 411, 425 (1991) (“Since the rule was not firmly established at the time in question, there is no need to dwell on the further point that the state court’s inconsistent application of the rule in petitioner’s case and *Sparks* would also fail the second *James* requirement that the state practice have been regularly followed.”)

Mr. Clabourne’s confession-based claim has been Mr. Clabourne’s primary claim in the District Court since 2003. As discussed above, with the

evidence to support the *Strickland* prejudice prong undeveloped, Mr. Clabourne was in the only forum then available to him. By 2018, Mr. Clabourne's investigation was before the District Court and it was uncontested. So the admissible evidence in District Court, beginning in 2018 until *Shinn v. Ramirez* was decided in 2022, was overwhelming.

Overwhelming or not, however, Dr. Spitz's evidence was untested, then as now, because the State has never addressed it and an evidentiary hearing had not yet taken place by the time that *Shinn v. Ramirez* was decided. Beginning in 2019, any attempt to jump to the trial court, while the District Court had the case under advisement, would have been entirely inappropriate and disrespectful to the process. *See*, for instance, Arizona Rule of Criminal Procedure 10.1(b)(1) ("A party seeking a change of judge for cause ... may not file a motion after a hearing or trial begins.").

Once Mr. Clabourne's case was back in front of the Ninth Circuit in 2023, and once it was clear that the prejudice prong for which the Ninth Circuit had remanded the case to the District Court could never be resolved in the District Court due to the intervening decision in *Shinn v. Ramirez* which prevented consideration of Dr. Spitz's evidence and resentencing counsel's affidavit regarding their error in failing to object to Mr. Clabourne's concededly inadmissible *Edwards*-violative confession, a

*Rhines*⁶ stay from the Ninth Circuit to resolve the prejudice prong in the trial court became appropriate. Before that, however, undersigned counsel could not countermand the Ninth Circuit by asking the District Court to return to the state trial court on a case that the Ninth Circuit had just remanded to the District Court. Nor could undersigned counsel countermand the District Court by bringing the same claim, based on the same evidence, into the trial court while the District Court had that very claim under advisement.

In 2023, the Ninth Circuit stayed Mr. Clabourne's federal habeas appeal to permit him to return to the Superior Court of Pima County to exhaust his IAC/*Edwards*-inadmissible confession claim, including the prejudice prong of *Strickland*, employing the new supporting facts. See Order, *Clabourne v. Thornell*, No. 23-99000, ECF 22 (9th Cir. Nov. 15, 2023). Mr. Clabourne has diligently followed the Ninth Circuit's *Martinez* remand, developed incontrovertible evidence of prejudice, reasonably expected the State to consider the integrity of its death-penalty conviction, avoided jumping between courts while the District Court had the matter under advisement and moved to administratively close the appeal in the Ninth Circuit at the appropriate time.

The Superior Court's ruling that Mr. Clabourne could not depend on his continuous, uninterrupted litigation in federal court since 2003 as a basis

⁶ *Rhines v. Weber*, 544 U.S. 269 (2005).

for not obtaining from the Superior Court of Pima County funding of his undeveloped IAC claim and investigating and presenting that claim sooner is diametrically opposed the Arizona Supreme Court's recent decision in *State v. Traverso* and to the trial court's procedural ruling in *State v. Miles*, No. CR 04038 (Dec. 14, 2015).

The *Miles* court not only rejected the State's untimeliness argument, but, after an evidentiary hearing, also granted relief in the form of vacatur of Miles' death sentence. Judge Villarreal's procedural order and Under Advisement Ruling are attached as Exhibits 1 and 2 to Mr. Clabourne's Motion for Rehearing in the Superior Court. Judge Villarreal's ruling granting PCR relief and finding Kevin Miles ineligible for the death penalty was upheld 7-0 by the Arizona Supreme Court. *State v. Miles*, 243 Ariz. 511 (2018).

In *Traverso*, the Superior Court after acknowledging, among other things, the time that it took Traverso to retain a mental health expert, stated that, "Counsel exercised due diligence in reviewing and evaluating the record and investigating complex issues before filing. ... Courts move slowly, and finding records and transcripts takes time. Traverso did not fire off a haphazard petition. It took time to research, consult, evaluate, and support for his request for relief." (July 21, 2021, Ruling of the Maricopa County Superior Court in *State v. Michael Traverso*, CR 20006-160536 DT,

at p.3, attached as Exhibit 3 to May 28, 2024, Motion for Rehearing filed in *State v. Clabourne*, CR-06824, CR 11.)

The *Miles* trial court decision held Miles' petition timely where Miles was litigating other issues in federal court. The *Traverso* Superior Court decision held Traverso's petition timely where Traverso was finished litigating other issues in federal court and had spent two years supporting his petition, including with expert opinions, before filing it in the trial court. Of the three Superior Court decisions addressing this issue, the diligence in Mr. Clabourne's case is by far the most compelling, as counsel for Mr. Clabourne was actively engaged in supporting and litigating this very issue, the *Strickland* prejudice prong of Mr. Clabourne's confession-based claim, which comprised his primary issue in the federal courts, during the entire pendency of the federal proceedings.

A state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this Court.

III
**Arizona's Creation of a Non-Discretionary Right of Review of IAC
Claims Followed by Arizona's Appointment of Inexperienced PCR
Counsel Who Provided Concededly Deficient Representation Denied
Mr. Clabourne Fourteenth Amendment Equal Protection Under
*Douglas v. California*⁷**

Fourteenth Amendment equal protection under *Douglas v. California*, 372 U.S. 353 (1963), requires appointment of counsel for indigent state defendants on their first appeal as of right, reasoning that states cannot create a right and then deny indigent defendants access to that right. PCR review of IAC claims in Arizona is a non-discretionary right of review which similarly cannot be denied to indigent defendants. That reasoning in *Douglas* was explicitly recognized in *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (citing *Douglas v. California* as supporting a possible exception to the general rule that there is no right to counsel in collateral proceedings.)

If it were the case that Arizona could limit IAC claims to PCR review and then refuse to appoint counsel (competent counsel, there is no point in appointing incompetent counsel) so that only wealthy defendants could expect to have their IAC claims reviewed and indigent clients would be left to fend for themselves. Mr. Clabourne's case is a perfect example. The Arizona Supreme Court knew that the PCR counsel it appointed had no PCR

⁷ *Douglas v. California* equal protection was raised in the Petition for Post-Conviction Relief before the trial court at p.76, in the Reply to Response to Petition for Post-Conviction Relief at pp.6-11 and in the Petition for Review by the Arizona Supreme Court at pp.44-45.

experience and stated as much in its order appointing PCR counsel.

(Appendix p.2451.) The trial judge knew that PCR counsel was proving himself unable to get the job done and provided PCR counsel with a series of orders with bolded instructions on how to complete his task. (ROA 969, 970, 979, 980, 990, 995, 999, 1000; Appendix 2453-2538.) Mr. Clabourne was alone in a one-man cell with none of the tools, training or experience that he would have needed to do the job himself. The unfairness is palpable.

Pennsylvania v. Finley, 481 U.S. 551 (1987), and *Ross v. Moffitt*, 471 U.S. 600 (1974), on which it is based, only apply, by their terms, where review is discretionary. An Arizona court, presented with a first Rule 32 petition raising IAC, does not have discretion to decline review.

Douglas v. California required appointment of counsel for indigent state defendants on their first appeal as of right, reasoning that states cannot create a right and then deny indigent defendants access to that right. *Ross v. Moffitt*, 471 U.S. 600 (1974), declined to extend the appointment of counsel to discretionary state appeals beyond the first stage appeal as of right to the North Carolina Court of Appeals, reasoning that the state had not created a right and so had not denied indigent defendants access to that right.

Pennsylvania v. Finley quite reasonably applied *Ross v. Moffitt* to deny appointed counsel to a defendant who wished to raise the same issues on discretionary PCR that had already been affirmed on direct appeal as of right

(*Commonwealth v. Finley*, 479 A.2d 568 (1984)), reasoning that she had no right to appointed counsel on discretionary review of the appeal and, therefore, had no further right to appointed counsel once the appellate process was exhausted:

We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.

Finley at 555. Unlike in the *Finley* case, however, the appellate process had not been exhausted with respect to Mr. Clabourne's IAC claims by the time of PCR.

Arizona provides a state created right to review of constitutional violations under Arizona Rule of Criminal Procedure 32.1(a), so long as those grounds have not been waived on appeal under Rule 32.2(a)(3). IAC claims may not be raised on direct appeal in Arizona⁸ and, therefore, could not have been waived on direct appeal. So Arizona, unlike Pennsylvania, has a state created right to review of IAC claims on PCR. Nothing is discretionary about review of IAC claims in an Arizona PCR. So *Douglas v. California* rather than *Ross v. Moffitt* governs IAC claims in an Arizona PCR. As *Pennsylvania v. Finley* notes, *Evitts v. Lucey*, 469 U.S. 387 (1985)

⁸ *State v. Spreitz*, 202 Ariz. 1, 3 (2002) (“We reiterate that ineffective assistance of counsel claims are to be brought during Rule 32 proceedings.”).

(guaranteeing effective assistance of appellate counsel), depends upon a constitutional right to counsel. *Finley* at 558.

Since there is a state created right of review of IAC claims in Arizona and a concomitant equal protection right to counsel, it follows that *Evitts v. Lucey* applies in this case. As noted but not decided in the *Martinez* decision, *Douglas v. California* suggests just such an exception to what would otherwise be the *Pennsylvania v. Finley* rule in initial-review collateral review proceedings. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

A state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this Court regarding the equal protection/*Douglas v. California* requirement of court appointed counsel for indigent state defendants on their first appeal as of right, as states cannot create a right and then deny indigent defendants access to that right.

Conclusion

Mr. Clabourne remains sentenced to death based, overwhelmingly, on his *Edwards*-inadmissible confession. The State has conceded, in *Clabourne v. Ryan*, 745 F.3d 362, 381-382 (9th Cir. 2014), that prior PCR counsel rendered deficient performance with regard to this issue with the Ninth Circuit noting that evidence supporting *Strickland*'s prejudice prong was not as clear.

In 2003, the trial court had dismissed Mr. Clabourne's PCR addressing other, unsupported, issues with prejudice based on prior PCR counsel's failure to support the prejudice prong of any of his bare allegations of deficient performance. While Mr. Clabourne's confession-based claim has been Mr. Clabourne's primary claim in the United States District Court since 2003, the *Strickland* prejudice prong of Mr. Clabourne's sentencing IAC claim was not evident until after the Ninth Circuit, in 2017, ordered a *Martinez* remand to determine prejudice. Only in 2018 did it become apparent that Mr. Clabourne's confession-based IAC claim had a *Strickland* prejudice leg upon which to stand. From 2003 until 2017, undersigned counsel was without funding in federal court to investigate the prejudice prong, the claim having been, dismissed with prejudice in state court for failure to support the prejudice prong in other IAC claims and still without out a prejudice prong for his confession-based claim.

Habeas counsel has litigated Mr. Clabourne's confession-based *Edwards* IAC claim as his primary issue continuously since 2003 in the federal courts with no break in the timeline since his appointment in the federal courts. In other cases the Arizona courts have found the very amorphous parameters of Arizona Rule of Criminal Procedure 32.4(b)(3)(D) ("The court must excuse an untimely notice requesting post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the

failure to timely file a notice was not the defendant's fault.") satisfied by the pendency of federal proceedings despite enormous gaps of inactivity in the timeline of litigation. *State v. Traverso*, 576 P.3d 97 (Ariz. 2025) (successive IAC claims are not automatically precluded under Arizona Rule of Criminal Procedure 32.2 and Traverso had "provided 'good reasons' for the timing of his successive petition [ten years after the denial of his initial PCR] based on the timeline of his initial state PCR and federal habeas proceedings" which habeas proceeding had concluded fully two years before Traverso brought his successive IAC claim.); *See also* Order, *State v. Miles*, No. CR 04038 (Dec. 14, 2015) ("it would be unjust to require a defendant to litigate simultaneously in two jurisdictions when the federal case is dependent upon the rulings and findings of the state case and when the two cases involve the same set of facts. Therefore, the Court finds that Petitioner has provided a meritorious reason for delay."); *State v. Anderson*, 257 Ariz. 226, 230 (2024) (The deficient performance prong of *Strickland* was not immediately apparent due to confusion about the abolition of parole in Arizona.").

Finally, Arizona's creation of a non-discretionary right of review of trial level IAC claims, but only for defendant's wealthy enough to afford private and competent counsel violates Fourteenth Amendment equal protection under *Douglas v. California*, 372 U.S. 353 (1963), which requires appointment of counsel for indigent state defendants on their first appeal as

of right, reasoning that states cannot create a right and then deny indigent defendants access to that right. Rule 32 review of IAC claims in Arizona is a non-discretionary right of review which similarly cannot be denied to indigent defendants.

Dated September 10, 2026.

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