

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID SHINN, DIRECTOR, ARIZONA            )  
DEPARTMENT OF CORRECTIONS,            )  
REHABILITATION AND REENTRY,            )  
  Petitioner,            )  
  v.                            ) No. 20-1009  
DAVID MARTINEZ RAMIREZ,                )  
  Respondent.            )  
- - - - -

Pages: 1 through 60  
Place: Washington, D.C.  
Date: December 8, 2021

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9                                    Respondent.            )  
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12                                    Washington, D.C.  
13                                    Wednesday, December 8, 2021

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15                                    The above-entitled matter came on for  
16   oral argument before the Supreme Court of the  
17   United States at 11:59 a.m.

18  
19   APPEARANCES:  
20   BRUNN W. ROYSDEN, III, Solicitor General,  
21        Phoenix, Arizona; on behalf of the Petitioner.  
22   ROBERT M. LOEB, ESQUIRE, Washington, D.C.; on behalf  
23        of the Respondent.

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P R O C E E D I N G S

(11:59 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20-1009, Shinn versus Ramirez.

Mr. Roysden.

ORAL ARGUMENT OF BRUNN W. ROYSDEN, III,  
ON BEHALF OF THE PETITIONER

MR. ROYSDEN: Mr. Chief Justice, and may it please the Court:

The issue presented in this case is fundamentally a question of statutory interpretation. When Congress enacted 2254(e)(2) as part of AEDPA, it created a high bar for federal evidentiary hearings on habeas claims involving state convictions.

It codified the first part of the Keeney test in the opening part of (e)(2) by echoing the words "failure to develop" from Keeney. And this Court, in Williams and Holland, has already held that attorney negligence counts as failure to develop under (e)(2) based on agency principles.

If a failure to develop has occurred, Congress did not merely repeat Keeney and

1 Coleman's cause and prejudice test for excusing  
2 it but, rather, supplanted it by specifying in  
3 subsections (A) and (B) of (e)(2) the cause and  
4 prejudice required.

5 Congress thus spoke clearly, and the  
6 courts' role is to apply the statutory language.  
7 That no fact-finder could have found the  
8 prisoner guilty is not enough. The prisoner  
9 must also satisfy (e)(2)(A) by showing either a  
10 new rule of constitutional law or that the  
11 factual predicate could not have been previously  
12 discovered through the exercise of due  
13 diligence.

14 This is an intentionally high bar.  
15 Respondents rely on Martinez to create an  
16 additional exception to (e)(2) beyond (A) and  
17 (B). That proposition fails. Martinez was  
18 addressing cause for the cause and prejudice  
19 test for excusing a procedural default.  
20 Congress did not codify the procedural default  
21 or the excuses for overcoming it in AEDPA.

22 In contrast, Congress did  
23 affirmatively codify the circumstances under  
24 which cause and prejudice is established to  
25 permit an evidentiary hearing following a

1 failure to develop under (e)(2).

2 Martinez's judge-made rule cannot  
3 rewrite Congress's statutory questions --  
4 standard.

5 I invite questions from the Court.

6 JUSTICE THOMAS: Counsel, the -- it  
7 seems rather odd that you would -- we would  
8 allow a -- we will excuse a default under  
9 Martinez but not allow the prisoner to make his  
10 underlying claim or develop his evidence --  
11 evidentiary basis for his underlying claim.

12 MR. ROYSDEN: Well, Your Honor,  
13 Martinez did not consider this question.  
14 Martinez --

15 JUSTICE THOMAS: Yeah, I understand  
16 that. But it's not -- it seems pretty worthless  
17 to have -- to say, well, you have -- we'll  
18 excuse a procedural default. To what end?

19 MR. ROYSDEN: In some cases, there may  
20 already be evidence in the state court record.

21 JUSTICE THOMAS: Okay. Let's take  
22 this case. To what end if you're not allowed to  
23 develop the underlying claim?

24 MR. ROYSDEN: Well, on this case, our  
25 position is that there -- the court -- the

1 district court should not have gone into a  
2 Martinez hearing in Jones without looking  
3 whether there was enough state court -- state  
4 record evidence to establish ineffective  
5 assistance of trial counsel in the first place.  
6 It's a -- it's a fruitless exercise. But that  
7 doesn't mean that Martinez can overcome the  
8 statutory language. The court should simply cut  
9 it off at the beginning. In the Ramirez case,  
10 the evidence just wasn't there either way.

11 And so -- so the short answer is  
12 Martinez can be accommodated. The district  
13 court just shouldn't go down the path of -- of  
14 having a Martinez hearing if there's not going  
15 to be state court evidence to establish the  
16 ultimate claim.

17 CHIEF JUSTICE ROBERTS: But it's a  
18 basic syllogism. The idea is, if you do get the  
19 right to raise the claim for the first time,  
20 because your counsel was incompetent before,  
21 surely, you have the right to get the evidence  
22 that's necessary to support your claim. I mean,  
23 the whole reason some states say you shouldn't  
24 raise your incompetence claim until after the  
25 direct proceedings is that it's much more

1 efficient and natural to have an evidentiary  
2 hearing at that time, rather when you're halfway  
3 up the chain between the trial court and the  
4 court of appeals.

5 MR. ROYSDEN: I -- I think Judge  
6 Collins in his dissent pointed out the flaw in  
7 that logic, which is there's asymmetric  
8 intervention here. Congress did specify in  
9 (e)(2) when you can have a hearing. So this --  
10 the problem is the major premise of that  
11 syllogism is faulty. There's not a --

12 CHIEF JUSTICE ROBERTS: Well, they  
13 specified that before our decision in Martinez,  
14 right?

15 MR. ROYSDEN: Could you -- sorry.  
16 Could you --

17 CHIEF JUSTICE ROBERTS: I'm sorry,  
18 they specified that before our decision in  
19 Martinez?

20 MR. ROYSDEN: I -- I'm talking about  
21 Judge Collins's dissent from denial en banc in  
22 this case.

23 CHIEF JUSTICE ROBERTS: Yeah. But I  
24 thought the point you were making is that he had  
25 an explanation for why the language in (e)(2)

1 trumped the theory that Martinez gave you the  
2 hearing and so then implicitly gave you the  
3 right to present evidence.

4 MR. ROYSDEN: I -- I think it's --  
5 it's incorrect to say that Martinez implicitly  
6 gave you the right to present evidence. That's  
7 just not in Martinez.

8 The -- the Court was presented with a  
9 constitutional question, you know, when a state  
10 breaks out ineffective assistance --

11 CHIEF JUSTICE ROBERTS: You're --  
12 you're certainly right about that.

13 MR. ROYSDEN: Right.

14 CHIEF JUSTICE ROBERTS: It's not in --  
15 not in Martinez. I mean, if it were, we  
16 wouldn't be here. But in what sense -- in other  
17 words, if your claim of incompetence has to do  
18 with some factual evidence, by saying to the  
19 prisoners, look, don't raise it on direct  
20 appeal, raise it collaterally, you use -- you  
21 lose the ability to press what is your central  
22 claim of incompetence.

23 MR. ROYSDEN: Correct, but I think  
24 Congress envisioned that in subsection (i) where  
25 Congress expressly said incompetence of

1 post-conviction counsel is not a basis for  
2 habeas relief.

3 CHIEF JUSTICE ROBERTS: But when --  
4 was that also before Martinez?

5 MR. ROYSDEN: Yes. That's in the  
6 AEDPA --

7 CHIEF JUSTICE ROBERTS: Well, then I  
8 don't think you can say Congress envisioned the  
9 problem. It only came up when we decided  
10 Martinez.

11 MR. ROYSDEN: Well, but I'm saying,  
12 even if Martinez had answered the question  
13 presented, which is there a constitutional right  
14 to effective post-conviction counsel when that's  
15 the first chance to raise ineffectiveness of  
16 trial counsel, that would not be a claim that  
17 could be brought in federal habeas in district  
18 court because Congress has stripped the district  
19 courts of jurisdiction, just -- just as district  
20 courts don't grant habeas relief on Fourth  
21 Amendment grounds.

22 JUSTICE KAVANAUGH: The --

23 MR. ROYSDEN: That would be a claim  
24 that would --

25 JUSTICE KAVANAUGH: Keep going.

1 Sorry.

2 MR. ROYSDEN: -- have to be brought in  
3 state court because of subsection (i). That's  
4 my point.

5 JUSTICE KAVANAUGH: I guess picking up  
6 on Justice Thomas's and the Chief Justice's  
7 question, though, doesn't it really gut Martinez  
8 in a huge number of cases and then what --  
9 what's the -- what's the point of Martinez? The  
10 Court obviously carefully crafted an opinion to  
11 give you the right to raise an ineffective  
12 assistance claim, to make sure it's considered  
13 at least once, and this would really gut that in  
14 a lot of cases. So I -- I need -- need a good  
15 explanation for how to do that or why to do that  
16 given what Martinez says.

17 MR. ROYSDEN: I think, to the extent  
18 that Martinez cannot be -- is reconciled with  
19 (e)(2), then, at the end of the day, Martinez  
20 should be overruled. I mean, Martinez offered a  
21 equitable exception to excusing a procedural  
22 default.

23 JUSTICE KAVANAUGH: Assuming we don't  
24 do that, what -- what's your next answer?

25 MR. ROYSDEN: Then Martinez can be --

1 can be kept to what was expressly a very narrow  
2 question, which is when is there cause to excuse  
3 a procedural default.

4 JUSTICE KAVANAUGH: But it was a  
5 narrow question on a -- on an important issue.  
6 And I don't -- I mean, you have to assume that  
7 the Court majority was unaware somehow of how  
8 this would play out and -- and was articulating  
9 this important right about when you could raise  
10 something but didn't realize, oh, actually,  
11 you're never really going to be able to pursue  
12 it because of this other provision.

13 I mean, that's -- it's hard to  
14 envision the Court thinking that that would make  
15 any sense.

16 MR. ROYSDEN: Congress's purpose in  
17 AEDPA and in the bar and evidentiary hearings in  
18 particular specifically imagined the -- the  
19 worst-case scenario, which is a prisoner is  
20 actually innocent. And that's (e)(2)(B). But  
21 that wasn't enough to permit a hearing.

22 It said you still have to meet A. And  
23 A says either it has to be a new rule of  
24 constitutional law or that the evidence could  
25 not have been developed even with diligence. So

1 I think the -- the fundamental question is, what  
2 was Congress's intent? And --

3 JUSTICE KAGAN: But --

4 MR. ROYSDEN: -- here, Congress spoke  
5 clearly, I think, in (e)(2)(B) that innocence  
6 isn't enough here.

7 JUSTICE KAGAN: -- why is it -- I -- I  
8 mean, (e)(2) has a fault standard in it. It  
9 says if the applicant has failed to develop the  
10 factual basis of a claim.

11 And I thought, in these various cases,  
12 you know, it's the usual rule that the  
13 attorney's fault gets attributed to the client,  
14 but that's not always the rule. And what  
15 Martinez essentially is saying is it's not the  
16 rule when that happens.

17 It's not the rule when the state has  
18 directed a person into a post-conviction  
19 proceeding that, at that point, we're going to  
20 ascribe the -- the failure to the state in the  
21 same way that we do when there's a  
22 constitutional claim of ineffective assistance.  
23 We say it's -- it's not your fault. We're going  
24 to ascribe the error to the state.

25 So why isn't Martinez just essentially

1 piggybacking on the -- the Coleman rationale  
2 that this is not your error, and so (e)(2)  
3 doesn't apply?

4 MR. ROYSDEN: So I don't think  
5 Martinez can be understood as -- as  
6 reinterpreting general agency principles. And  
7 in this Court's decision in Davila, which is  
8 from 2017, where it said ineffectiveness  
9 assistance -- ineffective assistance on direct  
10 appeal, you cannot use the Martinez exception.

11 So I don't think you can understand  
12 Martinez as a general agency case. Its -- it --  
13 it didn't purport to be that. It cannot  
14 logically be thought of as that because there's  
15 no limiting principle. I don't understand how  
16 the Court can say in Davila the -- the -- the  
17 post-conviction counsel is your agent for  
18 raising an ineffective assistance on direct --  
19 of direct appellate counsel but not your agent  
20 for raising ineffective assistance of trial  
21 counsel. Why -- why are they your agent in one  
22 but not the other?

23 That's not what Martinez did.  
24 Martinez said we're going to create a narrow  
25 equitable exception to the procedural default

1 rule, and when you have a judge-made exception  
2 to a judge-made rule compared to a statute that  
3 has its own exception that is very high, the  
4 statute ultimately has to trump. And -- and  
5 that's why this is ultimately a case of  
6 statutory interpretation.

7 JUSTICE SOTOMAYOR: Counsel, the  
8 problem is that the statute doesn't define what  
9 "at fault" means. It just says so long as you  
10 fail to develop. So, by definition, what  
11 constitutes fault is defined by us, correct?

12 MR. ROYSDEN: Correct. And in --

13 JUSTICE SOTOMAYOR: So stop. One  
14 second, please. Okay? So, in Williams, we said  
15 the question under AEDPA is whether the  
16 respondents were at fault for not developing the  
17 facts of their claim. So that's the AEDPA  
18 question, okay?

19 We have said in Maples that, if your  
20 attorney abandons you, you are not at fault.  
21 And in Martinez, we said, if your attorney errs  
22 in exactly the situation here by failing to  
23 develop the record on appeal, which was the only  
24 opportunity you had to do it, you are not at  
25 fault.

1           So I don't understand why you argue  
2           that the statute, because it doesn't say  
3           anything about what "at fault" means, why the  
4           statute forces us to conclude that the  
5           Respondents are not at fault?

6           MR. ROYSDEN: Well, because the -- the  
7           first part of (e)(2) is -- is echoing Keeney,  
8           was there a procedural default in the first  
9           place. Martinez is the second step, is there  
10          cause to excuse that. And then the third step,  
11          prejudice.

12          If -- if the correct way to read  
13          Martinez was that you're not at fault in the  
14          first place, there should not be a prejudice  
15          element to excuse the default. So, obviously,  
16          what Martinez is focused on is, is there cause  
17          to excuse a default that has occurred? And  
18          Williams and Holland --

19          JUSTICE SOTOMAYOR: But how is that --

20          MR. ROYSDEN: -- both said that  
21          attorney error is imputed.

22          JUSTICE SOTOMAYOR: -- how -- how  
23          different is that from abandonment?

24          MR. ROYSDEN: It -- it's different  
25          because general -- Maples was talking about

1 general agency principles. It said, under  
2 general first principles of agency law, if your  
3 agent abandons you by taking a job where they  
4 are a law clerk or they work for an  
5 international tribunal that they cannot even  
6 represent you, then they have abandoned you  
7 under general agency principles.

8           That's not what's happened here. The  
9 trial counsel may have been incompetent and  
10 ineffective, but he did not abandon and she did  
11 not abandon her client under agency principles.  
12 And that's the distinction. That's the  
13 fundamental distinction.

14           I think what's important to remember  
15 --

16           JUSTICE SOTOMAYOR: Thank you,  
17 counsel.

18           MR. ROYSDEN: -- is even in Coleman  
19 the attorney, I think he filed his notice of  
20 appeal of the post-conviction, like, 33 days  
21 late. So, I mean, how could the prisoner, if  
22 you just think of it from a -- how is he at  
23 fault for that? Or in, you know, Keeney, the --  
24 the post-conviction counsel failed to bring in  
25 evidence that the interpreter, you know, didn't

1 properly interpret what nolo contendere meant.

2 In all those cases, it's hard to think  
3 of the -- the prisoner as being at fault in the  
4 sense that we say what he did was wrong.

5 But the point is, under agency  
6 principles, the counsel is the agent and,  
7 therefore, the negligence of the agent is  
8 imputed to the prisoner. And that's what this  
9 Court --

10 JUSTICE KAGAN: Well, except that I  
11 think that Martinez pretty explicitly rejected  
12 that. And I'm just going to quote from a bunch  
13 of different places.

14 MR. ROYSDEN: Okay.

15 JUSTICE KAGAN: But the Court says it  
16 was the state's deliberate choice to move trial  
17 ineffectiveness claims outside the direct appeal  
18 process, and it was that choice that  
19 significantly diminished the prisoner's ability  
20 to assert trial ineffectiveness claims.

21 And so too the Court says it was the  
22 state's procedural framework that made  
23 ineffectiveness qualify as cause for a  
24 procedural default. I mean, that -- all that  
25 language is clearly sort of saying that the

1 blame here for post-conviction ineffectiveness  
2 is ascribed to the state.

3 Now, you know, I mean, this is an  
4 ascription and we can argue whether it really is  
5 the state's fault or, you know, we can argue in  
6 all these contexts about, like, really?

7 But -- but -- but -- but, essentially,  
8 this is the theory of Martinez, that the state  
9 has set up a system in which it's proper to  
10 ascribe the fault to the state, not to the  
11 defendant.

12 MR. ROYSDEN: I think Martinez is not  
13 the last word. In Davila, we're dealing with --  
14 imagine that the state -- Arizona said you raise  
15 ineffectiveness of trial counsel on direct  
16 appeal, and your direct appeal attorney was  
17 negligent, they didn't do a good job.

18 You go then to state post-conviction,  
19 and that post-conviction attorney doesn't even  
20 bother to raise that. You're now procedurally  
21 defaulted. And there -- and under Davila, I  
22 don't think you can go to federal habeas.

23 So I don't think the Martinez  
24 discussion about whether the state chose to put  
25 it in post-conviction versus direct appeal

1 answers the question of, you know, in federal  
2 habeas, can you have an evidentiary hearing  
3 under (e)(2). I think that's question is a  
4 question Congress answered by using the first  
5 part of the Keeney test, and in Holland and  
6 Williams, this Court has already said attorney  
7 error is attributable to -- to the prisoner.

8           So whether the -- the -- you have to  
9 raise ineffective assistance of trial counsel on  
10 direct appeal or on post-conviction, if the  
11 post-conviction attorney is negligent, that's  
12 going to be attributed to the prisoner for  
13 purposes of federal habeas.

14           JUSTICE ALITO: If the court in  
15 Martinez had accepted the prisoner's argument  
16 that there is a constitutional right, a Sixth  
17 Amendment right to the effective assistance of  
18 counsel in the first post-conviction proceeding  
19 when the state says you can't raise ineffective  
20 assistance of counsel until the first  
21 post-conviction proceeding, then it would  
22 follow, would it not, that the -- the fault of  
23 the ineffective attorney would not be attributed  
24 to the prisoner?

25           MR. ROYSDEN: I -- I -- I think what

1 would follow is that you would have a claim,  
2 potentially a claim for ineffective assistance  
3 of post-conviction counsel. I think it would be  
4 a different question. But then I think (i)  
5 would prevent you from raising that in federal  
6 habeas. You would probably have to raise that  
7 through direct appeal of the state  
8 post-conviction to this Court or through a  
9 subsequent --

10 JUSTICE ALITO: But the court did not  
11 accept that constitutional argument made by the  
12 Petitioner --

13 MR. ROYSDEN: Correct, Your Honor.

14 JUSTICE ALITO: -- which would  
15 potentially have changed the meaning of fault  
16 that was adopted by the Court in Williams, where  
17 it said that the -- that the -- the fault --  
18 that -- that the failure to -- to raise language  
19 in 2254(e)(2) imposes a negligence standard.  
20 But it -- the Court didn't do that.

21 MR. ROYSDEN: Correct, Your Honor.

22 JUSTICE ALITO: And so what do you  
23 deduce from that?

24 MR. ROYSDEN: I think what I deduce is  
25 that Martinez was addressing a very narrow

1 question, which is after there has been a  
2 procedural default, can the ineffectiveness of  
3 post-conviction counsel set -- provide cause.  
4 In this one narrow circumstance, the answer is  
5 yes, and then you have to move on to the second  
6 step, which is prejudice.

7 But it's a very -- it's a three-step,  
8 you know, is there a procedural default? Yes.  
9 Okay. Do we have cause and prejudice to excuse  
10 it? Martinez expressly said we are very  
11 narrowly saying as an equitable matter the  
12 ineffectiveness of post-conviction counsel can  
13 provide cause to excuse an existing procedural  
14 default.

15 JUSTICE KAGAN: But -- but just to go  
16 back to where the Chief Justice started, over  
17 and over in Martinez, when the Court is saying  
18 why this is important, the Court talks about the  
19 role of the attorney in developing evidence, I  
20 mean, you know, three, four, five times.  
21 Martinez was not under any, you know,  
22 misperception that this was not an evidentiary  
23 question essentially.

24 And, you know, as -- as the Chief  
25 Justice said, this is why states do it this way,

1 put it here, because everybody knows that in the  
2 vast majority of cases it's an evidentiary  
3 question, and Martinez talked about it in  
4 exactly those terms. This is what the counsel  
5 is supposed to be doing, is to develop evidence.

6 MR. ROYSDEN: That's correct, Your  
7 Honor. I mean, these are important questions,  
8 and they're often going to require the  
9 development of evidence. But -- but Congress  
10 has answered the question in (e)(2). And from  
11 Congress's point of view, even innocence is not  
12 enough because that only satisfies (B). You  
13 still have to meet (A).

14 This is -- this is a situation unlike,  
15 for example, the one-year statute of limitations  
16 for a claim of actual innocence, where this  
17 Court, I think in McQuiggin, said that's gets  
18 around it. This is not a question that was not  
19 on Congress's mind. I mean, Congress was --

20 JUSTICE KAGAN: But -- but --

21 MR. ROYSDEN: -- very specific.

22 JUSTICE KAGAN: -- Congress has only  
23 answered the question if we decide that the  
24 fault standard is met, and that's the entire  
25 question here, is -- is the fault standard met?

1                   It wouldn't be met if this were a  
2 constitutional ineffectiveness claim, as Justice  
3 Alito pointed out. So -- so is it met here?  
4 And as I said, I -- I do think that Martinez,  
5 although it didn't say that there was a  
6 constitutional right, that the whole theory of  
7 Martinez is about, you know what, this is --  
8 this is the state's responsibility to take  
9 ownership of this and to make sure it doesn't go  
10 south.

11                   MR. ROYSDEN: I think to say the fault  
12 standard would be met if this were itself a  
13 constitutional claim is not -- is not  
14 necessarily correct because that's for the  
15 claim. The Martinez question is kind of a  
16 predicate question. Can you -- can you have an  
17 evidentiary hearing on the claim in the first  
18 place?

19                   So, if it was made a constitutional  
20 right, then maybe it would support a claim,  
21 except for the fact that subsection (i) says you  
22 can't do it.

23                   But put aside (i), it might be a  
24 claim. That doesn't mean it's not a procedural  
25 default. And I don't think this Court in

1 Martinez was purporting to set forth general  
2 agency principles because, if that were true, in  
3 Davila, the -- there's no way to distinguish  
4 that position from Davila, where you said, well,  
5 the post-conviction counsel was negligent in  
6 raising ineffectiveness of direct appeal  
7 counsel.

8           How could the post-conviction counsel  
9 be an agent for one specific purpose -- or not a  
10 -- I should say not an agent for one specific  
11 purpose, which is to factually develop and raise  
12 the issue of ineffectiveness of trial counsel,  
13 but an agent for every other claim that could be  
14 raised on habeas?

15           JUSTICE KAVANAUGH: But you have --  
16 you have a forceful argument on the statutory  
17 language, and I think this case is close for  
18 that reason. But going back to Martinez -- you  
19 went to Davila -- but Martinez did contemplate,  
20 it seems, that ineffective assistance of trial  
21 counsel, that claim and that claim alone, I  
22 think, could be raised in federal habeas, even  
23 if otherwise defaulted, because it wouldn't be  
24 attributed to the client.

25           And then the question becomes, well,

1 did they really contemplate that it could be  
2 raised but not actually pursued, which seems  
3 like a very odd way to attribute what the Court  
4 -- you know, what the Court did in Martinez.

5 That's what I'm trying to figure out.  
6 There's obvious tension here, and that's what  
7 I'm trying to figure out.

8 MR. ROYSDEN: Right. And, again, our  
9 position is, to the extent that one has to give,  
10 Martinez should give because it's judge-made.  
11 But I think that the fundamental purpose of --

12 JUSTICE KAVANAUGH: What's wrong --

13 MR. ROYSDEN: -- AEDPA --

14 JUSTICE KAVANAUGH: Sorry to  
15 interrupt, but what's wrong -- I think this is  
16 really the heart of it for me -- is what's wrong  
17 with saying that Martinez said that you're not  
18 at fault in this one specific area? In other  
19 words, the fault's not going to be attributed to  
20 the client in this one very particular specific  
21 area, and then that applies to the "fail to  
22 develop" language here.

23 MR. ROYSDEN: Well, this is certainly  
24 not my position, but if that's what Martinez  
25 meant, then I don't understand why you have to

1 show prejudice because, if there was no default  
2 in the first place, then there's no reason to  
3 get to cause and prejudice. You would just move  
4 right on to the ineffective assistance of trial  
5 claim.

6 But I think Pinholster, to me, is  
7 really a case that's critical to understanding  
8 this, and in Pinholster, this Court spoke about  
9 Williams, and it basically said Congress has set  
10 up two independent bars to really restrict  
11 habeas. I think the Court said this was a  
12 watershed change in habeas.

13 And it said you have (d)(1), which, if  
14 the -- if it reached the merits, the court has  
15 to defer to the state court, and if (e)(2), a  
16 really high bar to evidentiary hearings.  
17 Congress was very clear. I mean, I think the --  
18 the answer consistent with AEDPA is, if somebody  
19 has a -- a good claim, then they need to go to  
20 state court and file a second or successive  
21 habeas petition.

22 Most states -- or, pardon,  
23 post-conviction petition. Most states allow  
24 actual innocence as a ground. In Arizona, we  
25 allow that. So you could go to court, you could

1 develop, you know, your record in state court.  
2 And I think that's the answer given the  
3 statutory requirements of AEDPA, which are very  
4 strict in this context.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Justice Thomas?

8 Justice Breyer, anything further?

9 Justice Alito?

10 JUSTICE SOTOMAYOR: I have one  
11 question, counsel.

12 You devote just one paragraph to  
13 Ramirez's waiver claim. You admit that you did  
14 not raise this -- this statutory argument that  
15 you're making today until your petition for  
16 rehearing. Normally, that's waiver.

17 I don't know how you can claim that  
18 you didn't know that this was at issue when  
19 Mr. Ramirez, in his appellate brief -- I'm  
20 quoting pages 48 -- 46 to 48 -- he specifically  
21 says the equitable remedy developed in Martinez  
22 would be pointless without an opportunity for  
23 federal fact development.

24 Federal court is Ramirez's opportunity  
25 to present the evidence that should have been

1 presented years ago but was not due to prior  
2 counsel's failure. That's a direct request to  
3 say I was entitled to my hearing. And yet you  
4 don't raise this argument.

5 MR. ROYSDEN: Well --

6 JUSTICE SOTOMAYOR: Why shouldn't we  
7 DIG?

8 MR. ROYSDEN: -- you should not DIG  
9 because, in Ramirez, it was even more egregious,  
10 because even taking all the evidence from the  
11 Martinez proffer, the court -- the Ninth Circuit  
12 said yet -- we're going to have yet another  
13 hearing on the merits, on the claim. So  
14 Martinez -- or, pardon me, Ramirez is directly  
15 contrary to the language of (e)(2). And that's  
16 the issue that we raised.

17 JUSTICE SOTOMAYOR: I -- I'm sorry,  
18 counsel, that -- that just gets to the point.  
19 You didn't raise this argument until your  
20 petition for rehearing.

21 MR. ROYSDEN: Our -- our position up  
22 to that point was, even if you look at his  
23 evidence, it's not enough to establish --

24 JUSTICE SOTOMAYOR: That was your --

25 MR. ROYSDEN: -- ineffectiveness.

1 JUSTICE SOTOMAYOR: -- that was your  
2 entire argument. It wasn't that he wasn't  
3 entitled to rely on that evidence.

4 MR. ROYSDEN: I wouldn't say it was  
5 our entire argument, but that was our position.  
6 When the Ninth Circuit said you've met Martinez  
7 and now we're going to have a no -- a new  
8 hearing on the claim, go back and do that, and  
9 we said no, that violates (e)(2). That's what  
10 we preserved. This was an alternative basis for  
11 affirmance. I don't think we had to raise it  
12 pre-petition for rehearing to preserve it.

13 JUSTICE SOTOMAYOR: Thank you,  
14 counsel.

15 MR. ROYSDEN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan,  
17 anything further?

18 Justice Gorsuch?

19 JUSTICE KAVANAUGH: Just one question.  
20 I'm just going to ask a question that  
21 Respondent's brief asked and have you answer it  
22 before -- before they stand up.

23 They say on page 2, if you're not at  
24 fault for failing to raise a claim, how can you  
25 be at fault for failing to develop that claim?

1           So just give you a chance to answer  
2 their question before they stand up.

3           MR. ROYSDEN: My answer is you are at  
4 fault. Martinez said you have cause to excuse  
5 it. And you do -- you have to map that onto  
6 (e)(2). You've now satisfied the first part of  
7 (e)(2), so now you have to satisfy (A) and (B).  
8 Unfortunately for them, they cannot satisfy (A)  
9 and (B). They need to go to state court.

10          CHIEF JUSTICE ROBERTS: Justice  
11 Barrett?

12          Thank you, counsel.

13          MR. ROYSDEN: Thank you, Your Honor.

14          CHIEF JUSTICE ROBERTS: Mr. Loeb.

15                    ORAL ARGUMENT OF ROBERT M. LOEB

16                            ON BEHALF OF THE RESPONDENT

17          MR. LOEB: Mr. Chief Justice, and may  
18 it please the Court:

19                    The limits imposed by section  
20 2254(e)(2) only apply where, in the words of the  
21 statute, "the applicant failed to develop the  
22 factual basis of a claim." And the statute  
23 doesn't define "applicant failed to develop,"  
24 but, in Michael Williams, this Court held that  
25 the phrase requires a finding of fault. So, in

1     arguing that Mr. Jones and Mr. Ramirez should be  
2     held at fault here, the state relies on Michael  
3     Williams' recitation of just the general rule  
4     that an attorney's acts are generally to be  
5     attributable to a client.

6             But this Court has long recognized  
7     that attribution rule is not categorical in  
8     nature.  Indeed, the state agrees that the  
9     failures of counsel are not to be attributed to  
10    the applicant when the attorney's  
11    ineffectiveness is at the Strickland level and  
12    when it occurs either at a criminal trial or on  
13    the direct criminal appeal.

14            This Court in Coleman left open the  
15    question of the fault -- the attribution where  
16    here -- like here, the state labels the first  
17    review, instead of an appeal, instead calls it  
18    post-conviction review.

19            This Court nine years ago squarely  
20    addressed that open question, and this Court  
21    examined the very same Arizona system at issue  
22    here, where the only review of -- provided for  
23    ineffective counsel claims is on post-conviction  
24    review.  And where that post-conviction review  
25    was not collateral or civil but is, under

1 Arizona rule, part of the original criminal  
2 action, in that specific context, this Court  
3 held that the labels used by the state do not  
4 matter and that the fault attribution is not to  
5 the claimant for the counsel's failures, just  
6 like in a direct appeal situation.

7 This Court held that the Arizona  
8 post-conviction review in -- for such  
9 ineffective trial counsel claims is in many ways  
10 the equivalent of a direct appeal and that in  
11 both contexts, the failures of counsel when it  
12 meets the Strickland levels are not to be  
13 attributed to the claimant. That same fault  
14 calculus applies under (e)(2) and fully supports  
15 holding that (e)(2)'s restrictions do not apply  
16 to Mr. Jones or Mr. Ramirez.

17 I welcome your questions.

18 JUSTICE THOMAS: Counsel, if we --  
19 well, first of all, I thought, in Martinez, we  
20 said that that was strictly procedural default?

21 MR. LOEB: It was addressing the --  
22 the situation of procedural default and cause  
23 and prejudice, correct, Your Honor.

24 JUSTICE THOMAS: Yes. And it  
25 emphasized that it was a -- in effect, a first

1 appeal?

2 MR. LOEB: Correct. It was saying  
3 that it is the first opportunity of review, just  
4 like the situation of an appeal.

5 JUSTICE THOMAS: So I thought that it  
6 sort of -- the suggestion was it was sui  
7 generis, but I -- I'll let that go.

8 If we -- if -- if -- if it's going to  
9 be the practice to use Martinez to eventually  
10 require a full evidentiary hearing, why don't we  
11 just apply AEDPA, 2254(e)(2) up front to the  
12 Martinez hearing?

13 MR. LOEB: Your Honor, the first  
14 question under (e)(2) is whether you're at  
15 fault. And so the question is are you going to  
16 be at fault under Martinez, the first stage is  
17 for cause and prejudice, you defaulted your  
18 claim, you didn't raise it in state court, you  
19 need an inquiry as to whether you're to be held  
20 at fault for failing to raise that claim.

21 So counsel here suggests that there's  
22 some -- some separation between -- that because  
23 cause was found, that there was no fault. But,  
24 here, there was the raised -- the claim wasn't  
25 raised, and under Martinez --

1                   JUSTICE THOMAS: Do you -- don't you  
2 think it's a bit odd, though, that you can use  
3 that to basically eviscerate the restrictions of  
4 AEDPA?

5                   MR. LOEB: It doesn't eviscerate the  
6 restrictions of AEDPA. What it's doing is  
7 recognizing that where you're -- you're not at  
8 fault for not raising a claim, you're not going  
9 to be held ordinarily, just as a matter of logic  
10 and precedent, aren't going to be held at fault  
11 for failing to develop that same claim.

12                   Indeed, Congress recognized that.  
13 This Court has long recognized it. In Keeney,  
14 this Court said that those two inquiries of  
15 whether you're at fault for not raising it and  
16 not developing it, that there's little to be  
17 said for applying different standards.

18                   And in Michael Williams, at page 444,  
19 this Court said a ruling on one will be  
20 sufficient for the other. And when Congress  
21 adopted the Keeney standard, it understood that  
22 under Keeney, there was no delta, as a matter of  
23 logic and force, between those two inquiries of  
24 whether you're at fault for failing to raise the  
25 claim and failing to develop the claim.

1                   And that's why, in Martinez and  
2 Trevino, this Court clearly anticipated that  
3 those -- these important substantial ineffective  
4 trial counsel claims would be developed once  
5 cause was -- was found and that a person was  
6 found not to be at fault for failing to raise  
7 it.

8                   And the rationale that this Court  
9 applied in Martinez for why you weren't at fault  
10 for not bringing the claim in the first instance  
11 applies squarely to (e)(2) as well.

12                   So Martinez says the post-conviction  
13 review, it provided, it said, in many ways, the  
14 equivalent of a prisoner's direct appeal. And  
15 all agree that if these errors occurred in a  
16 state where you could raise post -- you could  
17 raise ineffectiveness of trial counsel on  
18 appeal, everyone agree you would not be  
19 attributing fault here to Mr. Jones and Mr.  
20 Ramirez.

21                   So the fact that these are -- that in  
22 -- in Arizona, the way they've structured their  
23 system, the fact that the post-conviction review  
24 is meaningfully -- in every meaningful way  
25 serving the exact same role as the appeal and

1 functionally the same, can't be overlooked.

2           So, in both instances, in a direct  
3 appeal and here, in Arizona, the way they've  
4 constructed post-conviction review, this is your  
5 first and only right of review of an ineffective  
6 trial counsel claim.

7           JUSTICE ALITO: Well, this is a --  
8 this is really a tough case. You have a strong  
9 argument that accepting the state's  
10 interpretation of 2254(e) and Martinez would --  
11 of 2254(e) would drastically reduce what a lot  
12 of the lower courts have thought Martinez means.

13           And I certainly understand why the  
14 courts of appeals have interpreted Martinez the  
15 way they did. But the fact remains that we have  
16 to follow the federal habeas statute. We have  
17 to follow AEDPA, unless it's unconstitutional.

18           And 2254(e) was interpreted in Michael  
19 Williams, the Court interpreted what it means to  
20 failure -- for there to be a failure to develop  
21 the facts of a claim, and it said that that  
22 occurs when there is lack of diligence or some  
23 greater fault attributable to the prisoner or to  
24 the prisoner's counsel. That's where things  
25 stood at the time when we decided Martinez.

1           Now, you know, it's nice to attribute  
2           omniscience to the Court. The fact of the  
3           matter is that this whole 2254(e) issue was not  
4           briefed by anybody in Martinez, and the Court  
5           didn't address it.

6           So I think what you have to explain is  
7           how Martinez, which didn't purport to interpret  
8           2254(e) and certainly didn't purport to overrule  
9           Michael Williams, which is the case you have to  
10          rely on to -- in -- in support of your  
11          interpretation of failure to read -- to -- to --  
12          failure to raise, how Martinez could be  
13          interpreted now to have changed what that  
14          statutory phrase means?

15          MR. LOEB: Yeah, we're not arguing  
16          that Martinez changed the statutory phrase, and  
17          we're not arguing that Michael Williams needs to  
18          be overruled. And we're not disagreeing with  
19          the general rule that ordinary counsel's  
20          failures will be attributed to the client.

21          But it's always been understood and  
22          there's no disagreement that in some instances,  
23          in limited instances, that attorney's failures  
24          are not attributed to the client. Everyone  
25          agrees that if they're -- these same errors had

1 occurred in a state on a direct appeal  
2 situation, that they would not be -- the same  
3 failures at a Strickland level would not be  
4 attributed to the client. And so Martinez --

5 JUSTICE ALITO: That's true, but that  
6 -- that's because there would be a Sixth  
7 Amendment violation there.

8 MR. LOEB: And Martinez --

9 JUSTICE ALITO: And that's exactly  
10 what the Court did not adopt in Michael  
11 Williams.

12 MR. LOEB: Didn't address. Didn't  
13 address. It didn't -- it didn't reject it. It  
14 just said we don't need to get there.

15 JUSTICE ALITO: Well, it didn't adopt  
16 it. So is that what you want us to do? You  
17 want us to say extend the application of the  
18 Sixth Amendment?

19 MR. LOEB: No, Your Honor. Just like  
20 Martinez, you don't need to reach the issue.  
21 You just need to look at that all the attributes  
22 for fault that animate for not attributing fault  
23 in the situation in Coleman and for a direct  
24 appeal situation equally apply here.

25 So Martinez, there's two major --

1 major elements you need to recognize. One is  
2 the equivalency, that it's just like a direct  
3 appeal in this circumstance because you have a  
4 sort of first right of appeal. It's a part of  
5 the criminal action. It's not a separate civil  
6 action. It's not a collateral attack.

7           This is just like an appeal. It walks  
8 like a duck, quacks like a duck. It's not  
9 discretionary. It is a mandatory review just  
10 like an appeal.

11           That just -- because the fact that  
12 Arizona has slapped a different label on it is  
13 not a reason to have a different fault  
14 attribution to the client from a different -- if  
15 this had arose in a different state, where these  
16 very same errors occurred on a direct appeal.

17           And this Court's cases involving  
18 post-conviction review and habeas review saying  
19 they're materially different from appeal, they  
20 have no application here.

21           Look at Pennsylvania versus Finley.  
22 They say, well, you don't -- post-conviction  
23 review is different because it's civil, it's  
24 discretionary, but, under the Arizona system, it  
25 is by rule, look at Rule 32.3 of the Arizona

1 Criminal Rules, it says it's part of the  
2 criminal action. It is not a separate action.  
3 And it is not discretionary. It's mandatory.

4 This Court in Douglas versus  
5 California and Coleman said you should treat  
6 post-conviction review differently because  
7 you've already had your one bite at the apple.  
8 This is an additional review, layer of review.  
9 You've already had your appeal with  
10 constitutionally effective counsel.

11 That's not true here. Arizona has  
12 shunted this into post-conviction review,  
13 circumventing the right to appeal.

14 JUSTICE BARRETT: So --

15 MR. LOEB: So just like in Martinez,  
16 you don't need to reach the constitutional  
17 issue, but you can see, because it's the  
18 substantial equivalent, you should be treating  
19 them the same, and Congress would have expected  
20 that.

21 And the second major element of  
22 Martinez is one that Justice Kagan mentioned, is  
23 one that under ordinary understanding at the  
24 time of Michael Williams and at the time of  
25 (e)(2), is that when there's an external force

1 that impairs or obstructs the ability of the  
2 applicant to assert and to vindicate a  
3 constitutional right, you don't treat that as  
4 being attributed to the applicant.

5 And it's very important that Martinez  
6 addressed that very same subject in this very  
7 context and said that the applicant of this  
8 situation is to be deemed obstructed and impeded  
9 by the acts of the state.

10 And the Court -- Court explained why  
11 at page 13 of the decision. It said: By  
12 deliberately choosing to move the trial  
13 ineffective counsel claims outside the direct  
14 appeal process, where counsel is  
15 constitutionally guaranteed, the state has  
16 significantly diminished the prisoner's ability  
17 to -- to file and to, of course, vindicate such  
18 ineffective trial counsel claims.

19 So just nine years ago, a 7-2 majority  
20 here said what the state has done in  
21 constructing this system as it has impedes, in  
22 the words of the Court, and obstructs the  
23 vindication of these bedrock right to effective  
24 trial counsel.

25 CHIEF JUSTICE ROBERTS: Mr. Loeb, what

1 is -- do you have any general authority for what  
2 you do when you have a situation like this,  
3 where the plain language of the statute seems to  
4 require one result, the result your friend  
5 argues for, and the plainly logical meaning of a  
6 subsequent precedent would seem to require the  
7 result that you argue for? Like, what -- do you  
8 have a case that says how we're supposed to  
9 reconcile those two things?

10 MR. LOEB: Well, Your Honor, there --  
11 there isn't a conflict between the text. The --  
12 the language "failed to develop" was taken from  
13 Keeney and that --

14 CHIEF JUSTICE ROBERTS: Well, I -- I  
15 meant -- I'm once again asking you if you have a  
16 case that talks about my hypothetical, which  
17 suggests that there is a conflict between the  
18 statute and be -- and between the logical  
19 reading of -- of the -- of the precedent.

20 MR. LOEB: I think you have -- I don't  
21 have a case that's going to -- going to satisfy  
22 you on that, Your Honor, but you have to look at  
23 the statute in light of what Congress understood  
24 when they enacted it, and, certainly, at the  
25 time they enacted it, they understood every time

1 a court had found cause, there was always  
2 development of the facts.

3 So Congress would have understood that  
4 whatever "failed to develop" meant and how it  
5 was applied, that if you were going to find  
6 cause that you weren't at fault for failing to  
7 raise the claim, you -- logically and as a  
8 matter of logic and -- and -- and under Keeney  
9 case law, which Congress was aware of, you  
10 likewise would not be considered at fault for  
11 failing to develop the very same claim.

12 So Martinez, in finding that there was  
13 cause here and the person was at fault, Congress  
14 would have anticipated that if you weren't going  
15 to be held at fault for failing to bring the  
16 claim, you weren't going to be held at fault for  
17 failing to develop the claim. So there really  
18 isn't --

19 CHIEF JUSTICE ROBERTS: That -- that's  
20 a lot of prescience to ascribe to Congress.

21 MR. LOEB: Well -- well --

22 CHIEF JUSTICE ROBERTS: Instead of you  
23 should -- they would have anticipated the fact  
24 pattern that developed in Martinez, and that's  
25 how you should therefore read the statute that

1 they drafted however many years before that.

2 MR. LOEB: No, Your Honor. I mean,  
3 Coleman preceded (e)(2)'s enactment in AEDPA.  
4 And at that time, Coleman left open the question  
5 of this particular context, of where, instead of  
6 calling it an appeal, you call it a  
7 post-conviction review, and that's your first  
8 opportunity to raise the constitutional claim.  
9 Coleman said we don't need to address that here.  
10 In Coleman, it's not the facts of this case.

11 And then this Court then squarely  
12 dealt with that open issue in Martinez and held  
13 you're not to be held at fault, and it's -- it's  
14 going to be treated just like where the  
15 attorney's ineffectiveness in raising the  
16 ineffective trial counsel claim occurred on a  
17 direct appeal. So Congress --

18 JUSTICE ALITO: Well, what did -- what  
19 did Cole --

20 MR. LOEB: -- would have been aware --

21 JUSTICE ALITO: -- what --

22 MR. LOEB: -- this was an open issue  
23 and would have expected the courts to address  
24 that open issue applying the general principles  
25 of the time, and one of those principles are, if

1 there's an external force that obstructs or  
2 impedes you, you're not going to -- you're not  
3 going to be attributing fault to the -- to the  
4 claimant.

5 And, here, we have this Court  
6 expressly finding that the way Arizona set up  
7 its system -- it's allowed set it up however it  
8 wants, but the way it does significantly  
9 diminishes the ability to vindicate this  
10 important constitutional right.

11 JUSTICE ALITO: But what does -- what  
12 issue specifically do you think the Court left  
13 open in Coleman? Was it the question whether  
14 the Sixth Amendment would apply in the first  
15 post-conviction proceeding, or was it the  
16 question whether there could be a  
17 non-constitutional basis for finding that the  
18 fault of the attorney is not attributable to the  
19 client?

20 MR. LOEB: It -- it's more the former,  
21 Your Honor, but it's in the context of cause and  
22 prejudice as to whether you're going to  
23 attribute fault to the applicant in that  
24 particular context for failing to raise the  
25 claim. They left that open, and it was squarely

1 then addressed by this Court in Martinez.

2 And the rationale -- you know, we're  
3 not saying that Martinez controls the statute,  
4 but the rationale behind Martinez applies with  
5 full force here and in saying that fail to  
6 develop likewise shouldn't be --

7 JUSTICE KAVANAUGH: To pick up --

8 MR. LOEB: -- attributing fault to --

9 JUSTICE KAVANAUGH: -- to pick up on  
10 the Chief Justice's question and Justice  
11 Alito's, though, I think the other side says,  
12 well, the way you can square Martinez with the  
13 statute is to just read Martinez to do what it  
14 did and only what it did, and subsequent cases  
15 like Davila -- Davila support that, they say.  
16 And you can then hold the statute to say what it  
17 means. It means what -- what it says in the  
18 ordinary meaning, failure to develop, and you  
19 can -- Martinez still stands for what it stands  
20 for, without getting into the logical  
21 implications of Martinez.

22 I think that's a characterization of  
23 the other side, and we have to -- we can't  
24 ignore the statute. So what's your best  
25 response to that?

1           MR. LOEB: I mean, our best response  
2 is we're not ignoring the statute. We agree  
3 that you need to construe the statute here and  
4 that "fail to develop" here needs to be read in  
5 the particular context, a context that this  
6 Court said is substantially equivalent to a  
7 direct appeal where you would not be attributing  
8 fault. It's a situation where this Court says  
9 that because of the acts and the way that  
10 Arizona's constructed its system, it's  
11 significantly diminishing the ability to  
12 vindicate that right.

13           You're not going to attribute the  
14 fault to the applicant for failing to raise the  
15 claim. And then, as a matter of logic and  
16 precedent, you would apply that very same  
17 rationale at the (e)(2) in deciding whether you  
18 were to be held at fault for failing to develop  
19 that claim that your counsel did not raise.

20           So we're not asking to avoid the  
21 statute or to -- or to -- for equitable  
22 exception to the statute. It has to be read in  
23 light of this particular context. And we're  
24 fortunate enough that this Court, applying like  
25 principles, has already looked at this very

1 context in Arizona and said, look, it's really  
2 just like a direct appeal. There's no reason  
3 for treating fault differently in this situation  
4 than it is at direct appeal, and it's looked at  
5 the situation and said the way Arizona's  
6 constructed its system, it's -- there's an  
7 external force here that obstructs and impedes  
8 the -- the vindication of this right, that  
9 significantly diminishes the ability of the --  
10 of the applicant, and we're not going to treat  
11 him as at fault.

12           So if you -- all that rationale is  
13 correct as to why they shouldn't be held at  
14 fault for failing to bring the claim, and we're  
15 just -- our argument is, yes, and for the very  
16 same reasons, you're not at fault for failing to  
17 develop it.

18           And you don't get to the other aspects  
19 of -- of -- of (e)(2) because there's that  
20 threshold standard, did you fail to develop it,  
21 which Michael Williams says requires a finding  
22 of fault.

23           JUSTICE KAVANAUGH: What about, to  
24 pick up on Justice Thomas's question, that this  
25 would inevitably lead to extensive delays and

1 AEDPA was enacted to try to eliminate some of  
2 those delays in some of the litigation,  
3 particularly capital litigation? You want to  
4 respond to that?

5 MR. LOEB: No, it doesn't add any  
6 additional delays. I mean, again, if these very  
7 same attorney errors had happened on a direct  
8 appeal, we -- and there was no additional state  
9 forum to hear the ineffective trial counsel  
10 claims, you would be in federal court just like  
11 we are.

12 We're not asking for anything beyond  
13 what is -- would be applied in the ordinary  
14 context, where these very same kind of errors  
15 happen on a direct appeal. So we're not adding  
16 to anything. We're just trying to get the same  
17 equivalence of what would happen in a state  
18 where you can raise these things on a direct  
19 appeal.

20 And, indeed -- and to avoid the  
21 fortuity that -- that you -- you -- you can --  
22 that would exist under the Arizona argument  
23 here, that, well, if this arose in a state where  
24 you can raise it on appeal, then you get to  
25 proceed in federal court, but if it arose in

1 Arizona, where they've labeled the exact same  
2 thing but have just labeled it post-conviction  
3 review, now you don't have a forum that'll ever  
4 meaningfully hear your ineffective trial counsel  
5 claims?

6           There's no reason to ascribe that  
7 intent to Congress here. The language does not  
8 -- does not abide by that extreme reading, that  
9 just because of how the state here has labeled  
10 that first right of review, as post-conviction  
11 review as opposed to labeling it appeal, that --  
12 that substantial claims regarding ineffective  
13 trial counsel, one of the most meaningful  
14 rights, a bedrock right this Court said to  
15 having a fair justice system, will never be  
16 heard because these claims, like you -- as -- as  
17 you said in Martinez and said in Trevino,  
18 inherently require factual development.

19           There's a second material misreading  
20 of -- the state has of -- of (e)(2), is that  
21 they're saying that the -- it bars all  
22 consideration of evidence beyond the state court  
23 record. However, it only bars consideration of  
24 -- of -- it bars having an evidentiary hearing  
25 on the claim.

1           So, when you have evidence that's  
2 already been accepted by a federal court on the  
3 pause -- cause and prejudice stage, that is not  
4 covered by the plain language of (e)(2). That  
5 is not an evidentiary hearing. The claim just  
6 is considering evidence that you already have in  
7 your hand.

8           And Arizona's contrary argument would  
9 mean that a federal court has in its hands  
10 strong evidence, like you have for Mr. Jones  
11 here that he did not commit the murder that he  
12 was charged with. And -- and the federal court  
13 has it in its hands, and -- and the district  
14 court here ordered his release, given the  
15 strength of that evidence, or his retrial. And  
16 Arizona's argument is that -- that a federal  
17 court should just turn a blind eye to that  
18 evidence.

19           A construction of the statute that  
20 would require that, as the amicus brief from the  
21 former DOJ and bipartisan prosecutors says, that  
22 would really taint the federal judicial system.  
23 For the federal courts to have this evidence  
24 that he didn't commit the crime in its hand and  
25 to do nothing is really going to make them

1       complicit in a -- in a -- in a improper  
2       effecting of the death penalty here.

3                   JUSTICE SOTOMAYOR: Counsel --

4                   JUSTICE KAVANAUGH: One of -- one of  
5       their response --

6                   JUSTICE SOTOMAYOR: Oh, sorry.

7                   JUSTICE KAVANAUGH: Go ahead.

8                   JUSTICE SOTOMAYOR: Counsel, I guess,  
9       given the predictions of the dissent in  
10      Martinez, I was surprised that one of the  
11      statistics I read is that there's only two cases  
12      a year that present a Martinez hearing, where a  
13      has court found that a prisoner's eligible for a  
14      Martinez hearing.

15                   MR. LOEB: I -- I -- I think the --  
16      the amicus briefs went through, like, all the  
17      times Martinez has been -- has been raised in --  
18      in the primary states where it's at issue, and  
19      it's found in the nine years, there were  
20      several -- I think two to three dozen cases over  
21      nine years. I don't think it was two or three.  
22      I think one or two cases that ultimately have  
23      been people vindicated and got release orders,  
24      et cetera.

25                   But the number of hearings we're

1 talking about over a nine-year period over  
2 several states is -- the fact it's several dozen  
3 of them just is not a substantial burden. But,  
4 of course, this is a statutory construction  
5 question and not a question of -- of -- of -- of  
6 whether it's an over -- you know, overly  
7 burdening the courts. But there -- this Court  
8 in Martinez adopted a very narrow rule to a very  
9 narrow context --

10 JUSTICE SOTOMAYOR: Okay, counsel.

11 MR. LOEB: -- anticipating it wouldn't  
12 be a significant burden.

13 JUSTICE SOTOMAYOR: The -- the -- you  
14 have no reason to think amici was right that  
15 this happens rarely?

16 MR. LOEB: Correct, Your Honor.

17 JUSTICE SOTOMAYOR: Okay.

18 MR. LOEB: And -- and the record has  
19 borne -- borne that out. What this Court  
20 particularly in Martinez says this would not be  
21 a significant burden, but it would be an  
22 important, necessary way to vindicate one of the  
23 most important rights in the Constitution, and  
24 that's been borne out over the last nine years.

25 JUSTICE SOTOMAYOR: That's because

1 this is a completely unusual situation, as you  
2 pointed out.

3 MR. LOEB: We're talking about --

4 JUSTICE SOTOMAYOR: No court would  
5 have reviewed this evidence to see if someone  
6 was guilty as charged, correct?

7 MR. LOEB: There'd be no court which  
8 could meaningfully review the ineffective trial  
9 counsel claim here.

10 JUSTICE SOTOMAYOR: That would be --  
11 that was the Martinez's point, correct?

12 MR. LOEB: And the -- and the kind of  
13 evidence that was adduced from Mr. Jones showing  
14 that the murder charges against him were  
15 baseless, and the kind of evidence adduced as to  
16 Mr. Ramirez showing that there is substantial  
17 mitigation evidence that he should not be given  
18 the death penalty, would have never seen the  
19 light of day but for the appointment of  
20 competent counsel, who then were given a chance  
21 to develop the record and to present that  
22 evidence to federal court.

23 JUSTICE KAVANAUGH: One of the things  
24 that your friend on the other side says in  
25 response to what you just said, and I have no

1 idea whether this is sufficient, but I just want  
2 you to respond to it, is they say Arizona has a  
3 forum for raising actual innocence claims.

4 Can you respond to their raising of  
5 that point?

6 MR. LOEB: To say that you have a -- a  
7 forum for hearing and -- and -- and one where no  
8 one's ever succeeded in to raise an actual  
9 innocence claim is not giving you a forum to  
10 vindicate the most -- one of the most vital  
11 rights, the right to effective trial counsel.

12 You know, whether you're innocent or  
13 guilty, you have a right to a fair hearing. You  
14 have a right to an effective trial counsel. And  
15 that -- you have a right to have that  
16 vindicated.

17 So it's -- it's like them saying, if  
18 -- if you're coaching a basketball game and your  
19 -- one team gets five players and one team gets  
20 one player and we're going to play the game,  
21 but, at the end of the game, we're going to give  
22 you a shot from half court and that's going to  
23 make the game fair, that does not make the game  
24 fair, Your Honor.

25 There is a right to have trial counsel

1 here, and there was never a fair trial for Mr.  
2 Ramirez or for Mr. Jones. Right? And -- and  
3 the fact that they give a -- a -- a Hail Mary  
4 opportunity for relief at the end of the day or  
5 can give a pardon to Mr. Jones, that -- that  
6 does not mean that the right to effective trial  
7 counsel is being vindicated here.

8           And as Justice Sotomayor pointed out,  
9 as a -- a third argument, which pertains only to  
10 Mr. Ramirez, which there was no real meaningful  
11 response here, because Mr. Ramirez in the appeal  
12 before the panel in the Ninth Circuit clearly  
13 was relying on materials beyond that which was  
14 presented to the state court.

15           And that was not rejected by the state  
16 before the panel. It was not objected to. They  
17 didn't say, well, (e)(2) bars consideration of  
18 that evidence. They told the panel to consider  
19 that evidence.

20           And the panel then went on to render a  
21 decision based on the arguments that they made  
22 without even them raising (e)(2). And, of  
23 course, then they have the -- I think, the  
24 audacity in their cert position, it's like to  
25 say, well, (e)(2) is not even mentioned in the

1 Ninth Circuit decision. Well, it's not  
2 mentioned because they didn't raise it.

3 So there -- it's completely sandbagged  
4 the Ninth Circuit panel here by only raising  
5 this in the en banc petition and then their cert  
6 petition and blaming the panel for never  
7 reaching the issue that they didn't raise. They  
8 made a decision not to raise (e)(2) before the  
9 panel. That's a waiver. It was not fair to the  
10 panel. It's certainly not fair to Mr. Ramirez.  
11 He would have responded to the (e)(2) argument  
12 if it was raised before the panel.

13 So, for -- for Mr. Ramirez, you should  
14 affirm on the additional basis that the claims  
15 against him were waived.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Thomas?

18 JUSTICE THOMAS: No questions, Chief.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Breyer?

21 Justice Kavanaugh?

22 Thank you, counsel.

23 Rebuttal, Mr. Roysden.

24

25

1           REBUTTAL ARGUMENT OF BRUNN W. ROYSDEN, III,  
2                           ON BEHALF OF THE PETITIONER

3           MR. ROYSDEN: Thank you, Your Honor.  
4           If I can make three brief points.

5                           First, as to the question of is there  
6           a case that deals with this paradox of a judge  
7           -- implications of a judge-made versus statute,  
8           the dissent at the Ninth Circuit, page 373 of  
9           the Joint Appendix, cited *Ross v. Blake*.

10                          Congress sets the rules and courts  
11           have a role in creating exceptions only if  
12           Congress wants them to, and I think that's the  
13           fundamental question, here, Congress through A  
14           and B by setting such a high bar for having an  
15           evidentiary hearing, even actual in a sense is  
16           not enough. As made clear, it does not want the  
17           Court to create additional exceptions.

18                          And the building block is *Williams*.  
19           As -- as to the agency principles, *Williams*  
20           clearly holds at Headnote 6 that attributable to  
21           the prisoner or the prisoner's counsel. So I  
22           think the -- the answer is already been decided.

23                          The second point, I think there's a  
24           faulty assumption that *Martinez* somehow  
25           guarantees the right to have the claim heard in

1 federal habeas in district court. That's wrong.

2 Even in a state where ineffective  
3 assistance of trial counsel is brought in direct  
4 appeal, if there's one level of post-conviction  
5 review and that post-conviction review counsel  
6 does not pursue those claims, then, as a matter  
7 of independent and adequate state law, the  
8 federal court can't hear it.

9 So I don't think Martinez was doing  
10 anything more than what it purported to do,  
11 which was to narrowly create an equitable basis  
12 for cause following a procedural default.

13 As to the waiver on Ramirez, just to  
14 be clear, the state's position up to the panel  
15 hearing was, even if you look at that evidence,  
16 it's not going to establish ineffective  
17 assistance of trial counsel. This is the  
18 classic death penalty claim that I needed more  
19 mitigation than what I got. That's the  
20 run-of-the-mill case.

21 The state won at the district court on  
22 it. It didn't present it as an alternative  
23 basis for affirmance. But, once the Ninth  
24 Circuit said, no, we're going to have yet  
25 another hearing on the claim, the state timely

1 objected through a petition for rehearing and  
2 rehearing en banc.

3 With that, I respectfully ask that the  
4 Court reverse both judgments of the Ninth  
5 Circuit. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel, counsel. The case is submitted.

8 (Whereupon, at 12:53 p.m., the case  
9 was submitted.)

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