

SUPREME COURT OF THE UNITED STATES

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.)
- - - - -

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11
12 Washington, D.C.
13 Wednesday, December 8, 2021

14
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 the 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 the --
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
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 attorneys
13 fault gets attributed to the client, but that's
14 not always the rule. And what Martinez
15 essentially is saying is it's not the rule when
16 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. It -- 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 as 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's different because
25 general -- Maples was talking about general

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

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

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

15 JUSTICE SOTOMAYOR: Thank you,
16 counsel.

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

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

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

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

13 MR. ROYSDEN: Okay.

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

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

1 is ascribed to the state.

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

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

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

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

22 So I don't think the Martinez
23 discussion about whether the state chose to put
24 it in post-conviction versus direct appeal
25 answers the question of, you know, in federal

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

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

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

24 MR. ROYSDEN: I -- I -- I think what
25 would follow is that you would have a claim,

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

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

12 MR. ROYSDEN: Correct, Your Honor.

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

20 MR. ROYSDEN: Correct, Your Honor.

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

23 MR. ROYSDEN: I think what I deduce is
24 that Martinez was addressing a very narrow
25 question, which is after there has been a

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

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

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

22 And, you know, as -- as the Chief
23 Justice said, this is why states do it this way,
24 put it here, because everybody knows that in the
25 vast majority of cases it's an evidentiary

1 question, and Martinez talked about it in
2 exactly those terms. This is what the counsel
3 is supposed to be doing, is to develop evidence.

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

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

18 JUSTICE KAGAN: But -- but --

19 MR. ROYSDEN: -- very specific.

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

24 It wouldn't be met if this were a
25 constitutional ineffectiveness claim, as Justice

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

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

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

21 But put aside (i), it might be a
22 claim. That doesn't mean it's not a procedural
23 default. And I don't think this Court in
24 Martinez was purporting to set forth general
25 agency principles because, if that were true, in

1 Davila, the -- there's no way to distinguish
2 that position from Davila, where you said, well,
3 the post-conviction counsel was negligent in
4 raising ineffectiveness of direct appeal
5 counsel.

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

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

23 And then the question becomes, well,
24 did they really contemplate that it could be
25 raised but not actually pursued? Which seems

1 like a very odd way to attribute what the Court
2 -- you know, what the Court did in Martinez.
3 That's what I'm trying to figure out. There's
4 obvious tension here, and that's what I'm trying
5 to figure out.

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

10 JUSTICE KAVANAUGH: Well, what's wrong
11 --

12 MR. ROYSDEN: -- AEDPA --

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

22 MR. ROYSDEN: Well, this is certainly
23 not my position, but if that's what Martinez
24 meant, then I don't understand why you have to
25 show prejudice because, if there was no default

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

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

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

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

1 And I think that's the answer given the
2 statutory requirements of AEDPA, which are very
3 strict in this context.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas?

7 Justice Breyer, anything further?

8 JUSTICE SOTOMAYOR: I have one
9 question, counsel.

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

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

22 Federal court is Ramirez's opportunity
23 to present the evidence that should have been
24 presented years ago but was not due to prior
25 counsel's failure. That's a direct request to

1 say I was entitled to my hearing. And yet you
2 don't raise this argument.

3 MR. ROYSDEN: Well --

4 JUSTICE SOTOMAYOR: Why shouldn't we
5 DIG?

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

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

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

22 JUSTICE SOTOMAYOR: That was your --

23 MR. ROYSDEN: -- ineffectiveness.

24 JUSTICE SOTOMAYOR: -- that was your
25 entire argument. It wasn't that he wasn't

1 entitled to rely on that evidence.

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

11 JUSTICE SOTOMAYOR: Thank you,
12 counsel.

13 MR. ROYSDEN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Kagan,
15 anything further?

16 Justice Gorsuch?

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

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

24 So just give you a chance to answer
25 their question before they stand up.

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

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 Thank you, counsel.

11 MR. ROYSDEN: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Mr. Loeb.

13 ORAL ARGUMENT OF ROBERT M. LOEB

14 ON BEHALF OF THE RESPONDENT

15 MR. LOEB: Mr. Chief Justice, and may
16 it please the Court:

17 The limits imposed by section
18 2254(e)(2) only apply where, in the words of the
19 statute, "the applicant failed to develop the
20 factual basis of a claim." And the statute
21 doesn't define "applicant failed to develop,"
22 but, in Michael Williams, this Court held that
23 the phrase requires a finding of fault. So, in
24 arguing that Mr. Jones and Mr. Ramirez should be
25 held at fault here, the state relies on Michael

1 Williams' recitation of the general rule that an
2 attorney's acts are generally to be attributable
3 to a client.

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

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

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

1 held that the labels used by the state do not
2 matter and that the fault attribution is not to
3 the claimant for the counsel's failures, just
4 like in a direct appeal situation.

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

15 I welcome your questions.

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

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

22 JUSTICE THOMAS: Yes. And it
23 emphasized that it was a -- in effect, a first
24 appeal?

25 MR. LOEB: Correct. It was saying

1 that it is the first opportunity of review, just
2 like the situation of an appeal.

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

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

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

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

24 JUSTICE THOMAS: Do you -- don't you
25 think it's a bit odd, though, that you can use

1 that to basically eviscerate the restrictions of
2 AEDPA?

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

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

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

24 And that's why, in Martinez and
25 Trevino, this Court clearly anticipated that

1 those -- these important substantial ineffective
2 trial counsel claims would be developed once
3 cause was -- was found and that a person was
4 found not to be at fault for failing to raise
5 it.

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

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

19 So the fact that these are -- that in
20 -- in Arizona, the way they've structured their
21 system, the fact that the post-conviction review
22 is meaningfully -- in every meaningful way
23 serving the exact same role as the appeal and
24 functionally the same, can't be overlooked.

25 So, in both instances, in a direct

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

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

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

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

24 Now, you know, it's nice to attribute
25 omniscience to the Court. The fact of the

1 matter is that this whole 2254(e) issue was not
2 briefed by anybody in Martinez, and the Court
3 didn't address it.

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

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

19 But it's always been understood and
20 there's no disagreement that in some instances,
21 in limited instances, that attorneys' failures
22 are not attributed to the client. Everyone
23 agrees that if they're -- these same errors had
24 occurred in a state on a direct appeal
25 situation, that they would not be -- the same

1 failures at a Strickland level would not be
2 attributed to the client. And so Martinez --

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

6 MR. LOEB: And Martinez --

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

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

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

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

23 So Martinez, there's two major --
24 major elements you need to recognize. One is
25 the equivalency, that it's just like a direct

1 appeal in this circumstance because you have a
2 sort of first right of appeal. It's a part of
3 the criminal action. It's not a separate civil
4 action. It's not a collateral attack.

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

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

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

19 Look at Pennsylvania versus Finley.
20 They say, well, you don't -- post-conviction
21 review is different because it's civil, it's
22 discretionary, but, under the Arizona system, it
23 is by rule, look at Rule 32.3 of the Arizona
24 Criminal Rules, it says it's part of the
25 criminal action. It is not a separate action.

1 And it is not discretionary. It's mandatory.

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

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

12 JUSTICE BARRETT: So --

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

19 And the second major element of
20 Martinez is one that Justice Kagan mentioned, is
21 one that under ordinary understanding at the
22 time of Michael Williams and at the time of
23 (e)(2), is that when there's an external force
24 that impairs or obstructs the ability of the
25 applicant to assert and to vindicate a

1 constitutional right, you don't treat that as
2 being attributed to the applicant.

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

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

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

22 CHIEF JUSTICE ROBERTS: Mr. Loeb, what
23 is -- do you have any general authority for what
24 you do when you have a situation like this,
25 where the plain language of the statute seems to

1 require one result, the result your friend
2 argues for, and the plainly logical meaning of a
3 subsequent precedent would seem to require the
4 result that you argue for? Like, what -- do you
5 have a case that says how we're supposed to
6 reconcile those two things?

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

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

17 MR. LOEB: I think you have -- I don't
18 have a case that's going to -- going to satisfy
19 you on that, Your Honor, but you have to look at
20 the statute in light of what Congress understood
21 when they enacted it, and, certainly, at the
22 time they enacted it, they understood every time
23 a court had found cause, there was always
24 development of the facts.

25 So Congress would have understood that

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

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

16 CHIEF JUSTICE ROBERTS: That's a lot
17 of prescience to ascribe to Congress.

18 MR. LOEB: Well -- well --

19 CHIEF JUSTICE ROBERTS: Instead of you
20 should -- they would have anticipated the fact
21 pattern that developed in Martinez, and that's
22 how you should therefore read the statute that
23 they drafted however many years before that.

24 MR. LOEB: No, Your Honor. I mean,
25 Coleman preceded (e)(2)'s enactment in AEDPA.

1 And at that time, Coleman left open the question
2 of this particular context, of where, instead of
3 calling it an appeal, you call it a
4 post-conviction review, and that's your first
5 opportunity to raise the constitutional claim.
6 Coleman said we don't need to address that here.
7 In Coleman, it's not the facts of this case.

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

15 JUSTICE ALITO: Well, what did -- what
16 did Cole --

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

18 JUSTICE ALITO: -- what --

19 MR. LOEB: -- this was an open issue
20 and would have expected the courts to address
21 that open issue applying the general principles
22 of the time, and one of those principles are, if
23 there's an external force that obstructs or
24 impedes you, you're not going to -- you're not
25 going to be attributing fault to the -- to the

1 claimant.

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

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

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

25 And the rationale -- you know, we're

1 not saying Martinez controls the statute, but
2 the rationale behind Martinez applies with full
3 force here and in saying that fail to develop
4 likewise shouldn't be --

5 JUSTICE KAVANAUGH: To pick up --

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

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

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

23 MR. LOEB: I mean, our best response
24 is we're not ignoring the statute. We agree
25 that you need to construe the statute here and

1 that "fail to develop" here needs to be read in
2 this particular context, a context that this
3 Court said is substantially equivalent to a
4 direct appeal where you would not be attributing
5 fault. It's a situation where this Court says
6 that, because of the acts and the way that
7 Arizona has constructed its system, it's
8 significantly diminishing the ability to
9 vindicate that right.

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

17 So we're not asking to avoid the
18 statute or to -- or to -- for equitable
19 exception to the statute. It has to be read in
20 light of this particular context. And we're
21 fortunate enough that this Court, applying like
22 principles, has already looked at this very
23 context in Arizona and said, look, it's really
24 just like a direct appeal. There's no reason
25 for treating fault differently in this situation

1 than it is a direct appeal, and has looked at
2 the situation and said the way Arizona has
3 constructed its system, it's -- there's an
4 external force here that obstructs and impedes
5 the -- the vindication of this right, that
6 significantly diminishes the ability of the --
7 of the applicant, and we're not going to treat
8 him as at fault.

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

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

20 JUSTICE KAVANAUGH: What about, to
21 pick up on Justice Thomas's question, that this
22 would inevitably lead to extensive delays and
23 AEDPA was enacted to try to eliminate some of
24 those delays in some of the litigation,
25 particularly capital litigation? Do you want to

1 respond to that?

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

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

17 And, indeed -- and to avoid the
18 fortuity that -- that you -- you can -- that
19 would exist under the Arizona argument here,
20 that, well, if this arose in a state where you
21 can raise on appeal, then you get to proceed in
22 federal court, but if it arose in Arizona, where
23 they've labeled -- the exact same thing but have
24 just labeled it post-conviction review, now you
25 don't have a forum that'll ever meaningfully

1 hear your ineffective trial counsel claims?

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

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

22 So, when you have evidence that's
23 already been accepted by a federal court on the
24 pause -- cause and prejudice stage, that is not
25 covered by the plain language of (e)(2). That

1 is not an evidentiary hearing. The claim just
2 is considering evidence that you already have in
3 your hand.

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

15 A construction of the statute that
16 would require that, as the amicus brief from the
17 former DOJ and bipartisan prosecutors says, that
18 would really taint the federal judicial system.
19 For the federal courts to have this evidence
20 that he didn't commit the crime in its hand and
21 to do nothing is really going to make them
22 complicit in a -- in a -- in an improper
23 effecting of the death penalty here.

24 JUSTICE SOTOMAYOR: Counsel --

25 JUSTICE KAVANAUGH: One of -- one of

1 their response --

2 JUSTICE SOTOMAYOR: Oh, sorry.

3 JUSTICE KAVANAUGH: Go ahead.

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

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

21 But the number of hearings we're
22 talking about over a nine-year period, over
23 several states is -- the fact it's several dozen
24 of them just is not a substantial burden. But,
25 of course, this is a statutory construction

1 question and not a question of -- of -- of -- of
2 whether it's an over -- you know, overly
3 burdening the courts. But there -- this Court
4 in Martinez adopted a very narrow rule to a very
5 narrow context --

6 JUSTICE SOTOMAYOR: Okay, counsel.

7 MR. LOEB: -- anticipating it wouldn't
8 be a significant burden.

9 JUSTICE SOTOMAYOR: The -- the -- you
10 have no reason to think amici was right that
11 this happens rarely?

12 MR. LOEB: Correct, Your Honor.

13 JUSTICE SOTOMAYOR: Okay.

14 MR. LOEB: And -- and the record has
15 borne -- borne that out. What this Court
16 particularly in Martinez says this would not be
17 a significant burden, but it would be an
18 important, necessary way to vindicate one of the
19 most important rights in the Constitution, and
20 that has been borne out over the last --

21 JUSTICE SOTOMAYOR: That's because
22 this is a completely unusual situation, as you
23 pointed out.

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

25 JUSTICE SOTOMAYOR: No court would

1 have reviewed this evidence to see if someone
2 was guilty as charged, correct?

3 MR. LOEB: There'd be no court which
4 could meaningfully review the ineffective trial
5 counsel claim here.

6 JUSTICE SOTOMAYOR: That would be --
7 that was Martinez's point, correct?

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

19 JUSTICE KAVANAUGH: One of the things
20 that your friend on the other side says in
21 response to what you just said, and I have no
22 idea whether this is sufficient but I just want
23 you to respond to it, is they say Arizona has a
24 forum for raising actual innocence claims.

25 Can you respond to their raising of

1 that point?

2 MR. LOEB: To say that you have a -- a
3 forum for hearing, and -- and -- and one where
4 no one has ever succeeded in to raise an actual
5 innocence claim is not giving you a forum to
6 vindicate the most -- one of the most vital
7 rights, the right to effective trial counsel.

8 You know, whether you are innocent or
9 guilty you have a right to a fair hearing. You
10 have a right to an effective trial counsel. And
11 that -- you have a right to have that
12 vindicated.

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

21 There is a right to have trial counsel
22 here and there was never a fair trial for Mr.
23 Ramirez or for Mr. Jones. Right?

24 And -- and the fact that they give a
25 -- a -- a Hail Mary opportunity for relief at

1 the end of the day or can give a pardon to Mr.
2 Jones, that -- that does not mean that the right
3 to effective trial counsel is being vindicated
4 here.

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

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

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

25 So there -- it's completely sandbagged

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

10 So for -- for Mr. Ramirez you should
11 affirm on the additional basis that the claims
12 against him were waived.

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas?

15 JUSTICE THOMAS: No questions.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer?

18 Thank you, counsel.

19 Rebuttal, Mr. Roysden.

20 REBUTTAL ARGUMENT OF BRUNN W. ROYSDEN, III
21 ON BEHALF OF THE PETITIONER

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

24 First, as to the question of is there
25 a case that deals with this paradox of a judge

1 -- implications of a judge-made versus statute,
2 the dissent at the Ninth Circuit, page 373 of
3 the Joint Appendix, cited *Ross v. Blake*.

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

12 And the building block is *Williams*.
13 As -- as to the agency principles, *Williams*
14 clearly holds at headnote 6 that attributable to
15 the prisoner or the prisoner's counsel.

16 So I think the -- the answer is
17 already been decided.

18 The second point, I think there's a
19 faulty assumption that *Martinez* somehow
20 guarantees the right to have the claim heard in
21 federal habeas in district court. That's wrong.

22 Even in a state where ineffective
23 assistance of trial counsel is brought in direct
24 appeal, if there's one level of post-conviction
25 review and that post-conviction review counsel

1 does not pursue those claims, then as a matter
2 of independent and adequate state law the
3 federal court can't hear it.

4 So I don't think Martinez was doing
5 anything more than what it purported to do,
6 which was to narrowly create an equitable basis
7 for cause following a procedural default.

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

16 The state won at the district court on
17 it. It didn't present it as an alternative
18 basis for affirmance. But once the Ninth
19 Circuit said, no, we're going to have yet
20 another hearing on the claim, the state timely
21 objected through a petition for rehearing and
22 rehearing en banc.

23 With that I respectfully ask that the
24 Court reverse both judgments of the Ninth
25 Circuit. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.
3 (Whereupon, at 12:53 p.m., the case
4 was submitted.)

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