No. 20-1009

IN THE

# Supreme Court of the United States

DAVID SHINN, ET AL.,

*Petitioners*,

*v.*

DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENTS


Jon M. Sands
*Federal Public Defender*
*District of Arizona*
Dale A. Baich
Timothy M. Gabrielsen
Cary Sandman
*Assistant Federal*
*Public Defenders*
407 W. Congress Street
Tucson, Arizona 85701

Robert M. Loeb
*Counsel of Record*
Thomas M. Bondy
Paul David Meyer
Geoffrey C. Shaw
Monica Haymond
Sarah H. Sloan
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

*Counsel for Respondents*

## QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) bars a federal court from "hold[ing] an evidentiary hearing on the claim" when "the applicant has failed to develop the factual basis of [the] claim in State court proceedings," unless the applicant can fulfill two statutory requirements not at issue here. 28 U.S.C. § 2254(e)(2). A habeas claimant has "failed to develop" the basis of his claim in state court only when he is deemed "at fault" for that failure. *Williams v. Taylor*, 529 U.S. 420, 433 (2000).

The questions presented are:

1. Does 28 U.S.C. § 2254(e)(2) restrict factual development of a claim in federal court once a claimant has established cause and prejudice to excuse the failure to properly raise that claim in state court, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012)?

2. Does § 2254(e)(2)'s limitation on a federal court's ability to "hold an evidentiary hearing on the claim" restrict a federal habeas court's power to consider evidence already properly admitted and considered by the federal court during the hearing to determine whether cause and prejudice exist to excuse the default of the claim?

3. Should this Court consider the State's arguments as to Respondent David Ramirez, where the State waived those arguments by failing to timely assert them in the court of appeals?

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## INTRODUCTION

As Arizona notes at the outset: "The role of a federal habeas court is to guard against extreme malfunctions in the state criminal justice systems." Pet. Br. 3 (quoting *Davis v. Ayala*, 576 U.S. 257, 276 (2015)). That is why AEDPA provides that state courts generally should have the first opportunity to address a prisoner's claims, 28 U.S.C. § 2254(b), and that state-court decisions on the merits must be upheld unless they violate clearly established federal law or are based on an unreasonable determination of the facts, 28 U.S.C. § 2254(d). And that is why a procedural default—a state-court denial of a claim on state procedural grounds—is generally considered an adequate and independent ground barring federal relief.

That principle also underlies the statutory provision at issue here, 28 U.S.C. § 2254(e)(2): If a habeas claimant "failed to develop the factual basis of a claim in State court proceedings," he generally may not obtain a federal evidentiary hearing on the merits of that claim. "Failed to develop," this Court has held, means the claimant was at fault for that failure. By contrast, a claimant is not at fault if the failure to develop the factual basis of the claim is not fairly attributable to him.

This case concerns an example of where a failure to develop the facts supporting a claim is not fairly attributable to a claimant. Here, both Respondents received ineffective assistance of state-appointed trial counsel, in violation of their Sixth Amendment rights. Both also received ineffective assistance of state-

appointed postconviction counsel, who failed to properly raise and develop those Sixth Amendment claims at the first opportunity to do so in state court. In that context, there has been a systemic failure to protect "a defendant's trial rights," which are of "unique importance." *Davila v. Davis*, 137 S. Ct. 2058, 2066-67 (2017). The right to effective assistance of trial counsel is "a bedrock principle in our justice system" and a claim of a violation of that right must "receive review by at least one state or federal court." *Id.* at 2067. On that basis, the courts below, applying *Martinez v. Ryan*, 566 U.S. 1 (2012), found Respondents *not* at fault for failing to properly raise those claims in state court, and held they could raise the claims in federal habeas review.

Arizona argues that even though a federal court has deemed Respondents not at fault for failing to raise their ineffective assistance of trial counsel claims in state court, they should still be considered at fault under § 2254(e)(2) for failing to factually develop those same claims. No court of appeals has adopted the State's interpretation. And not once, before or after AEDPA, has this Court suggested that a federal court may find cause permitting a habeas claimant to raise a claim not properly raised in state court, but then must bar the claimant from developing the needed factual support for that claim.

That is hardly surprising. If you are not at fault for failing to raise a claim, how can you be at fault for failing to develop that claim? Permitting evidentiary development in that circumstance does not "engraft" an "equitable exception" on the text of § 2254(e)(2). Pet. Br. 32. Rather, it is a straightforward application

of the statutory language, "failed to develop," to the circumstances here.

Arizona's contrary argument relies on the generic rule that attorneys act as the agents of their clients, such that habeas claimants ordinarily must bear the consequences of their attorneys' errors. But as *Martinez* held, that rule does not apply to the circumstance where postconviction counsel performs ineffectively in a state where, as here, the postconviction proceeding is a prisoner's first opportunity to present an ineffective assistance of trial counsel challenge to his conviction and sentence. This Court held that such an extreme malfunction in the state proceeding renders the claimant not at fault for failing to raise the claim in state court.

Neither the *Martinez* majority nor the dissent suggested that § 2254(e)(2) would bar evidentiary development of the claim that the Court held could proceed in federal habeas review, even though the claim at issue required such development. That is because both the majority and dissent understood that allowing a claimant to bring a defaulted ineffective assistance of trial counsel claim in federal court meant that he could factually develop that claim. And that is why the follow-on case, *Trevino v. Thaler*, 569 U.S. 413 (2013), likewise does not mention the statute, and why it expressly contemplated that the claims there would require evidentiary development.

Arizona thus misreads § 2254(e)(2)'s plain text, and misconstrues its context, in arguing that Respondents here should be deemed at fault for failing

to develop their ineffective assistance of trial counsel claims.

Arizona also misreads the statute in a second way. Where it applies, § 2254(e)(2) restricts only "an evidentiary *hearing on the claim*." That does not bar a court from consulting evidence already properly developed at a *Martinez* cause-and-prejudice hearing. Arizona's contrary argument would tell federal courts that although they can examine additional facts during the cause-and-prejudice determination that show that ineffective assistance of trial counsel produced a wrongful conviction or sentence, they must close their eyes to that evidence when adjudicating the merits of the underlying habeas claim. The statutory text does not support that nonsensical suggestion.

Finally, the wrongness and recklessness of Arizona's arguments come into sharp focus when considered in the cases at hand. Arizona seeks to put Mr. Jones to death, notwithstanding that he never received a fair trial to present evidence that he did not commit murder. On the basis of that evidence, a district judge has ordered Mr. Jones released or retried—a decision affirmed by a unanimous court of appeals panel. That evidence was not developed in state court because of ineffective trial and postconviction counsel. That is exactly the narrow circumstance that the Court intended *Martinez* to capture.

Trial counsel for David Ramirez, meanwhile, failed to investigate and raise powerful mitigating evidence demonstrating that Mr. Ramirez has suffered from intellectual disability since childhood, and experienced severe physical abuse and neglect. State

postconviction counsel then failed to raise an ineffective assistance of trial counsel claim on that basis. Like in Mr. Jones's case, Arizona's position would mean that no court would ever hear that evidence or meaningfully adjudicate his substantial constitutional claim challenging his death sentence.

This Court should reject Arizona's misreading of § 2254(e)(2) and affirm the unremarkable proposition that where a court finds that there is cause and prejudice to excuse the failure to properly raise a claim in state court under *Martinez*, a claimant is likewise not at fault for failing to develop that claim.

## STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28, which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2241 *et seq*., provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus [o]n behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

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

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

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

…

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts

in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

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

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

...

> (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

## STATEMENT OF THE CASE

### A. Barry Jones

Barry Jones's murder conviction and death sentence have been overturned. A federal district court (Judge Burgess) and unanimous Ninth Circuit panel (Judges Rawlinson, Clifton, and Watford) have determined that Mr. Jones is entitled to habeas relief and must be released from prison or retried. The district court concluded that Mr. Jones's state-appointed trial counsel conducted a "deficient investigation [that] pervaded the entire evidentiary picture presented at trial, resulting in a 'breakdown in the adversary process.'" JA264. The Ninth Circuit agreed, and also concurred with the district court that, had trial counsel performed competently, "there is a reasonable probability that the jury might have arrived at a different conclusion on the question of whether Jones" had committed the crime. JA322.

The following is a history of Mr. Jones's pretrial, trial, and postconviction proceedings, as described by the federal courts.

### 1. Mr. Jones's Arrest and Conviction

Arizona charged Mr. Jones with felony murder relating to the death of his live-in-girlfriend's four-year-old daughter (R.G.). JA323-25. The prosecution rested its case on the theory that the injury that caused R.G.'s death occurred when she was in Mr. Jones's care for a short time the previous day. JA171-72.

State-appointed trial counsel's pretrial investigation was defined by "inattention and neglect." JA255. As the federal district court later found, counsel failed to conduct a minimally adequate inquiry "into the medical timeline, blood evidence, and eyewitness testimony." JA194. Specifically, trial counsel failed to follow up on pretrial witness statements that contradicted the State's theory (JA195-216); made no attempt to locate key physical evidence (JA199-200); failed to uncover readily-available medical evidence showing that R.G.'s injuries did not match the State's timeline (JA222-26); and failed to uncover readily-available evidence that other individuals may have abused R.G. before her death (JA245-47). Despite "the critical importance of the timeline" to the State's case, trial counsel failed to investigate "the dating of [R.G.'s] injuries" and failed to "challenge any of the State's evidence that suggested that all of [R.G.]'s injuries were consistent with being inflicted … when [R.G.] was alone with [Mr. Jones]." JA244. In short, trial counsel "performed constitutionally deficiently when he failed to perform an adequate pretrial investigation." JA284.

Mr. Jones's trial was distorted by those deficiencies. As the district court later observed, "[h]ad

counsel conducted an adequate investigation …, he could have presented an extremely different evidentiary picture than that shown to the jury." JA259. Specifically, "[h]ad trial counsel provided evidence to evaluate the potential cause and timing of [R.G.'s] injuries to one or more medical experts at the time of [Mr. Jones]'s trial, such an expert would have been able to testify that her injuries were not consistent with having been inflicted on the afternoon [of the day before her death]—thus negating the very grounds on which the State relied to prove that [Mr. Jones] inflicted the fatal" injuries. JA263.

Without such evidence, and with the State's evidence largely unchallenged, a jury convicted Mr. Jones and the trial judge sentenced him to death. The Arizona Supreme Court affirmed. JA326-27.

### 2. State Postconviction Review

Arizona appointed state postconviction counsel who "lacked the experience to satisfy Arizona's requirements for the appointment of capital post-conviction counsel." JA276-77. Counsel moved to appoint an investigator under the wrong state provision, twice, and failed to properly support that motion both times. JA192-93, 281-82. "One of the purposes of [postconviction] proceedings in Arizona is to furnish an evidentiary forum for the establishment of facts underlying a claim for relief when such facts have not previously been established of record." JA279. Yet, counsel conducted almost no investigation of "any potential claim that relied on the establishment of facts outside the record." *Id.*

Counsel then failed to raise a claim that trial counsel was ineffective for failing to "adequately investigate[] and present[] medical and other expert testimony to rebut the State's theory." JA270. The claims postconviction counsel did raise were "almost completely devoid of any assertion of prejudice, and it is apparent … that counsel believed he was not obligated to prove prejudice." JA279.

The state postconviction court denied Mr. Jones's petition; the Arizona Supreme Court denied review. JA327-28.

### 3. Federal Habeas Review

Mr. Jones, represented by the Arizona Federal Public Defender, filed a federal habeas petition. Habeas counsel investigated and presented a claim that state trial counsel was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), "for failing to conduct sufficient trial investigation; adequately investigate the police work, medical evidence, and timeline of death versus injury; and conduct sufficient mitigation investigation for sentencing." JA328.

Because Mr. Jones had not properly raised this ineffective trial counsel claim in his state postconviction petition, it was procedurally defaulted. *Id.* A federal habeas court, however, can excuse such a default if the claimant can show cause (*i.e.*, that the default is not fairly attributed to the claimant) and prejudice. *Infra* 32-33. As cause, Mr. Jones cited his state postconviction counsel's ineffectiveness for failing to

present his ineffective assistance of trial counsel claim. JA328-29.

The district court held that postconviction counsel's ineffectiveness could not constitute cause. JA329. While Mr. Jones's appeal was pending, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), holding that postconviction counsel's ineffectiveness may excuse the procedural default of a substantial claim of ineffective assistance of trial counsel. *Id.* at 14. The Ninth Circuit remanded for the district court to apply *Martinez*. JA329-30.

The district court held a hearing to determine whether Mr. Jones's postconviction counsel performed ineffectively by failing to raise the ineffective assistance of trial counsel claim. JA165-66. That inquiry, the district court determined, necessarily involved whether trial counsel's performance was, in fact, constitutionally ineffective. JA168.

At the hearing, Mr. Jones presented evidence establishing that state postconviction counsel performed ineffectively by failing to raise trial counsel's ineffectiveness. JA194. The hearing revealed that effective trial counsel would have easily uncovered evidence severely undermining the State's case. For instance:

- An examination of the victim's tissue would have revealed that the fatal injury "could not possibly have been inflicted on the day prior to her death," as the State alleged. JA221-223, 227.

- An expert in pediatric forensic pathology explained the basis for the State's timeline was deeply flawed, and that a visual determination of the age of bruising used by investigators and relied upon by the prosecution was "scientifically unreliable." JA126, 129, 262. And the State's own forensic pathologist admitted that his earlier bruise dating was unreliable. JA262. As the district court observed, although at trial the prosecution's key bruise evidence "went unchallenged," it "turn[ed] out to be scientifically unsupportable and untrue." *Id.*

- The State's lead investigator admitted that she had not looked at other suspects because she had made assumptions about the timeline of the injuries and death without supporting medical evidence. E.R. at 1569, *Jones v. Shinn*, No. 18-99006, Doc.13-8. Had she known that the timeline was different, she would have changed and broadened the investigation. *Id.* at 1570-71; JA195.

- The State's investigation failed to follow elementary standards. Investigators did not search for the clothing worn by Mr. Jones and the victim during the time the State alleged the injury occurred, even though the lead investigator "could not remember any sexual assault case where there was not a documented effort to identify and locate the victim's clothing, and could not rule out the

> possibility that the clothing [R.G.] and [Mr. Jones] were wearing that day might have had exculpatory value." JA199-200.

Based on that and other evidence at the hearing, the district court concluded that cause existed to excuse the procedural default of the ineffective trial counsel claim.[1] JA275-84.

In considering the merits of that claim, the court consulted the same evidence developed at the *Martinez* hearing, and it granted relief. JA241-75, 285. The court concluded that Mr. Jones "demonstrated that trial counsel performed constitutionally deficiently when he failed to perform an adequate pretrial investigation, leading to his failure to uncover key medical evidence [regarding the timing of events], as well as his failure to impeach the [S]tate's other physical and eyewitness testimony with experts who could support the chosen defense." JA284. "[C]ounsel's deficient investigation," the court further concluded, "pervaded the entire evidentiary picture" and "render[ed] the result [of Mr. Jones's trial] unreliable." JA264. "Had [Mr. Jones's] counsel adequately investigated and presented medical and other expert testimony to rebut the State's theory … there is a reasonable

[1] The district court focused on the question of "cause" to excuse the default, because the Ninth Circuit found that prejudice had "been established." JA168.

probability that the jury would not have unanimously convicted [Mr. Jones] of any of the counts ...."[2] JA270.

The district court therefore ordered Mr. Jones released, unless Arizona promptly retries him. JA285-86.

### 4. Court of Appeals Review

On appeal, Arizona did not contest that the district court properly held an evidentiary hearing to determine whether Mr. Jones had established cause to excuse the default of the ineffective trial counsel claim. JA334. Instead, Arizona argued that § 2254(e)(2) barred consideration of that same evidence when considering the merits of that claim. JA332. Arizona further argued that even if that evidence was properly considered, it did not support habeas relief. *Id.*

The court of appeals unanimously affirmed. JA321-22. Writing for the court, Judge Clifton "conclude[d] that 28 U.S.C. § 2254(e)(2) does not prevent a district court from considering new evidence, developed to overcome a procedural default under *Martinez v. Ryan,* when adjudicating the underlying claim."

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[2] Arizona cites the district court's statement at an early stage of the habeas proceeding that Mr. Jones had "not seriously call[ed] into question the jury's verdict." Pet. Br. 12. However, the court made that statement before the evidence introduced at the *Martinez* stage that, as the district court recognized, "significantly discount[ed] a central premise the State relied on in arguing [Mr. Jones]'s guilt, and establish[ed] a reasonable probability of a different outcome during the guilt phase of [Mr. Jones]'s trial had this evidence been presented." JA129-30.

JA337. On the merits of the claim, the court agreed that trial counsel failed to conduct a minimally adequate investigation, and that had he performed at a constitutionally competent level, "there is a reasonable probability that the jury might have arrived at a different conclusion." JA322. The court therefore affirmed the district court's decision granting Mr. Jones habeas relief from his felony murder conviction, and from the underlying predicate felonies and other assault convictions. JA368.[3]

The Ninth Circuit denied rehearing, with eight judges dissenting. JA371.

### B. David Ramirez

A unanimous Ninth Circuit panel (Chief Judge Thomas and Judges Berzon and Clifton) held that David Ramirez's state-appointed postconviction counsel performed ineffectively by failing to raise a claim that trial counsel was constitutionally ineffective. In Mr. Ramirez's case, trial counsel's ineffectiveness occurred at sentencing. Trial counsel failed to investigate or present evidence of Mr. Ramirez's intellectual disability and history of severe neglect and abuse, JA511-13, even though such evidence "could have

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[3] Unlike the district court, the Ninth Circuit found that, although the new evidence undermined the State's claim that Mr. Jones caused the injury that caused R.G.'s death, it was reasonably probable that a jury still would have convicted him for failing to obtain timely medical care for R.G. The court of appeals ordered the State to resentence Mr. Jones using the lesser included version of the offense, based on reckless misconduct, or to retry him on the more serious version, based on intentional or knowing misconduct. JA356-57, 367-68.

made a difference in the outcome of Mr. Ramirez's [sentence]," JA511. The Ninth Circuit has therefore remanded the case for the district court to consider the merits of Mr. Ramirez's habeas claim.

### 1. State Trial Proceedings

Mr. Ramirez was charged with first-degree murder for killing his girlfriend and her daughter. JA455, 489. State-appointed counsel, who called only one witness at trial, JA492, "had no capital experience and had not even observed a capital trial or sentencing." JA511-12. "She admitted she was unprepared to represent 'someone as mentally disturbed as David Ramirez, especially in a capital case.'" JA512. A jury found Mr. Ramirez guilty on both counts.

At sentencing, the court appointed a psychologist to "evaluate the defendant's current mental health." JA492. Defense counsel, however, failed to provide the psychologist with critical information. For example, counsel did not provide "evidence demonstrating that Ramirez may have been intellectually disabled," such as information that he had IQ scores consistent with intellectual disability, "was three to four grades behind his peers, switched schools ten times before completing seventh grade, and never graduated from high school." JA511.

"Despite possessing these facts, trial counsel failed to investigate further or present a claim of mental impairment, and instead relied on [the psychologist's] conclusion that Ramirez was 'well within the average range of intelligence.'" JA512. Trial counsel submitted a sentencing memorandum articulating

that conclusion. JA494. The sentencing memorandum downplayed the abuse that Mr. Ramirez suffered. JA517. "Overall, the picture of mitigation presented at sentencing [was] relatively innocuous compared to the details that later emerged about Ramirez's life." *Id.*

With critical mitigation evidence absent, the trial court sentenced Mr. Ramirez to death. The Arizona Supreme Court affirmed. JA497.

### 2. State Postconviction Review

State-appointed postconviction counsel raised no ineffective assistance of trial counsel claim based on trial counsel's failure to pursue or present mitigation evidence, even though "[p]ost-conviction counsel possessed evidence that indicated that Ramirez could have an intellectual disability, and knew that trial counsel failed to present or pursue evidence of an intellectual disability." JA520. Postconviction counsel also failed to undertake any "reasonable investigation into Ramirez's upbringing," even after "'red flags' raised at the penalty phase hearing." *Id.*

The state postconviction court denied Mr. Ramirez's petition. Thereafter, the Arizona Supreme Court denied review. JA497.

### 3. Federal Habeas Review

Mr. Ramirez filed a federal habeas petition. JA498. The district court appointed the Federal Public Defender to represent him "due to concerns regarding the quality of representation" he previously

received. *Id.* The Federal Public Defender raised the ineffective assistance of trial counsel claim. *Id.*

The district court found that claim procedurally defaulted because Mr. Ramirez did not properly raise it during state postconviction review, and thus dismissed the habeas petition. *Id.* While Mr. Ramirez's appeal of that ruling was pending, this Court decided *Martinez*. The court of appeals remanded for reconsideration in light of *Martinez*. JA452-53, 498-99.

On remand, Mr. Ramirez submitted declarations from family members—whom trial counsel had never contacted—"reveal[ing] the extent of abuse, poverty, and neglect that Ramirez suffered as a child." JA499. Those declarations disclosed that Mr. Ramirez's mother severely physically abused him; that Mr. Ramirez would often steal food after not eating for days due to his mother's neglect; that his mother was an alcoholic (who drank during her pregnancy) and drug user; and that he was continuously exposed to pesticides in the fields where his family worked. JA500-01. The evidence also showed that Mr. Ramirez exhibited significant developmental delays as a child: "delayed walking, potty training, and speech; not being able to read; and 'slow' or odd behavior," including eating with his hands because he could not use utensils and "poor hygiene" due to an inability to care for himself "at a basic level." JA501.

The psychologist who had been appointed for Mr. Ramirez's state postconviction proceedings submitted a new declaration stating that his professional opinion would have been significantly different had he received more information about Mr. Ramirez's abilities

and background. JA502. The psychologist would have administered a "comprehensive IQ test," which Mr. Ramirez had not received, and "would have insisted on obtaining information about Mr. Ramirez's adaptive behavior," which is necessary for an intellectual disability diagnosis. *Id.* The psychologist concluded that this additional information "would have indicated … that Mr. Ramirez may be retarded and it would have greatly expanded the nature of the evaluation [he] … conduct[ed]." *Id.*

Mr. Ramirez's trial counsel also submitted a declaration stating that she had not been "prepared to handle a capital trial as sole counsel." JA473. She admitted she was particularly unprepared "to handle 'the representation of someone as mentally disturbed as David Ramirez,'" and that "she 'did not fully understand his limitations.'" JA502. She explained that, had she obtained all of the information about Mr. Ramirez's childhood, she "would have changed the way [she] handled both David's guilt phase and his sentencing phase." *Id.*

In considering the ineffective trial counsel claim, the district court skipped over whether Mr. Ramirez had established "cause and prejudice" to excuse the default of that claim. JA484. At the State's urging, JA461, the court instead jumped to the merits and concluded that trial counsel's "performance at sentencing was neither deficient nor prejudicial." JA484. In reaching that conclusion, the district court considered the new "evidence presented by Ramirez in his supplemental *Martinez* brief." JA483.

### 4. Court of Appeals Review

On appeal, Arizona argued that the court should affirm the denial of habeas relief while considering the enlarged record. *See* Answering Br. at 58, *Ramirez v. Ryan*, No. 10-99023 (9th Cir. Mar. 9, 2018), Doc.37. In its panel briefing and argument, Arizona never objected to the expanded record, and raised no argument that § 2254(e)(2) barred evidentiary development. Based on that record, Arizona conceded that postconviction counsel performed deficiently, but argued that trial counsel did not. JA518-19.

The court of appeals unanimously reversed and remanded in relevant part. JA521, 527-28. The court of appeals held that the district court erred in bypassing the threshold *Martinez* inquiry. JA507-08. The court explained that Mr. Ramirez was not required at the *Martinez* stage to provide evidence sufficient to win his habeas claim, but merely enough to excuse default. JA508. On that issue, the court held Mr. Ramirez had established cause based on postconviction counsel's ineffective performance, and prejudice based on the substantialness of the ineffective assistance of trial counsel claim. JA490, 507-21. The court remanded the case and instructed that Mr. Ramirez be "given the opportunity" for "evidentiary development" of his claim. JA521.

In its petition for rehearing en banc, Arizona for the first time on appeal contended that § 2254(e)(2) precluded such evidentiary development. *See* Pet. 7, *Ramirez*, No. 10-99023 (9th Cir. Oct. 17, 2019), Doc.79-1. The court of appeals denied the petition, with eight judges dissenting. JA537.

## SUMMARY OF THE ARGUMENT

**I.** Section 2254(e)(2) limits a habeas claimant's ability to obtain an evidentiary hearing in federal court, but only where he "has failed to develop the factual basis of a claim in State court proceedings." This Court has held that "failed to develop" requires a finding that the claimant was "at fault" for that failure. Here, Respondents were not at fault for failing to develop their ineffective assistance of trial counsel claims in state court. The court of appeals found that Respondents were not at fault for failing to properly raise those claims in the first place. That finding establishes that they were not at fault for failing to factually develop those same claims.

**A.** In *Williams v. Taylor*, this Court looked to dictionary definitions and the common understanding of the term "failed," and held that § 2254(e)(2) limits federal evidentiary hearings only where a habeas claimant is "at fault" for failing to develop the claim in state court. 529 U.S. 420, 432-33, 435 (2000). When a claimant is not deemed "at fault" for that failure—*i.e.*, when the failure is due to "the conduct of another or … happenstance," *id.* at 432—the claimant need not satisfy § 2254(e)(2)(A)-(B) to obtain a hearing.

**B.** A claimant cannot be deemed at fault for failing to factually develop a claim under § 2254(e)(2) when the same federal court finds that he was not at fault for failing to raise that claim in the first place. This Court has never suggested that where cause exists to excuse the failure to properly raise a claim, a claimant may not factually develop that claim. And for good reason. Where a court finds that a claimant

should not be deemed at fault for his attorney's failure to raise the claim, that finding equally applies to the fault inquiry required by § 2254(e)(2).

Ordinarily, a habeas claimant must bear the consequences of his attorney's failures. Consistent with that general rule, § 2254(e)(2)'s restrictions typically apply when "there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. But a habeas claimant is not forced to bear the consequences of his attorney's ineffectiveness where it constitutes an independent constitutional violation. *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991). For example, ineffective assistance of appellate counsel is a constitutional violation, and the ineffective performance of appellate counsel in failing to raise a claim would not be attributed to a claimant.

In *Coleman*, this Court left open whether the same rule should apply when, as here, a state requires that certain claims be brought for the first time during postconviction review, such that postconviction review of that claim is the functional equivalent of an appeal. *Id.* at 755. In *Martinez*, this Court addressed that open issue. The Court concluded that a habeas claimant should not be deemed at fault for the ineffective performance of state postconviction counsel who fails to raise a substantial ineffective assistance of trial counsel claim, where, under the state's rules, the claim could not be raised on direct appeal. This Court explained that, where the ineffective trial counsel issue cannot be raised on appeal, the postconviction proceeding "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-

assistance [of trial counsel] claim." 566 U.S. at 11. The Court found that given Arizona's deliberate choice not to allow the ineffective trial counsel claim to be raised on direct appeal, postconviction review serves as "a prisoner's 'one and only appeal' as to" that claim. *Id.* at 8. In that context, the Court held that the ineffective performance of postconviction counsel is considered to have "impeded or obstructed," *id.* at 13, the claimant from raising his claim, and counsel's failures are therefore not attributable to the claimant.

A court's finding, in the *Martinez* context, that a claimant is not to be deemed at fault for postconviction counsel's failure to properly raise an ineffective trial counsel claim in state court equally applies to the § 2254(e)(2) fault inquiry. The conclusion that the habeas claimant in that situation is not at fault for failing to raise the ineffective trial counsel claim also means the claimant is not at fault, under § 2254(e)(2), for failing to develop the factual basis of that same claim.

Consistent with the natural congruence between a court's finding of no fault in failing to properly raise a claim and a finding of no fault in failing to develop that same claim, this Court in *Martinez* and the follow-on case of *Trevino* clearly understood that evidentiary development of the claims at issue would occur when the claims' procedural default was excused. And every court of appeals to consider the question has agreed that where a claimant is not at fault for failing to properly raise a claim in state court, he is not at fault for failing to develop that claim.

That does not "engraft an equitable exception" on the text of (e)(2). Pet. Br. 32. It is instead a straightforward application of the meaning of "failed to develop" to the circumstances here.

**C.** Arizona's contrary position would upend AEDPA's design and significantly damage the Sixth Amendment right to effective trial counsel. AEDPA places primary responsibility for adjudicating prisoners' claims on state courts. But it preserves the federal courts' role as a backstop to protect federal rights when there is extreme malfunction in the state proceedings. When an individual receives ineffective assistance of trial counsel, and then ineffective assistance of counsel in the first proceeding where he is allowed to raise that ineffective trial counsel claim, there has been an extreme malfunction. Under Arizona's misreading of the statute, however, a habeas claimant would still be restricted from developing that claim in federal court.

If prisoners who received ineffective assistance in state postconviction proceedings are precluded from ever developing their ineffective assistance of trial counsel claims, those Sixth Amendment claims—no matter how substantial—would never be meaningfully adjudicated. Arizona's position would, thus, undermine the "bedrock" Sixth Amendment right to effective trial counsel, thereby reviving the constitutional concerns that *Martinez* was carefully reasoned to avoid.

**D.** Nor is there any merit to Arizona's policy arguments. Permitting evidentiary hearings in these circumstances—where the State has provided a

prisoner with two rounds of ineffective counsel—would not undermine federalism interests or "flood the federal courts" with hearings. Pet. Br. 38. States may design procedures to obviate the need for federal *Martinez* proceedings altogether by channeling such claims to state court. And Arizona cites no empirical analysis whatsoever to support its assertion of a "flood" of hearings in federal court. After all, such hearings are only available in the highly limited circumstance when procedural default has been excused because a claimant has established both ineffectiveness of postconviction counsel and a substantial ineffective trial counsel claim.

Even less credible is Arizona's assertion that allowing evidentiary development in federal court will incentivize claimants to withhold claims in state court. Pet. Br. 37. Such conduct would violate a host of professional and ethical standards, and Arizona presents not one example of a lawyer deliberately declining to factually develop a claim in state court in hopes that the factual development of the claim will be permitted in federal court.

**E.** Finally, the individual cases here highlight the imprudence of Arizona's position, and confirm that *Martinez* is working in the narrow and targeted way this Court envisioned. Were it not for *Martinez* and the federal review it permits, Mr. Jones would be at risk of execution even though ineffective counsel failed to investigate the State's case against him and present readily-available evidence undermining that case. And Mr. Ramirez would be put to death notwithstanding that compelling mitigation evidence

regarding his intellectual disability and history of neglect and abuse was never presented.

**II.** Arizona's position reflects a second basic misreading of § 2254(e)(2). Where they apply, (e)(2)'s restrictions limit only "an evidentiary *hearing on the claim*." That language does not restrict the court, when considering the merits of the habeas claim, from considering evidence already properly introduced at a *Martinez* hearing to show cause and prejudice. Here, the district court in *Jones* did just that. It only considered evidence already properly introduced during the *Martinez* hearing. When a district court considers evidence admitted in a prior, properly held proceeding, it is not holding "an evidentiary hearing on the claim." The court is not taking new evidence, considering its admissibility, or hearing from witnesses.

Arizona's atextual reading of § 2254(e)(2) would undermine the integrity and dignity of the federal courts by forcing district courts to willfully blind themselves to compelling evidence of wrongful convictions and unconstitutional sentencing that was properly introduced and considered at an earlier stage. Requiring a federal court to ignore such evidence and affirm the conviction and death sentence of someone who did not receive the representation that the Constitution requires is not supported by the statute and would undermine our criminal justice system.

**III.** In Mr. Ramirez's case, Arizona waived any objection to an evidentiary hearing on the merits of his habeas claim. In district court, Mr. Ramirez introduced new evidence at the *Martinez* stage. Arizona urged the district court to reject Mr. Ramirez's

underlying trial counsel claim based on that enlarged record. Then before the panel on appeal, Arizona did not argue that § 2254(e)(2) precluded further evidentiary development, even when Mr. Ramirez specifically requested such development to prove the merits of his claim. Because Arizona made a strategic decision not to invoke § 2254(e)(2), Arizona waived its application to Mr. Ramirez's case.

## ARGUMENT

### I. Where A Federal Court Finds Cause To Excuse The Procedural Default Of A Claim Pursuant To *Martinez,* § 2254(e)(2) Does Not Restrict Development Of That Claim.

28 U.S.C. § 2254(e)(2) restricts federal evidentiary hearings on habeas claims where the habeas claimant "failed to develop the factual basis" of the claim in state court. As this Court has held, a claimant has "failed to develop" the basis of the claim under the statute only where he is deemed at fault for that failure. Respondents here cannot be deemed at fault for their failure to develop the basis of their claims in state court where a federal court has deemed them not at fault for failing to raise those claims in state court in the first place. The same rationale that supports finding Respondents not at fault for their counsels' failure to raise the claims equally mandates a finding, under § 2254(e)(2), that they were not at fault for failing to develop those very same claims in state court.

### A. Section 2254(e)(2) restricts federal evidentiary hearings only for claimants who are at fault for failing to develop evidence in state court.

Section 2254(e)(2) provides that if a habeas claimant "has failed to develop the factual basis of a claim in State court proceedings, the [federal] court shall not hold an evidentiary hearing" on the claim unless the claimant can satisfy the strict requirements in § 2254(e)(2)(A)-(B). The statute does not define what "failed to develop" means. In *Williams*, this Court addressed the meaning of that phrase and held that it requires that the habeas claimant be deemed "at fault" for failing to develop that evidence. 529 U.S. at 435-37. The Court explained that, according to the "customary and preferred" definition, "'fail' connotes some omission, fault or negligence on the part of the person who has failed to do something." *Id.* at 431 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 910 (2d ed. 1939); WEBSTER'S NEW INTERNATIONAL DICTIONARY 814 (3d ed. 1993); BLACK'S LAW DICTIONARY 594 (6th ed. 1990)). The Court concluded that "Congress used the word 'failed'" in that customary manner in § 2254(e)(2), *id.* at 432, thereby distinguishing "between a prisoner who is at fault [for failing to develop evidence in state court] and one who is not," *id.* at 435.

In so holding, this Court examined the standard for obtaining an evidentiary hearing prior to AEDPA. That standard, established in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 3-4 (1992), applied where a claimant properly raised a claim in state court but sought additional evidentiary development of it in federal

court. *Keeney* held that the fault-based rule of cause and prejudice—rather than another, lower standard—should apply to a claimant seeking a hearing in that circumstance. *Id.* at 8. *Keeney* emphasized that "little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court" and a different "standard for failing to develop the factual basis of that claim." *Id.* at 10. The Court did not suggest in *Keeney*—or in any pre-*Keeney* case applying the lower standard—that restrictions on federal evidentiary hearings apply when a court excuses the default of a claim not properly raised in state court.

*Williams* explained that the phrase "failed to develop" in § 2254(e)(2)'s opening clause "echoes *Keeney's* language regarding 'the state prisoner's failure to develop material facts in state court.'" 529 U.S. at 433 (quoting *Keeney*, 504 U.S. at 8). That language refers to a situation where the prisoner "contribut[ed] to the absence of a full and fair adjudication in state court." *Id.* at 437. *Williams* held that "Congress intended to preserve at least one aspect of *Keeney*'s holding: prisoners who are *at fault* for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Id.* at 433 (emphasis added); *see also id.* at 434 ("[T]he opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence."). Accordingly, only when a claimant is deemed at fault for the failure to develop the evidentiary basis of a claim in state court does § 2254(e)(2) "raise[] the bar" by "requiring [the petitioner to] satisfy § 2254(e)(2)'s provisions rather than show cause and prejudice." *Id.* at 433.

A claimant is not deemed at fault "when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. Fault lies, in those circumstances, either with the person who interfered with the accomplishment of the act or with no one at all." *Id.* at 432. For instance, a claimant is not deemed at fault where he raised a claim in state court and timely requested an evidentiary hearing, but the request was denied. *Id.* at 437. Or, as discussed below, a claimant cannot be deemed at fault for a failure to develop a claim where he has demonstrated cause to excuse the failure to present the claim in the first instance.

### B. A finding that a claimant was not at fault under *Martinez* for his counsel's failure to raise a claim also means the claimant is not at fault under § 2254(e)(2).

The application of § 2254(e)(2) therefore turns on whether the claimant was at fault for failing to develop the facts supporting the merits of his claim. A claimant may not be deemed at fault for his ineffective postconviction attorney's failure to factually develop a claim where he is not at fault under *Martinez* for the attorney's failure to properly raise the underlying claim in state court in the first place. When the court finds that cause exists to excuse the failure to raise the claim, that means the failure is not properly attributed to the claimant. Such a finding will also mean that the claimant is not at fault for counsel's failure to develop the claim's factual basis. That does not "engraft an equitable exception onto a statute." Pet. Br. 32. It is a straightforward application of the statute's requirement of fault in a circumstance

where a habeas claimant has been found not at fault for failing to raise the underlying claim.

### 1. A finding of cause under *Martinez* means the claimant was not at fault for his counsel's failure to raise an ineffective assistance of trial counsel claim.

A federal habeas claim generally cannot proceed if the claimant has procedurally defaulted the claim in state court, by, for example, failing to timely raise it. Such a failure typically constitutes "an independent and adequate state ground" barring federal review of the claim. *Coleman*, 501 U.S. at 731-32. That doctrine is grounded in "concerns of comity and federalism." *Id*. at 730.

Once procedural default is raised as a barrier to review, the federal court examines whether the habeas claimant has any basis to excuse that default. This Court has long recognized that when there exist "cause for the noncompliance" with the state procedural rule and "actual prejudice resulting from" the asserted constitutional violation, the procedural default will not bar the claim from being adjudicated on the merits in federal court. *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977).

"Cause" to excuse a procedural default is limited to "something that cannot fairly be attributed to" the claimant. *Coleman*, 501 U.S. at 753; *see McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991); *see also Maples v. Thomas*, 565 U.S. 266, 289 (2012) (finding cause where counsel abandoned his client). When the

failure to properly raise a claim in state court "cannot fairly be attributed to" the claimant, then the federal habeas court does not hold the claimant at fault for that failure. But when the failure is attributed to the claimant such that he is deemed at fault for the failure, the claim generally will not proceed in federal court. In that way, "[t]he cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (quoting *Strickland*, 466 U.S. at 697).

An attorney's errors do not ordinarily constitute cause to excuse a procedural default. *Coleman*, 501 U.S. at 752-54. That is because attorneys act as agents of their clients. That rule, described in *Coleman* and repeated in *Williams*, 529 U.S. at 432, establishes that a habeas claimant typically bears the consequences of his lawyer's conduct. This Court has, however, held that the failures of counsel will not be attributed to the claimant where those failures amount to a constitutional violation. *Coleman*, 501 U.S. at 753. And *Coleman* reserved judgment about whether deficient state postconviction lawyering would excuse the default of a Sixth Amendment claim where the collateral proceeding was the first opportunity to litigate it. *Id.* at 755.

*Martinez* then addressed the question that *Coleman* had left open. *Martinez*, 566 U.S. at 8-9.[4] This

[4] *Amici curiae* Jonathan Mitchell and Adam Mortara urge the Court to overrule *Martinez*. Because Arizona does not make

Court considered whether a habeas claimant should be held at fault for his state postconviction attorney's failure to raise an ineffective assistance of trial counsel claim, where: (1) the postconviction attorney's performance was itself ineffective under *Strickland* and (2) the state rules did not allow that claim to be raised on appeal, requiring instead that it be raised for the first time during postconviction review. The Court held that, in that context, the claimant is not properly considered at fault for his counsel's failures. *Martinez*, 566 U.S. at 13-14; *see also Trevino*, 569 U.S. at 423 (*Coleman* "contain[ed] an exception, allowing a federal habeas court to find 'cause,' thereby excusing a defendant's procedural default" in the *Martinez* context.); *Holland v. Florida*, 560 U.S. 631, 650–51 (2010) (*Coleman* does not "require[] a *per se* approach.").

This Court explained that the postconviction proceeding in those circumstances "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance [of trial counsel] claim." 566 U.S. at 11. In a state that permits that claim to be raised on direct appeal, the ineffective assistance of appellate counsel in failing to raise the claim indisputably constitutes cause to excuse that failure. *See id*. at 11-12. That is because there is a recognized constitutional right to counsel for the direct appeal. *Id.* at 13. The Court found that the same rule should apply in states, like Arizona, that have deliberately chosen to not allow the ineffective trial counsel claim on direct appeal, *id*., and where postconviction review serves as

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that argument, it is not properly before the Court. *See* S. Ct. Rule 14.1(a); *Turner v. Rogers*, 564 U.S. 431, 455 (2011) (Thomas, J., dissenting).

"a prisoner's 'one and only appeal' as to" that claim, *id.* at 8 (quoting *Coleman*, 501 U.S. at 756).

This Court's ruling in *Martinez* was specific to ineffective assistance of trial counsel claims. Such claims implicate "a bedrock principle in our justice system," because the right to effective trial counsel is "the foundation for our adversary system." *Id.* at 12. The Court held that, when a state "deliberately choos[es] to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, … counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." *Id.* at 13.

In that limited context, the failures of postconviction counsel are properly considered a force external to the claimant, something that "impeded or obstructed" the claimant's ability to "comply[] with the State's established procedures" for raising the claim. *Id.* Accordingly, counsel's ineffective performance cannot fairly be attributed to the claimant, and cause exists to excuse the procedural default. *Id.*; *see Davila*, 137 S. Ct. at 2065.

**2. A finding that a claimant is not at fault under *Martinez* for his counsel's failure to raise a claim means the claimant is not at fault under § 2254(e)(2) for his counsel's failure to develop that same claim.**

Arizona cannot dispute that when cause exists to excuse procedural default, the failure to raise a claim in state court is not fairly attributed to the habeas

claimant. But Arizona nonetheless argues that Respondents here should be deemed at fault for failing to develop their claims in state court because that failure was the product of the ineffectiveness of their state-appointed postconviction counsel. Arizona argues that the attribution rule stated in *Coleman*, repeated in *Williams*, resolves this issue.

But, as detailed above, *Coleman* left open whether a habeas claimant should be deemed at fault for his postconviction counsel's ineffectiveness that caused the default of an ineffective assistance of trial counsel claim in an initial-review postconviction proceeding. 501 U.S. at 755. And when this Court did address the issue in *Martinez*, it held that a habeas claimant is *not* at fault in that limited context. 566 U.S. at 13.

That same understanding of fault applies to the § 2254(e)(2) inquiry. Because § 2254(e)(2)'s restrictions apply only where the claimant is deemed at fault for failing to factually develop a claim in state court, *Williams*, 529 U.S. at 435-37, a determination that the claimant was not at fault for failing to raise the claim in the first place will likewise speak to the § 2254(e)(2) inquiry. Put simply, the same rationale supporting the lack-of-fault finding at the cause stage will require finding the claimant not at fault under § 2254(e)(2) for "failing to develop" that very same claim. This Court recognized that congruence in *Williams*; it stated that the absence of fault for failing to develop the factual basis of a claim in state court "should suffice to establish cause for any procedural

default petitioner may have committed."[5] 529 U.S. at 444; *see also Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) ("The Supreme Court in *Williams* also linked the 'failure to develop' inquiry with the cause inquiry for procedural default."). That is equally true when the inquiry runs the other way: The absence of fault for failing to properly raise a claim in state court is sufficient to establish the claimant was not at fault for any failure to factually develop that claim.

That conclusion is consistent with this Court's pre- and post-AEDPA decisions alike. When Congress enacted § 2254(e)(2), the doctrine of procedural default—including the cause-and-prejudice standard to excuse default—was well-established. In AEDPA, Congress chose not to displace that doctrine. *See, e.g.*, *Maples*, 565 U.S. 266 (applying cause and prejudice after AEDPA). And, tellingly, at the time Congress passed § 2254(e)(2), not once had this Court so much as suggested that evidentiary development of a claim in federal court might be restricted after the failure to raise that claim in state court was excused. To the contrary, it was understood that when cause exists to excuse the procedural default of a claim, the habeas claimant can factually develop that claim in federal

[5] Because of how the litigation unfolded in *Williams*, the court of appeals analyzed whether § 2254(e)(2) permitted an evidentiary hearing in federal court without first deciding whether the procedural default of the claims should be excused. *See* 529 U.S. at 428. Accordingly, this Court's decision focused on the proper interpretation of § 2254(e)(2). *Id.* at 429. But this Court made clear that the § 2254(e)(2) determination regarding "fault" for the lack of evidentiary development would also control as to whether a lack of fault existed to excuse the procedural defaults of the claims. *Id.* at 444.

court. *See generally Amadeo v. Zant*, 486 U.S. 214, 221-29 (1988) (finding cause to excuse procedural default where claim depended on further evidence outside the state-court record); *cf. Schlup v. Delo*, 513 U.S. 298, 314 (1995) (finding procedural default may be excused under miscarriage of justice exception where claims depended on further evidentiary development in federal court). Congress legislated against that background understanding in crafting § 2254(e)(2).

Moreover, in none of its post-AEDPA decisions has this Court ever restricted federal evidentiary hearings on claims where a federal court finds cause to excuse the procedural default of those claims. To the contrary, the Court has recognized that such development will occur.[6] In fact, *Martinez* itself plainly

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[6] That understanding is evident in *Cullen v. Pinholster*. Although the Court stated that § 2254(e)(2) has force where claims are not adjudicated on the merits in state court—*i.e.*, where they are procedurally defaulted—the Court never asserted that § 2254(e)(2) bars an evidentiary hearing on a claim where the default was excused. *See* 563 U.S. 170, 185-86 (2011); *cf.* 563 U.S. at 203 (Alito J., concurring in part and concurring in the judgment) (2254(e)(2) should not be interpreted to "distort[] … the law on 'cause and prejudice'"). To the contrary, Justice Sotomayor's dissent expressed concern that, under the Court's ruling, claimants with cause and prejudice to excuse a procedurally defaulted claim can obtain federal habeas relief "based on newly obtained evidence," while claimants "with newly obtained evidence supporting a claim adjudicated on the merits in state court" can obtain relief only if they "satisfy § 2254(d)(1) without the new evidence." 563 U.S. at 215 (Sotomayor, J., dissenting). The majority responded not by stating that § 2254(e)(2) bars federal habeas claimants with cause and prejudice to excuse a procedural default from relying on newly obtained evidence, as

contemplated factual development in federal court on the claimant's ineffective assistance of trial counsel claim once the default of that claim was excused. This Court understood that persons deprived of effective counsel would not have been able "to develop the evidentiary basis for a claim of ineffective assistance [of trial counsel], which often turns on evidence outside the trial record" and "often require[s] investigative work." 566 U.S. at 11-12. And the *Martinez* claimant himself needed to put forth new evidence in the federal proceeding because proving his underlying claim required him to show what the testimony of an expert would have been. *Id.* at 7. Neither the *Martinez* dissent nor Arizona suggested that evidentiary development in federal court was impermissible.

That was also true in *Trevino*, where this Court held that *Martinez* applies when a state does not explicitly require that an ineffective assistance of trial counsel claim be brought in postconviction review, but where a state's procedural framework "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise" the claim on direct appeal. 569 U.S. at 429. Again, the Court understood in that case that there would be further factual development of the claim if the default were excused. The claim at issue involved trial counsel's failure to "investigate and present mitigating" evidence. *Id.* at 419. The Court highlighted that bringing

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Arizona now argues. Instead, the Court suggested that there may be more situations where a claim would be considered not adjudicated on the merits—and thus where a claimant could obtain habeas relief based on new evidence without satisfying § 2254(d)(1)—than the dissent assumed. 563 U.S. at 186 n.10.

such a claim requires "investigat[ing] [the claimant's] background, determin[ing] whether trial counsel had adequately done so, and then develop[ing] evidence about additional mitigating background circumstances." *Id.* at 425; *see also Ayestas v. Davis*, 138 S. Ct. 1080, 1093-94 (2018) (recognizing the need for "investigation" in federal court to overcome procedural default under *Trevino* in a case that required further factual development on the merits). The Court went on to list evidence relevant to the claim—evidence not in the state court record—that would be considered if the claim's default were excused. *Trevino*, 569 U.S. at 419. Again, neither the *Trevino* dissent nor the state suggested that § 2254(e)(2) posed any bar to the federal court's consideration of that evidence. For good reason: By its plain terms, § 2254(e)(2) does not pose such a bar. *See also, e.g.*, *House v. Bell*, 547 U.S. 518, 539 (2006) (Section 2254(e)(2) does not apply in a first federal habeas petition "seeking consideration of defaulted claims" based on a showing of miscarriage of justice); *McQuiggin v. Perkins*, 569 U.S. 383, 402-04 (2013) (Scalia, J., dissenting) (recognizing that *House* did not "circumvent" a statutory bar).

Those cases understood the straightforward proposition that where a claimant is not at fault for failing to raise a claim, he cannot be at fault, under § 2254(e)(2), for failing to develop that same claim. Attributing fault and barring factual development in that circumstance would be nonsensical. Unsurprisingly, every court of appeals to have considered the question has agreed, and has rejected Arizona's position. Those courts have reached the same conclusion: If a claimant "establishes cause for overcoming his

procedural default, he has certainly shown that he did not 'fail to develop' the record under § 2254(e)(2)," because the "undeveloped record is [not] a result of his own decision or omission." *Barrientes*, 221 F.3d at 771; *see also Sasser v. Hobbs*, 735 F.3d 833, 853 (8th Cir. 2013) (If "postconviction counsel's alleged ineffectiveness" establishes "cause for any procedural default," then "the district court is authorized under 28 U.S.C. § 2254(e)(2) … to 'hold an evidentiary hearing on the claims.'"); *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 279 (6th Cir. 2019) (Where a claimant overcomes a default under *Martinez,* § 2254(e)(2) does not bar development of the "factual record in support of his ineffective-assistance claim."). Arizona cites no contrary holding.[7]

### C. Arizona's position is inconsistent with AEDPA's design and undermines the Sixth Amendment.

Arizona's position is even less sound when viewed through a broader statutory and constitutional lens. That position would put habeas claimants and courts in a bizarre Catch-22, the result of which is that there would be no forum—state or federal—in which such a

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[7] In many cases, states do not even suggest that (e)(2) restricts evidentiary development once a procedural default has been excused under *Martinez*, and those courts have allowed such development without controversy. *See, e.g.*, *Stokes v. Stirling*, No. 18-6, 2021 WL 3669570, at *10-14 (4th Cir. Aug. 19, 2021) (ordering habeas relief after excusing procedural default pursuant to *Martinez*); *Sigmon v. Stirling*, 956 F.3d 183, 198 (4th Cir. 2020); *Brown v. Brown*, 847 F.3d 502, 513-14, 517 (7th Cir. 2017). That includes cases in Arizona. *See Gallegos v. Shinn*, No. CV-01-01909, 2020 WL 7230698, at *1 (D. Ariz. Dec. 8, 2020).

habeas claimant has a functional opportunity to present, develop, and obtain merits adjudication of an ineffective assistance of trial counsel claim. Arizona's proposed scheme would both ignore a central premise of AEDPA and resurrect the serious constitutional concerns that *Martinez* avoided.

**1. Arizona's position contravenes AEDPA's design.**

Founded on considerations of comity, federalism, and finality, AEDPA "channel[s] prisoners' claims first to the state courts," and generally envisions that state courts will have "primary responsibility" over them. *Pinholster*, 563 U.S. at 182. Consistent with those premises, AEDPA strictly limits federal review of claims that were raised, or reasonably could have been raised, in state court. *See Duncan v. Walker*, 533 U.S. 167, 178-79 (2001); *Williams*, 529 U.S. at 437; 28 U.S.C. § 2254(d) (limiting federal review of claims adjudicated on the merits in state court); 28 U.S.C. § 2254(e)(1) (state-court factual determinations are presumed correct).

In the narrow circumstance where an "extreme malfunction[]" occurs in state proceedings, *Ayala*, 576 U.S. at 276, Congress maintained the federal courts' role as a critical backstop. Such a "malfunction" occurs, as in the cases here, when a claimant with a substantial Sixth Amendment claim receives ineffective assistance from state-appointed counsel in the first available proceeding to raise that claim (here, post-conviction review), such that he is "impeded" from bringing that claim. If federal habeas review of that

claim were limited to the state-court record, such review would be an empty charade.

As this Court recognized in *Martinez*, 566 U.S. at 11, ineffective assistance of trial counsel claims almost always depend on evidence outside the trial court record—evidence that ineffective postconviction counsel will not have developed. Thus, arguing that the claimant must be restricted to the trial court record in that circumstance is to say there will be no meaningful review of that claim.

Citing *Williams*, Arizona suggests that its reading ensures that § 2254(e)(2) "raise[s] the bar" for habeas claimants. 529 U.S. at 433. *Williams*, however, was addressing raising the bar for claimants who are deemed at fault for the failure to develop the record. *Id*. ("Congress raised the bar *Keeney* imposed on prisoners who were not diligent…."). The statute, through its demanding (e)(2)(A) and (B) standards, undeniably raises the bar for any claimant who is deemed at fault for not developing the claim. In addition, before (e)(2), hearings were mandatory when the standard for obtaining one was satisfied. *See Keeney*, 504 U.S. at 11 (explaining when claimant is "entitled" to an evidentiary hearing). In contrast, under AEDPA, "[i]n cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court." *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007).

### 2. Arizona's position would undermine the Sixth Amendment right to effective trial counsel.

Arizona's position would result in no functioning enforcement mechanism for the Sixth Amendment trial counsel right in the category of cases at issue in *Martinez*. That would resurrect the very constitutional concerns that *Martinez* was carefully tailored to address and avoid.

For claimants like Mr. Jones and Mr. Ramirez, a federal habeas proceeding is the *only opportunity* to enforce the Sixth Amendment right to counsel. They received ineffective assistance of trial counsel and then received ineffective postconviction counsel who did not properly raise or develop that claim in postconviction review. If such claimants were precluded from developing their ineffective assistance of trial counsel claims in federal court, those claims would *never* be meaningfully adjudicated, no matter how substantial they were.

That would do serious harm to the Sixth Amendment right to the effective assistance of trial counsel. As this Court recently explained in *Davila*, at trial "the stakes for the defendant are highest," and a defendant's trial rights are therefore of "unique importance." 137 S. Ct. at 2066; *see also Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (Because "[t]he purpose of the trial stage … is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt," a fair trial "cannot be assured" unless the defendant receives effective counsel.); *Kimmelman v. Morrison*, 477 U.S. 365, 392–93

(1986) (Powell, J., concurring) ("Ineffective-assistance claims stand on a different footing," because they implicate "the defendant's right to a fundamentally fair trial."). When trial counsel is constitutionally ineffective, that failure undermines the reliability of the trial and can lead to grave injustice. In *Jones*, for example, ineffective counsel failed to perform the minimal investigation needed to challenge the prosecution's theory of the case and demonstrate Mr. Jones should not be convicted of murder. *Supra* 9-10, 12-14. Similarly, counsel for Mr. Ramirez failed to investigate and present critical mitigation evidence at sentencing. *Supra* 17-20. As a result, Mr. Jones and Mr. Ramirez face death sentences they almost certainly would not have faced had they received effective assistance of trial counsel.

In recognition of the unique importance of the Sixth Amendment right to counsel, this Court has sought to "ensure that meritorious claims of trial error receive review by at least one state or federal court." *Davila*, 137 S. Ct. at 2067. At the same time, the Court has been careful not to interfere with state court procedures. *Martinez* struck a careful balance between enforcing the Sixth Amendment's trial counsel right and respecting state interests in choosing how to design postconviction review procedures. It ensured that substantial claims of trial counsel ineffectiveness will be meaningfully adjudicated by one court, while also giving states significant leeway to structure their postconviction review systems. *Martinez*, 566 U.S. at 16.

A state may, for example, permit ineffective assistance of trial counsel claims to be raised on direct

appeal, or choose to defer those claims to postconviction review. Likewise, a state may permit a prisoner to raise an ineffective assistance of trial counsel claim in a subsequent collateral proceeding in state court, if the claim was defaulted as a result of ineffective counsel in the initial collateral proceeding. *See infra* 48 (listing examples). But, as this Court explained, these choices are "not without consequences for the State's ability to assert a procedural default in later proceedings." *Martinez*, 566 U.S. at 13. If a state chooses "to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims." *Id.* It therefore must accept, in this "procedural framework," that "counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default" to permit federal review of the claim. *Id*. *Martinez* thus respects a state's prerogative to design its own legal procedures consistent with the prisoner's one fair opportunity to raise a Sixth Amendment claim of ineffective assistance of trial counsel. This Court's holding respects both "the importance of the right to the effective assistance of trial counsel and Arizona's decision to bar defendants from raising ineffective-assistance claims on direct appeal." *Id.* at 16-17. Arizona's position here, if adopted, would upend this careful balance.

Moreover, Arizona's position would lead to nonsensical results by making a prisoner's ability to enforce the right to effective trial counsel turn on the fortuity of how a state structures its review process. It is indisputable that claimants in Respondents' circumstances *would* be able to develop evidence to

support their Sixth Amendment claims if they were prosecuted in a state that permitted ineffective assistance of trial counsel claims on direct appeal, where the Constitution guarantees effective counsel. But if those claimants are prosecuted in a state that requires the claims be raised in postconviction review, where there is no recognized constitutional right to counsel, they would not be able to develop evidence to support those claims. *Martinez* correctly recognized that the question of fault and the resulting right to raise Sixth Amendment claims cannot turn on the label the state gives its first opportunity to review those claims. 566 U.S. at 12-13.

### D. Arizona's policy arguments are unsupported and unavailing.

Arizona repeatedly falls back on generic policy expressions of "comity, finality, and federalism" to justify its atextual statutory reading. *E.g.*, Pet. Br. 5, 33, 37. But allowing an evidentiary hearing on a claim where cause exists to excuse its default is fully consistent with those important principles. As this Court has explained, the "cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke*, 541 U.S. at 393 (*quoting Strickland*, 466 U.S. at 697). "It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case." Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 456 (1963). Where a state fails in that

responsibility, it cannot assert interests of "comity" and "federalism" to argue against meaningful federal habeas review. Cause to excuse a default under *Martinez* exists only where the state has failed to assure the provision of minimally competent counsel for a claimant's trial and postconviction review. Put otherwise, cause exists only where there has been a fundamental "malfunction[] in the state criminal justice system[]" such that no fair hearing could be had. *Ayala*, 576 U.S. at 276.

Further, if a state wishes to obviate the need for federal *Martinez* hearings altogether, it may do so by permitting a prisoner to raise an ineffective assistance of trial counsel claim in a subsequent collateral proceeding in state court, if the claim is defaulted due to ineffective counsel in the initial collateral proceeding. Indeed, many states have chosen to do just that. *See*, *e.g.*, *Allison v. State*, 914 N.W.2d 866, 891 (Iowa 2018); *State v. Quixal*, 70 A.3d 749, 752 (N.J. Super. 2013).

That states may structure their systems to have the first say on these issues and to avoid federal review also dispels Arizona's argument that its reading of § 2254(e)(2) is necessary to avoid "'flood[ing] the federal courts' with requests for evidentiary development." Pet. Br. 38. Further, Arizona cites nothing—no judicial or administrative finding, no academic study, no empirical analysis—to support its assertion. That is unsurprising. Under the proper reading of § 2254(e)(2), evidentiary hearings are available in limited circumstances when procedural default has been excused because a claimant has established both the ineffectiveness of postconviction counsel and the

substantiality of the ineffective assistance of trial counsel claim.

Similarly unfounded is Arizona's assertion that if its reading of § 2254(e)(2) is rejected, defense counsel will be "encouraged to withhold [ineffective trial counsel] claims until they reach federal court." Pet. Br. 21. As an initial matter, Arizona does not contend that the state-appointed counsel here failed to investigate or present claims as part of some scheme to get into federal court. The record shows that did not happen. More broadly, Arizona presents not one example of a lawyer deliberately abrogating ethical and professional responsibilities by strategically failing to raise potentially meritorious claims or evidence in state court. Such conduct would be unethical, violating Arizona Rule of Criminal Procedure 32.6, which requires appointed counsel to "investigate the defendant's case for any colorable claims," and other ethical rules (including the "duty not to abuse legal procedure," Ariz. Sup. Ct. R. 42, Rules of Prof. Conduct, Rule 3.1 cmt). No rational lawyer would risk a client's liberty or life, and their own law license, by intentionally failing to investigate and present the client's case, as part of a gamble to allow the client to avoid an "adjudicat[ion] on the merits" in state court, and thus the requirements of § 2254(d). In short, Arizona's made-up concerns of widespread unethical conduct by state-appointed counsel provide no basis to read § 2254(e)(2) to bar an evidentiary hearing when a court finds the underlying claim may be raised.

Instead of counteracting an illusory incentive for appointed lawyers to act unethically and irrationally, adopting Arizona's position would only serve to deny

meaningful hearings to persons with substantial ineffective trial counsel claims. Doing so would undermine the federal courts' role as a backstop in enforcing the constitutional right to counsel and remove an important incentive for states to appoint competent trial and postconviction counsel.[8]

### E. These cases highlight the wrongness and recklessness of Arizona's position.

The individual cases here underscore the rashness of Arizona's misreading of § 2254(e)(2) and show that *Martinez* has been working in the narrow and targeted way that the Court envisioned nine years ago.

As to Mr. Jones, both the district court judge and unanimous court of appeals panel have determined that Arizona appointed trial counsel whose performance was constitutionally ineffective, and then appointed ineffective postconviction counsel who failed to raise an ineffective assistance of trial counsel claim. And those two federal courts have ordered Mr. Jones released or retried, after determining that trial "counsel's deficient investigation pervaded the entire evidentiary picture presented at trial, resulting in a 'breakdown in the adversary process.'" JA264.

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[8] The vital need for an effective federal check to protect the right to counsel is no abstract matter: Arizona's appointment system has been criticized for decades for failing to establish standards and mechanisms to assure the provision of competent trial and postconviction counsel. *See* Comments of the American Bar Association, https://tinyurl.com/3dtn27nc.

That is precisely the narrow circumstance that *Martinez* intended to address. *Supra* 34-35.

As to Mr. Ramirez, Arizona's position would impute fault to a person with intellectual disability and limited functioning, regarding the failures of ineffective counsel whom the State appointed to safeguard his rights. And it would do so even though his trial counsel "had no capital experience," "had not even observed a capital trial or sentencing," and "admitted she was unprepared to represent 'someone as mentally disturbed' as David Ramirez." JA511-12. Arizona's position means that no court will hear the mitigation evidence that reasonably may have led the sentencing court to conclude a death sentence was improper. That offends the most basic notions of decency and fairness in a criminal justice system, and is not what Congress intended.

## II. Section 2254(e)(2) Does Not Limit Consideration Of Evidence Previously Admitted To Establish Cause and Prejudice.

Arizona's position suffers from a second fundamental misreading of § 2254(e)(2). By its terms, § 2254(e)(2) limits only "an evidentiary hearing on the claim." That language does not restrict the habeas court, when considering the merits of the habeas claim, from considering evidence that was already properly introduced to show cause and prejudice to excuse procedural default. The text of § 2254(e)(2) does

not require a habeas court to turn a blind eye to evidence properly admitted in a *Martinez* hearing.[9]

### A. Section 2254(e)(2) does not bar consideration of evidence admitted at a cause-and-prejudice hearing.

Section 2254(e)(2) addresses whether a court can hold "an evidentiary hearing on the claim." It does not address, or bar a court from considering, materials submitted to demonstrate cause and prejudice to excuse the procedural default of a claim.

**1.** As it did below, JA334, Arizona appears to accept that a cause-and-prejudice hearing on the issue of procedural default is *not* an evidentiary hearing on a habeas claim. *See* Pet. Br. 31 (distinguishing between "merits review" and evidence introduced at "a *Martinez* cause-and-prejudice hearing"). Indeed, Arizona's statutory argument to this Court is based on the premise that the *Martinez* stage and merits review are two distinct, separate phases. *E.g.*, Pet. Br. 22.

Arizona is correct in recognizing that "an evidentiary hearing on the claim" does not encompass a proceeding to determine whether cause and prejudice exist to excuse a procedural default.[10] Black's Law

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[9] In lower court proceedings in *Ramirez*, Arizona agreed that the district court could consider evidence introduced to show cause and prejudice when determining the merits of Ramirez's claim. *Infra* 58-59.

[10] Unlike Arizona, *amicus curiae* Criminal Justice Legal Foundation (CJLF) contends that § 2254(e)(2) also restricts

Dictionary defines "claim" as a "cause of action," *i.e.*, the "[m]eans by or through which [the] claimant obtains possession or enjoyment of [some] privilege or thing." BLACK'S LAW DICTIONARY 247 (6th ed. 1990). In the habeas context, the claim is the means to obtain the privilege of a writ of habeas corpus, *i.e.*, a demonstration that the claimant's custody violates the Constitution or federal laws. 28 U.S.C. § 2254(a). Consistent with that ordinary understanding, AEDPA uses the word "claim" to refer to the substantive basis for habeas relief. For example, § 2254(d) speaks to when a federal habeas petition may be granted with respect to a "claim" when that "claim" was adjudicated on the merits in state court.

This Court has repeatedly recognized the distinction between a claim for habeas relief and an excuse for the claim's procedural default. *See*, *e.g.*, *Martinez*, 566 U.S. at 17 (distinguishing between "a ground for [habeas] relief," like a claim of ineffective assistance

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evidentiary hearings on whether to excuse procedural default. CJLF Br. 6-9. This contention is not properly before the Court. *See* S. Ct. Rule 14.1(a); *Turner*, 564 U.S. at 455 (Thomas, J., dissenting) (the Court should not "consider new issues raised for the first and only time in an *amicus* brief," especially when "the new issue may be outside the question presented"). And it is meritless. CJLF asserts "evidentiary hearing on the claim" means "evidentiary hearing on a procedural prerequisite to the claim." CJLF Br. 9. But those are not the words Congress used. CJLF cites *Slack v. McDaniel*, 529 U.S. 473 (2000), but that decision does not support CJLF's atextual reading. *Slack*'s acknowledgment that a denial of a constitutional right may occur in a case where the district court denies a habeas petition on procedural grounds, 529 U.S. at 483-85, does not suggest that the word "claim" in § 2254(e)(2) means anything other than a substantive claim on the merits.

of trial counsel, and "cause" for procedural default). The courts of appeals have recognized that distinction, too. *See*, *e.g.*, *Cristin v. Brennan*, 281 F.3d 404, 418 (3rd Cir. 2002) ("claim" under AEDPA means "the substantive argument entitling the petitioner to [freedom from incarceration]" and does not "encompass excuses to procedural default").[11]

**2.** Because an earlier cause-and-prejudice hearing is not a hearing on the merits of the claim, the court can properly consider materials submitted at that earlier stage when it considers the claim's merits. Such consideration is not "an evidentiary hearing on the claim." 28 U.S.C. § 2254(e)(2). At an evidentiary hearing, "witnesses are heard and evidence [is] presented." BLACK'S LAW DICTIONARY 721 (6th ed. 1990); *see id.* (describing the "introduction and admissibility of evidence" at a hearing).[12] Consulting previously

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[11] *Accord Henry v. Warden*, 750 F.3d 1226, 1231-32 (11th Cir. 2014); *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc); *Teleguz v. Pearson*, 689 F.3d 322, 330-31 & n.6 (4th Cir. 2012); *Vineyard v. Dretke*, 125 F. App'x 551, 553-54 (5th Cir. 2005) (per curiam).

[12] *Compare* Rules Governing Section 2254 Cases Rule 7 (authorizing a district court to require parties to "expand the record" by submitting materials including "documents, exhibits, and … [a]ffidavits"), *with* Rule 8 (instructing district court to "review … materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted"); *see also Landrigan*, 550 U.S. at 468-69 (distinguishing between "expanding the record to include additional evidence" and holding an "evidentiary hearing"); *cf. Mathews v. Eldridge*, 424 U.S. 319, 325 n.4 (1976) (using "evidentiary hearing" to refer to a hearing that includes, inter alia, an opportunity to confront adverse witnesses and present evidence); 18 U.S.C. § 4247(d) (evidentiary hearing to

and properly admitted evidence does not meet that definition. *See Brumfield v. Cain*, 576 U.S. 305, 310 (2015) (state court did not hold "an evidentiary hearing" when it examined the briefing and record).

In *Holland v. Jackson*, this Court interpreted § 2254(e)(2) to restrict the introduction of new evidence on a claim in addition to restricting an "evidentiary hearing" on the claim. 542 U.S. 649, 652-53 (2004) (per curiam). The Court did not, however, consider whether the habeas court could consider previously submitted evidence, such as evidence properly admitted at a prior cause-and-prejudice hearing. That issue was not before the Court in its summary adjudication.[13] And no court of appeals applying *Holland*

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determine mental competency requires "opportunity to testify, to present evidence, to subpoena witnesses…, and to confront and cross-examine witnesses").

[13] In *Holland*, the habeas claimant sought to introduce new evidence in federal court for a claim that had been adjudicated on the merits in state court. 542 U.S. at 650-53. The claimant's filings focused on § 2254(d), not on how to analyze the application of § 2254(e)(2)'s limits on "hold[ing] an evidentiary hearing on the claim" to evidence properly admitted in a procedural default hearing, which was never raised by the claimant or considered. Similarly, the cases that *Holland* cited addressed whether to permit expansion of the record at the merits stage, not whether to permit consideration of evidence already presented in federal court at a prior phase of proceedings. 542 U.S. at 652-53 (citing *Cargle v. Mullin*, 317 F.3d 1196, 1209 (10th Cir. 2003), "and cases cited [therein]"); *Cargle*, 317 F.3d at 1208-09; *cf. Boyko v. Parke*, 259 F.3d 781, 792 (7th Cir. 2001) (district court may allow claimant to expand the record to determine whether he "failed to develop" claim in state court).

has read it to bar consideration of evidence admitted at a hearing on procedural default.

Thus, the plain text of § 2254(e)(2) does not require a federal court to turn a blind eye to evidence that was properly adduced at an earlier and distinct stage of the federal court proceedings.

### B. Arizona's atextual reading would wrongly bar consideration of properly admitted evidence of unlawful convictions and death sentences.

Arizona's atextual reading of "evidentiary hearing on the claim" to restrict the habeas court's ability to consider evidence previously introduced at the *Martinez* stage would place the federal district court in the untenable position of having to ignore properly admitted evidence that undermines the claimant's culpability. At his *Martinez* hearing, Mr. Jones properly presented evidence that his trial counsel failed to investigate his case, and that had his counsel done so, he would have found substantial holes in the State's theory. *See supra* 12-14. As the district court stated, based on that properly admitted evidence, had Mr. Jones's counsel impeached the State's witnesses by calling his own experts, or "adequately investigated and presented medical and other expert testimony to rebut the State's theory" about when R.G. sustained her fatal injury, there is a reasonable probability that Mr. Jones would not have been convicted. JA270; *see also* JA284. Indeed, the State's own lead investigator said that she did not consider other suspects because of the timeline she presumed was correct; had she understood the timeline's flaws, she

would have broadened the investigation. *Supra* 13. Based on the substantial holes in the State's case and other evidence properly admitted in the *Martinez* hearing, the district court and court of appeals determined that Mr. Jones must be released or retried. JA284-85, 322-23, 368.

Requiring a federal court at the merits stage to disregard this evidence, after the evidence is properly considered by the same federal court in a *Martinez* hearing, makes no sense. And to affirm the conviction and death sentence of Mr. Jones in this context undermines the credibility of our criminal justice system and its fundamental promise of one fair hearing before someone is put to death.

The Court should accordingly affirm the judgment of the court of appeals as to Mr. Jones, which was based on evidence adduced at the cause-and-prejudice hearing. And because the Ninth Circuit did not decide whether Mr. Ramirez's ineffective assistance of trial counsel claim would succeed based on the record as it existed after Mr. Ramirez submitted his supplemental *Martinez* briefing, *supra* 21; JA521, the Court should, at a minimum, remand in *Ramirez* for the court of appeals to make that determination.

## III. Arizona Has Waived Its Argument In Mr. Ramirez's Case.

Even if this Court were to accept Arizona's flawed reading of the statute, an evidentiary hearing regarding Mr. Ramirez's habeas claim should be allowed. In his case, Arizona waived the argument that § 2254(e)(2) bars consideration of additional evidence.

### A. Arizona waived its § 2254(e)(2) argument.

In district court, Mr. Ramirez introduced new evidence to demonstrate that he was entitled to proceed with his ineffective assistance of trial counsel claim under *Martinez*. *See* JA483, 499-500. That included evidence of his low intellectual functioning and brain damage, declarations from family members that "reveal[ed] the extent of abuse, poverty, and neglect that Ramirez suffered as a child," and an expert report on the ineffectiveness of trial and state postconviction counsel. JA499-502; Pet. Supp. Br., *Ramirez v. Ryan*, No. 2:97-CV-01331 (D. Ariz. May 4, 2015), Doc.256, Ex. S.

Although Mr. Ramirez submitted that evidence to demonstrate cause and prejudice to excuse the procedural default under *Martinez*, Arizona urged the district court to proceed to the merits and, taking into account the enlarged record, reject the ineffective assistance of trial counsel claim on its merits. JA461, 483; Opp. to Supp. Br., *Ramirez*, No. 2:97-CV-01331 (D. Ariz. July 6, 2015), Doc.257, at 1-2, 44-46, 49-52; *see also* Oral Arg. at 43:37, *Ramirez*, No. 10-99023, 2019 WL 1405619 (9th Cir. 2019) (state attorney affirming that Arizona had "urged the district court to simply decide the issue"). As Arizona requested, the district court skipped the *Martinez* inquiry, considered the additional materials, and ruled that Mr. Ramirez's ineffective trial counsel claim lacked merit. JA483-84.

Appealing that decision, Mr. Ramirez explained that he should have been allowed additional

evidentiary development before the district court decided the merits. Opening Br., *Ramirez*, No. 10-99023 (9th Cir. Nov. 9, 2017), Doc.30, at 46-48. He asked the Ninth Circuit to remand so he could "present the evidence [of trial counsel's ineffectiveness] that should have been presented years ago but was not, due to [postconviction] counsel's failures." *Id.* at 47-48, 117. And he observed that such development was appropriate under § 2254(e)(2). *Id.* at 47.

In response, Arizona chose not to argue that § 2254(e)(2) precluded further evidentiary development. *See* Answering Br., *Ramirez*, *supra*, at 58. To the contrary, Arizona accepted that evidentiary development may take place "where appropriate" and endorsed the proposition that "a district court *may take evidence to the extent necessary*" after a *Martinez* remand. *Id.* at 58 (emphasis in original). Rather than arguing that further "evidentiary development" was barred, Arizona contended that such development was "not warranted" in Mr. Ramirez's case because further development would not, in its view, assist the court in adjudicating the merits of the ineffective assistance claim. *Id.* Arizona did not raise any argument in its appellate briefing to the panel, or in its oral argument, that additional evidentiary development was inconsistent with § 2254(e)(2).[14] Nor did

[14] In the "standard of review" section of its opening brief, Arizona noted that "[h]abeas petitioners may introduce new evidence in federal court only for claims that are outside the constraints of § 2254(d) and reviewed *de novo*, unless inhibited by § 2254(e)(2)'s requirements." Answering Br., *Ramirez*, *supra*, at 40. Arizona, however, never argued in its brief that those requirements "inhibited" evidentiary development in Mr. Ramirez's case.

Arizona oppose the additional materials Mr. Ramirez had already submitted. In fact, at oral argument, Arizona confirmed that it "was content with the state of the record," Oral Arg., 2019 WL 1405619, at 43:30, which included the additional submissions.

Because Arizona made a strategic decision not to invoke § 2254(e)(2) to oppose evidentiary development, Arizona waived that argument. *See Puckett v. United States*, 556 U.S. 129, 134 (2009) (when a party does not invoke a claim of error "in a timely manner, his claim for relief from the error is forfeited"); *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (failure of a state officer to present an argument in an answering brief "waive[s] the argument").

In its reply brief in support of its certiorari petition, Arizona argued that it preserved the § 2254(e)(2) issue by raising it in its petition for rehearing. Cert. Reply Br. 8 n.4. But arguments that could have been raised before the three-judge panel are waived if, as here, they are "raised for the first time in a petition for rehearing." *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992), *as supplemented on denial of reh'g* (Mar. 11, 1992). Arizona (echoing Judge Collins's dissent from the denial of rehearing en banc, JA562 n.4), contended that "the issue of *additional* record expansion did not arise until the panel opinion was issued." Cert. Reply Br. 8 n.4 (emphasis in original).[15] But the permissibility of further factual

[15] Although Judge Collins contended that Arizona had not waived the application of § 2254(e)(2) to additional evidentiary development at the merits stage, he agreed that Arizona may

development was squarely at issue in the panel briefing. Thus, Arizona's argument that the statute barred factual development was not "timely." *Puckett*, 556 U.S. at 134.

### B. This Court must respect Arizona's decision not to raise an objection under § 2254(e)(2).

Arizona's decision to forgo an objection under § 2254(e)(2) must be respected. This Court has recognized in discussing other parts of § 2254 that AEDPA's rules and restrictions are "akin" to "affirmative defenses" that the state may assert—or not. *Day v. McDonough*, 547 U.S. 198, 208 (2006). So long as the statute "does not speak in jurisdictional terms," AEDPA's rules should be treated as ordinary "claim-processing rules," *Gonzalez v. Thaler*, 565 U.S. 134, 141, 143 (2012), which "may be waived or forfeited," *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17-18 (2017). Under this well-established framework, § 2254(e)(2) is a non-jurisdictional claim-processing rule akin to an affirmative defense.[16]

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have "waived any objection based on § 2254(e)(2) … [to] the use of the *same* evidence for the dual purposes of satisfying *Martinez* and addressing the merits." JA562 n.4 (emphasis in original). In other words, Arizona waived any opposition to Respondents' arguments in Section II of this brief by asserting that it was proper for the district court to consider at the merits stage evidence outside the state court record that Mr. Ramirez submitted at the *Martinez* stage.

[16] Nothing in the text sounds in "jurisdictional terms" or addresses the jurisdiction of the courts. *Gonzalez*, 565 U.S. at 143.

Nothing in § 2254(e)(2) prohibits a state from deciding not to oppose the consideration of new evidence. State attorneys will invoke the statute when in the state's interests to do so. In many instances, a state may prefer that courts fully evaluate the evidence a prisoner wishes to put forward, especially in a capital case. And in circumstances where state procedural rules may prevent the state's courts from considering new evidence, a state may wish that a prisoner have the opportunity to present that evidence in federal court. A state could well conclude that such a course is efficient and buttresses the accuracy and finality of its convictions and sentences.

Arizona's decision not to invoke § 2254(e)(2) reflects a determination that its interests were better served by seeking the denial of Mr. Ramirez's habeas petition on the merits, taking into account new evidence submitted in federal court. *Supra* 21. That strategic choice not to invoke § 2254(e)(2) must be respected and cannot properly be overridden by the courts. *Day*, 547 U.S. at 202, 210 n.11. This Court

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Section 2254(e)(2) uses the word "shall," but "a statute's use of that word" does not make a directive jurisdictional. *Dolan v. United States*, 560 U.S. 605, 611 (2010). In AEDPA, as in any other statute, "shall" indicates that a court must enforce a provision "[i]f a party timely raises" it, but does not establish that the provision ranks as jurisdictional. *Gonzalez*, 565 U.S. at 146; *see Day*, 547 U.S. at 205 (§ 2254(d)(1) of AEDPA, which uses "shall," is not jurisdictional). While the Court has permitted district courts to consider some non-jurisdictional § 2254 defenses even if they were not asserted by the state, *e.g.*, *Day*, 547 U.S. at 202 (timeliness), the Court has made clear that it "would count it an abuse of discretion to override a State's deliberate waiver." *Id.*

should therefore decline to entertain Arizona's arguments as to Mr. Ramirez.

## CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be affirmed.

Respectfully submitted,

Jon M. Sands
*Federal Public Defender*
*District of Arizona*
Dale A. Baich
Timothy M. Gabrielsen
Cary Sandman
*Assistant Federal*
*Public Defenders*
407 W. Congress Street
Tucson, Arizona 85701

Robert M. Loeb
*Counsel of Record*
Thomas M. Bondy
Paul David Meyer
Geoffrey C. Shaw
Monica Haymond
Sarah H. Sloan
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
rloeb@orrick.com

September 13, 2021