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 THE PETITIONERS

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CAPITAL CASES

QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e)(2), precludes a federal court from considering evidence outside the state-court record when reviewing the merits of a claim for habeas relief if a prisoner or his or her attorney has failed to diligently develop the claim's factual basis in state court, subject to only two statutory exceptions not applicable here. In the cases below, the Ninth Circuit concluded that AEDPA's bar on evidentiary development does not apply to a federal court's merits review of a claim when a court excuses that claim's procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012), because the default was caused by post-conviction counsel's negligence. The question presented, which drew an eight-judge dissent from the denial of en banc rehearing in each case, is:

Does application of the equitable rule this Court announced in *Martinez v. Ryan* render 28 U.S.C. § 2254(e)(2) inapplicable to a federal court's merits review of a claim for habeas relief?

PARTIES TO THE PROCEEDING

The petitioner (the respondent-appellee below) in *Ramirez* is David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry. The respondent (the petitioner-appellant below) is David Martinez Ramirez.

The petitioners (the respondents-appellants below) in *Jones* are David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry; and Walter Hensley, Warden of the Arizona State Prison Complex-Eyman. The respondent (the petitioner-appellee below) is Barry Lee Jones.

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OPINIONS BELOW

The Ninth Circuit's opinion reversing in part the district court's denial of habeas relief to David Martinez Ramirez is reported at *Ramirez v. Ryan*, 937 F.3d 1230 (9th Cir. 2019). JA 486-534. The Ninth Circuit's order denying rehearing and rehearing en banc is reported at *Ramirez v. Shinn*, 971 F.3d 1116 (9th Cir. 2020). JA 535-62. The district court's orders denying habeas relief are unpublished. JA 397-485.

The Ninth Circuit's opinion affirming in part and reversing in part the district court's order granting habeas relief to Barry Lee Jones is reported at *Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019). JA 318-68. The Ninth Circuit's order denying rehearing and rehearing en banc is reported at *Jones v. Shinn*, 971 F.3d 1133 (9th Cir. 2020). JA 369-96. The district court's order granting habeas relief is reported at *Jones v. Ryan*, 327 F. Supp. 3d 1157 (D. Ariz. 2018). JA 155-285. That court's previous order denying habeas relief is unpublished. JA 27-101.

STATEMENT OF JURISDICTION

The Ninth Circuit denied rehearing in both Jones's and Ramirez's cases on August 24, 2020. JA 369-96, 535-62. Petitioners Shinn, et al. (hereinafter "Arizona") timely filed a single petition for writ of certiorari covering both judgments pursuant to Rule 12.4, Rules of the United States Supreme Court, on January 20, 2021. *See* 589 U.S. __ (order dated March 19, 2020, extending filing date for all petitions for writ of certiorari). This Court granted the

petition on May 17, 2021, and thereafter extended the time for filing Arizona's merits brief and Joint Appendix until July 15, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defence.

The Anti-terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e), provides, in pertinent part:

> (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—
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> (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.

INTRODUCTION

"The role of a federal habeas court is to guard against extreme malfunctions in the state criminal justice systems." *Davis v. Ayala*, 576 U.S. 257, 276 (2015) (quotations omitted). To ensure that habeas corpus does not become "a substitute for ordinary error-correction," *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (quotations omitted), federal habeas law is governed by a web of statutory and court-created rules specifying the types of claims that can be heard, when and how those claims must be raised, what evidence can be offered to support those claims, and what showing must be made to obtain relief.

Two of these rules collided in the cases below. First, the Anti-terrorism and Effective Death Penalty Act (AEDPA) limits a federal court's power to grant habeas relief. In particular, 28 U.S.C. § 2254(e)(2) precludes a court from holding an evidentiary hearing if a prisoner "has failed to develop the factual basis of a claim in State court," unless the prisoner satisfies one of two stringent exceptions.

Second, this Court has imposed hurdles to habeas relief through judicially-created doctrines. As relevant here, the procedural-default doctrine generally bars a federal court from considering a claim's merits if the prisoner did not present that claim in a procedurally appropriate manner in state

court. *See Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012). In *Martinez*, this Court created an exception to the procedural default rule to allow a court to consider a substantial trial-counsel ineffectiveness claim if a prisoner can demonstrate that state post-conviction counsel performed inadequately in failing to present the claim. *Id.* at 9.

The decisions below expand *Martinez*'s narrow procedural-default exception to swallow the evidentiary limitations of § 2254(e)(2). Two different Ninth Circuit panels have concluded that a prisoner must be permitted to offer new evidence on the merits of a habeas claim whose default is excused under *Martinez*. These decisions conflict with this Court's precedent, and *Martinez* itself speaks neither to § 2254(e)(2) specifically nor to evidentiary development in general. On their faces, § 2254(e)(2) and *Martinez*'s exception to procedural default work independently; each applies at a different stage of habeas litigation. A prisoner who proves cause and prejudice is merely entitled to have his or her claim heard on the merits. *See Martinez*, 566 U.S. at 17. Once *Martinez*'s work is done and a default is excused, § 2254(e)(2) governs the evidence the court may consider in reviewing the merits of the claim.

Whether statutory or court-created, the restrictions on habeas relief share a common goal: to enshrine state courts as the primary forum for adjudicating challenges to state convictions, thereby safeguarding interests of comity, finality, and federalism. *See Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017); *Cullen v. Pinholster*, 563 U.S. 170, 185-86 (2011). After all, even when restricted, federal habeas review "intrudes on state sovereignty" to an incomparable degree. *Davila*, 137 S. Ct. at 2070

(quotations omitted). If the decisions below stand, they will pave the way for unrestrained federal merits review and evidentiary development, burdening states, undermining AEDPA, and frustrating comity, finality, and federalism interests. *See Davila*, 137 S. Ct. at 2070; *Pinholster*, 563 U.S. at 185-86. The "narrow" *Martinez* exception will crystalize as the "free pass to federal habeas" relief its dissenting Justices feared it would become. *Martinez*, 566 U.S. at 28-29 (Scalia, J., dissenting). This Court should reverse the decisions below.

STATEMENT

A. Facts and Procedural History of *Ramirez*.

Ramirez murdered Mary Ann Gortarez and her 15-year-old daughter, C.G., in their west Phoenix apartment more than 30 years ago. *State v. Ramirez*, 871 P.2d 237, 240 (Ariz. 1994). Ramirez already had a lengthy felony history, which included convictions for armed robbery, aggravated assault, burglary, and escape. *Ramirez v. Shinn*, Ninth Cir. Dkt. 38, SER Vol. 1, pp. 4-5. Around 5:00 a.m. on May 25, 1989, neighbors alerted police when they heard screaming, banging, and sounds of a struggle coming from the victims' residence. *Id.* Responding officers gained entry and encountered Mary Anne's dead body, along with a bloody knife blade. *Id.* at 240-41. Ramirez was also in the apartment, covered in blood and with cuts on his fingers. *Id.* at 241. Among other admissions, he explained that his girlfriend and her daughter were inside the apartment and that "they're hurt pretty bad. We're all hurt pretty bad." *Id.* Officers subsequently found C.G.'s nude body in her bedroom. *Id.*

The victims' apartment was awash in blood. *Id.* at 241-42. Various weapons, including knives, a box cutter, and scissors, were strewn about. *Id.* Autopsies revealed that both Mary Ann and C.G. had been stabbed repeatedly and had sustained blunt-force injuries. *Id.* at 242. C.G.'s vagina contained semen, and Ramirez could not be excluded as its donor. *Id.* Ramirez later admitted that he had had sex with 15-year-old C.G. the night of the murders, as well as on four prior occasions. *Id.*

A jury found Ramirez guilty of both murders. *Id.* at 239. The sentencing judge found three aggravating circumstances and various statutory and non-statutory mitigating factors, but considered them insufficient to warrant leniency and sentenced Ramirez to death on each count. *Id.* at 239, 242-43. The Arizona Supreme Court affirmed Ramirez's convictions on direct appeal and, after independently reviewing the aggravating and mitigating circumstances applied to his death sentences, agreed with the sentencing judge that the mitigation was not sufficiently substantial to call for leniency. *Id.* at 253.

Ramirez thereafter filed a first state petition for post-conviction relief raising ineffective-assistance claims. *See* JA 401. The post-conviction judge denied relief, and the Arizona Supreme Court denied Ramirez's petition for review. *Id.*

Ramirez next filed a federal habeas petition ultimately alleging, as relevant here, that trial counsel was ineffective in investigating and presenting mitigation. JA 402, 498. During the course of the habeas litigation, Ramirez returned to state court to exhaust various claims, including the

sentencing-ineffectiveness claim at issue here, in separate successive state post-conviction proceedings. *See* JA 401-02, 498 n.6. The state court found the ineffective-assistance claim untimely under Arizona Rule of Criminal Procedure 32.4(a) (2005), and denied relief. JA 402. But it held a hearing on a separate yet overlapping claim that Ramirez had intellectual disability and was ineligible for execution. JA 420; *see Atkins v. Virginia*, 536 U.S. 304 (2002).

On return to federal court after relief was denied on the *Atkins* claim, the district court found the sentencing-ineffectiveness claim procedurally defaulted and concluded that Ramirez could not, under then-existing law, invoke his first post-conviction counsel's ineffectiveness as cause to excuse the default. JA 397-447; *see Coleman v. Thompson*, 501 U.S. 722, 755-57 (1991) (holding that post-conviction counsel's ineffectiveness cannot constitute cause to excuse a procedural default). The court denied habeas relief. JA 448-49. While Ramirez's appeal from that decision was pending in the Ninth Circuit, this Court issued *Martinez*, creating a limited exception to *Coleman* and permitting post-conviction counsel's ineffectiveness to constitute cause in certain circumstances. *Martinez*, 566 U.S. at 9; *see* § I(B), *infra*. The Ninth Circuit remanded Ramirez's case to the district court to reconsider his ineffective-assistance-of-sentencing-counsel claim in light of *Martinez*. JA 454-55.

On remand, the district court expanded the record to include Ramirez's limited newly proffered documentary evidence but otherwise denied evidentiary development because the ineffective-assistance claim failed on the existing record. JA

454-84. The court compared counsel's penalty-phase presentation with Ramirez's post-sentencing evidence, including that developed at the state-court *Atkins* hearing, and determined that the sentencing-ineffectiveness claim lacked merit. *Id.* As a result, the court concluded, post-conviction counsel was not ineffective for failing to raise the claim and Ramirez had failed to show cause and prejudice to excuse its procedural default. *Id.*

On appeal, a three-judge panel of the Ninth Circuit reversed in part, concluding that the district court applied the incorrect standard in determining cause and prejudice under *Martinez*. JA 486-524. The panel faulted the district court for skipping to the sentencing-ineffectiveness claim's merits and "conducting a full merits review … on an undeveloped record." JA 507-08. The panel held that, to satisfy *Martinez*'s relatively low bar for excusing a procedural default, a prisoner need not show that he will prevail on his underlying trial-ineffectiveness claim's merits but only that that claim is substantial, that post-conviction counsel deficiently failed to raise it in state court, and that there is a reasonable probability that raising the claim would have changed the post-conviction proceeding's outcome. *Id.*; *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Arizona*, 813 F.3d 798, 818 (9th Cir. 2015) (en banc) (articulating formula for reviewing cause and prejudice under *Martinez*).

Under the correct standard, the panel continued, Ramirez had excused the procedural default of his sentencing-ineffectiveness claim. JA 509-21. The panel drew no "conclusion regarding the ultimate success of [Ramirez's] ineffective assistance of trial

counsel claim." JA 507. Instead, it remanded for additional consideration of the claim's merits, holding that Ramirez was "entitled" to further evidentiary development to litigate the claim because his post-conviction counsel's ineffectiveness precluded state-court evidentiary development. JA 521.

B. Facts and Procedural History of *Jones*.

Barry Lee Jones murdered his live-in girlfriend's child, 4-year-old R.G., in May 1994. *See State v. Jones*, 937 P.2d 310, 313 (Ariz. 1997). The day before her death, R.G. had spent most of her time in Jones's care and had accompanied him on multiple trips in his van. *Id.* Before that point, R.G. was eating and behaving normally. *Jones v. Shinn*, Ninth Cir. Dkt. 13, ER Vol. 44, pp. 10545-49, ER Vol. 3, pp. 571-72. During one of the van trips, two neighborhood children saw Jones striking R.G. as he drove. *Jones*, 937 P.2d at 313. Later, Jones stopped at a convenience store to obtain ice for a head injury R.G. had suffered. *Id.*

R.G.'s condition deteriorated rapidly in the ensuing hours, and Jones did nothing to help her. *See id.* In the afternoon, a neighbor encountered R.G. wandering the trailer park where she and her family lived, appearing pale and sick. *See Jones v. Shinn*, Ninth Cir. Dkt. 13, ER Vol. 43, pp. 10506-10. As the evening wore on, R.G. lay on the couch with her mother, bleeding from the head and crying in pain as Jones looked on. *See Jones*, 937 P.2d at 313; *Jones v. Shinn*, Ninth Cir. Dkt. 13, ER Vol. 27, pp. 6555-62. Some friends visited the home and expressed concern about R.G.'s condition; Jones told them that paramedics had examined and released

R.G. *Jones*, 937 P.2d at 313. This statement was false. *Id.*

R.G. died overnight. *Id.* In the morning, Jones drove R.G.'s mother and R.G.'s lifeless body to a hospital and left them there. *Id.*; *Jones v. Shinn*, Ninth Cir. Dkt. 13, Vol. 44, p. 10662. He fled to a friend's desert encampment, en route repeating his false statement that he had obtained medical care for R.G. the day before. *Id.* at pp. 10660-63. He admitted to another friend that he did not want to return to the hospital because the doctors "were going to look at [R.G.] and say it was abuse." *Id.* at ER Vol. 45, p. 10746.

A medical examiner subsequently opined that R.G. had died of peritonitis—an infection of the abdominal organs—as a consequence of blunt-force trauma to the abdomen. *Jones*, 937 P.2d at 313. Based on injuries to R.G.'s vagina, the medical examiner opined that she had also been sexually assaulted. *Id.* at 313, 318-19. Additionally, R.G. had suffered a laceration to the head. *Jones v. Shinn*, Ninth Cir. Dkt. 13, Vol. 45, p.10764. The medical examiner testified that R.G.'s abdominal and vaginal injuries were consistent with having been inflicted one day before her death (when Jones was observed striking her), while her head injury could have been one or two days old. *Id.* at pp. 10845, 10861, 10876-77; *see Jones*, 937 P.2d at 313, 319. The emergency-room doctor who pronounced R.G. dead likewise opined that R.G.'s head laceration was between 12 and 24 hours old. *Jones v. Shinn*, Ninth Cir. Dkt. 13, ER Vol. 2, pp. 478-79. And he explained that peritonitis "is a variable process, but typically death occurs within hours to days." *Id.* at p. 486.

The jurors found Jones guilty of first-degree felony murder, sexual assault, and three counts of child abuse, and a judge later found two death-qualifying aggravating factors. *Jones*, 937 P.2d at 313; *see* A.R.S. §§ 13-703(F)(6) (1994) (especially cruel, heinous, or depraved), (F)(9) (age of victim). Finding no mitigation sufficient to warrant leniency, the judge sentenced Jones to death for the murder conviction and to various term-of-years sentences for the child-abuse and sexual-assault convictions. *Id.*

The Arizona Supreme Court affirmed Jones's convictions and sentences on direct appeal, including his death sentence after independently reviewing the aggravating and mitigating evidence. *Id.* at 314-23. Jones thereafter sought state post-conviction relief. JA 327-28. Although Jones raised ineffective-assistance claims, and was granted an evidentiary hearing, he did not argue that counsel was ineffective for failing to investigate and present evidence to challenge the timeline of R.G.'s injuries and, by extension, Jones's identity as the perpetrator. *Id.* The post-conviction judge denied relief and the Arizona Supreme Court summarily denied review. *Id.*

Jones then filed a federal habeas petition, in which he raised for the first time his attorneys' failure to sufficiently investigate and challenge the medical evidence and the timeline of R.G.'s injuries. JA 328. The district court found the ineffective-assistance claim procedurally defaulted and, applying *Coleman*, rejected Jones's argument that post-conviction counsel's ineffectiveness excused the default. *See Jones v. Stewart, et al.*, Dist. Ct. Dkt. 115, at pp. 8-12.

Jones also attempted to excuse the default through a fundamental miscarriage of justice. *See Jones v. Stewart, et al.*, Dist. Ct. Dkt. 128, 135; *see generally Schlup v. Delo*, 513 U.S. 298, 327 (1995). He offered independent medical opinions, expert reports concerning blood spatter and other topics, and witness statements to assert that R.G.'s fatal injury occurred far earlier than the day before her death (when Jones was seen striking her), or to otherwise suggest a different perpetrator. *See Jones v. Stewart, et al.*, Dist. Ct. Dkt. 128, 135; JA 27-58. The district court acknowledged that the new medical evidence was "significant," but found that it did "not seriously call into question the jury's verdict" because a reasonable juror could still have determined that Jones killed R.G. JA 54, 58. After carefully considering the remainder of the evidence, and presuming all of Jones's factual allegations to be true, the court found that Jones could not "meet the *Schlup* gateway standard of actual innocence." JA 27-58. Accordingly, the court denied Jones's ineffective-assistance claim as procedurally defaulted. *Id.*

Jones appealed to the Ninth Circuit. *See* JA 102-03, 329-30. While his appeal was pending, this Court decided *Martinez*, and the Ninth Circuit allowed Jones to return to district court for that court to reconsider its dismissal of his trial-ineffectiveness claim. *Id.* In granting the motion, the Ninth Circuit made a threshold finding that the defaulted claim was substantial under *Martinez*. *See* JA 121. This finding left the district court to resolve only the issue of post-conviction counsel's ineffectiveness in

omitting the claim.[1] *See id.*; *see also Clabourne*, 745 F.3d at 377 (articulating formula). And the question of post-conviction counsel's ineffectiveness, in turn, depended in part on the strength of the defaulted trial-ineffectiveness claim. *See Clabourne*, 745 F.3d at 377; *see also Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) ("If trial counsel was not ineffective, then [the prisoner] would not be able to show that [post-conviction] counsel's failure to raise claims of ineffective assistance of trial counsel was such a serious error that [post-conviction] counsel was not functioning as the counsel guaranteed by the Sixth Amendment.") (quotations omitted).

On remand, Jones requested an evidentiary hearing on both the cause-and-prejudice question *and* the merits of his claim for habeas relief. *Jones v. Stewart, et al.*, Dist. Ct. Dkt. 167; *see Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc) (concluding that 28 U.S.C. § 2254(e)(2) does not bar court from conducting a hearing on cause to excuse a procedural default because cause is not a claim for relief). Arizona objected to a hearing on the merits in part because, regardless of post-conviction counsel's performance, § 2254(e)(2) barred the court from considering any evidence developed to resolve the trial-ineffectiveness claim, and that claim failed on the state-court record. *Jones v. Stewart*, Dist. Ct. Dkt. 175, at 64, 70-75. The court disagreed, concluding that a prisoner "who has shown … 'cause'

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[1] The Ninth Circuit also remanded a sentencing-ineffectiveness claim; the district court bifurcated the proceedings on remand and did not reach the sentencing-ineffectiveness claim after granting relief on the trial-ineffectiveness claim. *See* JA 159 n.3, 331 n.4.

to excuse procedural default, has also by definition shown 'cause' to excuse the failure to develop that same claim within the meaning of § 2254(e)(2)." JA 149. "Were this Court to find otherwise," the court continued, "then the harm the Supreme Court envisioned in *Martinez*, that 'no court will review the prisoner's [trial counsel IAC] claims,' would become a certainty." *Id.* (quoting *Martinez*, 566 U.S. at 10-11) (alterations in original).

The district court thereafter conducted a seven-day evidentiary hearing, at which the key disputed issue was whether Jones had met his burden under *Strickland* on the underlying trial-ineffectiveness claim.[2] To this end, his trial counsel testified that they had consulted a medical expert, Dr. Philip Keen, but could not recall having provided him with critical histological slides documenting the victims' injuries. JA 345-46.

Dr. Keen likewise testified that he could not recall having reviewed the slides and had no records indicating he did. JA 346. Based on his recent review of the evidence, he estimated that R.G. was injured about two days before she died but acknowledged that multiple variables affect that timeline and conceded that she could have been injured as soon as 12 hours before her death. *Jones v. Shinn*, Ninth Cir. Dkt. 13, ER Vol. 5, pp. 960, 984-85, 988, 993-95. He believed that R.G.'s non-fatal

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[2] Jones's post-conviction attorney also testified at the hearing. *See* JA 275-83. And Jones presented testimony from experts in biomechanics and eyewitness identification, in an effort to prove counsel ineffective in challenging testimony that Jones had been seen striking R.G. JA 234-40. The district court did not find these witnesses persuasive. JA 268-70.

scalp wound had occurred at least the day before she died, and that her vaginal injury represented a "combination of an older healing injury and a more fresh [vaginal] injury." *Id.* at pp. 991-92.

Jones also called Dr. Janice Ophoven, a pediatric pathologist who opined that R.G. was a chronically abused child and that her caretakers' failure to obtain medical care amounted to "fatal neglect." *Jones v. Shinn*, Ninth Cir. Dkt. 13, ER Vol. 36, p. 8837. Dr. Ophoven believed that R.G.'s injury was at least 48 hours old and could not possibly have occurred the day before she died. *Id.* at ER Vol. 6, pp. 1068-77. She opined that R.G.'s head laceration was about two days old and that her vaginal injury was weeks old; however, she conceded the presence of fresh bleeding and could not "exclude [the] possibility" that R.G. had been sexually abused shortly before she died. *Id.* at pp. 1084-85, 1102-03, 1114. Finally, Jones called emergency physician Dr. Mary Pat McKay, who testified that she had conducted a literature review and had found no reported case of a child dying from peritonitis within 48 hours of an abdominal blow. *Id.* at pp. 1245-74.

Testifying on Arizona's behalf, Dr. Howard again opined that R.G.'s injuries were recent and could all have occurred within the day before she died. *Jones v. Shinn*, Ninth Cir. Dkt. 13, ER Vol. 8, pp. 1700-10, 1714-15. He emphasized that pathologists cannot date injuries with precision because of case-to-case and individual-to-individual variations, and cautioned that "there is always a range" involved when dating injuries. *Id.* at p. 1711-14.

The district court found cause and prejudice and excused Jones's ineffective-assistance claim's

procedural default under *Martinez*. JA 275-85. The court reviewed the trial-ineffectiveness claim's merits de novo, considering the new evidence developed at the federal hearing. JA 241-75. The court found deficient performance and, based largely on its credibility assessment of the various medical experts,[3] concluded that Jones had also proven prejudice. JA 241-68. The court granted conditional habeas relief.[4] JA 284-85.

Arizona sought a stay pending appeal, arguing in part that it was likely to succeed on the merits of its argument that 28 U.S.C. § 2254(e)(2) barred an evidentiary hearing and the district court erred by considering new evidence. *Jones v. Stewart*, *et al.* Dist. Ct. Dkt. 308. Jones filed a cross-motion for release under Federal Rule of Appellate Procedure 23(c). *Id.* at Dkt. 311. The court denied both motions, finding, as relevant here, that it would be "illogical, and extraordinarily burdensome," to conduct a cause-and-prejudice hearing under *Martinez* only to exclude its fruits on merits review. JA 293-99. The court distinguished this Court's precedent construing 28 U.S.C. § 2254(e)(2) on the ground that it predated *Martinez*, and concluded that *Martinez*'s equitable exception was "equally

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[3] The district court also found that counsel's failure to rebut certain testimony regarding bloodstains in Jones's car was unreasonable and that Jones's evidence strengthened its finding of *Strickland* prejudice but did not individually warrant relief. JA 250-54, 264-68.

[4] The Ninth Circuit stayed the district court's judgment until the appellate mandate issues. *See Jones v. Shinn*, Ninth Cir. Dkt. 78. The mandate has, in turn, been stayed pending this Court's review. *See id.* Dkt. 89.

applicable … to evidentiary development of the claim [for relief] itself." *Id.*

The Ninth Circuit affirmed, "explicitly hold[ing]" that "*Martinez*'s procedural-default exception applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court." JA 334. The panel adopted the district court's reasoning in denying Arizona's motion to stay, remarking that it would be illogical and contrary to *Martinez* to bind a prisoner whose claim had passed through *Martinez*'s gateway to a state-court record developed by ineffective counsel. JA 331-37. The panel relied heavily on the plurality decision in *Detrich v. Ryan*, 740 F.3d 1237, 1246-47 (9th Cir. 2013) (plurality opinion of Fletcher, J.), as well as portions of *Martinez* observing that ineffective-assistance claims "'often require investigative work'" to support its conclusion. JA 331-37 (quoting *Martinez*, 566 U.S. at 11).[5]

C. Denial of Rehearing and Eight-Judge Dissent.

Arizona sought panel and en banc rehearing in each case. The court denied each motion. *See* JA 369-96 (Jones), 535-62 (Ramirez). Judge Daniel

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[5] The panel also rejected Arizona's argument that, even if the district court correctly considered the new federal evidence to grant relief, it incorrectly decided the claim on the merits, with the exception of vacating the district court's remedy on one of Jones's convictions and ordering that court to amend its judgment. JA 337-68. However, the panel admitted that whether Jones had shown *Strickland* prejudice on the first-degree murder conviction was "a close question" because "[t]here was ample evidence that could have supported a [guilty] verdict" based on the theory that Jones intentionally or knowingly failed to obtain medical care for R.G. JA 362-65.

Collins, however, authored a dissent from the denial of en banc rehearing, which he filed in each case and which seven additional judges joined. *Id.* Judge Collins brought into focus the two separate obstacles to habeas relief Ramirez and Jones faced: the equitable procedural-default doctrine, which bars merits review unless the default is excused, and the statutory prohibition on federal evidentiary development set forth in 28 U.S.C. § 2254(e)(2), which controls whether evidence outside the state-court record may be considered on merits review. *Id.*

Judge Collins concluded that the *Ramirez* and *Jones* panels had "disregard[ed] controlling Supreme Court precedent by creating a new judge-made exception to the restrictions imposed by [AEDPA] on the use of new evidence in habeas corpus proceedings." JA 371-72. While Judge Collins disagreed with each panel's decision, he found *Ramirez* to be a "particularly stark violation of § 2254(e)(2)" because, while *Jones* permitted already-developed cause-and-prejudice evidence to be considered on merits review, *Ramirez* determined that, "even after the *Martinez* exception had been established with new evidence, the petitioner was entitled to keep going and to develop even *more* evidence as if § 2254(e)(2) did not exist at all." JA 373-74.

Judge Collins explained that the panels lacked authority to extend the *Martinez* exception to a statute. JA 387-96. He further observed that the panels' decisions not only violated AEDPA, but also could not be reconciled with this Court's opinions in *Williams v. Taylor*, 529 U.S. 420 (2000), and *Holland v. Jackson*, 542 U.S. 649 (2004), which hold that a

prisoner is bound by counsel's state-court negligence for § 2254(e)(2)'s purposes. *Id.*

Finally, Judge Collins opined that, even if § 2254(e)(2) would bar relief in most cases after *Martinez* enabled a default to be excused, that outcome did not allow the majority to contravene the statute. JA 392 ("To the extent that it seems unfair that a potentially meritorious claim might escape federal habeas review, that feature is inherent in the restrictions that AEDPA imposes on the grant of federal habeas relief."). And he faulted the district court in Jones for holding a potentially wasteful cause-and-prejudice hearing without first "consider[ing] up front *both* of the *separate* obstacles" to relief: procedural default and § 2254(e)(2). JA 391 (emphasis in original). "There is no point in conducting a *Martinez* hearing to discover 'cause' to excuse a procedural default if the defaulted claim will inevitably fail on the merits because (due to the *other* procedural obstacle) evidence outside the state record cannot be considered in any event." JA 391-92 (emphasis in original).

SUMMARY OF ARGUMENT

Before AEDPA, federal courts applied equitable principles to determine whether a habeas petitioner could receive an evidentiary hearing on the merits of a claim. A prisoner could excuse his failure to develop a claim in state court by showing "cause" for the failure and resulting prejudice. But Congress's enactment of AEDPA, and § 2254(e)(2) in particular, dramatically limited a federal court's ability to permit evidentiary development, eliminating "cause and prejudice" as a means to excuse a failure to develop the state-court record and

imposing a test designed to restrict the discretion of federal habeas courts to consider new evidence. Section 2254(e)(2) thus prohibits an evidentiary hearing for prisoners who "failed to develop" the factual basis for a claim in state court. This Court has construed "failed to develop" as requiring "some lack of diligence" on the prisoner's part. *Williams*, 529 U.S. at 430-32. Because state post-conviction counsel's failures are imputed to the client, a petitioner is found to have "failed to develop" a claim if counsel failed to do so. *Id.*

In *Martinez*, this Court created a new, equitable exception to its procedural default doctrine, allowing a prisoner to excuse the default of a substantial trial-counsel ineffectiveness claim upon a showing that state post-conviction counsel was ineffective in failing to present the claim. *Martinez*, 566 U.S. at 9, 15-17. This ruling established an exception to the general rule that the failures of state post-conviction counsel do not provide cause to excuse a procedural default. *Id.*; *see Coleman*, 501 U.S. at 755 ("We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation.").

This Court emphasized that *Martinez* "merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." 566 U.S. at 17. The dissenting justices, however, observed that the rule in *Martinez* creates an incentive for prisoners to attack post-conviction counsel's performance to access the "free pass to federal habeas" relief that *Martinez* offered. *Id.* at 28-29 (Scalia, J., dissenting).

In two separate decisions, the Ninth Circuit has held that § 2254(e)(2) presents no obstacle to evidentiary development for claims whose defaults are excused under *Martinez*. In so doing, the court below resurrected the pre-AEDPA equitable standard for evidentiary development, ignoring § 2254(e)(2)'s statutory barrier. The *Jones* panel did so because it believed the statute interfered with the merits review the claim deserved; the *Ramirez* panel did not acknowledge § 2254(e)(2)'s existence.

The panel decisions cannot be reconciled with *Williams*, *Holland*, or § 2254(e)(2) itself, which preclude a finding of diligence in developing the state court record if the failure was caused by post-conviction counsel. Courts lack authority to ignore § 2254(e)(2) merely because they believe that a claim would benefit from additional factual development in federal court.

Moreover, the Ninth Circuit's unwarranted extension of *Martinez* to merits review undermines procedural default and creates inequity. After the decisions below, prisoners have no incentive to bring ineffective-assistance claims in state court. Rather, they are encouraged to withhold those claims until they reach federal court, where they can excuse the default under *Martinez* and obtain de novo review, presenting new evidence supporting the claim. This treats a prisoner who was diligent in presenting a claim in state court less favorably than one who is not diligent.

Applying the correct legal principles to Respondents' defaulted claims, the *Jones* panel should have reversed, because the district court granted relief only after considering new evidence

that had been developed in the cause-and-prejudice hearing. The *Ramirez* panel should have affirmed, because the district court correctly determined that the claim failed on the existing record.

Each panel excused the defaulted claims after finding that post-conviction counsel ineffectively failed to present them in state court. Although post-conviction counsel's failures may have established cause to excuse the defaults, those same failures precluded a finding of diligence under § 2254(e)(2), thus preventing evidentiary development. *Martinez* at most permits merits review of a defaulted ineffectiveness claim; it does not entitle a petitioner to bypass § 2254(e)(2) to obtain an evidentiary hearing on the claim. This Court should reverse the panel decisions and reestablish *Martinez* as the narrow exception it was intended to be.

ARGUMENT

I. The decisions below misappropriate the limited *Martinez* pathway around procedural default to evade AEDPA's restrictions on federal evidentiary development.

Procedural default and 28 U.S.C. § 2254(e)(2) impose "two distinct obstacles to presenting … ineffective-assistance-of-trial-counsel claims." JA 380 (Collins, J., dissenting). If one of these obstacles is insurmountable, relief is unavailable and whether the other obstacle can be overcome is irrelevant. *See* JA 391-92 (Collins, J., dissenting). Nonetheless, the court below concluded that, if *Martinez* applies, procedural default and § 2254(e)(2) are inextricably linked, such that overcoming procedural default also overcomes § 2254(e)(2)'s limitations. The court's

reasoning finds no support in § 2254(e)(2)'s text or this Court's precedent, creates other equitable concerns, and warrants reversal.

A. Section 2254(e)(2) precludes federal evidentiary development on a claim that a prisoner or counsel failed to develop in state court.

Before AEDPA, federal courts analogized a prisoner's failure to develop the factual basis of a claim in state court to procedural default and applied equitable principles to determine whether the prisoner could nonetheless receive an evidentiary hearing on the merits of a claim for habeas relief. *See, e.g., Keeney v. Tamayo-Rayes*, 504 U.S. 1, 8-10 (1992). Under these principles, a federal court could excuse a prisoner's failure to develop his claim, and thereby conduct a hearing, if the prisoner showed cause for and prejudice from the lack of state-court factual development. *Id.* This cause-and-prejudice standard was identical to the current cause-and-prejudice standard applied to excuse procedural default, as construed in *Martinez*. 566 U.S. at 9-10.

But Congress dramatically restricted a federal court's power to authorize evidentiary development when it enacted § 2254(e)(2) as part of AEDPA. This provision "imposes a limitation on the discretion of federal habeas courts to take new evidence in an evidentiary hearing," thereby effectuating AEDPA's overall intent "to strongly discourage" prisoners from offering new evidence in federal court. *Pinholster*, 563 U.S. at 185-86. Section 2254(e)(2) applies regardless whether the claim at issue is exhausted, and specifically "restricts the discretion of federal habeas courts to consider new evidence when

deciding claims that were not adjudicated on the merits in state court." *Id.* at 186.

Section 2254(e)(2)'s opening clause provides, "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" unless other conditions are met. 28 U.S.C. § 2254(e)(2). This Court has construed Congress's choice of "failed to develop" (as opposed to "did not" develop), to include a fault requirement that implied "some lack of diligence." *Williams*, 529 U.S. at 430. Because the "failed to develop" language "echoes *Keeney*'s language regarding the state prisoner's failure to develop material facts in state court," 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 (quotations omitted); *see also Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (when Congress uses "materially same language" as judicial decisions in a statute, "it presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning") (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); and *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). Thus, "the opening clause of § 2254(e)(2) codifies *Keeney*'s threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney*'s test for excusing the deficiency in the state-court record prior to AEDPA are now controlled by § 2254(e)(2)." *Williams*, 529 U.S. at 434.

In turn, *Keeney*'s test for when a prisoner has "failed to develop" a claim, which § 2254(e)(2) incorporates, also attributed to the prisoner counsel's

negligence in failing to develop the record. As a result, a failure to develop the factual record occurred even when counsel—as opposed to the prisoner personally—was to blame. *Keeney*, 504 U.S. at 4-5 (petitioner failed to develop factual basis of claim—and thus was required to excuse the factual default—"due to the negligence of postconviction counsel"). Section 2254(e)(2)'s opening clause is thus triggered 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 (emphasis added); *see also Coleman*, 501 U.S. at 754 ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation.").

Since *Williams*, this Court has reaffirmed its attribution of counsel's failures to the prisoner under § 2254. *See Holland,* 542 U.S. at 653 (concluding that prisoner had failed to develop facts of claim where post-conviction counsel had ignored "his pleas for assistance" because "[a]ttorney negligence … is chargeable to the client"). But Congress has not changed § 2254(e)(2)'s language or otherwise amended AEDPA to absolve a prisoner from the consequences of his or her attorney's failure to develop the state-court record.

While Congress, through AEDPA, preserved *Keeney*'s test for determining *when* a failure of state-court factual development has occurred, it eliminated *Keeney*'s cause-and-prejudice avenue for *excusing* such a failure. Congress instead "raised the bar" from this cause-and-prejudice standard and adopted in its place § 2254(e)(2)'s exacting statutory exceptions. *Williams*, 529 U.S. at 433. Those

exceptions permit federal factual development for a prisoner who has "failed to develop" his claim's factual basis only if the claim relies on a new, retroactively applicable rule of constitutional law or a newly discovered factual predicate that could not have been discovered earlier with due diligence, *and* the facts supporting the claim show the prisoner's actual innocence by clear-and-convincing evidence. 28 U.S.C. § 2254(e)(2)(A) & (B).

Thus, once a prisoner's failure to develop a claim triggers § 2254(e)(2)'s opening clause, a federal court may not receive new evidence to resolve the claim unless a statutory exception applies. *See* 28 U.S.C. § 2254(e)(2) (if prisoner has failed to develop claim's factual basis in state court a federal court "*shall not* hold an evidentiary hearing on the claim *unless*" the prisoner satisfies a statutory exception) (emphasis added). This restriction applies equally to formal evidentiary hearings and to the submission of new evidence in lieu of a hearing. *Holland*, 542 U.S. at 653.

B. Procedural default is a court-created bar to habeas relief, untethered to AEDPA, and *Martinez* is an exception to that bar.

Procedural default is a court-created doctrine, under which federal courts "will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez*, 566 U.S. at 9. The doctrine is related to the exhaustion requirement, as they both advance "comity, finality, and federalism interests" by channeling state prisoners' claims to state court. *Davila*, 137 S. Ct. at 2064; *see Coleman*, 501 U.S. at

731-32. But while the exhaustion doctrine is codified, *see* 28 U.S.C. § 2254(b), the procedural-default doctrine is an equitable rule created by this Court. *See Martinez*, 566 U.S. at 13.

This Court has determined that a prisoner may overcome a procedural default by demonstrating cause and prejudice for the default. *Coleman*, 501 U.S. at 750. In *Coleman*, this Court held that attorney error that does not amount to a constitutional violation cannot serve as cause to excuse a procedural default. *Id.* at 752 ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective …, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." (quotations omitted)). Because there is no constitutional right to counsel in state post-conviction proceedings, any error by post-conviction counsel "cannot be constitutionally ineffective," and a petitioner generally must "bear the risk of attorney error that results in a procedural default." *Id.* at 752-53 (quotations omitted).

Martinez, however, created a "narrow exception" to *Coleman's* rule: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. In so holding, this Court did not overrule *Coleman* or establish a constitutional right to effective counsel in a post-conviction proceeding. *Id.* at 16 (explaining that *Martinez* is an "equitable," and not a "constitutional," ruling). Accordingly, because post-conviction counsel's "ineffectiveness" does not amount to a constitutional violation, counsel's conduct is still imputed to the prisoner in all other

contexts. *See Davila*, 137 S. Ct. at 2065 ("*Martinez* did not purport to displace *Coleman* as the general rule governing procedural default."); *Martinez*, 566 U.S. at 16 ("The rule of *Coleman* governs in all but the limited circumstances recognized here.").

Martinez aimed to ensure that attorney error in an initial-review state collateral proceeding would not foreclose merits review of a prisoner's "substantial" claim of trial-counsel ineffectiveness. *Martinez*, 566 U.S. at 9, 14. But this Court also recognized competing interests of finality and comity and thus embedded in *Martinez* the promise that it would have limited application and would bring minimal strain to state resources. *Id.* at 15-16. This Court emphasized that a finding of cause under *Martinez* "merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Id.* at 17. This Court envisioned that a state would defend against any assertion of cause simply by asserting that a defaulted claim had no merit or lacked factual support, or that the initial-review post-conviction counsel "did not perform below constitutional standards." *Id.* at 15-16.

The dissenting Justices in *Martinez*, however, cautioned that the decision was, in reality, a "repudiation of the longstanding principle governing procedural default" that would inevitably swell beyond its bounds and envelop the interests in finality, comity, and federalism AEDPA was intended to protect. 566 U.S. at 23 (Scalia, J., dissenting). The rule also creates an incentive, as the dissenting Justices further noted, for prisoners to attack post-conviction counsel's performance in every case in order to access the "free pass to federal

habeas" relief *Martinez* authorized. *Id.* at 28; *see also Trevino v. Thaler*, 569 U.S. 413, 432 (2013) (Roberts, C.J., dissenting) ("[T]hat the exception was clearly delineated ensured that the *Coleman* rule would remain administrable.").

C. The *Martinez* exception to procedural default does not excuse Respondents' non-compliance with the separate procedural barrier of § 2254(e)(2).

The decisions below bring the *Martinez* dissenters' fears to reality by transforming *Martinez* into the "free pass to federal habeas" relief they predicted it would become. 566 U.S. at 28 (Scalia, J., dissenting). The decisions conflate two different hurdles to habeas relief, extend *Martinez* beyond its express bounds, and invoke a court-created equitable exception to evade a statute intended to restrict federal judicial authority. And they do so solely to enable the type of intensive appellate review that AEDPA is designed to channel to state courts.

1. The decisions below resurrect an equitable rule Congress intentionally abolished through AEDPA.

As discussed, Congress enacted § 2254(e)(2) not to "preserv[e] the opportunity for hearings," but to "*limit*[] the discretion of federal district courts in holding hearings." *Pinholster*, 563 U.S. at 185 n.8. To accomplish this goal, it abolished the equitable *Keeney* cause-and-prejudice standard for excusing a failure of state-court factual development—a standard that is coterminous with the cause-and-prejudice excuse for procedural default applied in *Martinez*. *See Williams*, 529 U.S. at 433.

Section 2254(e)(2) is thus a statutory barrier to habeas relief that a court may not disregard. *See Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (courts have authority to create exceptions to "judge-made … doctrines" but, with statutory provisions, "courts have a role in creating exceptions only if Congress wants them to"); *McQuiggin v. Perkins*, 569 U.S. 383, 404 (2013) (Scalia, J., dissenting) (court has "no 'equitable' power to discard statutory barriers to habeas relief," and thus "cannot simply extend judge-made exceptions to judge-made barriers into the statutory realm"); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315 (1981) (court cannot "judicially decree[] what accords with common sense and the public weal when Congress has addressed the problem") (quotations omitted); *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, AFL-CIO, 451 U.S. 77, 97 (1981) ("[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt."); *see generally Garland v. Dai*, 141 S. Ct. 1669, 1677 (2021) (Ninth Circuit's court-created "rule has no proper place in a reviewing court's analysis" where "Congress has carefully circumscribed judicial review" of the agency decision at issue).

But that is exactly what happened here. The panels below extended *Martinez*'s court-created rule to § 2254(e)(2), and they did so because the statute obstructed the intensive assessment they thought Respondents' claims deserved. The *Jones* panel expressly held that "*Martinez*'s procedural-default exception applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court." JA 334. The panel

cited this Court's intent in *Martinez* to ensure at least one round of merits review for substantial ineffectiveness claims, and opined that failing to permit factual development for that review would render *Martinez* "'a dead letter.'" JA 336 (quoting *Detrich*, 740 F.3d at 1247 (Opinion of Fletcher, J.)). The panel further suggested that § 2254(e)(2)'s "failed to develop" language does not encompass situations where the failure was caused by counsel's error not rising to a constitutional violation, citing two federal circuit decisions that were "based on a clear misreading of … *Williams*." JA 393 (Collins, J., dissenting); *see* JA 336-37 (citing *Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) and *Barrientes v. Johnson*, 221 F.3d 741, 771 n.21 (5th Cir. 2000)).[6] And it opined that, where a *Martinez* cause-and-prejudice hearing had already occurred, excluding that hearing's fruits from merits review would be "illogical" and "burdensome."[7] JA 335 (quotations omitted).

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[6] In authorizing an evidentiary hearing, the court in *Sasser* cited *Williams* for the proposition that § 2254(e)(2) does not prohibit an evidentiary hearing if the petitioner "'was unable to develop his claim in state court despite diligent effort.'" 735 F.3d at 853–54 (quoting *Williams*, 529 U.S. at 437). But its citation ignores *Williams*'s holding that counsel's failures are attributable to the prisoner for § 2254(e)(2)'s purposes. *Williams*, 529 U.S. at 439-40. And *Barrientes* erroneously conflated the cause-and-prejudice inquiry with the failure-to-develop question. 221 F.3d at 772. *Barrientes* also predates *Martinez* and did not involve a claim that counsel's errors constituted cause.

[7] Of course, as Judge Collins recognized, "[t]o the extent that the … scenario [in *Jones*] seems illogical or wasteful, that is only because the district court in *Jones* failed to consider up

The *Ramirez* panel went even further. Disagreeing with the district court's contrary conclusion, the panel found on the existing record that Ramirez had excused his claim's procedural default. JA 507-21. Then, citing the same page of *Detrich* as the *Jones* panel and nothing else (including § 2254(e)(2)), the panel proclaimed Ramirez "entitled" to evidentiary development on his claim's merits. JA 521. This "entitlement" stemmed from the panel's view that Ramirez was "precluded from such development because of his post-conviction counsel's ineffective representation." *Id.*

Neither panel made any effort to reconcile its decision with § 2254(e)(2)'s text, *Williams*, or *Holland*. This is not surprising, because this authority is not reconcilable. The panels below exempted Respondents' claims from § 2254(e)(2)'s requirements based on the exact condition that triggers § 2254(e)(2)'s opening clause under *Williams* and *Holland*: state counsel's ineffectiveness in post-conviction proceedings.

Finally, the decisions below are particularly troubling not only because they engraft an equitable exception onto a statute limiting federal authority, but also because they restore a pre-AEDPA cause-and-prejudice exemption that Congress intentionally eliminated. Worse still, they *expand* that standard to include a basis for excusing a lack of factual development that even *Keeney* did not contemplate: state counsel's ineffectiveness in a proceeding where

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front *both* of the *separate* obstacles that Jones faced." JA 391 (emphasis in original).

counsel is not constitutionally guaranteed. *See Keeney*, 504 U.S. at 7-10. The decisions thus effectively nullify § 2254(e)(2) for any claim that has passed through *Martinez*'s gateway. This in turn disarms 28 U.S.C. § 2254(e)(2); frustrates the principles of "comity, finality, and federalism" it was intended to protect; hinders Congress's efforts to limit federal hearings; and subjects states to the precise litigation AEDPA intended to avoid. *Pinholster*, 563 U.S. at 185 & n.8 (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)).

2. This Court's "limited" and "narrow" *Martinez* decision does not support ignoring § 2254(e)(2).

This Court intended *Martinez* to permit at least one merits review of a substantial ineffective-assistance claim. *Martinez*, 566 U.S. at 11-13. Applying § 2254(e)(2) to limit the evidence to be considered on that merits review is not inconsistent with that goal, particularly where Congress intended that merits review of any "claim" occur within § 2254(e)(2)'s parameters. *See* § I(A), *supra*; *see also Lewis v. Wilson*, 423 Fed. App'x 153, 158 (3d Cir. 2011) (mem.) (Section 2254(e)(2) barred evidence on claim's merits notwithstanding claim passing through the *Schlup* procedural-default gateway to merits review). The panels' perception that *Martinez* and § 2254(e)(2) cannot coexist was based on a misunderstanding of what *Martinez* provides.

The panels below each relied on a Ninth Circuit plurality decision (which did not command a majority of the court) to justify their results. JA 335, 521. In *Detrich*, Judge William Fletcher opined that ineffective-assistance claims often turn on factual

development and that "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state [post-conviction] counsel's ineffectiveness had been in state [post-conviction] proceedings, where the same ineffective counsel represented him." *Detrich*, 740 F.3d at 1247. Based on Judge Fletcher's observation, the *Jones* panel expressly extended the *Martinez* exception to merits review, and the *Ramirez* panel concluded that satisfying the *Martinez* exception opens the doors to *additional* factual development on the merits, notwithstanding § 2254(e)(2).[8] JA 337, 521.

But "[o]n its face, *Martinez* provides no support for extending its narrow exception" beyond the limited role of excusing a procedural default. *Davila*, 137 S. Ct. 2065. This Court did not discuss § 2254(e)(2) in *Martinez* and did not relax that

[8] The *Ramirez* panel found cause and prejudice under *Martinez* based primarily on a comparatively robust state record, which was developed through a series of successive post-conviction relief proceedings. JA 511-21. By remanding for *additional* evidentiary development, the panel implicitly found that Ramirez's claim failed on that record (a conclusion the district court also reached, *see* JA 461-82). JA 521. As a result, a correct application of § 2254(e)(2) would have led to the claim's dismissal. This illustrates another fault with the *Ramirez* opinion: its holding that the district court erred by skipping to the merits of Ramirez's claim "on an undeveloped record" to resolve the *Martinez* inquiry. JA 507. Contrary to the panel's impression, AEDPA expressly authorizes this analysis. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). And the panel's decision does not merely authorize a court to consider already-developed cause-and-prejudice evidence on the merits like the *Jones* panel's decision; it gives a prisoner another open-ended attempt to prove his claim in the first instance, with new factual evidence.

provision or any other statutory restriction on merits review. *Martinez* also did not cite, let alone overrule, *Williams* or *Holland*, which, as previously discussed, establish that post-conviction counsel's ineffectiveness does not excuse a prisoner's failure to develop the record under § 2254(e)(2). *See* JA 391 n.3 (Collins, J., dissenting) ("Because *Martinez* says literally nothing whatsoever about § 2254(e)(2), it cannot provide any basis for disregarding the directly applicable caselaw construing that provision."). In fact, in *Martinez*, this Court held that *Coleman*'s rule would continue to apply in all other contexts including, necessarily, § 2254(e)(2). *Martinez*, 566 U.S. at 16; *see Holland*, 542 U.S. at 653 (relying on *Coleman*).[9]

This analysis does not change even if most defaulted ineffective-assistance claims would benefit from additional factual development. A prisoner has

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[9] *Detrich* is part of a pattern of Ninth Circuit decisions expanding *Martinez* beyond its bounds, culminating in the decisions below. *See Dickens*, 740 F.3d at 1319 (permitting prisoner to offer new evidence on exhausted claim to "fundamentally alter[]" the claim into a procedurally defaulted one, thereby circumventing *Pinholster* and enabling *de novo* review after *Martinez* is satisfied); *Detrich*, 740 F.3d at 1243-44 (holding that *Martinez* is an "exception" to the cause-and-prejudice rule and is "more lenient" than the "usual" cause-and-prejudice inquiry); *id*. at 1245-46 ("A prisoner need not show actual prejudice resulting from his PCR counsel's deficient performance, over and above his required showing that the trial-counsel IAC claim be 'substantial.'"); *see also Hill v. Glebe*, 654 Fed. App'x 294, 295 (9th Cir. 2016) (mem.) (holding that *Martinez* applies to permit new evidence even when state waives procedural default); *see also Roseberry v. Ryan*, No. 2:15CV01507, Doc. 70, at 14–15 (D. Ariz. Jan. 30, 2018) (relying on *Hill* to expand the record on defaulted ineffective-assistance claims after state waived procedural default).

no right to factual development on habeas review, and limiting such development furthers § 2254(e)(2)'s specific intent to restrict federal evidentiary hearings. *See Pinholster*, 563 U.S. at 185 n.8; *see generally* JA 392 (Collins, J., dissenting).

Accordingly, when properly construed there is no conflict between *Martinez*'s narrow exception to procedural default and § 2254(e)(2)'s restrictions on new evidence. *See* JA 388 (Collins, J., dissenting from the denial of rehearing en banc) ("[T]he *Jones* panel and the *Detrich* plurality overstate the extent of the inconsistency between *Martinez* and § 2254(e)(2)."). As previously discussed, each presents a separate and independent hurdle to habeas relief. And if a conflict in fact exists, or if the *Jones* panel and *Detrich* plurality are correct that applying the statute divests *Martinez* of its relevance, *see* JA 335, then the solution is to revisit *Martinez*, not to ignore § 2254(e)(2) for the sole purpose of giving *Martinez* force. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021) ("Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality.").

3. The Ninth Circuit's interpretation of *Martinez* undermines procedural default and creates equitable imbalances.

This Court in *Martinez* reaffirmed the value of procedural default and its role in safeguarding

comity, finality, and federalism. 566 U.S. at 9; *see Davila*, 137 S. Ct. at 2068-70 (considering, in deciding whether to expand *Martinez* to other categories, interests of federalism and conservation of state resources). The decisions below, however, remove any remaining incentive for prisoners to bring their ineffective-assistance claims in state court. *See Pinholster*, 563 U.S. at 185-86. Withholding such claims until federal court, and then invoking *Martinez* to excuse their defaults and obtain evidentiary development, allows a prisoner to evade the stringent review standards of 28 U.S.C. § 2254(d) and the limitations on evidentiary development established under *Pinholster* and § 2254(e)(2) (which, under the decisions below, would continue to apply to claims raised in state court or, presumably, to procedurally defaulted claims that obtain merits review through a vehicle other than *Martinez*).

Encouraging prisoners to sidestep state court nullifies the procedural-default doctrine and undermines AEDPA's very purpose. *See Dickens*, 740 F.3d at 1328 (Callahan, J., dissenting in part) ("The majority's approach encourages state defendants to concoct "new" IAC claims that are nothing more than fleshed-out versions of their old claims supplemented with 'new' evidence."); *see, e.g.*, Jonathan D. Soglin, First District Appellate Project Training Seminar 16 (2008) https://perma.cc/JNU7-AXCR ("Practice Tip: The best scenario for federal court review may be where the state court finds the federal claim procedurally defaulted under a state procedural bar that is … excused …. In that situation, the federal court will review the claim on the merits and decide it de novo, with no deference to

the state court decision."). Procedural default is intended to be a bar to habeas relief, not an avenue thereto. By transforming the *Martinez* exception into a vehicle for record expansion on *de novo* review, the decisions below "aggravate the harm to federalism that federal habeas review necessarily causes." *Davila*, 137 S. Ct. at 2070.

The decisions below also purport to apply equitable principles to evade AEDPA's statutory evidentiary-development restrictions. But there is nothing equitable about treating an inmate who failed to develop a factual record in state court as equivalent to one who was diligent in doing so. *See* 28 U.S.C. § 2254(e)(2). Nor for that matter is there any equity in freely applying a more favorable *de novo* standard of review to a claim not presented in state court, while binding a properly exhausted claim to § 2254(d)'s standards and the evidentiary-development limitations of *Pinholster*.

Moreover, equity is not one-sided in favor of a prisoner; the State's interests, as well as judicial economy, must also be considered. *See Davila*, 137 S. Ct. at 2068-70. Like the proposed expansion in *Davila*, which would have made appellate-ineffectiveness claims subject to *Martinez*, the decisions below will "flood the federal courts" with requests for evidentiary development, which states will have to expend time and resources rebutting, in both capital and non-capital cases. *Id.* at 2068. The decisions below thus are not only legally erroneous, but they also undermine procedural default and create an equitable imbalance that warrants reversal.

II. Because Respondents did not develop their claims in state court and cannot meet § 2254(e)(2)'s exceptions, their claims fail.

Consistent with Congress's intent, this Court has routinely bound prisoners on merits review to the consequences of their attorneys' actions for § 2254(e)(2)'s purposes, even when the statute's application excluded relevant—or even compelling—evidence. *See Holland*, 542 U.S. at 653; *Williams*, 529 U.S. at 432; *see generally Coleman*, 501 U.S. at 754 ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation ...."). AEDPA intentionally sets high standards for relief, *see, e.g., Richter*, 562 U.S. at 102-03, and, as Judge Collins noted, the possibility that "a potentially meritorious claim might escape federal habeas review" is inherent in AEDPA's restrictions. JA 558.

Here, Respondents each were found to have excused their claims' procedural defaults under *Martinez*, thereby enabling merits review. But neither prisoner had developed his claim in state court, and each attributed that failure to counsel's lack of diligence. Jones did not present his claim in state court at all. *See* JA 328-29; *see Schriro v. Landrigan*, 550 U.S. 465, 479 (2007) (prisoner who fails entirely to present claim fails to develop that claim and cannot obtain a federal hearing). In contrast, Ramirez presented his claim in an inappropriate proceeding, reflecting a lack of diligence and leading the state court to dismiss the claim on procedural grounds. JA 457, 540 (Collins, J., dissenting).

Regardless whether post-conviction counsel's purported ineffectiveness excused their claims' defaults, Respondents were bound by their respective counsel's failures for purposes of § 2254(e)(2)'s opening clause. *See Williams*, 529 U.S. at 439-40. Once that clause was triggered, Respondents could not receive federal evidentiary development unless they asserted and proved one of § 2254(e)(2)'s narrow exceptions. *See* 28 U.S.C. § 2254(e)(2)(A) & (B); *Holland*, 542 U.S. at 653; *Williams*, 529 U.S. at 439-40. Neither prisoner did, and each prisoner's claim fails on the state-court record alone.

Thus, even if the procedural defaults were correctly set aside, Respondents' failure to clear the separate statutory hurdle to relief should have doomed their habeas claims. In fact, the district court in *Jones* should have considered the § 2254(e)(2) question before the procedural-default question, as Arizona encouraged it to do.[10] *See Jones v. Stewart*, Dist. Ct. Dkt. 175, at 64, 70-75; *see also Lopez v. Ryan*, 678 F.3d 1131, 1136-37 (9th Cir. 2012) (noting distinction between procedural default and § 2254(e)(2)). "Given the insuperable obstacle presented by § 2254(e)(2), whether the distinct obstacle presented by *Coleman/Martinez* could or could not be excused made no difference." JA 558 (Collins, J., dissenting). In light of the vast array of impediments to habeas relief, it is a routine occurrence that a claim may escape one bar only to

[10] As Judge Collins also noted, Arizona did not have the opportunity in *Ramirez* to object to evidentiary development on the merits until after the panel opinion. JA 562 n.4. In district court, Arizona argued that Ramirez had failed to show post-conviction counsel's ineffectiveness even considering his new federal evidence. *See* JA 461.

fall victim to another. *E.g. Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1249 (11th Cir. 2014) (*Martinez* does not affect separate timeliness bar). Such was the case here, and the courts below should have denied relief on both claims.

CONCLUSION

The judgments of the court of appeals should be vacated.

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