No. 10-1001

In The Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

vs.

CHARLES L. RYAN, Director
Arizona Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF FORMER STATE SUPREME COURT JUSTICES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

We are former state supreme court justices who submit this brief as amici curiae in support of Petitioner Martinez, pursuant to Supreme Court Rule 37.[1]

As members of the state judiciary, we devoted a substantial portion of our judicial attention to safeguarding the integrity and reliability of criminal prosecutions, ensuring that criminal proceedings in our respective states complied with both state and federal constitutional protections against improper and wrongful conviction. Federal claims can arise at any stage of a state criminal trial, as well as in many direct appeals. Certain federal claims, notably those asserting that the prosecution suppressed material evidence or that trial counsel was constitutionally ineffective, cannot practically be brought either at trial or on direct appeal because of the difficulties of discovering, or adequately litigating, the facts or legal principles supporting the claims. In some cases, as in the instant case, criminal defendants are prohibited from bringing these types of claims prior to state postconviction proceedings.

State and federal postconviction courts have long worked in tandem towards the goal of upholding

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[1] Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

federal constitutional rights. During the past half century, we have witnessed dramatic changes in the postconviction review of such claims in both the state and federal court systems. Prior to the 1960's, few federal claims were available to state defendants, and their review in state postconviction was rare. With this Court's incorporation of many federal Bill of Rights protections into the Fourteenth Amendment and expansion of access to federal habeas review in the 1960's, state petitioners who believed their federal rights were not upheld increasingly sought relief from the federal habeas courts. Underdeveloped state postconviction remedies often served only as a waystation to federal court.

During the past three decades, there has been a significant shift away from a federal habeas-dominated postconviction review process toward one that is state-court focused. This trend has been driven by decisions of this Court that modified and reduced the role of the federal courts, and further by congressional amendments to the federal habeas corpus statute in the Antiterrorism and Effective Death Penalty Act of 1996 that increased the significance and importance of state postconviction remedies.

Today, state postconviction remedies must provide a full opportunity for the development of federal constitutional claims that cannot be raised in earlier proceedings. Such claims typically are ones that require the assistance of counsel, investigative services, and extra-record development. State attorneys general have long recognized the necessity of providing skilled specialists at these proceedings. Prisoner-petitioners,

many of whom have limited education and mental limitations, also require the aid of skilled counsel and, when necessary, access to investigative and expert assistance, at least at the first stage in the state process where such claims are typically brought.

AMICI

Harry Lee Anstead served as an Associate Justice on the Florida Supreme Court from 1994 until 2009, and served as the Court's Chief Justice from 2002 through 2004.

Charles F. Baird served as an Associate Justice on the Texas Court of Criminal Appeals from 1990 through 1998.

Fred L. Banks, Jr., served as an Associate Justice on the Mississippi Supreme Court from 1991 through 2001, and was the Presiding Justice at the time of his retirement.

Rhoda Billings was appointed to the North Carolina Supreme Court as an Associate Justice in 1985 and served through 1986. In 1986, she was appointed Chief Justice.

Norman S. Fletcher served as an Associate Justice on the Supreme Court of Georgia from 1989 until 2001 when he was elevated to Chief Justice. He served in this position until his retirement in 2005.

Stewart F. Hancock, Jr, served as an Associate Justice on the New York Court of Appeals from 1986 through 1994.

Gerald Kogan served as an Associate Justice on the Florida Supreme Court from 1987 until 1996 when he became Chief Justice. He served in this position until his retirement in 1998.

Terry Trieweiler served as an Associate Justice on the Montana Supreme Court from 1991 through 2002.

Robert F. Utter served as an Associate Justice on the Washington Supreme Court from 1971 through 1995, except when he served as the Court's Chief Justice from 1979 through 1981.

Penny J. White served as an Associate Justice on the Tennessee Supreme Court from 1994 through 1996.

Michael D. Zimmerman served as an Associate Justice on the Supreme Court of Utah from 1984 until 2000, and served as Chief Justice from 1994 through 1998.

STATEMENT OF THE CASE

Martinez, an indigent prisoner in Arizona, sought to raise a federal constitutional claim – that his trial counsel failed to provide the effective assistance of counsel – in state postconviction proceedings. Under state law, this claim cannot be brought in earlier proceedings. *See State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). His appointed direct appeal attorney, apparently without notice to Martinez, initiated the state postconviction process. Without performing any

investigation as to trial counsel's effectiveness, she told the court she could find no colorable issue to raise, and the petition was later dismissed. When Martinez, through new counsel, filed a subsequent petition alleging his trial counsel had failed to provide effective assistance as required by the Sixth Amendment to the Constitution, the state courts ruled that the claim was precluded because the claim had not been asserted in his original state habeas proceeding, and it did not matter whether first state postconviction counsel had performed competently. *See Martinez v. Schriro*, 623 F.3d 731, 734 (9th Cir. 2010) (decision below) (describing state court procedural history). When Martinez sought review of this Sixth Amendment claim in federal habeas proceedings, both the district court and United States Court of Appeals for the Ninth Circuit held that state habeas counsel's failure to raise this claim in the original state habeas proceeding did not set forth a sufficient reason to permit review in federal habeas proceedings because there was no right to effective assistance of counsel in a state postconviction proceeding even when that was the first proceeding in which the claim could be raised. *See id*. at 734-43. Thus, no state or federal court has reviewed the merits of Martinez's claim that his trial counsel failed to act as counsel within the meaning of the Sixth Amendment.

SUMMARY OF ARGUMENT

Federal constitutional claims are regular fare in state court criminal prosecutions. In our system

of federalism, the state judiciary has the very same obligation as does the federal judiciary to enforce federal rights when they arise in state judicial proceedings.

While enforcement of some federal rights has long taken place in the postconviction process, in the wake of the Court's incorporation decisions in the 1960's and early 1970's, the federal habeas remedy provided a more viable and developed forum than did state postconviction remedies. At that time, numerous state postconviction systems were ill-equipped for such claims. More recent decisions from this Court, and congressional amendments to the federal habeas statute, have sharply reduced the role of the federal habeas courts and certified the state postconviction process as the primary forum for the development and litigation of federal claims that cannot practically be asserted at trial or on direct appeal.

While all states today have enacted modern postconviction remedies, many have incorporated statutes of limitations, various waiver doctrines, and other procedures that render the postconviction remedy both complex and uncharitable to error or mistake. At the same time, most of these systems fail to provide the essentials tools for the full development and reliable adjudication of claims that require extra-record evidence.

In the present case, it appears that Martinez's court-appointed appellate counsel did not represent him adequately in state postconviction proceedings with respect to a Sixth Amendment trial counsel

ineffective assistance claim. Arizona law forbids asserting such a claim before postconviction proceedings. The pleaded claim, which required investigation and evidentiary development, does not appear to be frivolous – indeed, it could be meritorious – and yet no court, state or federal, has reviewed its merits due to counsel's failings. Where a state does not provide reasonably competent counsel in a first state postconviction proceeding that concerns a federal claim that could not have been raised in earlier proceedings, the indigent prisoner cannot be held to have defaulted that claim. Given the increasing importance of state postconviction proceedings, we believe the Court's holdings in *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005), provide state postconviction petitioners a right to the effective assistance of counsel at first tier review, at least with respect to a federal constitutional claim subject to review for the first time.

ARGUMENT

I.

In Our System Of Federalism, Both State Courts And Federal Courts Are Charged To Protect And Enforce Federal Constitutional Rights.

We begin with first principles. The state and federal courts have long shared the same responsibility to protect and enforce federal constitutional rights. More than a century ago, this Court recognized that state courts are "subject also to the laws of the United

States," and a state is "just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State. . . ." *Claflin v. Houseman*, 93 U.S. 130, 137 (1876). As part of the original design of our collective national judiciary, "the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country. . . ." *Id*.

Succeeding decisions have repeatedly reaffirmed this fundamental principle. In *Robb v. Connolly*, 111 U.S. 624, 637 (1884), the Court observed that "[u]pon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . , whenever those rights are involved in any suit or proceeding before them. . . ." In so concluding, the Court reasoned that the Judiciary Act of 1789 declared that the original jurisdiction of United States circuit courts was "concurrent with the courts of the several states." *Id.* at 636. Moreover, state court judges, sworn as we are to uphold the U.S. Constitution and laws made in pursuance thereof, are fully competent to determine when proceedings are in conformity with federal constitutional rights. *Id.* at 637, 639. *See also Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (relying on *Robb*, 111 U.S. at 637); *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring) ("It is the solemn duty of [state] courts, no less the federal ones, to safeguard

personal liberties and consider federal claims in accord with federal law.").

Although federal and state courts are partners "equally bound to guard and protect rights secured by the Constitution," working on this project in tandem requires that one system be adaptive to the other. *Ex Parte Royall*, 117 U.S. 241, 251 (1886). For example, as this Court long ago recognized, state courts have the initial responsibility to protect and enforce federal constitutional rights; efficiency under our system of federalism requires that federal courts decline consideration of the federal constitutional claims brought by state petitioners until *after* state courts have had an opportunity to review them. *Id*. at 251. This doctrine, grounded in principles of comity, normally mandates that state remedies be exhausted before a federal claim can be brought in federal court. *See*, *e.g.*, *Ex Parte Hawk*, 321 U.S. 114, 117 (1944) ("[I]t is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist.") (internal quotation marks omitted); *Rose v. Lundy*, 455 U.S. 509, 519 (1982). Likewise, although a federal court has the power to look beyond the procedural default of a claim in state court, federal courts ordinarily decline to exercise this discretion, unless a defendant can demonstrate "cause" and "actual prejudice resulting from the alleged constitutional violation." *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *see also Smith v. Murray*, 477 U.S. 527, 533 (1986).

II.

The Federal Habeas Courts Assumed The Lead In Enforcing Federal Rights During The 1960's-1970's Due To The Lack Of Viable State Postconviction Remedies.

Prior to the 1960's, enforcement of the few then-applicable federal constitutional rights in state post-conviction proceedings was a rare event. Early on, state postconviction review was available through the common law writs of habeas corpus and coram nobis. In nearly all of the states, review was limited to whether the trial court had jurisdiction or whether the sentence exceeded the statutory maximum. One habeas scholar reports that from 1848 to 1900, only ten state postconviction decisions were reported from five states; by 1916 there were only 30 such decisions, and by 1931, the number had risen to roughly 85. *See* Donald E. Wilkes, Jr., *State Postconviction Remedies and Relief Handbook*, Vol. 1, § 2:4 (West 2010) ("Wilkes").

In the 1940's and 1950's, the number of reported cases brought in state postconviction proceedings increased considerably, in large part due to this Court's interest in coerced confessions and right to counsel issues.[2] Such cases also demonstrated the inadequacy

[2] *See Ashcraft v. Tennessee,* 322 U.S. 143 (1944) (coerced confession); *Betts v. Brady*, 316 U.S. 455 (1942) (right to counsel); *Smith v. O'Grady*, 312 U.S. 329 (1941) (involuntary plea and right to counsel); *Chambers v. Florida*, 309 U.S. 227 (1940) (coerced confessions).

of review provided by state postconviction systems. For example, in *Smith v. O'Grady*, the petitioner alleged that he had been duped into pleading guilty without adequate notice of the charge or punishment, and without the assistance of counsel. 312 U.S. 329, 332-33 (1941). The Nebraska state trial court denied Smith's habeas petition without requiring an answer or providing Smith "an opportunity to prove his allegations," and the state supreme court affirmed without opinion. *Id*. at 330. After this Court concluded that Smith had stated a claim upon which relief could be granted, it remanded the case back to the state court – notwithstanding the State's suggestion that, under Nebraska law, Smith could not assert federal rights in a habeas corpus proceeding – with instructions that, if Smith could prove his allegations, his conviction could not stand. *Id*. at 334.

In 1948, the Court granted certiorari to review an Illinois conviction, but noted "[w]e are once again faced with the recurring problem of determining what, if any, is the appropriate post-trial procedure in Illinois by which claims of infringement of federal rights may be raised." *Young v. Ragen*, 337 U.S. 235, 236 (1949). As the Court observed, "of course" a state "may choose the procedure it deems appropriate for the vindication of federal rights." *Id.* at 238. The Court made clear, however, that "it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." *Id.* Accordingly, the Court in *Young* "articulated the principle that the States

must afford prisoners some 'clearly defined method by which they may raise claims of denial of federal rights,'" *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (Clark, J., concurring) (quoting *Young*, 337 U.S. at 239). The Court remanded the case, and asked the state court to inform it "[i]f there is now no post-trial procedure by which federal rights may be vindicated. . . ." *Young*, 337 U.S. at 239.[3]

In 1965, the Court agreed "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." *Case*, 381 U.S. at 337. Case alleged that his trial counsel had performed ineffectively in violation of the Sixth Amendment. The Nebraska Supreme Court recognized that the allegations, if true, would establish a federal constitutional violation. *Id*. at 336. But it denied relief, holding that its common law habeas corpus remedy was limited to claims alleging either that the trial court lacked jurisdiction, or that the petitioner's sentence was in excess of the statutory limit. *Id*. at 337. This Court ultimately dismissed the case after Nebraska became the seventh state to adopt a "modern

[3] Shortly thereafter, Illinois became the first state to enact a modern postconviction remedies statute. *See* Wilkes, Vol. 1, § 2:5 at 39-40 (describing Illinois Post-Conviction Hearing Act of 1949). It authorized relief for constitutional violations or other basic rights, generally lifted procedural obstacles to relief, and was designed to be used instead of traditional habeas corpus and common law coram nobis remedies.

procedure for testing federal claims in the state courts" by passing a postconviction statute while the case was pending, but not before the Court implored the remaining states to adopt similar postconviction review mechanisms. *Id.* at 340.

This was the context for the Court's announcement of its seminal decisions in *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), which transformed the federal habeas remedy. In *Noia*, the Court held that federal habeas courts could adjudicate federal claims brought by state prisoners even if the petitioner had failed to present the claim at available state processes, so long as the applicant had not deliberately bypassed state remedies. A finding of deliberate bypass required that the petitioner himself intentionally forewent state procedures; accordingly, it did not encompass errors by petitioner's counsel. *See Noia*, 372 U.S. at 438-39. In *Townsend*, as discussed *infra*, the Court articulated a more expansive view of the federal habeas courts' power to conduct evidentiary development of claims asserted by state prisoners.

This Court's decisions in *Noia* and *Townsend*, and grant of review in *Case*, stimulated reform of state postconviction procedures throughout the country so that "by the end of 1965 a total of 40 states had to one degree or another significantly expanded their postconviction relief machinery. . . ." Wilkes, Vol. 1, § 2:5 at 42. Yet much of the evidentiary development of federal claims raised in the state postconviction courts would continue to take place in the federal

habeas courts. Indeed, *Noia* and *Townsend*, along with the Court's incorporation of many of the federal bill of rights into the Fourteenth Amendment, led to a huge increase in federal habeas filings by state petitioners. In 1961, while there were nearly 196,000 state prisoners, the federal courts received only 1,020 federal habeas petitions. By 1982, while the number of state prisoners had doubled to more than 384,000, the number of habeas petitions filed by state prisoners multiplied almost eightfold, to 8,059.[4]

Evidentiary development in federal court has led to the correction of numerous unconstitutional, and fundamentally unjust, state court convictions and sentences. *See*, *e.g.*, *Miller v. Pate*, 386 U.S. 1, 2-6 (1967) (prosecution deliberately presented false evidence – *viz.*, that shorts were stained with the victim's blood type when the shorts were actually stained with paint – to obtain capital conviction); *Dobbs v. Turpin*, 142 F.3d 1383, 1386, 1388-89 (11th Cir. 1998) (trial counsel failed to investigate and present mitigating evidence at penalty phase of capital trial, because, *inter alia*, counsel thought mitigating evidence was inadmissible); *Guerra v. Johnson*, 90 F.3d 1075, 1076-80 (5th Cir. 1996) (prosecution repeatedly suppressed eyewitness evidence exonerating the petitioner, and the police and prosecutors threatened witnesses); *Henderson v. Sargent*, 926 F.2d 706, 710-14 (8th Cir. 1991)

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[4] *See* U.S. Department of Justice, Bureau of Justice Standards, *Habeas Corpus, Federal Review of State Prisoner Petitions* at 3 (March 1984).

(trial counsel and state postconviction counsel failed to investigate readily available evidence implicating the victim's husband as the true murderer in this capital case, notwithstanding obvious leads in police file); *Harris v. Reed*, 894 F.2d 871, 877-79 (7th Cir. 1990) (trial counsel presented no evidence and failed to interview two men who saw the primary alternate suspect fleeing from the scene, even though counsel's opening statement told jurors they would hear evidence about the alternate suspect); *Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987), *aff'g* 667 F. Supp. 1456, 1458-60 (S.D. Fl. 1986) (the prosecution knew the crucial "expert" testimony it presented at trial – that the petitioner had fired the murder weapon – was scientifically invalid); *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985) (en banc) (the State suppressed a transcript for over two decades, in which the principal alternate suspect stated: "I did shoot at that policeman."); *Lindsey v. King*, 769 F.2d 1034, 1036, 1038-40 (5th Cir. 1985) (prosecutor in a capital trial purposefully suppressed a police report showing that a key prosecution eyewitness – directly contrary to his trial testimony – told police he did not see the perpetrator's face).

III.

The Court And Congress Define A Narrower, Secondary Role For The Federal Habeas Courts.

The late 1980's and 1990's witnessed a substantial contraction of federal habeas corpus review. The logic driving much of this contraction was that state

postconviction courts have a duty to vindicate federal constitutional rights, and that the state courts could be counted on to provide fair procedures for doing so.

Federal habeas has contracted in two principal ways. First, the number of cases in which federal courts may develop new facts has been sharply reduced. Second, federal review of state court merits rulings has been constrained.

In 1991, two decisions of this Court reduced federal habeas courts' authority to review state court merits rulings on federal claims. In *McCleskey v. Zant*, 499 U.S. 467, 493 (1991), the Court announced that the deliberate bypass standard announced in *Fay v. Noia* would be replaced by a cause and prejudice standard for successive habeas petitions. Cause and prejudice, unlike deliberate bypass, requires that petitioners normally "bear the risk of attorney error," *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The same year, the Court directly overruled *Noia* – which had been eroded beginning with *Francis v. Henderson*, 425 U.S. 536 (1976), and *Wainwright v. Sykes, supra,* – and replaced the deliberate bypass standard with the cause and prejudice standard for all independent and adequate state procedural defaults. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The following year, this Court narrowed federal habeas courts' authority to engage their fact-finding function. Under *Townsend*, an evidentiary hearing was required in federal habeas proceedings if, *inter alia*, the petitioner stated a claim for relief and the facts

were not adequately developed in state court, unless the petitioner deliberately bypassed state court procedures. *See Townsend*, 372 U.S. at 312, 314, 317. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), this Court overruled *Townsend* in part, holding that cause and prejudice applies in this context as well. 504 U.S. at 5-6, 11. Thus, under *Keeney*, errors by state postconviction counsel in developing facts normally deprived the petitioner of a mandatory federal evidentiary hearing. There was a "narrow exception" for petitioners who could "show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." *Id*. at 11-12.

Four justices dissented in *Keeney*, arguing that deliberate bypass remained the correct standard in the evidentiary hearing context. In Justice Kennedy's words: "[W]e consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. We ought not to take steps which diminish the likelihood that those courts will base their legal decision on an accurate assessment of the facts." *Id*. at 24 (dissenting opinion); *see also id*. at 15-18 (O'Connor, J., dissenting) (noting that, when the reliability of state factfinding is doubtful because crucial evidence was not presented, federal habeas courts have long examined facts anew: "As Justice Holmes wrote for the Court . . . : 'It does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.' ") (quoting *Moore v. Dempsey*, 261 U.S. 86, 92 (1923)).

The majority in *Keeney*, however, emphasized that state courts are capable of providing adequate process to ensure that relevant facts are developed in state court. "The state court is the appropriate forum for resolution of factual issues in the first instance . . . ," wrote the *Keeney* majority, and "[j]ust as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." 504 U.S. at 9-10. The Court further explained that the purpose of requiring petitioners to develop facts in state court "is not to create a procedural burden on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court." *Id*. at 10; *see also id*. at 9 ("[E]ncouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance.").[5]

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[5] Before Congress's enactment of the Antiterrorism and Effective Death Penalty Act in 1996, this Court restricted the ability of federal habeas courts to grant relief to state prisoners in two additional respects. *Teague v. Lane*, 489 U.S. 288 (1989), held that new rules of law could no longer be announced or applied in federal habeas proceedings. *Brecht v. Abrahamson*, 507 U.S. 619 (1993), held that the *Chapman v. California*, 386 U.S. 18 (1967) harmless error standard would no longer apply in habeas proceedings; instead, the standard first promulgated in

(Continued on following page)

In 1996, Congress enacted numerous amendments to the federal habeas statute. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). These amendments sought to make the federal review process faster and more final. Effectively, these amendments also rendered the state judiciary not only the front-line defender of federal constitutional rights, but often the last-line defender as well.

One of AEDPA's provisions is 28 U.S.C. § 2254(e)(2). This Court has interpreted § 2254(e)(2) as codifying *Keeney*'s holding that, where the petitioner or his counsel failed to develop facts diligently in state court, the petitioner must meet a heightened standard to obtain a federal hearing. *See (Michael) Williams v. Taylor*, 529 U.S. 420, 432-33, 439-40 (2000); *see also Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam). However, § 2254(e)(2) also supersedes *Keeney* in part, making that heightened standard even more difficult to meet. The statute replaces *Keeney*'s cause-and-prejudice test and freestanding miscarriage-of-justice exception with a test requiring petitioners to establish *both* a particular type of cause, 28 U.S.C. § 2254(e)(2)(A), *and* a miscarriage of justice under an especially stringent standard, 28 U.S.C. § 2254(e)(2)(B). *See (Michael) Williams*, 529 U.S. at 433.

Kotteakos v. United States, 328 U.S. 750 (1946) (error "had substantial and injurious effect or influence in determining the jury's verdict") would apply to all claims raised in habeas petitions.

Similar to this Court's logic in *Keeney*, § 2254(e)(2) is "premised upon recognition by Congress . . . that state judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings." *Id*. at 436-37. The statute's rigorous requirements for a federal hearing thus apply only if the petitioner is at fault for failing to develop evidence in state court. *Id*. at 437. Although federal habeas courts "are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings," "comity is not served by" barring a federal hearing where the prisoner "was unable to develop his claim in state court despite diligent effort." *Id*.; *see also id*. at 436 ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts.").

In addition to further limiting the scope of factual development in federal habeas cases, AEDPA substantially contracted federal habeas review of state court merits rulings. Before AEDPA, state court rulings on purely legal issues and mixed questions of fact and law were reviewed *de novo* in federal habeas proceedings. *See (Terry) Williams v. Taylor*, 529 U.S. 362, 400 (2000). Under AEDPA, however, a federal habeas court may grant relief on a claim adjudicated on the merits in state court only if the legal ruling "was contrary to, or involved an unreasonable application of," a prior decision by this Court. 28 U.S.C. § 2254(d)(1). Moreover, even in those cases where

factual development is permitted in federal court, only those facts presented in state court may be considered as part of this § 2254(d)(1) review. *See Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1398 (2011).

AEDPA similarly contracted the scope of federal habeas review of state court merits rulings based on contested factual determinations. Under pre-AEDPA law, state court factual determinations were normally presumed to be correct in federal habeas, but there were eight statutory exceptions to that presumption. *See Jefferson v. Upton*, 560 U.S. ___, 130 S. Ct. 2217, 2221 (2010) (citing pre-1996 version of 28 U.S.C. § 2254(d)). If, for example, material facts were not adequately developed in the state court hearing, the presumption of correctness was inapplicable. *See* 28 U.S.C. § 2254(d)(3) (1994). By contrast, under AEDPA, there are no express limitations on the presumption that state court fact-findings are correct, *see* 28 U.S.C. § 2254(e)(1), and federal habeas courts are limited to reviewing the state court record in determining whether a state court decision is based on an unreasonable determination of the facts, *see* 28 U.S.C. § 2254(d)(2).

AEDPA's limitations on federal habeas review of state court merits rulings once again reflect the fundamental principle that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 778 (2011); *see also Pinholster*, 131 S. Ct. at 1399 ("'The federal habeas scheme leaves primary responsibility with the state courts[.]'") (quoting *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)).

Although federal habeas continues to "stand[ ] as a safeguard against imprisonment of those held in violation of the law," *Harrington*, 131 S. Ct. at 780, 28 U.S.C. § 2254(d), as amended by AEDPA, "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction[.]" *Id*. at 786 (internal quotation marks omitted).

In light of this significant contraction of federal habeas review, it is now imperative that the state postconviction courts possess the means to provide for the full development and reliable adjudication of federal claims raised for the first time and at the first tier in those proceedings.

IV.

Current State Postconviction Remedies Fail To Guarantee A Full Opportunity To Develop Federal Claims That Cannot Be Asserted At Trial Or On Direct Appeal.

Much has changed in the state postconviction process since the Court's grant of review in *Case v. Nebraska* to decide whether the federal constitution required States to have "some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." 381 U.S. at 337.

Either by statute or court rule, every state and the District of Columbia has a modern postconviction remedy system. *See* Wilkes, Vol. 1, § 1:3. In each,

claims alleging the trial court lacked jurisdiction, or that the conviction or sentence was obtained in violation of state or federal constitutional rights are cognizable. *Id.* at § 1:4. In thirty-four states, newly discovered evidence of innocence is a cognizable ground for relief. *Id*.

These systems, however, are not simple, straightforward remedies that *pro se* applicants can safely navigate. All are governed by an increasingly complex set of rules and procedures that regulate nearly every step in the process – when the petition must be filed, which claims are and are not cognizable, how thoroughly each claim must be presented, which rules of law apply (or do not apply), etc.[6] For example, in nearly all jurisdictions, claims that were, or could have been, raised on direct appeal will not be considered.[7] Thirty-seven states have enacted statutes of

[6] Two retired Alabama appellate jurists recently characterized the Alabama postconviction process in similar terms. *See* Brief of *Amici Curiae* Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner in *Maples v. Thomas*, No. 10-63 at 29 ("Alabama's postconviction process is governed by exceptionally complex procedural rules, unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate the maze. The rules are so complex, and often so unyielding, that an inmate who is not represented by competent counsel has little chance of survival.").

[7] *See*, *e.g.*, *Lamarca v. State,* 931 So. 2d 838, 851 n.8 (Fla. 2006) (claims that could have been raised on direct appeal are barred in postconviction proceedings); *People v. Petrenko*, 931 N.E.2d 1198, 1204 (Ill. 2010) (same); *Mills v. State*, 868 N.E.2d 446, 452 (Ind. 2007) (same); *Loden v. State*, 43 So. 3d 365, 377 (Miss. 2010) (same).

limitation that apply to some or all postconviction cases. Wilkes, Vol. 1, § 1:6 at 10-11. Some begin to run as early as from the date of sentencing;[8] others do not begin until the completion of direct appeal. In states with no limitation period, case law provides that prejudicial delay in filing may result in dismissal of the petition.[9] *Id*. at § 1:6. Numerous states have adopted heightened pleading requirements for all asserted claims.[10] It is not enough to identify the claim, the applicable constitutional provision, and then plead a core set of facts in support thereof. In many states, petitioners must identify and plead all possible claims in the first application as successor or successive petitions are rarely allowed.

This new complexity strongly suggests the necessity of counsel, at least for federal claims that cannot be asserted in earlier state proceedings. Currently, only twenty-eight states make some provision for counsel in postconviction proceedings in non-capital cases; fifteen states provide counsel for capital proceedings only; in the District of Columbia and seven other states – Alabama, Delaware, Georgia, Massachusetts,

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[8] *See State v. Milne*, 842 A.2d 140, 143 (N.J. 2004).

[9] *See Walker v. Martin*, 562 U.S. ___, 131 S. Ct. 1120 (2011).

[10] Under Alabama postconviction law, "[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Ala. R. Crim. P. 32.6(b). Tennessee law has the same specificity requirement. *See* Tenn. Code Ann. § 40-30-106(d).

Michigan, Nebraska, and New Hampshire – there is no right to counsel in postconviction proceedings. Wilkes, Vol. 1, § 1:5.

Even in those states that make provision for counsel in non-capital cases, appointment is not a matter of right, and is often made contingent on various factors. In Colorado, for example, there is "a limited statutory right to postconviction counsel"; in most instances, the court will send the case to the public defender to determine whether counsel is necessary. *See Silva v. People*, 156 P.3d 1164 (Colo. 2007). This is also the rule in Ohio. *See* Ohio Rev. Code Ann. § 120.06(A)(3). In Florida, the court has discretion to appoint counsel and must consider four factors before making an appointment. *See Bynum v. State*, 932 So. 2d 361 (Fla. App. 2006) (relevant factors are (1) the adversary nature of the proceeding; (2) its complexity; (3) the need for an evidentiary hearing; and (4) the need for substantial legal research). In Louisiana, counsel is appointed only if the court orders an evidentiary hearing or if discovery is to be taken. *See* La. Code Crim. P. Art. 930.7.

Empirical studies reveal that, even in jurisdictions with a statutory counsel provision, counsel is not appointed in the vast majority of non-capital habeas cases. One study looked at habeas practice in San Diego trial-level courts in the early 1990's. A review of 312 case files showed that *pro per* petitioners filed their own petitions and sought the appointment of counsel in 71 cases; the courts appointed counsel in only two of those cases. *See* Perrello &

Delzeit, *Habeas Corpus in San Diego Superior Court (1991-1993): An Empirical Study*, 19 T. Jefferson L. Rev. 283, 285-86 (1997). According to the study, "[t]he San Diego petitions examined were usually denied without factual investigation, without appointment of counsel, and without hearings. There is usually no analysis of the merits in the decisions." *Id*. at 288.

Similarly, while many postconviction schemes make allowance for discovery and for evidentiary development, discovery is available only at the court's discretion and requires that the petitioner first demonstrate a substantial need. In Washington and Oklahoma, for example, discovery is conditioned upon a showing of "good cause." *See* Wash. R. App. P. 16.12; Okla. Stat. Ann., tit. 22 § 1083(a). In Pennsylvania, no discovery is available except by leave of the court and with a showing of exceptional circumstances. *See* Pa. Cons. Stat. Ann., tit. 42 § 9545(d)(2).

Our knowledge and review of the current post-conviction systems persuades us that although state postconviction remedies have improved significantly during the past three decades, access to the tools necessary for petitioners to adequately plead and develop their claims is inconsistent. Whether a state post-conviction system in fact provides a forum for the development of federal claims that cannot be asserted earlier is largely determined by the discretionary decisions of the courts to appoint counsel, provide adequate funding for investigation and experts where appropriate, and allow discovery.

V.

Indigent Petitioners In State Postconviction Proceedings Require Effective Counsel To Adequately Litigate At First Tier Review Those Federal Claims That Cannot Be Asserted Earlier.

In the wake of this Court's ruling in *Cullen v. Pinholster*, *supra*, it is clear to us that state petitioners who allege non-frivolous federal claims that could not have been asserted earlier must have a fair opportunity to do so at the first tier in their original state postconviction proceeding. The state courts' equal partnership in our system of federalism requires no less. It is also clear to us that only the most unusual incarcerated prisoner would have the means to develop such claims without the services of able counsel who are reasonably compensated, and who, when necessary, have access to investigative and expert assistance, and to formal discovery.

It also seems to us that the original state postconviction process in this case failed to work properly due to appointed counsel's ineffective representation. Because this was the very first opportunity for Martinez to air his trial counsel ineffective assistance claim, his claim should not be forever precluded. The Court's decisions in *Douglas v. California, supra*, and *Halbert v. Michigan*, *supra*, would seem to control here because this was Martinez's first opportunity to raise his federal claim, a claim that depended upon extra-record fact development, and his appointed appellate counsel apparently failed to perform adequately.

CONCLUSION

For the reasons stated above, amici curiae request that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

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