No. 10–1001

IN THE
SUPREME COURT OF THE UNITED STATES

LUIS MARIANO MARTINEZ,

Petitioner,

VS.

CHARLES L. RYAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a federal habeas petitioner can establish "cause" for the procedural default of an ineffective-assistance-of-trial-counsel claim by alleging ineffective assistance of state-collateral-review counsel.

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STATEMENT OF THE CASE

Petitioner was charged and convicted of two counts of sexual conduct with a person under the age of fifteen. *Martinez v. Schriro*, 623 F.3d 731, 733 (9th Cir. 2010). After his convictions were affirmed on direct appeal, the Arizona trial court appointed counsel to pursue collateral relief under Arizona Rule of Criminal Procedure 32.4. *Id.* at 733–34. Petitioner's counsel filed a "Notice of Post-Conviction Relief" to initiate the proceedings, but subsequently indicated she had "reviewed the transcripts and trial file and [could] find no colorable claims" to raise. *Id.* at 734. Counsel requested that Petitioner be granted additional time to file a *pro per* post-conviction relief petition. *Id.* The trial court granted the request, but Petitioner did not file a petition. *Id.* The trial court dismissed the post-conviction relief proceeding after the time for filing the petition had expired. *Id.*

Over a year later, Petitioner, through new counsel, filed a second notice of post-conviction relief, and subsequently, he filed a petition in support of that notice, asserting that his trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment. *Id.* The Arizona trial court dismissed the petition, finding Petitioner's claims were precluded under the Arizona Rules of Criminal Procedure. *Id.* The Arizona Court of Appeals affirmed the trial court's finding of preclusion, rejecting Petitioner's contention that his claims should not be precluded because his prior post-conviction-relief

counsel was ineffective.[1] (Petitioner's Appendix ["Pet. App.], at 80a–81a.) The Arizona Supreme Court subsequently summarily denied review. *Martinez*, 623 F.3d at 734.

On April 24, 2008, Petitioner filed a federal petition for writ of habeas corpus, contending that his trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment. *Id.* The district court ruled that Petitioner's claims were procedurally defaulted, and that Petitioner had not shown cause for the default. *Id.* Accordingly, the court denied the petition. *Id.*

On September 27, 2010, the Ninth Circuit Court of Appeals affirmed the dismissal of Petitioner's habeas action, concluding: (1) the Arizona trial court's finding of preclusion resulted in a procedural default of Petitioner's claims that his trial counsel was ineffective; and (2) Petitioner could not show "cause and prejudice" for his default because there is no federally-recognized right to the assistance of counsel in post-conviction or collateral review proceedings. *Id.* at 735–43.

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[1] Petitioner contends that, in his second post-conviction relief proceeding, he exhausted a claim that his first post-conviction-relief counsel was constitutionally ineffective. (Petition, at 5 n.4.) Petitioner only asserted that claim, however, as a basis for his contention that his ineffective-assistance-of-trial-counsel claims should not be precluded. (Respondents' Appendix ["Resp. App."], at A28–A 31 [post-conviction relief petition]; *id.* at B2, B16–B20 [petition for review in the Arizona Court of Appeals].)

On November 5, 2010, the Court of Appeals denied Petitioner's timely petition for rehearing and rehearing en banc. (Pet. App., at 84a–85a.)

SUMMARY OF ARGUMENT

The petition for certiorari does not assert a split among the lower courts or otherwise raise a question that warrants review by this Court. Petitioner first argues that Arizona's rule barring claims that could have been raised in a prior post-conviction proceeding was not an "adequate" ground under the "adequate and independent" doctrine. (Petition, at 9–11.) This Court, however, has already held that a dismissal on this ground is an adequate ground for denying a claim. *Gray v. Netherland*, 518 U.S. 152, 161–62 (1996). Petitioner has not established a compelling basis for this Court to revisit this issue.

Petitioner's second argument is that he should be able to establish "cause" for his procedurally-defaulted ineffective-assistance-of-trial counsel claims by demonstrating that he received ineffective assistance of counsel during his first state collateral-review proceeding. (Petition, at 11–21.) However, in order for the ineffectiveness of counsel to constitute cause for a procedural default, a habeas petitioner must show that counsel's ineffectiveness amounted to a constitutional violation. This Court has properly determined that there is no federal constitutional right to counsel in collateral-review proceedings. A defendant is entitled to counsel to conduct the main event—the trial. The fact that Arizona provides counsel in collateral review to evaluate the "main event" does not establish a right

to constitutionally effective counsel. Further, recognizing any such right would necessarily involve a right to a second collateral-review proceeding to evaluate the performance of a defendant's first collateral-review counsel, which would take us even further away from the trial itself.

Moreover, even if Petitioner could establish a constitutional right to the effective assistance of collateral-review counsel, he still could not show cause for his procedural default because the recognition of such a right would amount to a "new rule," which may not be the basis for a federal collateral attack on a state-court conviction.

Finally, even if it is assumed that Petitioner did have a right to the effective assistance of counsel in his state collateral-review proceeding, and further assuming that recognizing such a right would not establish a "new rule," he still cannot show cause for his procedural default because, after his counsel filed a notice that she could not find any colorable claim to raise, Petitioner had an opportunity to file a *pro per* petition. Petitioner, therefore, bears the ultimate responsibility for not raising his ineffective-assistance-of-trial-counsel claims.

REASONS NOT TO GRANT THE WRIT

I. The State Court Finding of Preclusion was An "Adequate and Independent" Reason to Deny Petitioner's Claims That His Trial Counsel Was Ineffective.

In addition to failing to demonstrate a split among the lower courts, the petition for certiorari does not raise a question that warrants review by this Court. Petitioner first asserts that the procedural ground on which the state court denied his federal claims was not "adequate" under the adequate and independent state law doctrine. (Petition, at 8.) When the Arizona trial court considered Petitioner's second post-conviction relief petition, however, it concluded, *inter alia*, that Petitioner's claims that his trial counsel was ineffective were precluded because Petitioner did not present them in his original post-conviction relief proceeding. (Pet. App., at 68a–78a.) The Arizona Court of Appeals affirmed the trial court's dismissal of Petitioner's second post-conviction proceeding, concluding that the trial court did not abuse its discretion when it found Petitioner's claims were precluded. (Pet. App. at 80a–81a.) This finding of preclusion constitutes an independent and adequate state ground that bars federal habeas review. *See Gray*, 518 U.S. at 161–62 (state-court finding that claims in second post-conviction petition were precluded because they could have been raised in first petition constituted adequate and independent grounds for denying relief).

Petitioner asserts that the finding of preclusion was not an "adequate" ground for denying his claims because it frustrated his ability to bring a claim that

his collateral-review counsel was ineffective, and prevented him from raising his underlying ineffective-assistance-of-trial-counsel claims. (Petition, at 9.) As noted above, however, in his second post-conviction relief petition, Petitioner did not raise a separate claim that his collateral-review counsel was ineffective; he merely argued that his ineffective-assistance-of-trial counsel claims were not precluded because of the alleged ineffectiveness of his collateral-review counsel. (Resp. App., at A28–A31; B2, B16–B20.) The finding of preclusion, therefore, only related to Petitioner's ineffective-assistance-of-trial-counsel claims. (Pet. App., at 80a–81a.) Because the "adequacy" of the preclusion finding in this case concerns only Petitioner's underlying ineffective-assistance-of-trial-counsel claims, it is clear that this finding was an adequate ground for denying Petitioner's claim. *See Walker v. Martin*, ___ U.S. ___, 131 S. Ct. 1120, 1127–28 (2011) (stating that a finding of preclusion is an adequate ground for denying relief if it is "firmly established and regularly followed")

This Court has previously concluded that a state-court finding that a claim was precluded because it was not raised in a prior post-conviction relief proceeding is an adequate and independent ground for denying habeas relief. *Gray*, 518 U.S. at 161–62; *see also Lopez v. Schriro*, 491 F.3d 1029, 1043 n.11 (9th Cir. 2007) (referring to the application of Arizona Rule of Criminal Procedure 32.2(a) as an "independent and adequate" state law ground for denying habeas relief).

Petitioner does not challenge any of the above authority holding that a state-court finding of

preclusion is an adequate and independent ground for denying a habeas claim; instead, he complains that the finding of preclusion in this case frustrated his right to assert a claim that his trial counsel was ineffective. (Petition, at 9.) That, however, is a natural consequence of this Court's recognition that a state-court finding of procedural default constitutes an adequate and independent ground for denying habeas relief. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (stating that without the adequate and independent state ground doctrine, habeas petitioners would be able to take "an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws"); *see also McCleskey v. Zant*, 499 U.S. 467, 490–91 (1991) (stating that the doctrine of procedural default flows "from the significant costs of federal habeas corpus review," which strikes at the important interest of "finality," and "places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes"); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) ("We believe the adoption of the [adequate and independent ground] rule in [habeas proceedings] will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing.").

II. Petitioner Has Not Established Cause for His Procedural Default Because There is No Constitutional Right to Effective Assistance of Counsel During Collateral Review.

The Court of Appeals correctly held that

recognizing a right to counsel in collateral-review proceedings would be an unwarranted expansion of this Court's precedent. Further, the fact that Arizona has enacted procedures to allow criminal defendants to challenge their convictions in collateral-review proceedings does not entitle Petitioner to "effective" assistance of counsel under either the Sixth or Fourteenth Amendments; instead, any right to counsel was fulfilled by the state's appointment of counsel. Thus, because Petitioner did not have a right to constitutionally-effective counsel during his post-conviction proceeding, any theoretical deficiencies in his counsel's performance during that proceeding should not be deemed to provide cause for the procedural default of his ineffective-assistance-of-trial-counsel claims. *Coleman,* 501 U.S. at 757.

A. There is no constitutional right to the assistance of counsel at collateral-review proceedings.

In order for the ineffective assistance of collateral-review counsel to constitute cause for the procedural default of an ineffective-assistance-of-trial-counsel claim in state court, a habeas petitioner must establish that the alleged ineffectiveness of collateral-review counsel "*itself* [is] an independent constitutional claim." *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). There is no constitutional right to collateral-review counsel, and, thus, Petitioner cannot establish cause for his default.

As an initial matter, it is well-established that the Sixth Amendment only applies to trial rights. *See Martinez v. Court of Appeal of California, Fourth*

Appellate Dist., 528 U.S. 152, 159–60 (2000) (stating that the rights enumerated in the Sixth Amendment "are presented strictly as rights that are available in preparation for trial and at the trial itself").

Furthermore, there is no generally-recognized right to counsel in post-conviction proceedings. *Coleman*, 501 U.S. 756–77; *Pennsylvania v. Finley*, 481 U.S. 551, 555–59 (1987); *Johnson v. Avery*, 393 U.S. 483, 488 (1969). This is true even in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality); *see also Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007) (stating, in a capital case, that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel"). Petitioner recognizes this, but argues his post-conviction relief proceeding was the functional equivalent of a first direct appeal, and, thus, he was entitled to counsel based on this Court's decisions in *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Douglas v. People of State of Cal.*, 372 U.S. 353 (1963). (Petition, at 13–19.) As the Court of Appeals correctly concluded, however, Petitioner's case is not sufficiently analogous to *Halbert* or *Douglas* to justify creating an exception to the rule that there is no right to counsel in collateral proceedings. *Martinez*, 623 F.3d at 736–40.

In *Douglas*, this Court held that the right to due process and equal protection requires states to provide indigent criminal defendants counsel for their "first appeal" in state court. 372 U.S. at 355–56; *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (holding that the right recognized in *Douglas* includes the right to

effective assistance of counsel). In *Halbert*, the Court extended *Douglas* to require the appointment of counsel for defendants who plead guilty and waive their right to direct appeal, but nonetheless retained their ability to seek discretionary review of their convictions in the state court of appeals. 545 U.S. at 610–22. Crucial to the determination that *Douglas* required the appointment of counsel was the fact the state court of appeals' ruling on a defendant's claim provided "the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Id.* at 619. Petitioner had a counseled direct appeal; and, thus, neither *Douglas* nor *Halbert* supports the contention that Petitioner was constitutionally entitled to counsel for his first-post conviction relief proceeding. *Martinez*, 623 F.3d at 740.

Instead, Petitioner's case is more analogous to *Ross v. Moffitt*, 417 U.S. 600 (1974). There, the Court concluded that a state is not required to appoint counsel for a criminal defendant beyond a first appeal. 417 U.S. at 610–19. After acknowledging that a state need not provide a criminal defendant an appeal at all, *Ross* rejected the notion that due process required the appointment of counsel merely because a state provided the right to appeal. *Id.* at 610–11. The Court also rejected the suggestion that the equal-protection right recognized in *Douglas* applies to all state proceedings that allow criminal defendants to challenge their convictions. *See id.* at 612 ("Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles

recognized in other decisions of this Court.") (footnote omitted).

Ross concluded that an indigent defendant was not denied meaningful access to the courts when he was not appointed counsel to assist him in seeking discretionary review. *Id.* at 615. By that time, the defendant had already received "the benefit of counsel in examining the record of his trial and in preparing an appellate brief," and, thus, "prior to his seeking discretionary review in the State Supreme Court, his claims had 'once been presented by a lawyer and passed upon by an appellate court.'" *Id.* at 614–15 (quoting *Douglas*, 372 U.S. at 356.) And, of course, nothing prevented the defendant—who had access to the trial transcripts, the appellate brief, and other materials—from petitioning for further review himself. *Ross*, 417 U.S. 615. As in *Ross*, Petitioner already had a counseled direct appeal, and, thus, Arizona was not constitutionally required to appoint him collateral-review counsel. *Martinez*, 623 F.3d at 740; *see also Finley*, 481 U.S. at 557 (noting that States have no obligation to provide post-conviction relief proceedings, "and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well").

Petitioner contends that he was entitled to counsel to raise his ineffective-assistance-of-trial counsel claims because those claims could not have been raised on direct appeal. (Petition, at 14–15.) Notably, however, when this Court rejected the notion that there was a right to collateral-review counsel in the

capital context, it did so despite the dissent's complaint that ineffective-assistance-of-counsel claims could usually not be raised on direct appeal. *Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting) (noting that claims of ineffective-assistance-of-counsel claims could not be raised on direct appeal under the state law at issue).

Moreover, claims of ineffective assistance are fundamentally different than record-based claims raised on direct appeal because they essentially reflect a defendant's second chance to raise—using ineffective assistance of counsel as a conduit—issues that should have been pursued at trial. In other words, even ineffective-assistance-of-trial-counsel claims are essentially collateral to the conviction and sentence because they do not seek to upset a verdict or sentence by showing error in the record; they seek reversal by attempting to relitigate what has already been litigated. *Cf. Finley*, 481 U.S. at 559 (stating that a defendant in a post-conviction relief proceeding is in a "fundamentally different position" than a defendant who is on trial or pursuing a first appeal as of right). They are also different than record-based claims because they "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial . . . ." *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 788 (2011).

Also, given the "strong presumption" that a trial attorney's assistance is reasonable and the temptation for a "defendant to second-guess counsel's assistance after [a] conviction or adverse sentence," this Court has cautioned against allowing "intrusive post-trial inquiry" of a trial counsel's performance, which can

result in "a second trial, this one of counsel's unsuccessful efforts." *Strickland v. Washington*, 466 U.S. 668, 689–90 (1984) (citation and internal quotation marks omitted). Recognizing a right to counsel in collateral-review proceedings to attack trial counsel's performance would often result in a *third* trial, this one of collateral-review counsel's unsuccessful efforts in the "second trial" (*i.e.*, the first collateral-review proceeding) to establish that performance of the defendant's counsel in his first trial was constitutionally deficient.

Recognizing a constitutional right to the effective-assistance-of-collateral-review counsel would require at least two collateral-review proceedings after direct appeal, the second one to attack first collateral-review-counsel's performance. Further, if a criminal defendant were deemed to have a constitutional right to counsel in a first collateral-review proceeding merely because he could not have previously raised his ineffective-assistance-of-trial-counsel claims, he would presumably have a right to counsel in a subsequent proceeding because *that* proceeding would be the first place he could raise a claim that his second collateral-review counsel was ineffective; and so on, and so on. *See Martinez*, 623 F.3d at 742 (declining to adopt an exception to the general rule that there is no right to counsel in collateral proceedings for claims of ineffective-assistance-of-trial counsel because "this exception would swallow the general rule"); *see also Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993) (noting that recognizing a right to effective assistance of counsel in a first post-conviction relief proceeding to raise claims that trial counsel was ineffective would

logically result in "an infinite continuum of litigation in many criminal cases").

Petitioner argues that the Court of Appeals' concern of an "infinite continuum of litigation is understandable," but unfounded because: (1) a challenge to the effectiveness of the performance of the attorney attacking the collateral-review counsel's performance would amount to a "**second**-tier review of the effectiveness of trial counsel," which he acknowledges is not cognizable; and (2) it would be unlikely that a federal habeas petitioner "could work his way through several tiers of state post-conviction review without running afoul of the one-year statute of limitation for federal habeas cases [as set forth in] 28 U.S.C. § 2244(d)(1)." (Petition, at 20, original emphasis, footnote omitted.) As noted above, however, in order to constitute cause for a procedural default, a claim must be presented as a separate claim. *Carpenter*, 529 U.S. at 451. Thus, a claim that collateral-review counsel was ineffective would have to be asserted not during a "second-*tier* review," but as an independent claim in a second collateral-review proceeding. Further, Petitioner's second point fails to acknowledge that 28 U.S.C. § 2244(d)(2) allows for the tolling of the 1-year limitations period while a timely-initiated state post-conviction relief proceeding is pending.

Finally, Petitioner contends that even if there would be "some habeas cases involving multi-level ineffective-assistance claims, that would not justify denying the constitutional right" to the effective assistance of collateral-review counsel because the

failure to recognize such a right would render the right to effective assistance of trial counsel "an abstract right." (Petition, at 21.) Petitioner's assertion, however, presumes that appointed collateral-review attorneys will, as a matter of course, fail to execute their obligations under state law. There is no basis for any such presumption. *Cf. Smith v. Robbins,* 528 U.S. 259, 286 (2000) ("[W]here, as here, the defendant has received appellate counsel who has complied with a valid state procedure for determining whether the defendant's appeal is frivolous, and the State has not at any time left the defendant without counsel on appeal, there is no reason to presume that the defendant has been prejudiced."); *Strickland*, 466 U.S. at 689 (trial counsel is presumed to have rendered professional assistance). Moreover, Petitioner's contention—taken to its logical conclusion—would require the type of infinite litigation the Court of Appeals referred to; that is, in order to make the right to effective-assistance-of-collateral-review counsel an "effective" right, not an "abstract" one, a defendant would necessarily need the right to the effective assistance of a second collateral-review counsel to ensure that his prior counsel was effective, and so forth, and so forth. *Cf. Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (noting that, despite the fact the Court has found a right to counsel on direct appeal, other decisions of the Court "make clear that there is no continuum requiring varying levels of process at every conceivable phase of the criminal system").

B. Petitioner's state-created procedural right to collateral-review counsel did not create a right to "effective" assistance of counsel.

Petitioner's argument that he can show cause for his procedural default assumes not only that he had a constitutional right to counsel in his collateral-review proceeding, but that he has a constitutional right to the *effective* assistance of that counsel. *See Carpenter*, 529 U.S. at 451 (stating that "[n]ot just any deficiency in counsel's performance" may constitute cause for a procedural default; instead "the assistance must have been so ineffective as to violate the Federal Constitution"). There is no such right.

The right to effective assistance of counsel under the Sixth Amendment is limited to the assistance of effective trial counsel. *Strickland*, 466 U.S. at 686. Subsequently, this Court found that, although criminal defendants do not have a constitutional right to appeal, they have a due-process right to the effective assistance of appellate counsel if the state provides an appeal. *Evitts*, 469 U.S. at 396–97. The Court, however, has never extended this right to post-conviction relief proceedings, because—as discussed above—it has consistently held there is no right to counsel in that context. *Lawrence*, 549 U.S. at 336–37; *Coleman*, 501 U.S. 756–77; *Giarratano*, 492 U.S. at 10; *Finley*, 481 U.S. at 555–59; *Johnson*, 393 U.S. at 488.

Further, because there is no substantive right to collateral post-conviction relief proceedings, any contention that a state post-conviction review process violates due process must be based on a claim of

"procedural due process." *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, ___ U.S. ___, 129 S. Ct. 2308, 2312, 2316–22 (2009) (concluding that because convicted prisoner did not have a substantive right to DNA testing, his claim that he was denied access to testing necessarily involved a claim of procedural due process). Given the wide discretion states are afforded in enacting post-conviction review legislation, a procedural due process challenge in this context faces a formidable hurdle. *See Finley*, 481 U.S. at 559 (rejecting the contention that "when a State chooses to offer help to those seeking relief from [their] convictions, the Federal Constitution dictates the exact form such assistance must assume"). Thus, "[f]ederal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 129 S. Ct. at 2320; *see also Skinner v. Switzer*, 562 U.S. ___ , ___ (2011) (slip op., at 2) (stating that the Court's analysis in *Osborne* "left slim room for the prisoner to show that the governing state [post-conviction procedure] denies him procedural due process"). *Cf. Herrera v. Collins*, 506 U.S. 390, 399 (1993) (noting that due process "does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person," because "[t]o conclude otherwise would all but paralyze our system for enforcement of the criminal law").

The procedures Arizona follows in collateral post-conviction relief proceedings are not "fundamentally inadequate to vindicate" a defendant's right to challenge his conviction or sentence. *Osborne*, 129 S.

Ct. at 2320. First, the procedures provide that a defendant may initiate a proceeding with a simple "notice of post-conviction relief." Ariz. R. Crim. P. 32.4(a). Secondly, after that notice is filed, a defendant is appointed counsel if it is his first post-conviction relief proceeding. Ariz. R. Crim. P. 32.4(c). A defendant is also provided cost-free transcripts of the relevant trial proceedings. Ariz. R. Crim. P. 32.4(d). Discovery is available after a petitioner has filed a petition outlining his claims. *Canion v. Cole*, 115 P.3d 1261, 1263, ¶¶ 10–11 (Ariz. 2005). If the petitioner states a colorable claim for relief, an evidentiary hearing is held. Ariz. R. Crim. P. 32.8. Additionally, if appointed counsel fails to find a colorable claim to pursue, the defendant is provided additional time to file a *pro per* petition, with his former counsel acting as advisory counsel. Ariz. R. Crim. P. 32.4(c)(2). Furthermore, if a petition is denied, the defendant may petition for review in the Arizona Court of Appeals and, after that, in the Arizona Supreme Court. Ariz. R. Crim. P. 32.9(c) & (g).

These procedures plainly provide an Arizona defendant a constitutionally-adequate avenue to vindicate the underlying state-created right, *i.e.*, the right to have the Arizona courts hear his claims.

By appointing counsel for defendants in their first collateral-review proceedings, Arizona has created a sufficient procedure to allow defendants to present their challenges in a collateral-review proceeding. *See Osborne*, 129 S. Ct. at 2320 ("We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in

general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence."); *Giarratano*, 492 U.S. at 14–15 (Kennedy, J., concurring) (concluding that due process was satisfied where capital defendants had access to prison's "institutional lawyers" to assist them in preparing their post-conviction relief petitions); *Finley*, 481 U.S. at 559 (holding that state-court procedures for providing prisoners access to post-conviction review were constitutionally adequate, even though the procedures did not provide for the appointment of counsel); *see also Callins v. Johnson*, 89 F.3d 210, 212–13 (5th Cir. 1996) (noting that the mere fact that state prisoner was appointed counsel in his first federal capital habeas petition did not mean that he had a right to constitutionally effective counsel in that proceeding).

Moreover, when determining whether there is a violation of procedural due process, a federal court looks at the procedures in general and not whether in the court's opinion the procedures produced a fair result. *See, e.g., Swarthout v. Cooke*, ___ U.S. ___, 131 S. Ct. 859, 862 (2011) (stating that where parolees received the procedures they were constitutionally entitled to, "[t]hat should have been the beginning and the end of the federal habeas courts' inquiry into whether [they] received due process"); *Lawrence*, 549 U.S. at 337 ("[A] State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay."); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) ("We hold that the power vested in the Connecticut Board of Pardons [under state law] to commute sentences

conferred no rights on respondents beyond the right to seek commutation."). Instead, once it is established that the required procedures themselves were followed, any error in the proceedings would be a "mere error of state law," "not a denial of due process." *Cooke*, 131 S. Ct. at 863 (quoting *Engle v. Isaac*, 456 U.S. 107, 121, n.21 (1982)).

In sum, assuming *arguendo* Petitioner had a right to counsel in his collateral-review proceeding to raise ineffective-assistance-of-trial-counsel claims, that right was a state-created right, which did not entail the further right to the "constitutionally effective assistance of counsel" under either the Sixth or Fourteenth Amendments; instead, Arizona's obligation to Petitioner was fulfilled by the appointment of counsel. *See Finley*, 481 U.S. at 558 ("Since respondent has received exactly that which she is entitled to receive under state law—an independent review of the record by competent counsel—she cannot claim any deprivation without due process.").

Furthermore, a conclusion that a defendant may allege ineffective assistance of collateral-review counsel as cause to excuse a procedural default would be inconsistent with Congress's prohibition on granting relief on any such claim. *See* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). This is because, in order to reach the underlying claim, a habeas petitioner would first have to establish, as an independent violation, that his collateral-review counsel was ineffective.

Carpenter, 529 U.S. at 452. Thus, before determining whether the petitioner's underlying claim is valid, a federal court would have to rule on the merits of the petitioner's claim of ineffective-collateral-review-counsel, which would amount to granting relief on that claim. *See Jimenez v. Florida Dep't of Corr.,* 481 F.3d 1337, 1343 (11th Cir. 2007) ("[Petitioner] asserted the ineffective assistance of his state-appointed counsel in his post-conviction proceedings deprived him of his state-created right to full and fair state post-conviction process. Section 2254 explicitly bars this claim."); *Post v. Bradshaw*, 422 F.3d 419, 423 & n.1 (6th Cir. 2005) (holding that § 2254(i) bars all types of "relief," not just relief on the merits of a habeas petition); *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (concluding that § 2254(i) bars a habeas petitioner from claiming ineffective assistance of counsel in post-conviction proceedings as "cause" for a procedural default); *Gosier v. Welborn*, 175 F.3d 504, 511 (7th Cir. 1999) (stating that § 2254(i) means "that counsel's errors in post-conviction proceedings cannot supply the 'cause' that would relieve a defendant of his forfeitures").

Moreover, even assuming a finding of ineffective-assistance-of-collateral-review-counsel constitutes only "cause," and not "relief" under § 2241(i), the principal harm that statute seeks to avoid—litigation of collateral proceedings—would necessarily ensue. *See Williams v. Taylor*, 529 U.S. 362, 386 (2000) (opinion of Stevens, J.) (stating that by enacting the Antiterrorism and Effective Death Penalty Act of 1996, the "AEDPA," "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to

the extent possible under law"); *see also Johnson v. McDonough,* 480 F. Supp. 2d 1309, 1313 (S.D. Fla. 2007) (noting that "Congress added 28 U.S.C. § 2254(i) when it enacted the AEDPA").

III. *Teague* Prevents Petitioner from Establishing Cause Based on any Newly-Recognized Right to Collateral-Review Counsel.

Even if Petitioner could somehow establish that he was constitutionally entitled to the effective assistance of collateral-review counsel to raise an ineffective-assistance-of-trial-counsel claim, Petitioner would still not be able to show cause because this would amount to a "new rule," which would not be applicable to Petitioner's case.[2] *Teague v. Lane*, 489 U.S. 288, 305–11 (1989). *Cf. McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (stating that the "[a]pplication of the cause and prejudice standard in the abuse-of-the-writ context does not mitigate the force" of *Teague's* rule, "which prohibits, with certain exceptions, the retroactive application of new law to claims raised in federal habeas").

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[2] Any "new rule" would only affect collateral-review proceedings, and, thus, would not fall within *Teague's* exceptions for: (1) rules placing certain types of conduct "beyond the power of the criminal law–making authority to proscribe"; and (2) "watershed rules of criminal procedure" that affect the accuracy of the criminal proceeding. 489 U.S. at 311–12.

IV. Petitioner Cannot Show Cause for His Default Because Ultimately He Was Personally Responsible for Any Default.

Finally, Petitioner cannot show cause because—even if he had a right to the effective collateral-review counsel to raise ineffective-assistance-of-trial-counsel claims in his first post-conviction relief proceeding—Petitioner himself was ultimately the cause for the procedural default. As discussed above, if an Arizona defendant's appointed counsel concludes there are no colorable issues to raise in a post-conviction relief proceeding, the defendant has the opportunity to pursue a *pro se* petition where, *inter alia*, claims of ineffective-assistance-of-counsel claims may be raised. Ariz. R. Crim. P. 32.4(c)(2); *see also State v. Smith*, 910 P.2d 1, 4 (Ariz. 1996) ("If, after conscientiously searching the record for error, appointed counsel in a [post-conviction relief] proceeding finds no tenable issue and cannot proceed, the defendant is entitled to file a pro per [post-conviction relief].").

Petitioner acknowledges there is no right to counsel beyond a first collateral-review proceeding. (Petition, at 21, n.11.) And, although Petitioner contends that he should be able to attack the performance of his first collateral-review counsel in a second post-conviction proceeding, the simplest way for Petitioner to have asserted what he claims are "valid" ineffective-assistance-of-trial-counsel claims would have been to raise those claims directly in a *pro per* petition after his counsel notified the trial court that she could not find any colorable issues to raise. That way, the validity of the claims could be addressed without

Petitioner first having to establish that his collateral-review counsel's performance was "objectively unreasonable." *Robbins*, 528 U.S. at 285.

Thus, assuming *arguendo* Petitioner's appointed counsel erred when she concluded there were no colorable issues to raise, there still is no cause because Petitioner himself is responsible for any error in failing to raise ineffective-assistance-of-counsel claims during his first post-conviction relief proceeding.[3] *Coleman*, 501 U.S. at 753–54 (cause is not established where failure to present claim is attributable to the defendant himself); *see also Smith v. Baldwin*, 510 F.3d 1127, 1146–47 (9th Cir. 2007) (stating that the alleged errors by petitioner's collateral-review counsel did not prevent the petitioner from raising his substantive post-conviction claims himself); *Custer v. Hill*, 378 F.3d 968, 974–75 (9th Cir. 2004) (habeas petitioner could not rely on state collateral-review counsel's errors to overcome procedural default when the petitioner did

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[3] In his statement of the case, Petitioner cites the opinion below and asserts that his counsel "failed effectively to inform [him] that he needed to file his own petition, and he did not do so." (Petition, at 4–5, citing *Martinez*, 623 F.3d at 734.) The Court of Appeals, however, merely indicated that Petitioner had made this *allegation*. *Martinez*, 623 F.3d at 734. More importantly, Petitioner does not assert this as a ground for overcoming his procedural default; instead, he seeks to establish a general constitutional right to the effective assistance of collateral-review counsel in raising ineffective-assistance-of-trial-counsel claims. (Petition, at 8–21.) Thus, any contention that Petitioner's default should be excused because he was not adequately informed of his right to file his own *pro per* petition is not before this Court. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court").

not preserve the substantive claims by presenting them *pro se* to the state court). *Cf. Lawrence*, 549 U.S. at 337 (concluding that attorney error in postconviction proceeding could not be the basis for equitable tolling, *inter alia*, because the prisoner could have represented himself).

CONCLUSION

Adopting Petitioner's position that he is entitled to effective assistance of counsel during his first state collateral-review proceeding would effectively require a second collateral-review proceeding to assess the effectiveness of counsel who handled the first proceeding; this, in turn, would defeat the States' interests in the finality of their criminal convictions and would improperly shift the focus of criminal proceedings away from the "main event"—the trial.

Accordingly, and for the above reasons, the State respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted

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Appendix