No. 10-1001

In the
Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

v.

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Respondent.

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

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

ARGUMENT. 1

I. PETITIONER'S FEDERAL INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM IS NOT SUBJECT TO PROCEDURAL DEFAULT FOR TWO INDEPENDENTLY SUFFICIENT REASONS 1

A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate" 1

B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims. 3

II. PETITIONER HAS NEVER ARGUED THAT HIS STATE-CREATED PROCEDURAL RIGHT TO COLLATERAL-REVIEW COUNSEL CREATED A FEDERAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL 8

Table of Contents

Page

III. THIS CASE PRESENTS NO GENUINE ISSUE OF "RETROACTIVITY" UNDER *TEAGUE V. LANE* 10

IV. PETITIONER DID NOT PROCEDURALLY DEFAULT HIS INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM, OR HIS RIGHT TO EFFECTIVE ASSISTANCE OF FIRST POST-CONVICTION COUNSEL WITH RESPECT TO THAT CLAIM, BY FAILING TO RAISE AND LITIGATE IT HIMSELF IN THE FIRST POST-CONVICTION PROCEEDING 12

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

CASES

Coleman v. Thompson,
501 U.S. 722 (1991) 4, 9, 13

Douglas v. California,
372 U.S. 353 (1963) . . . . *passim*

Edwards v. Carpenter,
529 U.S. 446 (2000) 6

Gosier v. Welborn,
175 F.3d 504 (7th Cir. 1999) 10

Halbert v. Michigan,
545 U.S. 605 (2005) . . . . *passim*

Hopkins v. Reeves,
524 U.S. 88 (1998) 10

McConnell v. Rhay,
393 U.S. 2 (1968) 11

Murray v. Giarratano,
492 U.S. 1 (1989) 4

Ross v. Moffitt,
417 U.S. 600 (1974). 3, 4, 5, 7

Schiro v. Farley,
510 U.S. 222 (1994) 10

Page

Strickland v. Washington,
466 U.S. 668 (1984) 7

Teague v. Lane,
489 U.S. 288 (1988) 10, 11

Walker v. Martin,
___ U.S. ___, 1131 S. Ct. 1120 (2011) 2

STATUTES

28 U.S.C. § 2244(d)(1) 7

28 U.S.C. § 2244(d)(2) 7

28 U.S.C. § 2254(i) 9, 10

ARGUMENT

For the reasons that follow, Respondent's Brief in Opposition fails to refute the Petition's showing that the Court of Appeals' dispositive holding -- that Petitioner did not have a federal right to effective assistance of first post-conviction counsel with respect to any ineffective-assistance-of-trial-counsel claim, even though the first post-conviction proceeding provided the first opportunity for Petitioner to raise such a claim -- was contrary to this Court's decisions in *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005).

I. PETITIONER'S FEDERAL INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM IS NOT SUBJECT TO PROCEDURAL DEFAULT FOR TWO INDEPENDENTLY SUFFICIENT REASONS

A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate"

Respondent's argument that the state court's finding of preclusion was an adequate and independent state ground for the dismissal of Petitioner's ineffective-assistance-of-trial-counsel claim (BIO at 5-7) is not persuasive:

1. Respondent offers no explanation for the conclusory statement that "[b]ecause 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." (*Id.*). Perhaps this is because

Respondent's parenthetical assertion that this Court stated in *Walker v. Martin*, ___ U.S. ___, 1131 S. Ct. 1120, 1127-28 (2011), that "a finding of preclusion is an adequate ground for denying relief if it is 'firmly established and regularly followed'" (BIO at 6) is incorrect. What this Court did state in *Walker* was that "[t]o qualify as an 'adequate' procedural ground, a state rule **must be** 'firmly established and regularly followed.'" 131 S. Ct. at 1127 (emphasis added). In short, being "firmly established and regularly followed" is a necessary -- but not a sufficient -- condition for "adequacy." Thus, this Court noted in *Walker* that "a state ground would be inadequate if the challenger shows a 'purpose or pattern to evade constitutional guarantees,'" *id*. at 1130-31; and such a purpose or pattern is precisely what the Petition has demonstrated (at 9-12).

2. Ultimately, Respondent argues that if "the finding of preclusion in this case frustrated his right to assert a claim that his trial counsel was ineffective," that "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." (BIO at 7). But that remarkably extreme argument is not supported by the cases that Respondent cites, and it is inconsistent with other decisions by this Court and the Ninth Circuit's opinion in this case (*see* Pet. at 9).

3. In any event, whether the state court's preclusion ruling was "adequate" is not dispositive. As Respondent recognizes (BIO at 8), even an adequate default is excused if it was the product of a violation of the defendant/petitioner's constitutional right to effective assistance of counsel. (Pet. at 12).

B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims

1. With regard to the central issue in this case -- whether Petitioner had a federal constitutional right to effective assistance of first post-conviction counsel with respect to any ineffective-assistance-of-trial-counsel claim -- Respondent does not challenge Petitioner's *Douglas/Halbert* argument directly. Thus, Respondent does not dispute that in Arizona, a defendant must raise any ineffective-assistance-of-trial-counsel claim for the first time in a petition for post-conviction relief, or that post-conviction review of ineffective-assistance-of-trial-counsel claims meets both requirements for "first-tier" review under *Douglas* and *Halbert*, or that a defendant has a federal constitutional right to appointed counsel on first-tier review, or that the right to appointed counsel necessarily means the right to effective assistance of counsel. (*See* BIO at 8-15). Instead, Respondent seeks to distinguish *Douglas and Halbert*, and to analogize this case to *Ross v. Moffitt*, 417 U.S. 600 (1974), primarily on some of the grounds suggested by the Court of Appeals. As the following paragraphs will show, Respondent's arguments regarding *Douglas*, *Halbert*, and *Ross* are without merit.

2. Respondent's first attempt to distinguish *Douglas* and *Halbert* (BIO at 9-10) is substantively identical to the Court of Appeals' reasoning with respect to whether Petitioner's first post-conviction proceeding amounted to "first-tier" review for purposes of *Douglas* and *Halbert*. The Petition (*see* secs. II(A)(1)-(4), pp. 13-15) has demonstrated the several flaws in that reasoning,

and the Brief in Opposition makes no attempt to address those flaws.

3. Respondent's attempt to analogize this case to *Ross* (BIO at 10-11) echoes the Court of Appeals' reasoning in rejecting of Petitioner's argument that he was "ill equipped" to represent himself in the first post-conviction proceeding with respect to any ineffective-assistance-of-trial-counsel claims. 623 F.3d at 741 (App. at 19a). But as the Petition has shown (at 15-17), the Court of Appeals' reasoning has three major flaws -- none of which is addressed by the Brief in Opposition.

4. With respect to Respondent's citation to Justice Stevens' dissent in *Murray v. Giarratano*, 492 U.S. 1, 24 (1989) (BIO at 11-12), it is sufficient to say (a) that the majority in *Giarratano* did not even mention Justice Stevens' dissenting point about ineffective-assistance claims (perhaps because the issue in that case was the validity of a lower court order that required appointment of counsel for any death row inmate who wished to pursue state habeas proceedings on **any** ground), and (b) that *Giarratano* was decided before *Coleman v. Thompson*, in which this Court explicitly recognized that there might be an exception to the general rule that "there is no right to counsel in state collateral proceedings" when "state collateral review is the first place a prisoner can present a challenge to his conviction." 501 U.S. at 755.

5. Although Respondent said nothing, in any filing in the District Court or the Court of Appeals, about any concern that recognition of the right to effective assistance of first post-conviction counsel (with respect to ineffective-assistance-of-trial-counsel claims that were prohibited

on direct appeal) might lead to an "infinite continuum of litigation," the Brief in Opposition (at 13-15) devotes almost three pages to that concern. But Respondent's attempts to refute Petitioner's demonstration that the Court of Appeals' apparent fear of a possible infinite continuum of litigation was unwarranted (Pet. at 19-21) are confused and unpersuasive:

a. In response to Petitioner's primary theoretical point -- that recognition of right to effective assistance of **first** post-conviction counsel would not, as the Court of Appeals thought, imply a right to effective assistance of **second** post-conviction counsel (with respect to the effectiveness first post-conviction counsel) under *Douglas*, *Halbert*, and *Ross* (Pet. at 20-21) -- Respondent argues as follows:

> As noted above, however, in order to constitute cause for a procedural default, a claim must be presented as a separate claim. *[Edwards v.] Carpenter*, 529 U.S. [446 (2000)] 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.

BIO at 14 (emphasis in original). This argument is incoherent, and it fails to answer, or even to meaningfully address, Petitioner's primary point regarding the Court of Appeals' infinite-continuum concern:

i. Although the Brief in Opposition does not say what it means by a "separate" or "independent" claim, it seems to be interpreting those terms as

meaning "freestanding," or "independently sufficient to grant relief." But when (as here), a claim of ineffective assistance of counsel that is made solely to provide cause to excuse the procedural default of another, underlying constitutional claim, it inherently cannot be sufficient to grant relief independently of the underlying claim. Instead, as *Edwards* itself makes clear, the procedural-default-excusing ineffective-assistance claim must be "independent" of the underlying claim for relief only in the sense that the alleged deficiency in counsel's performance must have been of constitutional dimension; and it must have been separately/independently exhausted in state court:

> [I]n certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice. . . . Not just any deficiency will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. . . . **In other words**, ineffective assistance adequate to establish cause for the procedural default of some **other** constitutional claim is **itself** an independent constitutional claim. And we held in *Carrier* that the principles of comity and federalism that underlie our long-standing exhaustion doctrine . . . require **that** constitutional claim, like others, to be first raised in state court.

529 U.S. at 541-42 (citations omitted; some emphasis added).

ii. Because any claim that a defendant's failure to make an ineffective-assistance-of-trial-counsel claim in his first state post-conviction proceeding is excused by first post-conviction counsel's ineffectiveness will be raised in a **second** post-conviction proceeding, adjudication of the "gateway" first-post-conviction-counsel claim necessarily will require **second**-tier review of the underlying trial-counsel claim -- because first post-conviction counsel's failure to raise the trial-counsel claim could not be ineffective, under *Strickland v. Washington*, 466 U.S. 668 (1984), unless the trial-counsel claim was valid. Thus, under *Ross* the defendant would not be constitutionally entitled to effective assistance of **second** post-conviction counsel; and that would mean that in any **third** post-conviction proceeding, the defendant could not raise a new ineffective-assistance-of-trial-counsel claim and then seek to excuse his failure to raise that claim in the second (or first) post-conviction proceeding by arguing that second post-conviction counsel was ineffective. Thus, the "continuum" of litigation regarding the effectiveness of all counsel, rather than being potentially "infinite," would end with the second post-conviction proceeding.

b. Respondent complains that Petitioner's practical infinite-continuum point -- regarding the one-year statute of limitation in 28 U.S.C. § 2244(d)(1) (Pet. at 21) -- "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." (BIO at 14). But § 2244(d)(2) is relevant only to the extent that, at the end of each stage of the "continuum," the defendant very quickly could find new counsel to very promptly present to the state courts some new ineffective-

assistance-of-trial-counsel claim; and it is unrealistic to suppose that this would happen often. In any event, this practical point is moot in light of the primary theoretical point addressed in paragraphs a(i)-(ii), above.

c. Respondent's paraphrasing of the third paragraph of Petitioner's discussion of the "infinite continuum" concern (BIO at 14-15) conflates two related, but separate, points and, more importantly, omits part of the second point (*see* Pet. at 21). Respondent then argues that Petitioner "presumes that appointed collateral-review attorneys will, as a matter of course, fail to execute their obligations under state law." (*Id.* at 15). But Petitioner has presumed no such thing. The Petition's ultimate point -- which Respondent fails to quote -- is that the Court of Appeals' decision effectively means that "**if** [a defendant] is deprived of that right [to effective assistance of trial counsel], he has no **federal right** to an effective remedy." (Pet. at 21; emphasis added).

II. PETITIONER HAS NEVER ARGUED THAT HIS STATE-CREATED PROCEDURAL RIGHT TO COLLATERAL-REVIEW COUNSEL CREATED A FEDERAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A. Approximately six pages of the Brief in Opposition (at 16-22) are devoted to a subsection II(B) entitled "Petitioner's state-created procedural right to collateral-review counsel did not create a right to 'effective' assistance of counsel." This is puzzling, since Petitioner has never argued that his state-law right to appointed counsel in a first post-conviction relief proceeding

gave rise to any federal constitutional right to effective assistance of counsel. Moreover, almost everything in Respondent's subsection II(B) is irrelevant to the central issue presented in this case, given this Court's holdings in *Douglas* and *Halbert*.

B. There is, however, one argument in Respondent's subsection II(B) which has some relevance to this case (albeit not to the title of that subsection): that "a conclusion that a defendant may allege ineffective assistance of collateral-review counsel as cause to excuse a procedural default" would be inconsistent with 28 U.S.C. § 2254(i). (BIO at 210). But this argument has no merit, at least in this case, for the following reasons:

1. Section 2254(i) provides that "[t]he 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." (Emphasis added). In this case, however, Petitioner is asserting the ineffectiveness of first post-conviction relief counsel not as a "ground for relief," but as a reason why his actual ground for relief -- the ineffectiveness of his trial counsel -- should not be procedurally defaulted.

2. As the Petition effectively has demonstrated (at 8-21), applying § 2254(i) to this case would vitiate (a) the "independent and adequate state ground" requirement, (b) the rule from *Coleman v. Thompson*, 501 U.S. 722, 755 (1991), that a procedural default is excused when it is caused by constitutionally ineffective assistance of counsel, and (c) the constitutional right to counsel for "first-tier" review that was recognized in *Douglas* and

Halbert. Obviously, no statutory provision, including § 2254(i), properly could have such unconstitutional effects.[1]

III. THIS CASE PRESENTS NO GENUINE ISSUE OF "RETROACTIVITY" UNDER *TEAGUE V. LANE*

A. Respondent did not raise *Teague v. Lane*, 489 U.S. 288 (1988), or any issue of "new rule" retroactivity, in his Answer in the District Court (USDC DN-10) or in his Answering Brief in the Court of Appeals.[2] Nevertheless, the Brief in Opposition (at 22) makes a "new rule" argument -- in a single sentence that is both cryptic and conclusory (with an equally conclusory footnote). Given Respondent's failure to make a "new rule" argument in the Court of Appeals and the perfunctory nature of that argument in the Brief in Opposition, this Court need, and should, not consider it here. *See Hopkins v. Reeves*, 524 U.S. 88, 94 n. 3 (1998); *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994).

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1. In only one of the cases that Respondent cites to support his § 2254(i) argument (BIO at 21) did the court apply § 2254(i) to reject a claim that ineffectiveness of post-conviction counsel supplied cause to excuse a procedural default (of an underlying claim other than ineffective assistance of counsel); and the court did so perfunctorily, without any explanation or citation to authority. *Gosier v. Welborn*, 175 F.3d 504, 510-11 (7th Cir. 1999).

2. In the District Court, Respondent's Response to Petitioner's Objections to Report and Recommendation briefly raised a Teague issue, even though neither the Report nor Petitioner's objections had done so (USDC DN-14 at 8-10); but as noted above, Respondent abandoned Teague in the Court of Appeals.

B. In any event, there is no genuine new-rule/retroactivity issue in this case, for two independently sufficient reasons:

1. Because the right to counsel on first-tier review on which this case turns was dictated by this Court's 1963 decision in *Douglas v. California*, long before Petitioner's state-court trial and post-conviction proceedings, there is no new-rule/retroactivity issue at all.

2. Even if the right to counsel in the first proceeding in which an ineffective-assistance-of-trial-counsel claim could be raised somehow amounted to a "new" rule, it would be retroactively applicable under *Teague*, 372 U.S. at 311, 313, because it was a "watershed" rule "without which the likelihood of an accurate conviction is seriously diminished." In *Teague* itself, this Court recognized the right to counsel at trial as a primary example of a "watershed" rule, 489 U.S. at 311; and this Court has held the right to counsel to be retroactive in other contexts, including sentencing. *McConnell v. Rhay*, 393 U.S. 2, 3 (1968). Perhaps most importantly, this Court recognized in *Rhay* that the *Douglas* right to counsel on first-tier review had been "applied retroactively," and that it related to "the very integrity of the fact-finding process." *Id.*

IV. PETITIONER DID NOT PROCEDURALLY DEFAULT HIS INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM, OR HIS RIGHT TO EFFECTIVE ASSISTANCE OF FIRST POST-CONVICTION COUNSEL WITH RESPECT TO THAT CLAIM, BY FAILING TO RAISE AND LITIGATE IT HIMSELF IN THE FIRST POST-CONVICTION PROCEEDING

A. Respondent's final argument is that even if Petitioner had a "right to effective post-conviction counsel to raise ineffective-assistance-of-trial-counsel claims in his first post-conviction relief proceeding," Petitioner could not show cause because "Petitioner himself was ultimately the cause for the procedural default" -- since he could have raised 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." (BIO at 24-25). In short, Respondent argues that Petitioner defaulted any ineffective-assistance-of-counsel claims by failing to adequately represent **himself** with regard to them.

B. The most obvious problem with this argument is that one of the primary reasons for a right to appointed counsel in "first-tier" review proceedings [i.e., the first available opportunity for review] is that "indigent defendants pursuing first-tier review . . . are generally ill equipped to represent themselves." *Halbert*, 545 U.S. at 616-17, 618-22; *see also Douglas*, 372 U.S. at 357-58. Consequently, it is an absurd Catch-22 to suggest that a defendant effectively defaults his constitutional right to the assistance of first post-conviction counsel, with respect to ineffective-assistance-of-trial-counsel claims, by failing to raise and litigate such claims **without** the assistance of counsel.

C. Although Respondent cites *Coleman* in support of his Catch-22 argument (BIO at 25), *Coleman* clearly is to the contrary: "Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default . . . ." 501 U.S. at 754.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the Petition.

Respectfully submitted,

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