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IN THE  
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA  
DEPARTMENT OF CORRECTIONS, ET AL.,

*Petitioners,*

vs.

STEVEN CRAIG JAMES,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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TOM HORNE  
Attorney General of Arizona

DAVID R. COLE  
Solicitor General

KENT E. CATTANI  
Division Chief Counsel

JEFFREY A. ZICK  
Section Chief Counsel

LACEY STOVER GARD  
Assistant Attorney General  
(Attorney of Record)  
Capital Litigation Section  
400 West Congress,  
Bldg. S-315  
Tucson, Arizona 85701  
Telephone: (520) 628-6654

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**CAPITAL CASE****QUESTION PRESENTED**

The state post-conviction (PCR) court rejected Respondent Steven Craig James' ineffective-assistance-of-counsel (IAC) claim as procedurally barred. In the alternative, the court found, as to the entire petition, that James had presented no colorable claims for relief.

On federal habeas review, a panel of the Ninth Circuit Court of Appeals reversed the district court's denial of relief and remanded with instructions to grant the habeas writ based on ineffective assistance of sentencing counsel. The panel refused to apply the Anti-terrorism and Effective Death Penalty Act's (AEDPA's) deferential standard of review because it found, in direct conflict with decisions from other circuits, that Petitioners had "waived" any argument that the state PCR court rejected James' IAC-at-sentencing claim on the merits. The Ninth Circuit further found that the PCR court did not individually address the claim's merits and thus did not issue a merits decision within AEDPA's meaning.

Does the panel opinion conflict with AEDPA and this Court's decisions in *Harrington v. Richter*, 131 S.Ct. 770 (2011), and *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), insofar as it a) treated AEDPA's deferential standard as a waivable defense, rather than an inherent restriction on a federal court's authority, b) refused to find that the PCR court issued a merits ruling on James' IAC claim, when the state court expressly ruled that *none* of James' PCR claims were colorable, and c) considered evidence presented for the first time in federal court to grant habeas relief?

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**OPINIONS BELOW**

The Ninth Circuit's opinion (App. A), amending and superseding the previous panel opinion and denying rehearing *en banc* is reported at *James v. Ryan*, 679 F.3d 780 (9th Cir. 2012) (*James III*). The superseded panel opinion is reported at *James v. Schriro*, 659 F.3d 855 (9th Cir. 2011) (*James II*). In an unpublished order filed on March 6, 2012, the Ninth Circuit stayed issuance of its mandate pending disposition of the present petition. (App. F.)

The district court's unpublished decision and order denying James habeas relief (App. B) is reported at *James v. Schriro*, 2008 WL 2796395 (D. Ariz. July 18, 2008). The district court denied James' motion to alter or amend the judgment in an unpublished and unreported order (App. C).

The state PCR court denied the PCR petition relevant to James' present claim in an unreported minute entry. (App. D.) The Arizona Supreme Court's summary order denying review of the PCR court's order is also unpublished. (App. E.)

The Arizona Supreme Court's opinion affirming James' conviction and death sentence on direct appeal is reported at *State v. James*, 685 P.2d 1293 (Ariz. 1984) (*James D*). This Court's memorandum decision denying certiorari review is reported at *James v. Arizona*, 469 U.S. 990 (1984).

## STATEMENT OF JURISDICTION

A panel of the Ninth Circuit granted habeas relief in an opinion issued October 12, 2011. *James II*, 659 F.3d at 855. On February 29, 2012, the Ninth Circuit issued a published order reporting the denial of Petitioners' petition for rehearing and amended its prior panel opinion. (App. A.) On May 25, 2012, Justice Anthony Kennedy granted Petitioners' application for a 30-day extension of time to file a petition for writ of certiorari. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254(d) provides, in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

### 1. *Facts of the crime.*

A jury convicted James of first-degree murder and kidnapping. *See James I*, 685 P.2d at 1296. James, along with codefendants Lawrence Libberton and Martin Norton, severely beat the victim, Juan Maya, before stealing his wallet, car, and personal belongings. *See State v. Libberton*, 685 P.2d 1284, 1287–88 (Ariz. 1984). James then told the others that “[t]he only thing we can do is kill” Maya. *Id.* at 1287. James said that they could hide Maya’s body in a mine shaft on his parents’ property in Salome, Arizona. *Id.* Libberton agreed and, at gunpoint, forced Maya into his own car for the almost two-hour drive to Salome. *Id.* On the

way, James used one of Maya's credit cards to buy gas and cigarettes. *Id.* A police officer also stopped James for speeding, at which time he exited the car to talk to the officer while Libberton threatened to shoot Maya if he said anything. *Id.* The group then proceeded to Salome, arriving at James' parents' property shortly before daybreak. *Id.*

After exiting Maya's vehicle, Libberton gave James the gun, and James ordered Maya to walk up the side of a small mountain to the mine shaft. *Id.* Maya asked if he could smoke a cigarette; James and Libberton permitted him to do so before they began their final assault. *Id.* James then ordered Maya to walk to the shaft, a hole approximately five feet in diameter with a beam across the top. *Id.* Maya begged, "don't kill me," but James fired the gun twice, releasing sparks, instead of bullets, because the gun was filled with debris. *Id.* Maya's ordeal continued:

Maya ran at James, grabbed the gun, struggled with James, and fell to the ground. [Libberton] grabbed a five-pound rock and began beating Maya on the back of the head and shoulders with it. Maya was still struggling with James for the gun. Norton handed [Libberton] a board, with which [Libberton] struck Maya on the back, forcing Maya to let go of the gun. James then shot in the direction of Maya's head. As before, only sparks came out of the gun. Maya was still conscious, making "gurgling sounds," and moaning. [Libberton] grabbed the gun from James

and fired it at Maya's head. Again, the gun malfunctioned. Maya was still not dead, so all three assailants picked up large rocks and slammed them on the back of Maya's head as Maya lay face down. After about five blows Maya lay unconscious. [Libberton] and James dragged Maya to the mine shaft and threw him in.

*Id.* at 1287–88. The trial court sentenced James to death for first-degree murder and to 21 years' imprisonment for kidnapping. *James I*, 685 P.2d at 1296.<sup>1</sup>

## **2. State PCR proceedings.**

Following the Arizona Supreme Court's direct appeal decision affirming James' convictions and sentences, *id.* at 1301, James filed a number of state PCR petitions. *See James III*, 679 F.3d at 799–801. In

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<sup>1</sup> Following his conviction in a separate jury trial for first-degree murder, among other offenses, the trial court sentenced Libberton to death. *Libberton*, 685 P.2d at 1286. In a separate opinion authored by the same judge that authored the opinion in James' case, the Ninth Circuit granted habeas relief with respect to Libberton's sentence. *Libberton v. Ryan*, 583 F.3d 1147, 1169–73 (9th Cir. 2009). Integral to its ruling were its findings that James had a "violent nature," that he was the instigator of Maya's murder, and that Libberton was merely a "follower." *Id.*

his first petition, which he filed in 1985, James claimed that counsel was ineffective for failing to investigate and present evidence of James' potential for rehabilitation and his LSD intoxication at the time he killed Maya. *Id.* The PCR court dismissed the claims as precluded under Arizona Rule of Criminal Procedure 32.2(a)(3) because James could have raised them on direct appeal. *Id.* at 799–801, 806–07.

In 1991, James filed a second PCR petition; he did not present a freestanding IAC claim, but alleged trial, appellate, and first PCR counsel's ineffectiveness to excuse any procedurally-barred claims. *Id.* at 799–800. The PCR court found James' IAC claims precluded because he had litigated similar claims in his first PCR petition. *Id.*

In his third PCR proceeding—filed for the purpose of exhausting certain claims in his 1993 federal habeas petition, which the district court had dismissed without prejudice—James raised the IAC at sentencing claim on which the Ninth Circuit ultimately granted relief. *Id.* at 800. The PCR court found the claim procedurally barred under Arizona Rule of Criminal Procedure 32.2(a)(3): “To the extent that the [IAC] claims were precluded in the first petition, they were precluded in the second, and are precluded now in the third petition. ... Those issues were and are precluded under Rule 32.2(a)(3). That is the law of the case.” (App. D, at D-24–D-26.) The court alternatively found the IAC claims barred because James failed to raise them in his second PCR petition. (*Id.* at D-26.) At the end of its order denying relief, the PCR court

rejected the petition, in its entirety, for failing to state a colorable claim for relief:

As to the *entire petition*, the court finds that there are no genuine or material issues of fact or law that are in dispute that would entitle the petitioner to an evidentiary hearing. *No colorable claims have been made.* An evidentiary hearing is required only when there is a colorable claim. To be colorable, a claim must have the appearance of validity. The court has assumed that all of the allegations are true. *There is no reasonable probability that any of [the] facts presented would have changed the result of the trial or sentencing.* Further proceedings would not serve any useful purpose. The petition and all of the claims in the petition are dismissed.

(*Id.* at D-34; emphasis added and internal citation omitted.)

### ***3. District court proceedings.***

James filed a petition for writ of habeas corpus on June 29, 2000, raising, among others, the present IAC claim. *James III*, 679 F.3d at 801. He also expanded the record with 82 exhibits, the majority of them related to the IAC claim. *Id.* The district court rejected Petitioners' procedural default defense, finding that the Arizona courts had not regularly applied the

requirement that IAC claims be raised on direct appeal. *Id.* at 806.

On July 18, 2008, the district court reviewed James' IAC claim *de novo* and rejected it, concluding that, even if counsel performed deficiently, James failed to demonstrate prejudice under *Srickland*. (App. B, at B-53–B-90.). Noting that it had fully considered evidence James proffered in federal court, the district court concluded that James was not entitled to further evidentiary development because he had failed to allege “facts which, if proved, would entitle him to relief.” (*Id.* at B-89–B-90.)

On August 12, 2008, the district court denied James' motion to alter or amend the judgment based on newly-proffered declarations from five witnesses. (App. C.) The court found that the declarations did not change its prior conclusion that “nothing offered by [James] in support of his habeas petition was of such a nature as to create a reasonabl[e] probability that if it had been presented to the sentencing court [James] would not have been sentenced to death.” (*Id.* at C-6.) Accordingly, the court denied the motion. (*Id.* at C-9.)

#### ***4. Ninth Circuit proceedings.***

A panel of the Ninth Circuit reversed the district court, finding that “counsel’s complete failure to investigate and present mitigating evidence of James’s troubled childhood, his mental illness, and his history of chronic drug abuse constituted deficient performance” and that counsel’s deficient performance prejudiced James. *James II*, 659 F.3d at 860. The

panel concluded that an evidentiary hearing was unwarranted and remanded the case to the district court with instructions *to grant the habeas writ* with respect to James' death sentence. *Id.* at 892.

Petitioners moved for panel rehearing and rehearing *en banc*, arguing that (1) the panel decision overlooked the state court's alternative merits ruling on James' IAC claim, which was entitled to AEDPA deference, and (2) even if the state courts did not render a merits decision, the panel erred by granting relief rather than remanding to district court for an evidentiary hearing, where Petitioners would have the opportunity to cross-examine the witnesses who provided affidavits on James' behalf. *See James III*, 679 F.3d at 802, 820–21.

The panel denied Petitioners' motion. *Id.* at 785. In the same order, the panel withdrew its prior opinion and issued a superseding one, which differed materially from the original opinion in limited respects. Most significantly, the court found that Petitioners had waived their argument that the state courts entered an alternative merits ruling on James' claim by raising it for the first time in the motion for rehearing. *Id.* at 802. Waiver notwithstanding, the court concluded that the state court had not resolved the IAC claim on the merits because, unlike other claims in the post-conviction petition, it did not *individually analyze* that claim. *Id.* at 802–03. The panel distinguished this Court's decision in *Richter* on the ground that *Richter* applies only when "the state court 'did not say it was denying the claim for any ... reason'" other than on the merits. *Id.* (quoting

*Harrington v. Richter*, 131 S.Ct. 770, 784–85 (2011)). In James’ case, the panel continued, the state court “expressly stated that it denied James’[] ineffective assistance of counsel claim as procedurally barred.” *James III*, 679 F.3d at 802–03.

The panel further found this Court’s decision in *Pinholster* inapplicable, because that case’s reasoning applies only to claims adjudicated on the merits in state court. *Id.* at 804. As a result, the panel “consider[ed] the new evidence developed by James’[] federal habeas counsel and presented to the district court” to resolve James’ IAC claim. *Id.* at 104.

## REASONS FOR GRANTING CERTIORARI

The Ninth Circuit's panel opinion conflicts with AEDPA and with rulings from other circuits. Furthermore, the Ninth Circuit's ruling contravenes this Court's opinions in *Richter* and *Pinholster*. The panel incorrectly found that James is entitled to relief because the State had waived its argument that the state PCR court rejected James' IAC claim on the merits in the alternative to its imposition of a state procedural bar. In so finding, the panel failed to recognize that AEDPA deference is mandatory when the state court has issued a merits decision, and is not subject to waiver.

Furthermore, the panel incorrectly determined that the state PCR court did not address the merits of James' IAC claim. In James' third PCR proceeding, the state court found the claim precluded under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure, but found in the alternative that the petition as a whole failed to present a colorable claim. Contrary to the panel's conclusion, this alternative merits ruling is subject to AEDPA deference.

As a result of the above two erroneous rulings, the Ninth Circuit considered evidence presented for the first time in federal court. This practice contravenes this Court's decision in *Pinholster*.

Finally, assuming *arguendo* there was no state-court merits ruling triggering AEDPA deference, the Ninth Circuit improperly granted the habeas writ with respect to James' sentence rather than remanding to

district court for an evidentiary hearing on James' IAC claim. The court incorrectly determined that Petitioners had conceded that all allegations presented in James' state and federal court affidavits were true. To the contrary, Petitioners have never agreed that James' evidence is accurate, and have consistently argued that the evidence does not establish a basis to conduct an evidentiary hearing, much less grant federal habeas relief. At a minimum, the Ninth Circuit erred by granting habeas relief, rather than ordering an evidentiary hearing at which James' evidence would be subject to adversarial scrutiny.

**I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH AEDPA, *RICHTER*, AND *PINHOLSTER*.**

The Ninth Circuit's opinion conflicts with AEDPA's mandate and with this Court's precedent. Contrary to the Ninth Circuit's opinion, AEDPA's standard of review is unwaivable. Moreover, the court misapplied this Court's opinion in *Richter* in concluding that the state PCR court did not adjudicate James' IAC at sentencing claim on the merits. Finally, assuming the court did not err by failing to apply AEDPA deference, it improperly granted habeas relief based on James' affidavits, without remanding for an evidentiary hearing in district court.

**A. *Waiver*.**

In refusing to apply AEDPA deference to the state court's resolution of James' claim, the Ninth Circuit found that Petitioners had waived their argument that the state court issued a merits decision

by raising it for the first time in a petition for rehearing. *James III*, 679 F.3d at 802–03. However, AEDPA’s deferential standard is not an affirmative defense or other argument that a state may waive; it is an inherent restriction on a federal court’s discretion to grant habeas relief on a claim rejected on the merits in state court.

AEDPA is crafted in mandatory language. *See* 28 U.S.C. § 2254(d) (“[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* with respect to any claim that was adjudicated on the merits in state court...” unless statutory exceptions are satisfied) (emphasis added). At least four United States Circuit Courts of Appeal have recognized this fact, and concluded that a federal court is bound to apply AEDPA deference when faced with a state-court merits decision. *See Wilson v. Mazzuca*, 570 F.3d 490, 500 (2nd Cir. 2009) (“The standard of review set forth in AEDPA is not conditional. It is stated in mandatory terms—habeas relief ‘*shall not be granted* with respect to *any claim* that was adjudicated on the merits in state court proceedings ...”) (quoting 28 U.S.C. § 2254(d)); *Gardner v. Galetka*, 568 F.3d 862, 878–79 (10th Cir. 2009) (“The correct standard of review under AEDPA is not waivable. It is, unlike exhaustion, an unavoidable legal question we must ask, and answer, in every case.”); *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008) (party does not waive AEDPA deference by arguing its applicability for the first time on appeal because “a party cannot waive the proper standard of review by failing to argue it”); *Eze v. Senkowski*, 321 F.3d 110, 120–21 (2nd Cir. 2003)

“AEDPA’s standard of review ... is not a procedural defense but a standard of general applicability for all petitions filed by state prisoners after the statute’s effective date presenting claims that have been adjudicated on the merits by a state court. The statute contains unequivocally mandatory language.”) (citations omitted); *Valdez v. Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001) (“The word ‘shall’ is mandatory in meaning. Thus, we lack discretion as to the operation of this section.”) (citation omitted).

The Ninth Circuit’s contrary conclusion runs afoul of Congress’ intent in enacting AEDPA, which was to promote “comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance.” *Cullen v. Pinholster*, 131 S.Ct. 1388, 1401 (2011) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)); *see also Williams v. Taylor*, 529 U.S. 420, 436 (2000). By refusing, under the guise of waiver, to acknowledge a state-court merits decision and apply the level of deference AEDPA requires, the Ninth Circuit’s opinion disregards these principles. *See Gardner*, 568 F.3d at 878–79 (“It is one thing to allow parties to forfeit claims, defenses, or lines of argument; it would be quite another to allow parties to stipulate or bind us to application of an incorrect legal standard, contrary to the congressional purpose.”).

Despite the clarity of the law set forth above, the Ninth Circuit cited no relevant authority in support of its conclusion. *James III*, 679 F.3d at 802–03. Instead, the court relied on two inapposite opinions recognizing that a party waives an argument by failing to include it

in the party's principal brief. *Id.* (citing *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) and *Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008)). But as discussed above, regardless whether the state argues in its briefing that a state court issued a merits decision, § 2254(d)'s restriction on a federal court's discretion remains. This Court should grant certiorari review to address the conflict between the Ninth Circuit's ruling and decisions from other circuits and to correct the Ninth Circuit's erroneous application of AEDPA.

**B. *Merits decision.***

As an alternative to its waiver finding,<sup>2</sup> the Ninth Circuit concluded that the state PCR court did not rule on the IAC claim's merits because the state court did not specifically "discuss[] or analyze[] the merits" of that claim. *James III*, 679 F.3d at 802–03. This holding directly contravenes this Court's opinion in *Richter*.

In *Richter*, 131 S.Ct. at 785, this Court held that 28 U.S.C. "§ 2254(d) does not require a state court to

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<sup>2</sup> The Ninth Circuit's alternative ruling that the state court did not enter a merits decision appears inconsistent with its finding of a waiver. By determining that Petitioners had waived the argument that the state court adjudicated the IAC claim on the merits, the Ninth Circuit necessarily found that a merits decision existed but Petitioners had failed to timely assert that point.

give reasons before its decision can be deemed to have been ‘adjudicated on the merits.’” In so holding, this Court reasoned that “[t]here is no text in the statute requiring a statement of reasons” for the state court’s decision; rather, “[t]he statute refers only to a ‘decision,’ which resulted from an ‘adjudication.’” *Id.* at 784. Under *Richter*, a state court can summarily deny a claim, with no discussion, and that ruling is still entitled to AEDPA deference. Here, in contrast, the Ninth Circuit found no state-court merits decision merely because the PCR court did not address each claim individually but rather found that James’ petition as a whole had presented no facts that would have changed the verdict or sentence, which specifically disposed of the IAC claim. This result is irreconcilable with *Richter*.

The Ninth Circuit attempted to distinguish *Richter* by limiting that case’s holding “to instances where the state court ‘did not say it was denying the claim for any other reason’” than the merits. *James III*, 679 F.3d at 803 (quoting *Richter*, 131 S.Ct. at 784). The court further determined that the state PCR court in this case had “expressly stated that it denied James’[] ineffective assistance of counsel claim as procedurally barred,” and concluded that it “need not presume that the brief paragraph at the end of [the PCR court’s] opinion somehow adjudicated the claim on the merits.” *James III*, 679 F.3d at 803.

The foregoing analysis unreasonably restricts *Richter*’s reach. Viewed in context, in the portion of *Richter* quoted above, this Court responded to the prisoner’s claim that § 2254(d) did not apply because

the state court did not expressly state that it had adjudicated his claim on the merits. 131 S.Ct. at 784–85. This Court continued:

When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state law procedural principles to the contrary. *Cf. Harris v. Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis).

*Id.* Nothing in the foregoing passage requires that a state court’s summary dismissal of a claim in the alternative to imposition of a procedural bar does not constitute a merits ruling. Rather, it recognizes that courts may presume that a state court resolved a claim on its merits, absent an express indication that it resolved the claim solely on procedural grounds.

As the Ninth Circuit acknowledged in this case, *James III*, 679 F.3d at 802, a state court’s merits ruling is subject to AEDPA deference when entered in the alternative to imposition of a procedural bar. *See Stephens v. Branker*, 570 F.3d 198, 208 (4th Cir. 2009) (“[W]e agree with our sister circuits that an alternative merits determination to a procedural bar ruling is entitled to AEDPA deference.”); *Brooks v. Bagley*, 513

F.3d 618, 624–25 (6th Cir. 2008) (noting, in finding alternative merits ruling subject to AEDPA deference, that “[t]he language of the statute does not draw a distinction between cases involving alternative rulings; it refers broadly to ‘any claim that was adjudicated on the merits in State court proceedings’”) (quoting 28 U.S.C. § 2254(d)). Because the PCR court’s alternative ruling in this case constituted a decision on the merits under *Richter*, it is entitled to AEDPA deference.

The Ninth Circuit’s improper refusal to apply AEDPA’s standard of review led it to grant relief based on evidence presented for the first time in federal court. *James III*, 679 F.3d at 803–04. In light of the existence of a state-court merits decision, the Ninth Circuit’s analysis is faulty under *Pinholster*. 131 S.Ct. at 1398 (“[R]eview under [28 U.S.C.] § 2254(d)(1) is *limited to the record that was before the state court* that adjudicated the claim on the merits.”) (emphasis added); *id.* at 1400 (new evidence presented for first time in federal court “has no bearing” on resolution of claim rejected on its merits in state court). This Court should therefore grant certiorari and remand to the Ninth Circuit for consideration of the issue on the merits under AEDPA and *Pinholster*.

Finally, assuming the state court opinion can somehow be construed as not addressing the merits of James’ IAC claim, the Ninth Circuit clearly erred by granting habeas relief outright rather than remanding the case to district court for an evidentiary hearing on the claim. The court incorrectly found that Petitioners had conceded that all of the evidence alleged in the affidavits James submitted in state and federal court is

true. There has been no such concession. While some of the evidence may not be disputed, Petitioners have never suggested that *all* of James' evidence is accurate or undisputed. Moreover, Petitioners have consistently argued that the evidence does not establish a basis to conduct an evidentiary hearing, much less federal habeas relief.

By making an argument in state or federal court that a prisoner has not established a colorable claim for relief on a claim supported by affidavits, the state assumes that the evidence set forth in affidavits would be *presented* as detailed in the affidavits, but nevertheless posits that the evidence does not provide a basis for relief—either because the submitted evidence is obviously inaccurate or is inconsequential. *See, e.g., State v. Krum*, 903 P.3d 596, 600–01 (Ariz. 1995). If, for example, a petitioner files a post-conviction petition, with an attached affidavit from the petitioner stating that he did not commit the crime he was videotaped committing, the state does not stipulate that the evidence is accurate. Instead, the state—in arguing that summary dismissal is warranted—assumes that the petitioner would testify at an evidentiary hearing consistent with what is in his affidavit. That assumption does not mean that the state agrees that the evidence is accurate.

Similarly, in addressing a claim for post-conviction or federal habeas relief supported by new affidavits, state and federal courts assume—for purposes of addressing a motion to deny relief—that the evidence would be submitted as presented in the affidavits. The courts can nevertheless *reject* a claim

supported by affidavits as not colorable without holding an evidentiary hearing. A finding that the claim is not colorable is a conclusion that, even without subjecting the proffered evidence to cross-examination or rebuttal evidence, the petitioner has not established a basis for relief. A court may not, however, *grant* relief based on affidavits without subjecting the evidence to adversarial scrutiny. Contrary to the panel's decision, trial counsel in fact presented significant mitigation, including evidence of James' difficult childhood, mental health, and substance abuse around the time of the crime. Accordingly, the panel clearly erred by granting habeas relief, rather than remanding for an evidentiary hearing in district court.

## CONCLUSION

This Court should grant the petition for writ of certiorari, and reverse that part of the Ninth Circuit opinion remanding to the district court for issuance of the habeas writ with respect to James' sentence.

Respectfully submitted,

TOM HORNE  
Attorney General of Arizona

DAVID R. COLE  
Solicitor General

KENT E. CATTANI  
Division Chief Counsel  
Criminal Appeals/ Capital  
Litigation Division

JEFFREY A. ZICK  
Section Chief Counsel  
Capital Litigation Section

LACEY STOVER GARD  
Assistant Attorney General  
(Attorney of Record)  
Capital Litigation Section  
400 West Congress, Bldg. S-  
315  
Tucson, Arizona 85701  
Telephone: (520) 628-6654.