No. 13-868

IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioner

vs.

DAVID SCOTT DETRICH,

Respondent

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the petition for writ of certiorari be denied where Petitioner does not challenge the Court of Appeals' judgment that Mr. Detrich is entitled to a remand to the district court pursuant to *Martinez v. Ryan*, ---U.S. ---, 132 S. Ct. 1309 (2012), but challenges only the reasoning of a non-binding four-judge plurality opinion?
2. Should the petition for writ of certiorari be denied where the Court of Appeals held that the district court, rather than the Court of Appeals, should apply *Martinez* and *Trevino v. Thaler*, --- U.S. ---, 133 S. Ct. 1911 (2013), in the first instance?

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STATEMENT OF THE CASE

Respondent David Detrich respectfully requests that this Court deny the petition for writ of certiorari, where Petitioner asks this Court to exercise its discretionary authority to review the reasoning of a non-binding plurality opinion of a court of appeals in the absence of a circuit split.

After the district court denied Mr. Detrich's Petition for Writ of Habeas Corpus, *Detrich v. Schriro*, No. CV-03-229-TUC-DCB, 2007 WL 4024551 (D. Ariz. 2007), Mr. Detrich appealed. A three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed the district court's order and vacated the death sentence, holding that Mr. Detrich was denied his Sixth Amendment right to effective counsel at sentencing. *Detrich v. Ryan*, 619 F.3d 1038 (9th Cir. 2010). Petitioner filed a petition for writ of certiorari. This Court granted the petition, vacated the judgment below and remanded for additional proceedings in light of *Cullen v. Pinholster*, 563 U.S. ---, 131 S. Ct. 1388 (2011). *Ryan v. Detrich*, ---U.S. ---, 131 S. Ct. 2449 (2011) (mem.).

After considering the effect of *Cullen v. Pinholster* on this case, the three-judge panel of the Court of Appeals again vacated Mr. Detrich's death sentence, holding that Mr. Detrich was denied his Sixth Amendment right to effective counsel at sentencing. *Detrich v. Ryan*, 677 F.3d 958 (9th Cir. 2012). Petitioner successfully moved for re-hearing *en banc*. *Detrich v. Ryan*, 696 F.3d 1265 (9th Cir. 2012). Prior to the *en banc* argument, Mr. Detrich moved to remand the case pursuant to this Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). A majority of the *en*

banc court voted to grant the motion to remand, concluding that the district court should consider Mr. Detrich's *Martinez* arguments in the first instance. *Detrich v. Ryan*, 740 F.3d 1237, 1240 (9th Cir. 2013) (*en banc*) ("*Detrich V*"). Three opinions comprised the majority on the judgment to remand, but no opinion garnered a majority vote. *Id.* at 1240 (Fletcher, J., joined by Pregerson, J., Reinhardt, J., and Christen, J.); *id.* at 1260 (Nguyen, J., concurring in the result); *id.* at 1262 (Watford, J., concurring in the judgment). Consequently, there was no majority opinion on the *Martinez* analysis.

REASONS FOR DENYING THE PETITION

1. PETITIONER FAILED TO STATE A COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO GRANT THE PETITION FOR WRIT OF CERTIORARI

a. Petitioner Does Not Challenge the Circuit Court's Judgment

Though Petitioner challenges the reasoning of the four-judge plurality opinion ("plurality opinion"), Petitioner does not challenge the holding that Mr. Detrich is entitled to a remand to the district court for resolution of his *Martinez* motion. Pet. 5, n. 2. Throughout the petition, Petitioner advocates for this Court to adopt concurring Judge Nguyen's application of *Martinez* and *Trevino v. Thaler*, --- U.S. ---, 133 S. Ct. 1911 (2013), yet Judge Nguyen also concluded that Mr. Detrich was entitled to a remand. Pet. 16-19, 24-26. Petitioner has not addressed or challenged the issue on which the decision below turned: whether the Court of Appeals should remand to the district court to decide the *Martinez* arguments in the first instance or decide the issue itself. Petitioner also does not assert that Mr.

Detrich's underlying claim of ineffective assistance of counsel is insubstantial or that he would be unable to establish prejudice such that he should be entitled to relief. In short, Petitioner objects to the plurality's reasoning (Pet. 5, n. 2), but not to the outcome of the majority decision below.

"The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 359, 95 S. Ct. 2330 (1975). For this Court to grant a petition for writ of certiorari, a case must involve "a present, live controversy" in order "to avoid advisory opinions on abstract propositions of law." *Halls v. Beals*, 396 U.S. 45, 48, 90 S. Ct. 200, 201-02 (1969) (citing *Golden v. Zwickler*, 394 U.S. 103, 110, 89 S. Ct. 956, 960 (1969); *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703 (1962); *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 133 (1895)). There is no controversy here since Petitioner does not challenge the judgment below, but only the reasoning of the four-judge plurality. Granting the petition would result in this Court issuing an abstract advisory opinion. 396 U.S. at 48. This Court should not do so. U.S. Const. art. III, §2, cl. 1.

b. Petitioner Does not Allege a Circuit Split

This Court's rules state that "[a] petition for a writ of certiorari will be granted only for compelling reasons," including that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter...." Rule 10(a), Supreme Court Rules. Petitioner has not alleged that any circuit's court of appeals has interpreted *Martinez* or *Trevino* differently than the plurality opinion below. This Court's

resources are not best served on a plurality opinion of a single court of appeals, especially where this Court's precedents were just announced in its last two terms. *See U.S. v. O'Malley*, 383 U.S. 627, 630, 86 S. Ct. 1123, 1125 (1966) (granting certiorari to resolve "conflicting decisions" among appellate courts). "We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23, n. 1, 115 S. Ct. 1185, 1198 (1995) (Ginsberg, J., dissenting) (citing *McCray v. New York,*461 U.S. 961, 961, 963, 103 S. Ct. 2438, 2439 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("...[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.") To the extent that *Martinez* and *Trevino* are subject to different interpretations, this case is a poor vehicle for resolving that question.

c. Petitioner Only Challenges the Court of Appeals' Non-Binding Plurality Opinion

Petitioner's questions presented misstate the holding of the Court of Appeals and elevate the opinion of a four-judge plurality to binding precedent. A majority of the *en banc* panel below held only that this case should be remanded to the district court for ruling on the motion made pursuant to *Martinez* ("*Martinez* motion"). 740 F.3d at 1259-62. Contrary to Petitioner's questions presented, the Court of Appeals did not "improperly hold that *Martinez v. Ryan*...provides a 'more lenient rule...for excusing procedural default'" than the rule previously established by this Court's

opinion in *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991). Pet. i. Nor did the Court of Appeals "improperly remove the prejudice prong from an analysis of ineffective assistance of post-conviction counsel as provided in *Martinez* and *Strickland v. Washington*, 466 U.S. 668 (1984)." Pet. i. Rather, Petitioner's perceived faults with the *Detrich V* opinion are attributable only to the plurality opinion of four judges. Two other judges concurred in the result, but not the rationale. 740 F.3d at 1260, 1262. Because the plurality's analysis was not endorsed by a majority of the *en banc* panel, it has no precedential value. *See e.g. Clabourne v. Ryan*, --- F.3d ----, 2014 WL 866382 at *10 (9th Cir. Ariz., Mar 05, 2014) (rejecting the *Detrich V* plurality's reasoning) (discussed *infra*). There was no majority Court of Appeals holding on the interpretation or application of *Martinez, Trevino* or any other Supreme Court jurisprudence. The only decision the Court of Appeals made was to remand Mr. Detrich's case for the district court to consider his *Martinez* arguments in the first instance. This decision was proper because a district court, rather than an appellate court, should consider arguments and evidence in the first instance. *Holland v. Florida*, 560 U.S. 631, 654, 130 S. Ct. 2549, 2565 (2010) (recognizing "the prudence, when faced with an 'equitable, often fact-intensive' inquiry, of allowing the lower courts 'to undertake it in the first instance'") (citing *Gonzalez v. Crosby*, 545 U.S. 524, 540, 125 S. Ct. 2641 (2005) (Stevens, J., dissenting)). Therefore, the Court of Appeals did not "decide[ ] an important federal question in a way that conflicts with the relevant decisions of this Court[.]" Rule 10(c), Supreme Court Rules.

The inconsequence of the *Detrich V* plurality opinion within the Ninth Circuit is demonstrated by its two subsequent opinions analyzing *Martinez*. In *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014), the *en banc* majority of the Court of Appeals did not rely on *Detrich V* for its analysis of Dickens' *Martinez* motion. A three-judge dissenting opinion mentioned *Detrich V* only in a footnote, when discussing an aspect of *Martinez* irrelevant to the questions presented here.[1] Instead, the *Dickens* court analyzed the *Martinez* motion using the plain language of *Trevino*. *Id.* at 1319-20. Further, in *Clabourne v. Ryan*, --- F.3d ----, 2014 WL 866382 (9th Cir. 2014), a three-judge panel of the Court of Appeals rejected the *Detrich V* plurality's reasoning that *Martinez* requires a showing only that post-conviction counsel performed in a deficient manner and that the underlying ineffective assistance of trial claim is substantial. 2014 WL 866382 at *10. Instead, the court in *Clabourne* adopted the reasoning advanced by Judge Nguyen and Judge Graber in their *Detrich V* concurrences—the same analysis advanced by Petitioner here. *Id.*

In light of the unique posture of this case, and the fact that the Court of Appeals' decision in *Detrich V* was so limited in scope, Petitioner has failed to state any "compelling" reason for this Court to exercise its discretionary review pursuant to Supreme Court Rule 10. This Court has long held that justification for granting the writ of certiorari "impl[ies] a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional

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[1] The dissenting judges had "no quarrel with the statement in the plurality opinion in *Detrich* that the *Martinez* exception may apply where PCR counsel raised some issues of trial counsel IAC, but not the new substantial claim of trial counsel IAC that he seeks to raise for the first time in his federal habeas petition." 740 F.3d at 1328, n. 5 (Callahan, J., dissenting in part) (citation to *Detrich V* omitted).

dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 617 (1955) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 56 S. Ct. 466, 480 (1936) (Brandeis, J., concurring)). Review of the *Detrich V* opinion, which stands for nothing more than that Mr. Detrich is entitled to have the district court consider his *Martinez* arguments in the first instance, is not an appropriate use of this Court's resources. *See Marks v. U.S.*, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds...'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S. Ct. 2909, 2923 (1976)) (alteration in original).

Further, this Court has stated that it "should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice*, 349 U.S. at 77, 75 S. Ct. at 618. The analytical question raised by the petition—whether *Martinez* requires a federal habeas petitioner to prove a defaulted claim of ineffective assistance of trial counsel is substantial *and* that there was a reasonable likelihood that the claim would have been meritorious in post-conviction—was not decided by a majority of the panel below. Indeed, the district court may agree with Petitioner's interpretation of the law when it has the opportunity to review Mr. Detrich's *Martinez* arguments. But at present Petitioner's

complaints are premature, and as such, Mr. Detrich's case is a poor vehicle for settling this analytical dispute. In light of the foregoing, Petitioner has failed to offer a legitimate reason for this Court to grant the petition.

2. The Court of Appeals' Plurality Opinion Correctly Applied this Court's Decisions in *Martinez* and *Trevino*

a. The Plurality Identified and Applied the *Trevino* Requirements to Overcome Procedural Default

Petitioner challenges the four-judge plurality's analysis for "perceiv[ing] in *Martinez* a 'more lenient rule...for excusing procedural default' than that required by *Coleman*, stating that *Martinez* 'created an exception to the normally applicable *'cause' and 'prejudice'* rule for excusing state-court procedural default on federal habeas.'" Pet. 14 (quoting *Detrich V*, 740 F.3d at 1244) (emphasis and alteration in Petition). Petitioner further claims that the plurality "improperly removed *Strickland's* prejudice prong from the showing under *Martinez* that PCR counsel was ineffective." Pet. 21. This is an inaccurate description of the plurality's analysis. Rather, the plurality adhered to this Court's opinions in *Martinez* and *Trevino*. The plurality below specifically applied the four-part test of *Trevino*, which finds procedural default is overcome where:

> (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim]...be raised in an initial-review collateral proceeding.

133 S. Ct. at 1918 (citing *Martinez*, 132 S. Ct. at 1318-19, 1320-21). Consistent with these four requirements, the four-judge plurality below concluded that the demonstration that a claim is "substantial" "may be seen as the *Martinez* equivalent of the 'prejudice' requirement under the ordinary 'cause' and 'prejudice' rule from *Wainwright*." 740 F.3d at 1245. As Petitioner acknowledges, the five dissenting judges agreed with this plain reading of *Trevino*. Pet. 18 (citing 740 F.3d at 1265). Finding that *Martinez* substantiality satisfies the *Coleman* prejudice prong is not equivalent to removing *Strickland's* prejudice requirement—an undebatable requirement to proving the merits of the claim and being entitled to relief.

The petition entirely disregards the *Trevino* four-step analysis. Petitioner instead argues that prejudice under *Coleman*'s cause-and-prejudice analysis "is different from, and more stringent than, either the showing that a trial-IAC claim be 'substantial,' or the showing of prejudice under *Strickland*." Pet. 14 (*citing Zinzer v. Iowa*, 60 F.3d 1296, 1299 n. 7 (8th Cir. 1995)).[2] As Judge Nguyen stated below, this Court's and the Ninth Circuit Court of Appeal's jurisprudence holds that the prejudice standards under *Coleman* and *Strickland* are "one and the same." 740 F.3d at 1261 (Nguyen, J., concurring) (citing *Robinson v. Ignacio*, 360 F.3d 1044, 1054 (9th Cir. 2004) and *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S. Ct. 1029 (2000)); *see also Strickler v. Greene*, 527 U.S. 263, 296, 119 S. Ct. 1396, 1955 (1999) (a showing that there was a reasonable probability that the conviction or sentence would have been different if the government had disclosed exculpatory materials

[2] The Eighth Circuit also recently held that prejudice from post-conviction counsel's failure to raise a trial ineffectiveness claim is to be judged by the standard set forth in *Strickland*. *Sasser v. Hobbs*, --- F.3d --- 2014 WL 764171 (8th Cir. 2014) (denying petition for rehearing).

would establish both prejudice under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) and under *Coleman*).

The plurality's interpretation of *Trevino* is also consistent with that suggested by Justice Breyer in his opinion respecting the denial of the petition for writ of certiorari in *Gallow v. Cooper*, 133 S. Ct. 2730 (2013) (mem.) In *Gallow*, the Fifth Circuit ruled it could not consider new evidence of the petitioner's claim of ineffective assistance of trial counsel because such consideration was prohibited under *Cullen v. Pinholster*, 563 U.S. ---, 131 S. Ct. 1388 (2011). Justice Breyer, joined by Justice Sotomayor, wrote, "[t]he ineffective assistance of state habeas counsel might provide cause to excuse the default of the [ineffective assistance of trial counsel] claim, thereby allowing the federal habeas court to consider the full contours of Gallow's ineffective-assistance claim." 133 S. Ct. at 2731. This suggests that at least some members of this Court would allow the consideration of an underlying trial ineffective-assistance claim on the merits without requiring an additional *Strickland* showing of prejudice for the ineffectiveness of post-conviction counsel.

It would be impractical, if not impossible, for a federal habeas petitioner whose claim has been defaulted to prove state post-conviction counsel's ineffectiveness at this stage because to do so he would have to prove the full merits of the underlying claim of ineffective assistance of trial counsel. *Strickland*, 466 U.S. at 686, 104 S. Ct. 2052, 2064. As this Court recognized in *Martinez*, developing factual support for an ineffectiveness claim often requires investigation and a

hearing. 132 S. Ct. at 1318 ("...ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim."). Mr. Detrich has not had an adequate opportunity to develop the facts supporting the defaulted portions of his ineffective assistance of trial counsel claim because he was represented in post-conviction by an ineffective lawyer. Dkt. 128 (Motion to Remand, 8/2/2012). Despite Mr. Detrich's requests for funding necessary to plead and prove his claims, the district court denied resources to investigate any claims it found procedurally defaulted. ER7 at 52; ER100. Though Mr. Detrich argued that his post-conviction counsel's ineffectiveness was cause to excuse this default, DCT Dkt. 75 at 24-25; DCT Dkt. 99 at 4-7, the district court rejected that argument since *Martinez* was not decided until Mr. Detrich's case was pending on appeal. The district court is in the best position to entertain Mr. Detrich's *Martinez* arguments as it is the only venue that can provide evidentiary development on post-conviction counsel's ineffectiveness and the merits of Mr. Detrich's underlying ineffective assistance of trial counsel claim.

b. Even Under Petitioner's Analysis, Mr. Detrich is Entitled to a Remand

As mentioned above, Petitioner advocates for Judge Nguyen's application of *Martinez*. Pet. 16-19, 24-26. Yet Judge Nguyen agreed with the plurality and Judge Watford that Mr. Detrich is entitled to a remand to the district court for determination of whether the ineffective assistance of his post-conviction counsel may serve to overcome the default of his ineffective assistance of trial counsel claim.

Judge Nguyen reads the substantiality requirement of *Martinez* and *Trevino* as providing a threshold requirement for further review. If a claim is "patently meritless," it is not substantial and the federal courts need do nothing more with the defaulted claim. 740 F.3d at 1261. If, however, "the claim is substantial and *Martinez's* other cause requirements are met," then the federal court must "perform *Coleman's* more searching prejudice inquiry." *Id.*

Ultimately, this approach offers the same result as that of the plurality opinion. Neither the plurality nor Judges Nguyen or Watford determined whether Mr. Detrich's ineffective assistance of trial counsel claim was meritorious. Rather, those six judges agreed that the district court was in the best position to rule on the *Martinez* arguments in the first instance. 740 F.3d at 1254, 1262. Thus, even if this Court agrees with Judge Nguyen's analysis, the result is still a remand to the district court to determine whether the ineffective assistance of Mr. Detrich's post-conviction counsel is sufficient to overcome the default of his ineffective assistance of trial counsel claim and whether his claim is meritorious.

c. The Plurality Opinion Below does not Alter the Requirements to Obtain Habeas Relief under 28 U.S.C. §2254

Petitioner's argument in favor of a stricter prejudice requirement than this Court set forth in *Trevino*, *Martinez*, or *Coleman* is based in its unfounded concern that "[t]he *Detrich V* plurality significantly expands relief under 28 U.S.C. §2254...." Pet. 14. Petitioner's statement finds no support in the opinion below. Indeed, the majority judgment did not grant relief under 28 U.S.C. §2254 to Mr. Detrich, let alone expand other habeas petitioners' ability to obtain relief. The four-judge

plurality, along with the concurring Judges Nguyen and Watford, simply remanded Mr. Detrich's case to the district court to determine whether the procedural default of Mr. Detrich's ineffective assistance of trial counsel claim could be excused under *Martinez*. Though the four-judge plurality and dissenting opinions below found that substantiality is sufficient prejudice for a claim to be heard on its merits, no judge found that a substantial claim was sufficient to grant the writ of habeas corpus. The *Detrich V* opinion does nothing to expand a habeas petitioner's ability to obtain relief beyond allowing federal courts to hear the merits of otherwise defaulted claims of ineffective assistance of counsel, consistent with this Court's holdings in *Martinez* and *Trevino*. Even under the four-judge plurality opinion, a habeas petitioner will not earn relief unless he proves the merits of his underlying ineffective assistance of counsel claim.

CONCLUSION

The petition presents no case or controversy. U.S. Const., art. III, §2, cl. 1. Instead Petitioner is requesting an advisory opinion on an "academic" or "episodic" matter. *Rice*, 349 U.S. at 74. Petitioner has not provided a "compelling reason" nor alleged a circuit split, nor has the Court of Appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10. The petition for certiorari should be denied.

Respectfully submitted this 9th day of April, 2014.

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