

No. 13-1073

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**In the Supreme Court of the United States**

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

v.

STEVEN CRAIG JAMES,  
*Respondent.*

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

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**BRIEF IN OPPOSITION**

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**CAPITAL CASE**

**QUESTION PRESENTED**

Whether the *Richter-Williams* presumption that a federal claim raised in state court has been adjudicated on the merits is inapplicable when the state court has expressly denied the claim on the sole ground that it is precluded, and state law prevents the state court from adjudicating the merits.

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## STATEMENT OF THE CASE

### A. State Court Proceedings.

#### 1. Conviction, sentence and appeal.

In 1982, a jury convicted Steven James of murder and kidnapping, but acquitted him of robbery and theft charges arising from the same incident. The trial judge sentenced James to death on the murder charge, and a term of twenty-one years for kidnapping. The Arizona Supreme Court affirmed James's conviction and death sentence on appeal in 1984. *State v. James*, 141 Ariz. 141, 148, 655 P. 2d 1293, 1300 (1984).<sup>1</sup>

#### 2. State post-conviction proceedings.

James's first petition for post-conviction relief [PCR] in 1985 included claims of ineffective assistance of counsel [IAC] at both the guilt and penalty phases of his trial. With regard to the penalty phase, James alleged that his counsel had failed to investigate and present evidence from witnesses familiar with his life history, chronic substance abuse, and suicidal mental

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<sup>1</sup> James participated in the murder with Laurence Libberton and Martin Norton. In separate proceedings, Libberton was convicted of murder, aggravated kidnapping, robbery, and theft. He was sentenced to death, but his sentence was later reversed, and today he is serving a term of life imprisonment. *James v. Schriro*, 659 F. 3d 855, 859-860 (9th Cir. 2011) [*James I*]; SER 895-898. Norton pled guilty to murder and received a sentence of three years incarceration in a juvenile facility. *James I*, 659 F. 3d at 859. James alone remains on death row, although his sentence has now been reversed by the court below.



state. ER 320-325.<sup>2</sup> The State's responsive pleadings urged the superior court to deny the IAC claims solely on the ground that they were precluded under state law because they had not been raised on direct appeal, and instructed the court not to adjudicate their merits. ER 507; SER 826.<sup>3</sup> The superior court agreed, ignored the merits of the IAC claims, and denied them as "clearly precluded." ER 147. The Arizona Supreme Court denied review without opinion. ER 145.

James filed a second PCR petition in 1991, and, acting *pro se*, checked a box on a preliminary form stating that he was seeking relief for ineffective assistance of counsel. SER 865-866. Once again, the State pressed the superior court to deny the claim solely as precluded [SER 891, 893], and the court agreed [ER 713-714]. The Arizona Supreme Court denied review without comment. ER 706.

A similar sequence occurred in James's third PCR proceeding in 1995. This petition included Sixth amendment guilt and penalty phase IAC claims, along with ten other claims unrelated to the effectiveness of counsel. The penalty phase IAC claim expanded on the allegations in the first petition and included an appendix with detailed affidavits from a psychiatrist and an investigator. ER 461-465; SER 830-832. A paragraph on the final page of James's seventy-three page petition included a sentence requesting an evidentiary hearing to develop his twelve claims.

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<sup>2</sup> ER and SER citations in this brief refer to the excerpts of record and supplemental excerpts of record filed in the court of appeals.

<sup>3</sup> This brief refers to the parties as "James" and "the State."

ER 558. The State opposed each of the ten non-IAC claims on the merits, but once again opposed the IAC claims solely on the ground that they were precluded under state law. SER 865-867. The superior court followed the State's advice, expressly denying the two IAC claims solely because they were precluded. Certiorari Petition [CP], App. D at 32-36. In a paragraph at the end of its opinion (eleven pages after it had precluded the IAC claims), the PCR court rejected James's request for an evidentiary hearing on his remaining claims. *Id.* at 50-51.<sup>4</sup> The Arizona Supreme Court denied review without opinion. ER 106.

### **B. Federal District Court Proceedings.**

James included his guilt and penalty phase IAC claims in his habeas petition, filed in 2000. At the request of the district court, the parties initially briefed the procedural status of each claim. Both sides reported that the state court had denied the IAC claims solely as precluded, but James also contended that the state court's preclusion rule was not firmly established or regularly followed. ER 97, SER 886-887. The district court held in 2006 that the preclusion rule barring the guilt and penalty phase IAC claims was not "adequate," and that federal review could proceed on the merits. ER 96-98. The parties then addressed the merits of twenty-two claims in the habeas petition, including the IAC claims. The district court's merits decision in 2008 applied *de novo* review to James's penalty phase IAC claim, concluding that James's counsel had provided

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<sup>4</sup> This is the paragraph the State contends to be an "alternative" merits ruling on the IAC claim. This brief discusses the State's contention below, in REASONS TO DENY THE WRIT, Section 2.

“clearly deficient” penalty phase representation, but also that counsel’s deficiencies had not prejudiced James. CP, App. B at 95-96, 107-108, 115-116.

### **C. Federal Appellate Proceedings.**

A unanimous panel of the Ninth Circuit Court of Appeals affirmed the district court’s rulings that the state court had relied on an inadequate procedural rule to preclude James’s penalty phase IAC claim, and that *de novo* review was appropriate. *James I*, 659 F. 3d 855, 876, 878-879 (9th Cir. 2011). The panel also agreed with the district court that James’s trial counsel had provided “clearly deficient” representation. *Id.* at 880. However, the court of appeals reversed the district court on *Strickland*’s prejudice requirement, holding that James had presented “powerful” mitigating evidence, which, “[i]n comparison to the meager mitigation evidence set before the sentencing judge,” developed “a detailed picture of James’ troubled childhood, his mental illness, and his downward spiral of depression and drug use in the year before [the] murder.” *Id.* at 882-883, 892. The court of appeals remanded the case with instructions to grant the writ. *Id.* at 892-893.

The State filed a petition for rehearing and rehearing *en banc*, arguing – for the first time – that although the superior court in James’s third PCR proceeding precluded the penalty phase IAC claim, it also reached the merits of the claim as an “alternative” ruling, in the paragraph in which it dismissed James’s PCR petition without an evidentiary hearing. The panel rejected this contention in an amended opinion. *James v. Ryan*, 679 F. 3d 780, 802-804, 820-821 (2012) [*James II*]. Without a single dissent, the entire Ninth

Circuit Court of Appeals denied *en banc* review. *Id.* at 785.

The State filed a petition for writ of certiorari in this Court, re-asserting the “alternative merits determination” argument it first made in its petition for rehearing and *en banc* review. While the State’s certiorari petition was pending, this Court decided *Johnson v. Williams*, 133 S. Ct. 1088 (2013). Shortly thereafter, this Court granted certiorari in James’s case, vacated the court of appeals decision in *James II*, and remanded for further consideration in light of *Williams. Ryan v. James*, 133 S. Ct. 1579 (2013). On remand, the court of appeals again rejected the State’s contention, holding that the circumstances of this case were entirely different from those in *Williams* and its precursor, *Harrington v. Richter*, 131 S. Ct. 770 (2011). *James v. Ryan*, 733 F. 3d 911, 915-916 (2013) [*James III*]. The State petitioned a second time for rehearing and *en banc* review. The panel summarily rejected the State’s petition, and the full Ninth Circuit unanimously denied *en banc* review. CP, App. H.

### **REASONS TO DENY THE WRIT**

#### **A. The State Court Expressly Denied James’s IAC Claim Solely as “Precluded” under State Law.**

The State tries doggedly to fit James’s case into mold of *Richter* and *Williams*, even though the state court record in this case contrasts starkly with the record in those cases. Instead of focusing on the record, the State attacks the decision below largely because it was rendered by a panel of the often divided and sometimes reversed Ninth Circuit Court of Appeals. CP at 12-13, 15, 19, 21-24. However, this is *not* an instance

of a maverick Ninth Circuit panel “evad[ing]” AEDPA deference, and “ignor[ing]” this Court’s precedents, as the State asserts. CP at 15, 19. Each of the judges on the *James* panel has voted dutifully in other cases to apply the dictates of *Richter* and *Williams*.<sup>5</sup> Even more telling, the State has petitioned twice in this case for *en banc* review of the issue now before this Court, and in each instance *not a single judge on the entire Ninth Circuit* requested or voted for an *en banc* hearing, even *after* this Court’s GVR. In all relevant respects, James’s case is the *opposite* of *Richter* and *Williams*.

In both *Richter* and *Williams*, this Court clarified that federal habeas courts should presumptively apply deferential review under 28 U.S.C. § 2254(d)(1) when a state court has denied a federal claim *without expressly addressing the claim*. *Williams* explained:

In [*Richter*], we held that, when a state court issues an order that summarily rejects without discussion *all* the claims raised by a defendant, including a federal claim that the defendant subsequently presses in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits. We see no reason why the same rule should not apply when the state court addresses some of the claims

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<sup>5</sup> See *Phillips v. Herndon*, 730 F. 3d 773, 775-777 (9th Cir. 2013) (Fletcher, J.); *Sully v. Ayers*, 725 F. 3d 1057, 1067 (9th Cir. 2013) (Berzon, J.); *Ayala v. Wong*, 2014 WL 707162 (9<sup>th</sup> Cir. 2014) (M. Smith, J., in dissent).

raised by a defendant but not a claim that is later raised in a federal habeas proceeding.

133 S. Ct. at 1091 (emphasis in original).

*Richter* and *Williams* also differentiated state court merits adjudications from decisions resting on state procedural law:

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 (1989).

*Williams*, 133 S. Ct. at 1094; *Richter*, 131 S. Ct. at 784-785 (emphasis added). *Williams* commented further on this point. Justice Alito's opinion for the Court defined a merits adjudication as a decision based on "the intrinsic rights and wrongs" of an issue, as opposed to a matter of form or procedure. 133 S. Ct. at 1097. Justice Scalia, concurring in the Court's judgment, declared: "An 'adjudication on the merits' is 'best understood by stating what it is not: it is not a resolution of a claim on procedural grounds.'" 133 S. Ct. at 1100 (quoting *Muth v. Frank*, 412 F. 3d 808, 815 (7th Cir. 2005)).

Two salient points emerge from *Richter* and *Williams*. First, deferential review under 28 U.S.C. § 2254(d) presumptively applies (subject to rebuttal) when a state court is *silent* regarding its reason for denying a federal claim. *Williams*, 133 S. Ct. at 1096; *Richter*, 131 S. Ct. at 785. Second, if a state court expressly relies on "state-law procedural principles" to

deny a federal claim, the presumption of a merits adjudication is not applicable. Both *Richter* and *Williams* cited *Harris v. Reed*, which instructed that when a state court intends to deny a federal claim on a state procedural ground, it can do so by “clearly and expressly” declaring in a “plain statement” that its denial of the claim rests on state procedural law. *Harris*, 489 U.S. at 263-265 (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983)). This Court’s reference to *Harris* leaves no doubt that the presumption of a merits adjudication is inapplicable when the state court declares “clearly and expressly” in a “plain statement” that it relies on a state procedural rule to deny a federal claim.

The state court record in this case places it squarely within the *Harris* “plain statement” rule. In James’s first PCR petition in 1985, the state superior court specifically denied James’s penalty phase IAC claim as “clearly precluded” [ER 147], and chose to ignore the merits of the claim, at the urging of the State [ER 507; SER 826]. The same occurred in James’s second PCR petition in 1991. Once again, the superior court ruled clearly and expressly that James’s IAC claim was “precluded” [ER 714], at the urging of the State itself [SER 891, 893].

In James’s third PCR petition in 1995 (the subject of the state’s certiorari petition in this case), the superior court expressly addressed each of James’s twelve claims in a separate section of the court’s thirty-eight page opinion. CP, App. D. The court denied eight of the non-IAC claims (Claims A-D and H-K) solely on the merits [*Id.* at 15, 19, 23, 26, 38, 39, 42, 46], and denied two other non-IAC claims (Claims E and L)

alternatively on the merits and on procedural grounds [*Id.* at 32, 47, 50]. The court discussed the merits of each of the non-IAC claims in detail, even the two claims it denied alternatively on procedural grounds. In contrast, the court devoted four pages of its opinion to addressing and denying the two Sixth Amendment IAC claims (Claims F and G) *solely* on the ground that they were precluded under state law. *Id.* at 32-36. The judge repeatedly emphasized the basis for denying the IAC claims:

These claims are discussed together because *both of them are precluded*. . . . To the extent that the claims were precluded in the first petition, they were precluded in the second, *and are precluded now* in the third. . . . Those issues [guilt and penalty phase IAC] *were and are precluded* under Rule 32.2(a)(3). That is the law of the case. [James] is *precluded from claiming* ineffective assistance of trial counsel, either during the trial or at sentencing. . . [James's] claims of ineffective assistance of counsel *are denied as precluded* under Rule 32.2(a)(3).

*Id.* (emphasis added). The Arizona Supreme Court summarily denied review of this decision without opinion. ER 106.

This record clearly establishes that the *Richter-Williams* presumption is inapplicable to James's Sixth Amendment penalty phase IAC claim. First, the state superior court (the last state court to render a reasoned decision on the claim) expressly addressed the claim, in detail, unlike the state courts in *Williams* and *Richter*. Second, the superior court emphatically declared (*five times*) that it denied the claim *solely* on state-law



procedural principles, explicitly holding that it was “denied as precluded.” It would be virtually impossible to formulate a “plain statement” that more “clearly and expressly” relies on a procedural ground to deny a claim.

Other federal courts have reached the same conclusion as the court of appeals decision in this case, in analogous circumstances. The Seventh Circuit has held that the presumption of a merits adjudication does not apply when a state court analyzes and denies a federal constitutional claim under state evidence law, without referring to federal constitutional law. *Harris v. Thompson*, 698 F. 3d 609, 623-624 (7th Cir. 2012). *See also Yarbrough v. Rapelje*, 2013 WL 1163413, at \*6-7 (E.D. Mich. 2013) (presumption of merits adjudication does not apply where last reasoned state court decision rests on procedural default, not the merits). And even if this Court were to conclude that the merits presumption somehow applies to James’s penalty phase IAC claim, the record convincingly *rebutts* the presumption. “The presumption may be overcome when there is reason to think *some other explanation* for the state court’s decision *is more likely*.” *Richter*, 131 S. Ct. at 785 (emphasis added). *See McClellan v. Rapelje*, 703 F. 3d 344, 349-351 (6th Cir. 2013); *cert. denied, Rapelje v. McClellan*, 134 S. Ct. 399 (presumption of merits adjudication rebutted when state trial court expressly denied claim as procedurally defaulted, and most likely explanation for appellate court affirmance was procedural default, not the merits of the claim).

The State *concedes* that the state courts expressly addressed James’s Sixth Amendment IAC claim in all

three PCR proceedings, and ruled each time that the claim was precluded under state law. CP at 7-8. The State also concedes that the third PCR court expressly declared that it was bound by prior findings of preclusion that were the “law of the case.” *Id.* at 8. Additionally, the State concedes that the presumption of a merits adjudication only applies “absent an express indication that [the state court] resolved the claim solely on procedural grounds.” *Id.* at 21. The State also does not challenge the holdings of the courts below that the state court preclusion rule was not firmly established or regularly followed, and therefore was not “adequate” to bar federal review of the merits.

**B. The State Court did not “Alternatively” Adjudicate the Merits of James’s IAC Claim.**

Despite this unambiguous record, the State contends that the third PCR court “alternatively” denied James’s penalty phase IAC claim on the merits in the final paragraph of its thirty-eight page opinion, eleven pages after it had already precluded the claim. The State’s argument fails for three separate reasons: (1) well-settled Arizona law barred the third PCR court from reaching the merits of James’s penalty phase IAC claim; (2) the State interprets the final paragraph of the PCR court’s opinion totally out of context, in a manner inconsistent with the record as a whole; and (3) the State’s own pleadings, over twenty-six years, demonstrate that the state court did not adjudicate the IAC claim on the merits.

1. **Well-settled Arizona law barred the third PCR court from reaching the merits of James’s penalty phase IAC claim in the final paragraph of its opinion.**
  - a. **The trial court in James’s third PCR proceeding lacked legal authority to reopen a claim already resolved by the Arizona Supreme Court.**

Arizona cases have frequently recognized that a trial judge has a “fundamental obligation” to follow an earlier ruling of an appellate court in the same case. *J. Powell-Cerkoney v. TCR-Montana Ranch Joint Venture*, 176 Ariz. 275, 278, 860 P. 2d 1328, 1331 (Ct. App. 1993). This core principle of the “law of the case” doctrine, differentiating between higher and lower courts, applies even if the trial judge believes the appellate ruling is erroneous. The Arizona Supreme Court has noted:

A judgment of this court imports absolute verity. It must be regarded as free from all error. It is final and conclusive upon the superior courts and the judges thereof, and they may not question such judgment . . .

*State v. Federico*, 104 Ariz. 49, 51, 448 P. 2d 399, 401 (1969) (quoting *State v. Griffith*, 54 Ariz. 436, 441, 96 P. 2d 752, 754 (1939)). This fundamental limitation on the discretion of trial courts barred the third PCR court from adjudicating the merits of James’s penalty phase IAC claim.

The first PCR court ruled in 1985 that James’s guilt and penalty phase IAC claims were precluded because the claims had not been asserted on direct appeal.

ER 147. The Arizona Supreme Court summarily denied review of this ruling [ER 145], even though it had permitted PCR petitioners in other cases to raise IAC claims after the conclusion of direct appeal. *See, e.g., State v. Carriger*, 132 Ariz. 301, 305, 645 P. 2d 816, 820 (1982). In James's second PCR petition, the trial court again ruled that his IAC allegations were precluded, and the Arizona Supreme Court denied review. ER 706, 713-714.

James argued in his third PCR petition that the first PCR court had erroneously precluded his guilt and penalty phase IAC claims, contending there was no firmly established or regularly followed procedural rule requiring such claims to be raised on direct appeal. ER 131, 560-561. James urged the third PCR court to adjudicate the merits of the IAC claims, predicting (accurately) that if the first PCR court's erroneous ruling were not corrected in state court, the federal courts would review the merits of the claims *de novo*. *Id.* James asserted that state courts, not federal courts, should have the initial and primary responsibility for addressing the merits of federal claims arising from state court prosecutions. *Id.* The third PCR court expressly addressed this argument in its opinion, declaring that it was *powerless* as a trial court to reach the merits of the claims, because the Arizona Supreme Court had already denied review of the first and second PCR courts' preclusion rulings:

[James] asserts that the judge made the wrong decision in ruling on the first petition for post-conviction relief, and thus, this court was wrong when it found preclusion in the second petition. . . . It is the role of appellate courts to review the

rulings of trial courts and to rectify errors made by the trial courts. The Arizona Supreme Court declined to find error in the rulings made on the first petition. It denied review, without comment . . . . Review of the second petition was denied without comment by the Arizona Supreme Court . . . [in] 1992. Those issues [guilt and penalty phase IAC] were and are precluded under Rule 32.2(a)(3). *That is the law of the case.*

CP, App. D at 33-34 (emphasis added).

This passage demonstrates that the judge in the third PCR proceeding understood her lack of legal authority, as a trial court, to overrule prior decisions of the Arizona Supreme Court in the same case, on the same issue. The judge could not accept James's invitation to review the merits of his penalty phase IAC claim, regardless of whether the claim had merit. After two rulings of the Arizona Supreme Court upholding the preclusion of James's IAC claims, the third PCR judge knew that she was powerless to adjudicate their merits. This passage also demonstrates the implausibility of the State's assertion that the last paragraph of the court's opinion constituted an "alternative" merits ruling. The State's contention assumes that the judge somehow *forgot* what she had clearly and emphatically stated eleven pages earlier in her opinion. If the judge believed that she could not legally reach the merits of the claim, why would she do just that?

**b. “State-law procedural principles”  
barred an alternative merits  
adjudication in the last paragraph of the  
third PCR court’s opinion.**

In addition to being bound by the prior rulings of the Arizona Supreme Court, the third PCR court was required to follow general dictates of Arizona procedural law that barred a merits adjudication of James’s IAC claims after the PCR court had already ruled them precluded. First, Rule 32.6(c) of the Arizona Rules of Criminal Procedure (as amended in 1992 and still in force today) obligated the third PCR court to follow a particular course of action in differentiating between precluded claims and claims to be adjudicated on the merits. Rule 32.6(c) provides, in pertinent part:

On reviewing the petition, response, reply, files and records, . . . the court shall identify all claims that are procedurally precluded under this rule. If the court, *after identifying all precluded claims*, determines that no *remaining* claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed. If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law.

Rule 32.6(c), Ariz. R. Crim. P. (1992) (emphasis added).<sup>6</sup>

The third PCR court followed these steps precisely. First, it devoted four pages of its opinion to a discussion of James’s guilt and penalty phase IAC claims, declaring (clearly, expressly, and repeatedly) that they were precluded. CP, App. D at 32-36. Then, in the final paragraph of its opinion, it addressed the relief James sought in the final paragraph of his PCR petition: a generic request for an evidentiary hearing. *Id.* at 50-51. In other words, *after identifying all precluded claims*, the court addressed whether it would dismiss the *remaining* claims summarily, or would instead grant James an evidentiary hearing. The paragraph closely tracked the language of Rule 32.6(c). The first sentence, for example, stated that there were “no material issues of fact or law that are in dispute that would entitle the petitioner to an evidentiary hearing.” This phraseology demonstrated that the court was following the requirements of Rule 32.6(c).

The Arizona Supreme Court has repeatedly emphasized the importance of the procedural sequence set forth in Rule 32.6(c) (and followed by the third PCR court in this case). In *State v. Shrum*, 220 Ariz. 115, 203 P. 3d 1175 (2009), the Arizona Supreme Court discussed the significance of preclusion in the efficient operation of PCR proceedings. Citing Rule 32.6(c), the Supreme Court stated that “after” eliminating precluded claims from a petition, a PCR court may then determine whether the defendant is entitled to an

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<sup>6</sup> The State inexplicably fails to mention or cite Rule 32.6(c) in its petition for certiorari.

evidentiary hearing on the claims that have not been precluded. 220 Ariz. at 118, 203 P. 3d at 1178. The *Shrum* court reasoned that there must be an “end to litigation” of a claim that has been precluded under the Rules of Criminal Procedure. *Id.*

The Arizona Supreme Court has even declared *itself* to be bound by the procedural strictures that PCR courts must follow under Rule 32.6(c). In *State v. Bennett*, 213 Ariz. 562, 146 P. 3d 63 (2006), the Arizona Supreme Court addressed a Sixth Amendment IAC claim that a PCR court had ruled to be precluded. The Supreme Court engaged in a two-step analysis, declaring that it could not reach the merits of the claim unless it first found that the trial court’s preclusion ruling was erroneous. 213 Ariz. at 565-566, 146 P. 3d at 66-67. The Supreme Court ultimately determined that the defendant’s IAC claim was colorable, entitling him to an evidentiary hearing. 213 Ariz. at 568-569, 146 P. 3d at 69-70. However, it did so only after it first concluded that the lower court’s preclusion ruling was, in fact, incorrect. 213 Ariz. at 566, 146 P. 3d at 67.

The combination of Rule 32.6(c), *Shrum*, and *Bennett* leaves no doubt in the present case that the third PCR court could not, under Arizona procedural law, adjudicate the merits of James’s IAC claims after it had already ruled (repeatedly) that the claims were precluded. When a claim has been precluded under the Arizona Rules of Criminal Procedure, the defendant is barred even from “raising the issue.” *State v. Medina*, 232 Ariz. 391, 400, 306 P. 3d 48, 57 (2013); *State v. Mata*, 185 Ariz. 319, 332, 334, 916 P. 2d 1035 1048, 1050 (1996). Summary dismissal without evidentiary development is required because the defendant is “not



entitled to assert” the claim. *State v. Andersen*, 177 Ariz. 381, 388, 868 P. 2d 964, 971 (Ct. App. 1994).

**2. The State interprets the final paragraph of the PCR court’s opinion totally out of context, in a manner inconsistent with the record as a whole.**

The final paragraph in James’s third PCR petition included a generic request for an evidentiary hearing [ER 558], and, as the court below noted, the final paragraph of the PCR court’s opinion merely addressed that request. *James III*, 733 F. 3d at 916. The PCR court had already discussed each claim individually, and only the two IAC claims were denied as precluded.<sup>7</sup> In discussing the merits of the ten non-IAC claims earlier in its opinion, the court had expressly declared that *some* of the claims were not colorable, and that James was not entitled to an evidentiary hearing on those claims. CP, App. D at 15, 19, 23, 47. However, its discussion of *more than half* of the non-IAC claims was less clear. The court found these claims to lack merit, but did not state whether James had presented a material issue of fact or law, requiring a hearing. *Id.* at 26, 32, 38, 39, 42, 46. The final paragraph of the

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<sup>7</sup> The State misleadingly alters the phraseology of the third PCR court’s opinion, declaring that the final paragraph included “an express merits adjudication” of James’s penalty phase IAC claim. CP at 15. This is false. The paragraph did not even mention the claim, let alone expressly adjudicate it. The State also repeatedly declares that the paragraph was a “denial” of all claims in the petition. CP at i [Question Presented], 4. This too is false. The paragraph did not “deny” *any* claims. Instead, pursuant to Rule 32.6(c) (which the State ignores), the PCR court “dismissed” the *petition* summarily, without an evidentiary hearing.

opinion simply clarified that, in the court's view, James was not entitled to the evidentiary hearing he requested on *any* of the *non-precluded* claims.<sup>8</sup> The paragraph had no relevance to James's two IAC claims, which had already been precluded and thereby eliminated from the court's consideration. James's penalty phase IAC claim could not even be addressed on the merits, let alone qualify for further evidentiary development.

The judge in James's third PCR proceeding clearly understood her ability to deny claims on alternative grounds, as demonstrated by her denial of Claims E and L. After discussing the merits of Claim E, a claim alleging prosecutorial misconduct, the judge added that it "may [also] be precluded," and she concluded her discussion by stating that "it is denied or is precluded." CP, App. D at 31-32. With regard to Claim L, a claim relating to victim impact evidence, the judge commented that "a viable argument can be made that this claim is precluded." *Id.* at 47. She then proceeded to discuss the merits of the claim in detail, and to expressly deny the claim on the merits. *Id.* at 50. The judge chose not to act similarly on James's guilt and penalty phase IAC claims, which she discussed and denied *solely* on the ground of preclusion. If the court

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<sup>8</sup> Ignoring the PCR court's *obligation* under Rule 32.6(c) to address James's request for a hearing on all of his *non-precluded* claims, the State argues that the paragraph must have had a broader meaning, implicitly including a merits ruling on the already precluded IAC claims. CP at 18 n.3. The State then proceeds to declare how the PCR court *should* have worded its denial of an evidentiary hearing, if it wanted to be clear. *Id.* This demonstrates that *the State*, not the court of appeals panel, is "dictat[ing] how state courts should craft their opinions." CP at 4, 21-24.

truly wanted to deny the IAC claims on alternative grounds, she surely would have included a discussion of the merits when she addressed the claims individually, just as she had regarding claims E and L.<sup>9</sup>

**3. The State’s own pleadings, over twenty-six years, demonstrate that the state court did not adjudicate the IAC claim on the merits.**

In *Williams*, this Court pointed to the defendant’s own “litigation strategy” in state and federal court proceedings as a significant factor supporting the conclusion that the state court had in fact adjudicated the defendant’s federal claim on the merits. 133 S. Ct. at 1099. The defendant (*Williams*) had treated her state and federal claims as interchangeable in her briefing, and this Court found it “hardly surprising” that the state courts would follow her lead and view them the same way. *Id.* Additionally, after the state court discussed and resolved the federal claim (a Sixth Amendment claim) only on state law grounds:

Williams neither petitioned that court for rehearing nor argued in subsequent state and federal proceedings that the state court had

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<sup>9</sup> The State cites Fourth and Sixth Circuit cases that applied § 2254(d) deference to alternative merits rulings. CP at 22-23, n. 5. See *Stephens v. Branker*, 570 F. 3d 198, 206, 208 (4th Cir. 2009); *Brooks v. Bagley*, 513 F. 3d 618, 624-625 (6th Cir. 2008) (discussing alternative merits ruling in *State v. Brooks*, No. 73729, 1999 WL 401655, at \*6-7 (Ohio Ct. App. 1999)). However, in each of these cases, the state court *expressly addressed and resolved the merits of the claim in its opinion*, as James’s third PCR court did in relation to Claims E and L, but did not do with James’s IAC claims.

failed to adjudicate her Sixth Amendment claim on the merits.

*Id.* Under these circumstances, this Court concluded that Williams (like everyone else involved in the case) assumed that the state court had resolved her Sixth Amendment claim on the merits. *Id.*

In the present case, the State opposed James's guilt and penalty phase IAC claims in all three PCR proceedings exclusively on preclusion grounds. The state repeatedly urged the court to *ignore* the merits of the IAC claims.

In the first PCR proceeding, the state argued:

[James] failed to raise on appeal . . . any challenges to the performance of trial counsel and is precluded from doing so now. . . . *The state urges this Court . . . not to reach the merits of any part of James' petition.* . . . The state . . . respectfully requests that the Court simply dismiss[] the petition solely on the basis of preclusion."

ER 507; SER 826 (underlined emphasis in original; italicized emphasis added).

The State made a similar argument for denying James's IAC claim in the second PCR petition:

[T]his Court should hold the second petition procedurally barred, address nothing on its merits, and summarily dismiss it. . . . *To avoid the possibility that the federal courts would reach the merits if this Court rendered an alternative ruling . . . we respectfully ask the*

Court to rule exclusively on the basis of preclusion.

SER 891, 893 (emphasis added).

Again, in opposing the IAC claims in James's third PCR petition, the State ignored their merits and instead (citing the holdings of the first two PCR courts) contended *solely* that James was *precluded* from challenging the performance of counsel. SER 865-867. In view of the State's consistent strategy in each of the three PCR proceedings to treat James's penalty phase IAC claim as precluded from a merits determination, "it is hardly surprising that the state courts did so as well." *Williams*, 133 S. Ct. at 1099.

*Williams*'s reasoning also applies to the State's litigation strategy *after* the third PCR court denied James's guilt and penalty phase IAC claims. When James filed a motion for rehearing, the State's responsive pleading asked the court to clarify the basis of its rulings (preclusion v. the merits) on certain of James's claims, but *not* the IAC claims. Response to Motion for Rehearing at 7. Given that the State had repeatedly urged the superior court *not* to reach the merits of the IAC claims in an alternative ruling, the State's decision not to seek clarification of the superior court's final paragraph strongly suggests that the State *understood* that the paragraph dealt only with James's eligibility for an evidentiary hearing on his *non-precluded* claims, and was not an "alternative" merits ruling on the IAC claims.

James next filed a petition for Arizona Supreme Court review of the trial court's dismissal of his third PCR petition, arguing once again that the IAC claims

in his *first* PCR petition had been erroneously precluded because there was no firmly established or regularly followed Arizona procedural rule barring IAC claims from PCR proceedings if they had not been raised on appeal. Petition for Review at 14-16. James *expressly* noted that his penalty phase IAC claim had *never* been “adjudicated on the merits.” *Id.* at 16. He quoted the third PCR court’s statement that she was powerless to do so because, as a trial judge, she could not overrule two prior Arizona Supreme Court decisions. *Id.* James requested the Arizona Supreme Court itself to correct the ongoing procedural error, rather than leaving it to the federal courts to reach the merits of his guilt and penalty phase IAC claims. *Id.*

If, as the State now claims, the third PCR court had in fact rendered an “alternative” merits adjudication in the final paragraph of its opinion, James’s petition for review gave the State the perfect opportunity to set the record straight. However, the State’s pleading in opposition to the petition for review simply reiterated its prior assessment of the third PCR court’s rulings:

The trial court ruled that claims F and G [ineffective assistance at trial and sentencing] were precluded . . . The trial court denied relief on the merits of the remainder of the [claims].

SER 883. The State added that the trial court “merely” applied the “usual rules of preclusion” to deny the IAC claims. Opposition to Petition for Review at 18.

The State had another important opportunity in federal district court to assert its “alternative” merits adjudication argument. When the district court ruled that the state court preclusion rule was not “adequate”

to bar federal *de novo* review of the merits of James's penalty phase IAC claim, the State failed to bring the PCR court's supposed "alternative merits adjudication" to the district court's attention. Instead, the state's sole contention in the district court was that James's IAC claims in the third PCR proceeding were "precluded under Rule 32.2(a)(3)." SER 886. In *every* subsequent pleading and brief filed by the State, after the third PCR court's 1999 denial of the PCR claim and before the State's 2011 petition for rehearing and rehearing *en banc* in the federal court of appeals, it consistently characterized the denial of James's IAC claims in the third PCR petition as based *solely* on preclusion. This record demonstrates that the State itself (like James and his counsel, the superior court, the Arizona Supreme Court, the district court, and every judge on the entire circuit court of appeals) understood that the denial had been based solely on a procedural ground, with no alternative adjudication on the merits.

Applying *Williams's* "litigation strategy" analysis to the present case provides additional evidence that the state courts denied James's penalty phase IAC claim *solely* as precluded. The State's consistent litigation strategy, over more than a quarter century, supports the inescapable conclusion that James's penalty phase IAC claim was not adjudicated on the merits in state court.

## CONCLUSION

James agrees with one point in the State's certiorari petition: that the first principle in interpreting state court opinions is to use "common sense." CP at 19.

- Common sense informs us that when a state court declares *five times* that a claim is precluded, the court means what it says.
- Common sense informs us that when a state trial judge declares that she *cannot lawfully overrule* her own supreme court, she means what she says.
- Common sense informs us that a state court adheres to the requirements of the state's rules of criminal procedure.
- Common sense informs us that if *every* judge *ever* to review a state court's denial of a claim *agrees* that the claim was denied *solely* as precluded, it was – in fact – denied solely as precluded.
- Common sense informs us that when counsel for the State consistently declares, *over a quarter of a century*, that a claim has been denied solely as precluded, the State *believes* what it says.

This Court should deny the Petition for Writ of Certiorari.



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