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No. 10-1001

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

v.

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

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

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The panel opinion of the Ninth Circuit Court of Appeals (Pet. App. 1a-25a) is reported as *Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010). The decisions and opinions of the Maricopa County Superior Court, the Arizona Court of Appeals, the Supreme Court of Arizona, the United States Magistrate Judge, and the United States District Court for the District of Arizona (Pet. App. 26a-85a) are unreported.

JURISDICTION

The Court of Appeals denied rehearing on November 5, 2010. Pet. App. at 84a. Petitioner filed a timely petition for a writ of certiorari on February 3, 2011. This Court granted certiorari on June 6, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. State Court Proceedings

A. Evidence Presented at Trial

Petitioner was charged in the state trial court with two counts of sexual conduct with a person under the age of fifteen. 623 F.3d at 733 (Pet. App. 3a). The State's theory was that Petitioner had sexual intercourse with his stepdaughter, Lacey, on two occasions during the morning of July 10, 1999. Resp. App. A11.

Lacey testified at some length at trial, but she stated that she did not remember much of what had (or had not) happened on July 10, 1999. *Id*. On cross-examination, however, Lacey testified that Petitioner did **not** try to have sex with her or "put his penis up against" her. *Id*. at A12.

Although Lacey's trial testimony did not inculpate Petitioner, the State was permitted to offer testimony that Lacey had made statements prior to trial indicating that Petitioner had rubbed her "private area" and twice had put his "private area" inside her "private area." *Id*. Defense counsel presented some evidence that Lacey had recanted her accusations against Petitioner during later pretrial conversations with several people, but he failed to present other, more persuasive evidence of such recantations. *Id*. at A12, A20-A22. Lacey's recantations were consistent with Petitioner's exculpatory statements to the police. *Id*. at A12.

The prosecution sought to explain away Lacey's recantations primarily by arguing that they were the

result of her mother's failure to support Lacey's initial accusations against Petitioner. *Id*. at A12-A13. In this regard, the prosecution relied heavily on expert testimony by a social worker, Wendy Dutton, that "a range of research" indicated that recantations by children of true accusations of sexual abuse most commonly were caused by a "lack of support from the mother of the victim." *Id*. at A13. Although defense counsel knew that Ms. Dutton would testify, he did not research the purported "scientific" basis for Ms. Dutton's opinions; and he did not seek to obtain expert testimony to refute those opinions, even though such testimony was readily available. *Id*. at A13, A17-A18.

The State presented evidence that a nightgown that Lacey was wearing when the police arrived at the Martinez residence on the morning of July 10, 1999 contained semen stains that matched Petitioner's DNA. *Id*. at A13. However, the evidence also indicated that it was not possible to determine when the semen contacted the nightgown, that semen still could be found on a garment even after it had been washed, and that the extremely low sperm count in the semen samples on the nightgown could have resulted from washing. *Id*. Moreover, and inconsistently with the State's theory, a sexual assault examination on the day of the alleged assaults did not disclose any evidence of injury or trauma on Lacey's body, including her vaginal area; and vaginal swabs collected during the same examination did not contain semen. *Id*. at A13-A14. Petitioner's trial counsel failed to uncover and present evidence that Petitioner had masturbated onto a nightgown that was in the household's dirty clothes pile prior to July 10, 1999. *Id*. at A23-A24.

Petitioner was convicted on both of the counts against him, and he was sentenced on February 19, 2002 to consecutive terms of 35 years to life. 623 F.3d at 733 (Pet. App. 3a); Resp. App. A3.

B. State Appellate Proceedings

On direct appeal, Petitioner raised issues that are not relevant to this Petition. The Arizona Court of Appeals affirmed Petitioner's convictions on March 22, 2004; and the Arizona Supreme Court denied review on September 21, 2004. *Id.* (Pet. App. at 3a); Resp. App. A6-A7.

C. State Post-Conviction Proceedings

1. Arizona's procedures for the adjudication of ineffective-assistance-of-counsel claims

At least since January 2002, the bright-line rule in Arizona has been that any ineffective-assistance-of-trial-counsel claims "raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002).[1] Consequently, a convicted Arizona defendant must raise any ineffective-assistance claim in a post-conviction relief proceeding under Rule 32 of the Arizona Rules of Criminal Procedure, even if its merit is apparent from the appellate record. *Id.*

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1. Eight years before *Spreitz*, the Arizona Supreme Court stated that it would no longer "resolve an ineffective assistance of counsel claim on direct appeal unless the record clearly indicates that the claim is meritless." *State v. Maturana*, 882 P.2d 933, 940 (1994). Nevertheless, counsel continued to raise ineffective-assistance claims on direct appeal. *Spreitz*, 39 P.3d at 526.

A federal ineffective-assistance-of-counsel claim is authorized by Ariz.R.Crim.P. 32.1(a), which provides that it is a ground for post-conviction relief that "[t]he conviction or the sentence was in violation of the Constitution of the United States." A post-conviction relief proceeding is commenced by timely filing in the state trial court a "notice of post-conviction relief," which is a very simple form that does not require the defendant to describe any claims for relief. Ariz.R.Crim.P. 32.4(a), Form 24(b); 623 F.3d at 734 (Pet. App. 3a). A notice of post-conviction relief is timely if it is filed "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal." Ariz.R.Crim.P. 32.4(a).

The "notice" form permits the defendant to request appointed post-conviction counsel by checking a box [Form 24(b), para. 8]; and the trial court must appoint counsel for an indigent defendant "[u]pon the filing of a timely or first notice." Ariz.R.Crim.P. 32.4(c)(2). When post-conviction counsel is appointed, he or she is responsible for preparing and filing either a petition for post-conviction relief or a statement that he or she has not been able to discover any colorable claims for relief. A petition must include "every ground known to [the defendant] for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, and certify that he or she has done so." Ariz.R.Crim.P. 32.5, Form 25.

Although an indigent defendant has a right to appointed counsel in a first post-conviction relief proceeding under Arizona Rule 32.4(c)(2), the Arizona Supreme Court has held that a defendant has no right to effective assistance of first post-conviction counsel, even with respect to a

federal ineffective-assistance-of-trial-counsel claim. *State v. Mata*, 916 P.2d 1035, 1052-53 (Ariz. 1996); *see also State v. Martinez* (Ariz. Ct. App. Memo Decision 2006) [Pet. App. 79a, 81a-82a].

2. Petitioner's truncated first post-conviction relief proceeding

In May 2002, during the pendency of Petitioner's direct appeal but without his authorization, his court-appointed appellate counsel, Harriette Levitt, filed a Notice of Post-Conviction Relief in the state trial court. 623 F.3d at 733-34 (Pet. App. 3a-4a). Consistently with the Arizona Rules of Criminal Procedure, this Notice did not state any claims for relief; but it had the effect of commencing a post-conviction relief proceeding. *Id.* at 734 (Pet. App. 3a); Ariz.R.Crim.P. 32.4(a), 32.5, Form 24(b).

There was no reason for Ms. Levitt to file the May 2002 Notice of Post-Conviction Relief before the conclusion of Petitioner's direct appeal.[2] That Ms. Levitt in fact had no such reason became apparent in February 2003, when -- without having communicated with Petitioner's trial counsel, without having otherwise investigated a possible ineffective-assistance-of-trial-counsel claim, and without Petitioner's consent -- she filed with the state trial court a statement (a) asserting that she had "reviewed the transcripts and trial file and [could] find no colorable claims pursuant to Rule 32" and (b) requesting that the court issue an order granting Petitioner 45 days to file

2. As previously noted, a notice of post-conviction relief is timely if it is filed "within thirty days after the issuance of the order and mandate in the direct appeal." Ariz.R.Crim.P. 32.4(a).

a pro se petition for post-conviction relief. 623 F.3d at 734 (Pet. App. 4a); Resp. App. A10-A11. Ms. Levitt sent Petitioner a letter informing him that he needed to file his own petition, but the letter was written in English -- even though Petitioner had informed Ms. Levitt, in Spanish, that he did not read English and did not "understand anything of what [was] happening." Resp. Pet. A30. Petitioner did not file a pro se post-conviction relief petition, and the state trial court dismissed the pending post-conviction Notice on April 28, 2003 (more than one year before the conclusion of the direct appeal). 623 F.3d at 734 (Pet. App. 4a).

It is especially inexplicable that Ms. Levitt filed a notice of post-conviction relief but then did nothing (besides reviewing court records) to investigate a possible ineffective-assistance-of-trial-counsel claim: That type of claim is one of the few for which a first post-conviction proceeding provides first-tier review in Arizona; and Arizona's "preclusion" rules make it very difficult to obtain review of most claims that could have been raised on direct appeal -- or in a previous post-conviction relief proceeding. *See* Ariz.R.Crim.P. 32.2(a), 32.2(b); Pet. App. 79a-83a.

3. Petitioner's second post-conviction relief proceeding

With the assistance of the Arizona Justice Project, Petitioner filed a timely pro se Notice of Post-Conviction Relief in the state trial court on October 18, 2004. After that court denied Petitioner's request for appointed counsel [Pinal County Superior Court Order of December 8, 2004],

pro bono counsel associated with the Justice Project filed a timely Petition for Post-Conviction Relief. 623 F.3d at 734 (Pet. App. 4a); Resp. App. A1-A33. The Petition alleged that Petitioner's trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, in several respects, including failing to object to Ms. Dutton's expert testimony regarding the alleged victim's recantations, even though that testimony was inadmissible under state law; failing to research the purported basis for Ms. Dutton's testimony or to present readily available and persuasive expert testimony that Ms. Dutton's testimony was inaccurate and misleading in light of the empirical literature in the field; failing to impeach an important prosecution witness concerning Lacey's pre-trial statements with his own police report; failing to discover or present additional compelling evidence that the alleged victim's initial accusations were false and her subsequent recantations true; and failing to present exculpatory evidence relating to the State's DNA evidence. 623 F.3d at 734 (Pet. App. 4a); Resp. App. A14-A27.

Petitioner also argued in the second post-conviction relief proceeding that his ineffective-trial-counsel claim was not "precluded" because he had a Fourteenth Amendment right to effective assistance of **first** post-conviction counsel with respect to his Sixth/Fourteenth Amendment ineffective-assistance-of-trial-counsel claim -- and because Ms. Levitt had performed ineffectively by failing to contact trial counsel, to communicate meaningfully with her Spanish-speaking client, to perform any other extra-record investigation into trial counsel's effectiveness, and to uncover the prejudicial deficiencies in trial counsel's performance outlined in the

preceding paragraph. Resp. App. A28-A30; Habeas Ex. 9 at 3-5 [USDC Dkt. #11-2 at 5-7].[3]

The state trial court dismissed the post-conviction relief petition without a hearing, finding that Petitioner's ineffective-trial-counsel claim was "precluded" from merits review, under Ariz.R.Crim.P. 32.2(a), because Ms. Levitt had not raised that claim in the aborted first post-conviction relief "proceeding" described above. 623 F.3d at 734 (Pet. App. 5a). The Arizona Court of Appeals granted review but denied relief, solely on the ground that Petitioner's claim was precluded because it could have been raised in the previous post-conviction proceeding. *Id.*; Pet. App. 81a-83a. In doing so, the Arizona Court of Appeals rejected Petitioner's argument that he had a Fourteenth Amendment right to effective assistance of first post-conviction counsel with respect to his ineffective-assistance-of-trial-counsel claim. *Id.* The Arizona Supreme Court subsequently denied review without opinion. 623 F.3d at 734 (Pet. App. 5a).

II. Federal Habeas Corpus Proceedings

Petitioner filed a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. §§ 2241(a) and 2254(a), on April 24, 2008. *Id.* The Petition asserted the Sixth/Fourteenth

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3. Petitioner also argued in the Arizona Court of Appeals and the Arizona Supreme Court that he had a Fourteenth Amendment right to effective assistance of first post-conviction counsel with respect to his ineffective-trial-counsel claim, but that Ms. Levitt had performed ineffectively. Resp. App. B17-B20; Habeas Ex. 10 at 5-10 [USDC Dkt. #11-2 at 22-27]. Thus, under *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000), Petitioner exhausted the issue on which this Court has granted certiorari.

Amendment ineffective-assistance-of-trial-counsel claim described above, and it argued that the claim was not subject to procedural default because Petitioner had not received the effective assistance of first post-conviction counsel, with respect to his ineffective-trial-counsel claim, to which he was entitled under the Fourteenth Amendment. *Id.*; Habeas Pet. [USDC Dkt. #1] at 67-83, 87-94.

On December 12, 2008, the District Court issued an Order denying the Petition solely on the ground that Petitioner's claim was procedurally defaulted. 623 F.3d at 734 (Pet. App. 5a). After Petitioner filed a timely Notice of Appeal, the District Court issued a Certificate of Appealability with respect to two related issues: "1) whether Arizona's procedural bar, as applied in this case, is an adequate and independent state law ground for denying relief; [and] 2) whether Petitioner has shown cause to excuse his procedural default." *Id.*

On September 27, 2010, the Court of Appeals issued a panel opinion affirming the judgment of the District Court. 623 F.3d 731 (Pet. App. 1a). The Court of Appeals' ruling was based on its conclusion that Petitioner did not have a constitutional right to effective assistance of his first post-conviction relief counsel with regard to his federal ineffective-assistance-of-trial-counsel claim, and that the claim therefore was procedurally defaulted. 623 F.3d at 735-43 (Pet. App. 6a-25a). Petitioner's timely Petition for Panel Rehearing and Rehearing En Banc was denied on November 5, 2010. (Pet. App. 84a).

SUMMARY OF ARGUMENT

A. The Court of Appeals' dispositive ruling that Petitioner's Sixth/Fourteenth Amendment ineffective-assistance-of-trial-counsel claim was procedurally defaulted necessarily was based on the Arizona Court of Appeals' decision -- made in the context of a second state post-conviction relief proceeding -- that the claim was "precluded." That state-court decision in turn was based on the fact that Petitioner's ineffective-trial-counsel claim was not raised by Petitioner's appointed counsel in a truncated first state post-conviction relief proceeding. The Court of Appeals erred for two related, but independently sufficient, reasons: (1) The procedural ground on which the Arizona Court of Appeals denied Petitioner's claim was not "adequate" to bar federal habeas corpus review; and (2) there was cause and prejudice to excuse any default. Both of those reasons depend on the proposition that a defendant has a Fourteenth Amendment right to effective assistance of first post-conviction counsel with regard to a Sixth/Fourteenth Amendment ineffective-trial-counsel claim, when the first post-conviction proceeding provides the first opportunity to raise such a claim.

B. The first post-conviction relief proceeding in this case unquestionably was the first point at which Arizona law permitted Petitioner to raise any ineffective-assistance-of-trial-counsel claim. *State v. Spreitz*, *supra*. Moreover, Arizona courts must review such a claim on the merits when it is asserted in a timely first post-conviction relief proceeding; and a defendant pursuing "first-tier" review of such a claim -- with regard to which he necessarily has not previously received the benefit of assistance of counsel -- is especially ill equipped to represent himself.

Consequently, under *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005), Petitioner had a Fourteenth Amendment right to first post-conviction relief counsel with regard to his Sixth/Fourteenth Amendment ineffective-trial-counsel claim. And the right to counsel means the right to **effective assistance** of counsel. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

C. The foregoing analysis implicitly suggests why the Court of Appeals' attempts to distinguish *Douglas* and *Halbert* -- and to analogize this case to *Ross v. Moffitt*, 417 U.S. 600 (1974) -- are unpersuasive. Unlike the defendant in *Ross*, Petitioner had no opportunity, prior to his first post-conviction proceeding, to obtain either review of his claim or assistance of counsel with respect to that claim; and unlike the second-tier reviewing courts in *Ross*, the state trial court in Petitioner's first post-conviction proceeding had no discretion, on any basis, to decline to review the merits of any ineffective-assistance-of-trial counsel claim.

D. Contrary to the suggestion of the Court of Appeals, recognition of the right to effective assistance of first-tier review counsel with respect to ineffective-assistance-of-trial-counsel claims would not lead to an "infinite continuum" of post-conviction litigation. On a theoretical level, nothing in *Douglas* or *Halbert*, or in Petitioner's argument, would require a right to appointed/effective counsel for second-tier review; and any review of the effectiveness of first post-conviction counsel necessarily would require second-tier review of the effectiveness of trial counsel, since first post-conviction counsel's deficient performance could not result in **prejudice** unless the

underlying ineffective-trial-counsel claim was valid. Even if that was not so, as a practical matter it is unlikely in the extreme that any defendant could litigate through more than two tiers of state post-conviction review without violating existing state and federal statutes of limitation, or that many defendants would try to do so; and in any event the State would be free to simply prohibit "second or successive" post-conviction relief petitions, or to impose on such petitions restrictions similar to those imposed by 28 U.S.C. § 2244(b).

E. Because the Arizona Court of Appeals' ruling that Petitioner's federal claim was "precluded" -- without regard to whether or not first post-conviction relief counsel was effective -- frustrated the protection of Petitioner's Sixth/Fourteenth Amendment right to effective assistance of trial counsel **and** his Fourteenth Amendment right to effective assistance of first post-conviction counsel, it was not "adequate" to bar federal habeas corpus review. And even if the procedural ground on which the Arizona Court of Appeals based its decision was "adequate," there would be "cause and prejudice" to excuse the resulting default if it resulted from a deprivation of Petitioner's federal right to effective assistance of first post-conviction counsel with respect to his federal ineffective-trial-counsel claim. *Coleman v. Thompson*, 501 U.S. 722 (1991).

F. Because of their erroneous holdings that Petitioner had no federal constitutional right to effective assistance of first post-conviction counsel, even with respect to an ineffective-trial-counsel claim for which the first post-conviction relief proceeding provided first-tier review, the District Court and the Court of Appeals declined to address the merits of either of Petitioner's ineffective-

assistance claims. This Court therefore should reverse the judgment of the Court of Appeals and remand for a determination of those claims.

ARGUMENT

For the reasons that follow, the Court of Appeals' dispositive holding -- that Petitioner's ineffective-assistance-of-state-trial-counsel claim was subject to procedural default because Petitioner did not have a federal right to effective assistance of first post-conviction counsel with respect to that claim, even though the first post-conviction proceeding provided the first opportunity for Petitioner to raise such a claim -- was contrary to this Court's decisions in *Douglas v. California*, 372 U.S. 353 (1963), *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

I. Petitioner's Federal Ineffective-Assistance-Of-Trial-Counsel Claim Is Not Subject To Procedural Default, For Two Related Reasons That Turn On His Due Process/Equal Protection Right To Effective Assistance Of First Post-Conviction Counsel With Regard To That Claim

As noted above, the state courts denied Petitioner's ineffective-assistance-of-trial-counsel claim on the procedural ground that the claim was not raised in the aborted first post-conviction "proceeding" and therefore was precluded in the second post-conviction proceeding. Petitioner of course agrees with the Court of Appeals, 623 F.3d at 735 (Pet. App. 6a-7a), that a federal habeas corpus court may not reach the merits of a claim which the state courts have denied on a procedural ground if that ground

is "adequate and independent," unless the petitioner can demonstrate "cause and prejudice to excuse his default" (or show that failure to reach the merits would "result in a fundamental miscarriage of justice"). *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). In this case, however, there are two related reasons why Petitioner's ineffective-assistance-of-trial-counsel claim was not subject to procedural default: (A) the procedural ground on which the Arizona Court of Appeals denied Petitioner's claim was not "adequate"; and (B) there is cause and prejudice to excuse any "adequate" default.

A. The Procedural Ground On Which The State Court Denied Petitioner's Federal Claim Was Not "Adequate"

As the Court of Appeals recognized, a "state procedural rule is not adequate to bar federal review if that 'state procedural rule frustrates the exercise of a federal right.'" 623 F.3d at 742 (Pet. App. 6a) (quoting *Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir.), *cert. denied*, 534 U.S. 944 (2001)); *see also Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *Reece v. Georgia*, 350 U.S. 85, 88-90 (1955). As the following paragraphs will show, the state court's procedural ruling in this case -- that Petitioner's federal claims were precluded because of the failure of his first post-conviction counsel to raise them, regardless of whether or not she provided even minimally effective assistance -- was not adequate to prohibit federal-court review because it frustrated the protection of two related federal rights: (a) Petitioner's right to effective assistance of trial counsel, and (b) Petitioner's right to

effective assistance of first-tier post-conviction counsel with respect to any ineffective-trial-counsel claim.

1. The "adequacy" argument outlined above depends in part on the proposition that Petitioner, as an Arizona defendant, had a federal constitutional right to effective assistance of his **first** post-conviction counsel with respect to a claim of ineffective assistance of trial counsel. In *Coleman v. Thompson*, this Court stated the general rule that "there is no right to counsel in state collateral proceedings." 501 U.S. at 755. But this Court then recognized that there might be an exception to that general rule when "state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* The following paragraphs will demonstrate that there is such an exception, in the specific circumstances of this case, under *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005).

In *Douglas*, this Court held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, an indigent defendant had a right to appointed counsel in a first appeal as of right, 372 U.S. at 355-58 -- even when the appellate court already was required by state law to appoint counsel unless its independent investigation of the record indicated that "such appointment would be of no value to either the defendant or the court." *Id.* at 354-55. In so holding, this Court emphasized the "benefit of counsel's examination into the record, research of the law, and marshalling of arguments," and the unfairness of providing that benefit only to those defendants who were wealthy enough to afford it. *Id.* at 355-56, 358.

In *Ross v. Moffitt*, 417 U.S. 600, 614-18 (1974), this Court held that an indigent defendant, who had been represented by counsel on direct appeals in the state court of appeals, had no federal right to appointed counsel to pursue further review in either the state supreme court or this Court. That holding was based primarily on this Court's conclusion that after the first stage of review, the defendant would have, "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals" -- materials that "would appear to provide the [state supreme court] with an adequate basis for its decision to grant or deny review." *Id.* at 615. And that conclusion was "fortified" by the fact that review by the state supreme court, and by this Court, was "discretionary and depend[ed] on numerous factors other than the perceived correctness" of the lower court's judgment. *Id.* at 615-17.

The defendant in *Halbert* was convicted on a plea of nolo contendere. He then requested that counsel be appointed to represent him in applying for leave to appeal, but the Michigan courts denied that request. 545 U.S. at 609. This Court, however, held that the Fourteenth Amendment required "the appointment of counsel for [Michigan] defendants, convicted on their pleas, who [sought] access to first-tier review" -- even though such review was discretionary, rather than of right. *Id.* at 610. This holding was based on this Court's conclusion that *Douglas*, rather than *Ross*, provided "the controlling instruction," 545 U.S. at 616-17; and that conclusion in turn was based on two factors that correlated to the decisive considerations in those competing precedents: (a) "in determining how to dispose of an application for

leave to appeal, Michigan's intermediate appellate court looks to the merits of the claims made in the application"; and (b) "indigent defendants pursuing first-tier review [i.e., their first available opportunity for review] in the Court of Appeals are generally ill equipped to represent themselves" (in part because they, unlike the defendant in *Ross*, had not already had the benefit of counsel's investigation, research, or briefing of relevant issues). *Id.* at 617, 618-22.

2. The holdings and rationale in *Douglas* and *Halbert* apply squarely to this case, and *Ross* therefore does not. With respect to Petitioner's ineffective-assistance-of-trial-counsel claim, the first tier of review available to him was a state post-conviction relief proceeding -- because he was not permitted to raise any such claim on appeal under Arizona law. *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). Moreover, both of the factors discussed in the preceding paragraph are fully satisfied here:

a. In deciding how to dispose of an ineffective-trial-counsel claim raised in a first post-conviction relief proceeding, an Arizona trial court -- unlike the discretionary second-tier review courts in *Ross* -- must "look to the merits" (and only the merits) of the claim. Ariz.R.Crim.P. 32.1(a), 32.8(d).

b. In a first post-conviction relief proceeding, an Arizona defendant -- unlike the defendant in *Ross* -- will have received no prior assistance of counsel with regard to any ineffective-assistance-of-trial-counsel claim; and he will be at least as ill equipped as the defendants in *Douglas* and *Halbert* to represent himself in investigating and presenting such a claim.

3. To put it more succinctly, *Douglas* controls this case because in Arizona a first post-conviction relief proceeding effectively serves as the first appeal for any ineffective-assistance-of-trial-counsel claim.[4] In fact, the need for effective assistance of first-tier review counsel is even greater for ineffective-trial-counsel claims than for record-based "direct appeal" claims, because the former typically depend on non-record evidence (such as testimony by trial counsel, or by fact or expert witnesses who were not called at trial) which a first-tier reviewing court cannot uncover on its own, and which usually is impossible for a convicted -- and imprisoned -- defendant to discover and present to the reviewing court.

4. The preceding paragraphs demonstrate that an Arizona defendant pursuing his first opportunity for review of an ineffective-assistance-of-trial-counsel claim (necessarily in a Rule 32 post-conviction relief proceeding) has a Fourteenth Amendment right to appointed counsel under *Douglas* and *Halbert*. That means that such a defendant also has a due process right to **effective assistance** of counsel on such first-tier review. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

5. The federal habeas corpus context of this case demonstrates more concretely than *Douglas* or *Halbert* that a due process/equal protection right to counsel is especially necessary for first-tier state-court review of **federal** claims (such as ineffective assistance of trial

4. And that first appeal is "direct," in the sense that -- with regard to the ineffective-trial-counsel claim -- no other proceeding intervenes between the trial and the first post-conviction relief proceeding.

counsel), even though a State is not constitutionally required to provide such review at all, *see Ross*, 417 U.S. at 606, and *Halbert*, 545 U.S. at 610:

> If a State chose not to provide even first-tier review of a federal ineffective-trial-counsel claim, the defendant would not be significantly prejudiced -- because he could raise that claim in a federal habeas corpus proceeding under 28 U.S.C. § 2254(a), without any issue of exhaustion of state remedies or procedural default. When a State does provide an opportunity for first-tier review of a federal claim, however, the defendant will not be permitted to obtain federal habeas corpus review of that claim unless he first has presented it to the state courts, as a federal claim, with considerable clarity and precision, *Baldwin v. Reese*, 541 U.S. 27, 29-33 (2004) -- and most defendants will be ill equipped to do that without the assistance of counsel.

As noted above, the typical pro se defendant also will be ill equipped to uncover and present the evidence that is necessary to support most federal ineffective-assistance-of-trial-counsel claims in a state first-tier review proceeding; but when a state court has adjudicated a federal claim on the merits, federal habeas corpus review is limited to the record that was developed in the state court, and the state court's decision is entitled to a strong presumption of correctness. 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 563 U.S. ___, 131 S.Ct. 1388, 1398-1401 (2011). On the other hand, the limitations created by § 2254(d) would not apply if the State did not provide any review of a federal claim at all, since there would be no state-court adjudication of the claim on the merits.

Thus, a State's provision of first-tier review for a federal claim, without a right to effective assistance of counsel in presenting the claim, has a profoundly adverse, and unfair, effect on a defendant's ability to present the claim not only in the first-tier state-court proceeding itself, but also in any subsequent federal habeas corpus action. Providing first-tier review without the reasonably competent assistance of counsel effectively is a trap that makes it much more difficult for most defendants to obtain meaningful review of a federal claim in federal court.

6. When an Arizona defendant is deprived of his federal right to effective assistance of trial counsel, his first and only recourse is to file a notice of, and then a petition for, post-conviction relief, which he has a right to do under Ariz.R.Crim.P. 32.1(a). Like the defendants in *Douglas* and *Halbert*, however, a defendant is ill-equipped to litigate an ineffective-assistance-of-trial-counsel claim without the assistance of first post-conviction counsel -- and such assistance is of little use if it is not effective. Thus, the state courts' ruling that Petitioner's ineffective-trial-counsel claim was "precluded" because his first post-conviction counsel failed to raise it -- regardless of whether or not first post-conviction counsel performed effectively -- frustrated the protection of Petitioner's federal right to effective assistance of trial counsel; and it did so by denying Petitioner's federal right to effective assistance of first-tier-review counsel with respect to his ineffective-trial-counsel claim under *Douglas* and *Halbert*. The state courts' preclusion ruling therefore is not an "adequate" ground for procedural-default purposes.

B. There Is Cause And Prejudice To Excuse Any Procedural Default Of Petitioner's Ineffective-Assistance-Of-Trial-Counsel Claims

Even if the purely procedural ground for the Arizona Court of Appeals' decision in this case had been adequate and independent, there would be cause and prejudice to excuse the procedural default if Petitioner could show that first post-conviction counsel was **unconstitutionally** ineffective. *Coleman*, 501 U.S. at 753-54 ("Attorney error that constitutes ineffective assistance of counsel is cause"). Argument sections I(A)(1)-(5) have demonstrated that Petitioner did have a federal right to effective assistance of first post-conviction counsel with respect to his ineffective-trial-counsel claim. Under *Coleman*, a violation of that right constituted cause and prejudice for any procedural default of Petitioner's federal claim in the first post-conviction relief proceedings.

II. The Court Of Appeals Misapplied This Court's Decisions In Holding That Petitioner Did Not Have A Fourteenth Amendment Right To Effective Assistance of Counsel On First-Tier Review Of His Ineffective-Assistance-Of-Trial-Counsel Claim

With regard to the central issue in this case, the Court of Appeals sought to distinguish *Douglas* and *Halbert*, and to analogize this case to *Ross*, on several grounds. 623 F.3d at 739-43 (Pet. App. 16a-23a); see also BIO at 8-15. As the following paragraphs will show, the Court of Appeals' reasoning regarding *Douglas*, *Halbert*, and *Ross* does not withstand analysis.

A. The Court of Appeals' first attempt to distinguish *Douglas* and *Halbert* asserted that

> Martinez has already received direct review of his conviction and received the assistance of counsel in connection with that appeal. . . . Even if collateral review presents the first tier of review for Martinez' ineffective assistance of [trial] counsel claim, we conclude that Martinez' action is not analogous to a direct appeal -- or the **first** opportunity for him to obtain review of his conviction -- so as to entitle him to effective counsel.

623 F.3d at 740 [Pet. App. 18a]; see also BIO at 9-10. But this effort to argue that Petitioner's first post-conviction proceeding did not constitute first-tier review is neither consistent with *Douglas* and *Halbert* nor supported by *Ross*:

As the above-quoted passage from the Court of Appeals' opinion recognizes, the fact that Petitioner was **prohibited** from raising his ineffective-assistance-of-trial-counsel claim in his "direct appeal" from his conviction meant that the first post-conviction proceeding was "the first tier of review" for that claim; and with respect to that claim, Petitioner unquestionably had not "already received the assistance of counsel in connection with that first appeal." Thus, for Petitioner's trial-counsel claim the first post-conviction proceeding fully implicated the "first tier" due process and equal protection concerns that underlay *Douglas* and *Halbert*.

The foregoing implicitly suggests how clearly *Ross* is distinguishable from this case. In *Ross*, the discretionary review proceedings in which the defendant sought appointed counsel necessarily were restricted to claims that he already had litigated in the state court of appeals -- with appointed counsel. 417 U.S. at 603-604. Thus, those discretionary review proceedings provided second (or third) tier review for all of the *Ross* defendant's claims; and he -- unlike Petitioner -- really **had** "already received the assistance of counsel" for those claims.[5]

The Court of Appeals' position regarding "first tier" review would mean that the State could deprive a defendant of his right to effective assistance of counsel with respect to first-tier review of any federal constitutional claim simply by (i) restricting direct "appeal" to state-law errors and (ii) requiring all federal errors to be raised by means of a subsequent "post-conviction" petition. Such a label-driven result would defy common sense; and it would not be consistent with the holdings in *Douglas* and *Halbert*, or with this Court's explicit statement in *Halbert* that the right to counsel on first-tier review is not dependent on whether such review is labeled an "appeal." 545 U.S. at 619.

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5. In *Douglas*, this Court noted that it was not concerned with the right to counsel "for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the **claims** have once been presented by a lawyer and passed upon by an appellate court." 372 U.S. at 356 (emphasis added). And in *Ross*, this Court stated that the State had a duty "only to assure [that an] indigent defendant [had] an adequate opportunity to present his **claims** fairly in the context of the State's appellate process." 417 U.S. at 616 (emphasis added).

The Court of Appeals' flawed reasoning also implies that if an Arizona defendant filed a notice and petition for post-conviction relief alleging ineffective assistance of trial counsel **before** he filed a notice of direct appeal [as he could under Ariz.R.Crim.P. 31.3 and 32.4(a)], he would be entitled to effective assistance of counsel in the post-conviction proceedings -- but not with respect to any issues that had to be raised on direct appeal. Such a result would make no sense in terms of the holdings in *Douglas* and *Halbert* (and *Ross*).[6]

B. In attempting to analogize this case to *Ross*, the Court of Appeals stated that

> Martinez faces a lesser handicap in pursuing collateral review than a defendant pursuing

6. In some States, a convicted defendant may (or must) raise any ineffective-assistance-of-trial-counsel claim on direct appeal; but when the merit of such a claim depends on evidence not in the appellate record, the defendant may move for a remand to the trial court for an evidentiary hearing to supplement the record -- after which the ineffective-trial-counsel claim returns to the appellate court, with the entire remand-and-return procedure being regarded as part and parcel of the original "direct appeal." *See*, *e.g.*, *Rice v. State*, 154 P.3d 537, 539-42 (Kan. App. 2007); *State v. Johnson*, 13 P.3d 175, 178 (Utah 2000); *Calene v. State*, 846 P.2d 679, 683-84, 692 (Wyo. 1993). The Court of Appeals' opinion in this case would mean that a defendant in the system described above would have a Fourteenth Amendment right to effective assistance of first "direct appeal" counsel in remand proceedings in the trial court with regard to an ineffective-trial-counsel claim. But for purposes of the right to counsel for first-tier review, there is no reason to distinguish such a remand-and-return procedure from Arizona's "post-conviction relief" procedure simply because the former is labeled as part of the "direct appeal."

> a first appeal, as in *Douglas* and *Halbert*. Martinez has already received the assistance of appellate counsel in a prior proceeding, like the petitioner in *Ross*.
>
> . . . . A defendant seeking second-tier review will have received the assistance of counsel in connection with direct review, and would have "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case."

623 F.3d at 741 (Pet. App. at 19a) (quoting *Ross*, 417 U.S. at 615); see also BIO at 11. These statements would make sense when the "collateral" proceeding in question -- like the second-tier review proceedings at issue in *Ross* -- involved the same claims as a prior counseled direct appeal. However, they do not apply at all to the first post-conviction proceeding in this case:

1. The "assistance of appellate counsel" that Petitioner received "in a prior proceeding" could not have had anything to do with any ineffective-trial-counsel claim, since Arizona law prohibited such claims on direct appeal. Similarly, neither the "brief on his behalf in the [Arizona] Court of Appeals" nor any "opinion by the [Arizona] Court of Appeals" on direct appeal could have addressed any claim that trial counsel was ineffective.

2. A "transcript or other record of trial proceedings" would be inadequate to evaluate the effectiveness of trial counsel, which often depends on what trial counsel did

(or did not do) outside the record. And with respect to such extra-record factors, a convicted (and imprisoned) defendant obviously is especially ill equipped to represent himself.

C. In seeking to distinguish this case from *Douglas* and *Halbert*, the Court of Appeals pointed out that both of those cases involved review proceedings in which the reviewing courts looked to the merits of the defendants' claims in performing a "gatekeeping" function. 623 F.3d at 741 (Pet. App. 20a). But in both *Douglas* and *Halbert*, this Court's point was that **even though** the reviewing courts were performing a gatekeeping function, they looked to the merits in doing so. 372 U.S. at 354-57; 545 U.S. at 612, 617-19. The fact that an Arizona trial court presented with an ineffective-trial-counsel claim in a first post-conviction proceeding has no gatekeeping function, and must address the merits directly, makes *Douglas* even more clearly controlling in this case than it was in *Halbert*.

The preceding point effectively demonstrates why it is not relevant that

> discretionary appeal to a state Supreme Court or to the United States Supreme Court is not intended to correct error in individual cases, but rather to address questions of public importance, critical issues of law, conflicts in the decisions of relevant courts, and so forth.

623 F.3d at 741 (Pet. App. 21a). In a first post-conviction proceeding, an Arizona trial court has no discretion whether to rule on an ineffective-assistance claim based on considerations of public importance (or anything else);

and contrary to the Court of Appeals' suggestion, *id*. at 742 (Pet. App. at 21a), with respect to such claims the Arizona trial courts do perform an "error correction function" that is precisely "analogous to an appellate court hearing a criminal defendant's direct appeal as of right." *State v. Spreitz*, 39 P.3d at 526; Ariz.R.Crim.P. 32.1(a), 32.4(c)(2).[7]

D. The Court of Appeals' discussion of Petitioner's argument for a very specific "exception to the general rule that there is no right to counsel in collateral review" concludes with the assertion that "this exception would swallow the general rule." 623 F.3d at 742 (Pet. App. at 23a). While this statement is cryptic, it is supported by a citation to *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996) -- which in turn cites to *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993), in which the Court of Appeals offered the following explanation:

> The actual impact of such an exception would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state

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7. In the Arizona context, the Court of Appeals also was incorrect in asserting that post-conviction relief "is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature," 623 F.3d at 742 (Pet. App. 21a): Rule 32.3 of the Arizona Rules of **Criminal** Procedure specifically provides that a post-conviction relief proceeding "is part of the original criminal action and not a separate action."

> postconviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state postconviction proceeding. Furthermore, because the petitioner's first federal habeas petition will present the first opportunity to raise the ineffective assistance of counsel in the second state post-conviction proceeding, it follows logically that the petitioner has a Sixth Amendment right to counsel in the first federal habeas proceeding as well. And so it would go. Because any Sixth Amendment violation constitutes cause, . . . federal courts would never be able to avoid reaching the merits of any ineffective-assistance claim, regardless of the nature of the proceeding in which counsel's competence is alleged to have been defective. As a result, the "exception" would swallow the rule.

Id. at 430; see also BIO at 13. Although the Court of Appeals' concern about the likelihood of an "infinite continuum of litigation" is understandable in the abstract, it is misplaced in this case, for both theoretical and pragmatic reasons.

1. On a theoretical level: A second post-conviction proceeding in which a defendant asserts that first post-conviction counsel was ineffective with respect to an ineffective-assistance-of-trial-counsel claim obviously will provide the first opportunity for the defendant to obtain review of the adequacy of first post-conviction counsel's **performance**. But first post-conviction counsel could not be **ineffective**, under *Smith v. Robbins*, 528 U.S. 259,

285-86 (2000), unless his or her deficient performance resulted in **prejudice**; and there could be no prejudice unless the defendant's ineffective-trial-counsel claim was valid. Thus, if the defendant is to prevail in the second post-conviction proceeding, that proceeding inherently will require **second**-tier review of the underlying ineffective-trial-counsel claim -- since the first opportunity for review of that claim was provided by the first post-conviction proceeding. *Douglas* and *Halbert* therefore would not require the appointment of counsel for the second post-conviction proceeding, and the supposedly "infinite continuum" of constitutionally required counsel would end after one tier of review (in Arizona, the first post-conviction relief proceeding).[8]

In the generalized example discussed above, the defendant might argue that because he did not receive constitutionally adequate "benefit of counsel" in the first post-conviction proceeding, he should have a constitutional right to effective appointed counsel in the second post-conviction proceeding. Although this argument would have some appeal in cases (like this one) in which first post-conviction counsel failed to raise any effective-trial-counsel claim, *Ross* did not indicate that its holding regarding second-tier review was limited to cases in which first-tier-review counsel was constitutionally effective.

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8. This does not mean that a defendant (like Petitioner) could not challenge the effectiveness of first post-conviction counsel by means of a second post-conviction proceeding (if state law permitted such a proceeding); it just means that the defendant would have no federal right to counsel in the second post-conviction proceeding (or in any subsequent federal habeas proceeding).

Moreover, *Ross* made it clear that "a State can, consistently with the Fourteenth Amendment, provide for differences [between indigent and non-indigent defendants] so long as the result does not amount to a denial of due process or an 'invidious discrimination,'" 417 U.S. at 608 (quoting *Douglas*, 372 U.S. at 356-57), and that "[t]he question is not one of absolutes, but one of degrees," 417 U.S. at 612. In determining whether procedural protections satisfy due process requirements, an important factor is "the risk of an erroneous deprivation of [a private interest] through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *see also Turner v. Rogers*, 564 U.S. ___, 131 S.Ct. 2507, 2517-19 (2011). At the outset of any **second** post-conviction proceeding (which is when the right to appointed counsel for that proceeding becomes pertinent), the risk that both trial counsel **and** first post-conviction counsel actually were ineffective will be exponentially lower than the ab initio risk, at the first post-conviction stage, that just trial counsel actually was ineffective. It therefore would be reasonable to conclude that fundamental fairness did not require the State to provide appointed counsel, in any second or subsequent post-conviction relief proceeding, for the purpose of investigating the effectiveness of all prior counsel.[9]

9. In *Douglas*, *Evitts*, and *Halbert*, this Court already has determined that if a criminal defendant was not represented on first-tier review of claims of error relating to his conviction, the risk (and costs) of an erroneous determination would be sufficiently great that the defendant has a Due Process right to effective assistance of counsel on such review. But none of those precedents means that the same is true on second-tier review, and *Ross* suggests the contrary.

In any event, whether or not an "infinite continuum of litigation" would be theoretically possible is not an important consideration in this case, given the practicalities discussed below.

2. Even if successive post-conviction proceedings -- each of which claimed that all previous post-conviction counsel had been ineffective with regard to an ineffective-assistance-of-trial-counsel claim -- theoretically would all amount to first-tier review for purposes of *Douglas* and *Halbert*, it is unlikely in the extreme that any defendant could work his way through more than two tiers of state post-conviction review without running afoul of state and federal statutes of limitation, or that many defendants would even try to do so:

As previously noted, in Arizona a non-capital defendant convicted after a trial must commence any post-conviction relief proceeding by filing a "notice" of post-conviction relief "within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal." Ariz.R.Crim.P. 32.4(a).[10] Not surprisingly, a notice of post-conviction relief usually is filed (if at all) after the conclusion of direct appeal. In such a typical case, it is virtually inconceivable that the defendant could commence and litigate a first post-conviction relief proceeding, and then commence even a second post-conviction proceeding

10. Rule 32.4(a) provides that "[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h)." Since a claim of ineffective assistance of counsel is authorized only by Rule 32.1(**a**) ["[t]he conviction was in violation of the Constitution of the United States or of the State of Arizona"], the Arizona Rules do not permit such a claim to be untimely.

(to challenge the effectiveness of first post-conviction counsel with respect to an ineffective-trial counsel claim), within thirty days after the order and mandate in the direct appeal.

Even in the less usual case (like this one) in which a first post-conviction proceeding is commenced and concluded during the pendency of direct appeal, it is highly improbable that the defendant could commence and litigate a second post-conviction proceeding, and then file a **third** notice of post-conviction relief, within thirty days after the order and mandate in the direct appeal.[11]

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11. If this Court holds that Arizona defendants have a federal constitutional right to effective assistance of first post-conviction counsel with respect to ineffective-assistance-of-trial-counsel claims, one would hope and expect that Arizona will amend the above-described time limit for the commencement of a second post-conviction proceeding to challenge the effectiveness of first post-conviction counsel. But such an amendment could, and probably would, mirror the existing time limit for a second notice of post-conviction relief in the one situation in which Arizona already recognizes a federal constitutional right to effective assistance of counsel in a first post-conviction proceeding: a challenge to a guilty or no-contest plea (or certain probation violations). *State v. Martinez*, 250 P.3d 241 (Ariz. App. 2011); *State v. Pruett*, 912 P.2d 1357, 1360 (Ariz. App. 1995). With respect to such a challenge -- which Ariz.R.Crim.P. 32.1 somewhat strangely labels an "of-right" proceeding -- Ariz.R.Crim.P. 32.4(a) provides that any second notice of post-conviction relief must be filed "within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding." (Emphasis added). That time limit would be difficult to meet for a second post-conviction notice, and virtually impossible for a third notice.

Quite apart from the time-limitation pragmatics discussed above, it is unrealistic to think that many convicted defendants would be able to find a succession of attorneys willing to allege that all previous trial and post-conviction counsel were ineffective; and most defendants would be ill equipped to fashion, file, and litigate multiple successive ineffective-assistance-of-all-counsel petitions on their own. No doubt some especially determined and vexatious defendants could **attempt** to achieve an "infinite continuum" of ineffective-assistance litigation. But the same already is true in Arizona with regard to such cognizable claims as newly discovered evidence [Ariz.R.Crim.P. 32.1(e)] and actual innocence [Ariz.R.Crim.P. 32.1(h)] -- both of which are explicitly exempted from "preclusion" by Ariz.R.Crim.P. 32.2(b).[12]

3. While the foregoing discussion of practical limitations on any theoretical "infinite continuum of litigation" has focused on Arizona's post-conviction relief system, any State would be free to implement such a system. Moreover, any State would be free, under *McKane v. Durston*, 153 U.S. 684, 687 (1894), to simply prohibit all second or successive post-conviction relief petitions -- or to restrict such petitions in the same manner as 28 U.S.C. § 2244(b).

4. From the federal habeas corpus perspective: Even if a potential habeas petitioner somehow could complete several tiers of state post-conviction review, it is highly

12. Nevertheless, the total number of new post-conviction relief filings in Arizona in 2010 (1,746) was quite small, especially in comparison to the number of criminal cases in which defendants were sentenced in 2009 (48,961) [or in 2008 (48,543)]. http://www.azcourts.gov/Portals/39/2010DR/SuperiorTemporary.pdf, pp. 3-4.

unlikely that he could do so without exceeding the one-year statute of limitation prescribed by 28 U.S.C. § 2244(d)(1). This is so even though § 2244(d)(2) provides that the one-year period is tolled while a timely-initiated state post-conviction relief proceeding is pending: Section 2244(d)(2) would be pertinent only to the extent that, at the end of each and every stage of the "continuum," the defendant very quickly could find new counsel to present to the state courts some new ineffective-trial-counsel claim; and it is unrealistic to suppose that this would happen often.

5. Even if there was a likelihood that there would be some state post-conviction or federal habeas cases involving multi-level ineffective-assistance claims, that would not justify denying the constitutional right to first-tier-review counsel recognized in *Douglas* and *Halbert*. In effect, the Court of Appeals' decision means that a state criminal defendant has an abstract right to effective assistance of trial counsel -- but that if he is deprived of that right, he has no federal right to an effective remedy.

E. In light of the foregoing not-quite-infinite discussion of Respondent's forward-looking "infinite continuum of litigation" argument, it may be useful to note that recognition of the right to effective assistance of first post-conviction counsel with respect to any ineffective-trial-counsel claim would not require Arizona to automatically appoint first post-conviction counsel for every indigent convicted defendant:

Arizona law currently requires the trial court to appoint counsel for any indigent defendant who (i) files a "timely **or** first" notice of post-conviction relief on a very simple, non-substantive form and (ii) indicates (by

checking a box on the form) that he wants appointed counsel. Ariz.R.Crim.P. 32.4(c)(2), Form 24(b).[13] There is no reason to think that the relatively small number of convicted Arizona defendants who have taken advantage of their right to obtain appointed post-conviction counsel by simply filing a Form 24(b) notice of post-conviction relief would be increased significantly (if at all) by this Court's recognition of a constitutional right to effective assistance of first post-conviction counsel with respect to ineffective-trial-counsel claims -- especially when it is highly likely that most Arizona defendants already would expect (albeit incorrectly, under current Arizona law) that appointed post-conviction counsel were legally required to perform with some minimally reasonable competence.

Moreover, nothing in Petitioner's position in this case suggests that Arizona must provide every convicted defendant with appointed counsel before he decides whether he wishes to request appointed post-conviction counsel -- to assist him to determine what claims, if any, he may have -- by filing Form 24(b). That decision does not require specialized legal knowledge or skill of the sort that **is** required to determine and litigate whether trial counsel was constitutionally effective. As long as the State provides adequate "substitute procedural safeguards" -- such as reasonable notice of the defendant's right to request appointed post-conviction counsel if he is indigent, and of the deadline and the simple means for doing so

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13. As previously noted, however, the Arizona courts have held that there is no requirement that first post-conviction counsel mandatorily appointed under Rule 32.4(c)(2) must be effective, even with respect to first-tier review of ineffective-assistance-of-trial-counsel claims. *State v. Mata*, 916 P.2d 1035, 1052-53 (Ariz. 1996); *State v. Martinez* (Ariz. Ct. App. Memo Decision 2006), Pet. App. 79a, 81a-82a.

[such as Form 24(b)] -- neither *Douglas* nor *Halbert* would require the State also to provide counsel to help the defendant decide whether to exercise that right. *See also Turner v. Rogers*, 131 S.Ct. at 2518-19 (2011).

III. Petitioner Did Not Procedurally Default His Ineffective-Assistance-Of-Trial-Counsel Claim, Or His Right To Effective Assistance Of First Post-Conviction Counsel With Respect To That Claim, By Failing To Raise And Litigate It Himself In The First Post-Conviction Proceeding

The final argument in Respondent's Brief in Opposition was that even if Petitioner had a "right to effective post-conviction counsel to raise ineffective-assistance-of-trial-counsel claims in his first post-conviction relief proceeding," Petitioner could not show cause because Petitioner himself could have raised those claims "directly in a **pro per** petition after his counsel notified the trial court that she could not find any colorable issues to raise." (BIO at 24-25). In short, Respondent has argued that Petitioner defaulted his ineffective-assistance-of-counsel claims by failing to adequately represent **himself** with regard to them.

The most obvious problem with the argument described above is that one of the primary reasons for a right to appointed counsel in first-tier review proceedings is that "indigent defendants pursuing first-tier review . . . are generally ill equipped to represent themselves." *Halbert*, 545 U.S. at 616-17, 618-22; *see also Douglas*, 372 U.S. at 357-58. Consequently, it is an absurd Catch-22 to suggest that a defendant effectively defaults his Fourteenth Amendment right to effective assistance of first post-conviction counsel, especially with respect to

Sixth/Fourteenth Amendment ineffective-trial-counsel claims, by failing to raise and litigate such claims **without** the assistance of counsel.

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

CONCLUSION

Like the Petition for Certiorari, this brief has not addressed the merits of Petitioner's ineffective-assistance-of-trial-counsel and ineffective-assistance-of-first-post-conviction-counsel claims, because neither the Court of Appeals nor the District Court did so. This Court therefore should reverse the judgment of the Court of Appeals and remand with direction to require the District Court to consider the merits of Petitioner's ineffective-assistance claims.

Respectfully submitted,

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