

No. 10-1001

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

—◆—
LUIS MARIANO MARTINEZ,
Petitioner,

vs.

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

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), this Court held that the right to counsel does not apply to state collateral proceedings and, thus, there is no right to the effective assistance of collateral-review counsel. As a matter of state law, Arizona provides criminal defendants with counsel to challenge their convictions and sentences in state collateral proceedings following the conclusion of direct appeal. Does this state procedure create a federal constitutional right to the effective assistance of collateral-review counsel?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Tenth Amendment to the United States Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The Fourteenth Amendment to the United States Constitution provides that no 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.”

28 U.S.C. § 2254(d)(1) mandates that habeas relief “shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

28 U.S.C. § 2254(i) mandates that “[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not

be a ground for relief in a proceeding arising under section 2254.”



STATEMENT OF THE CASE

In August of 2001, jurors in Pinal County, Arizona, convicted Petitioner Luis Martinez of two counts of sexual conduct with a person under the age of 15. (Pet. App. at 38a.) The victim was Martinez’s 11-year-old step-daughter, who reported the conduct to several individuals, including her mother, a police officer, and a social worker. (*Id.* at 38a; Resp. App. at A11-A12.) DNA testing established that semen on the victim’s nightgown came from Martinez. (Resp. App. at A13.)

Prior to and during trial, the victim recanted her allegations that Martinez had sexually abused her. (Resp. App. at A11-A13.) Nevertheless, a jury convicted Martinez after considering the DNA evidence described above and the victim’s previous statements incriminating him. (*Id.* at A10-A14.) Martinez was sentenced to consecutive terms of life imprisonment with no possibility of parole for 35 years. (*Id.* at A10.)

Newly-appointed counsel represented Martinez on direct appeal. During the pendency of the appeal, counsel initiated a post-conviction-relief proceeding on Martinez’s behalf. (Pet. App. at 3a.) Counsel subsequently filed a notice indicating she could not find any colorable issues to raise in a petition for post-conviction relief. (*Id.* at 4a.) On April 28, 2003,

the trial court dismissed the post-conviction-relief proceeding after the time for Martinez to file his own petition expired. (*Id.*)

On February 7, 2005, Martinez, through new counsel, filed a petition for post-conviction relief, asserting that his trial counsel was ineffective. (Resp. App. at A1-A27.) Martinez also argued that his original post-conviction attorney was ineffective, and, thus, his claims were not procedurally barred under Rule 32.2 of the Arizona Rules of Criminal Procedure.¹ (*Id.* at A27-A32.)

The Pinal County Superior Court denied the petition, concluding that the claims were precluded under Rule 32.2, and, alternatively, that the claims failed on the merits. (Pet. App. at 68a-78a.) The Arizona Court of Appeals granted review of Martinez's case, but denied relief on the basis that the claims were precluded, without reaching the merits of the claims. (*Id.* at 79a-83a.) The Arizona Supreme Court denied review without comment. (*Id.* at 5a.)

On April 24, 2008, Martinez filed a petition for writ of habeas corpus in the United States District Court claiming: (1) his trial counsel was ineffective; and (2) his ineffective-assistance-of-trial-counsel claims were not subject to procedural default. (*Id.* at 42a-46a.) The Magistrate Judge issued a report and

¹ Ariz. R. Crim. P. 32.2(a)(3) provides that claims that could have been raised in "any previous collateral proceeding" are precluded.

recommendation, recommending that the petition be denied because: (1) Martinez’s ineffective-assistance-of-trial-counsel claims were procedurally defaulted; (2) the state-court finding of preclusion was an adequate and independent ground for denying relief; (3) Martinez could not establish “cause” to excuse the default by asserting that his post-conviction counsel was ineffective; (4) Martinez did not establish “a fundamental miscarriage of justice,” and (5) his ineffective-assistance-of-trial-counsel claims failed on the merits. (*Id.* at 46a-67a.) On December 12, 2008, the District Court concluded that it would be inappropriate to deny Martinez’s claims on the merits because Respondent (hereinafter “the State”) had filed an answer limited to procedural default. (*Id.* at 35a-36a.) The court adopted the report and recommendation in all other respects. (*Id.* at 26a-36a.)

On September 27, 2010, the Court of Appeals affirmed the judgment of the District Court, concluding that “there is no federal constitutional right to the assistance of counsel in connection with state collateral relief proceedings, even where those proceedings constitute the first tier of review for an ineffective assistance of counsel claim.” *Martinez v. Schriro*, 623 F.3d 731, 739-40 (9th Cir. 2010). The court further held that because there is no such right: (1) the state-court finding of preclusion was an adequate and independent ground for denying relief; and (2) Martinez could not allege the ineffective assistance of post-conviction-relief counsel as “cause” to excuse the

procedural default of his ineffective-assistance-of-trial-counsel claims. *Id.* at 742-43. On November 5, 2010, the court denied Martinez’s request for rehearing and rehearing en banc. (Pet. App. at 84a-85a.)



SUMMARY OF ARGUMENT

The Court of Appeals correctly found that Martinez procedurally defaulted his ineffective-assistance-of-trial-counsel claims because: (1) the state procedural ground denying post-conviction-relief was adequate to bar federal habeas review; and (2) Martinez did not establish “cause” to overcome the procedural default. Martinez’s arguments to the contrary are premised on the same unsustainable proposition, *i.e.*, that a state criminal defendant has the right to the effective assistance of counsel in collateral-review proceedings.

This Court has categorically held that there is no constitutional right to counsel in collateral-review proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 554-59 (1987). This Court has adhered to that rule, even in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 7-15 (1989).

Noticeably absent from Martinez’s opening brief is any reference to *Finley* and *Giarratano*, which address procedural facts similar to those at issue here. Martinez ostensibly seeks an exception to the rule in *Finley* and *Giarratano* for claims that must be raised for the first time in a state collateral proceeding.

However, collateral proceedings in Arizona (and in other states) are generally limited to claims that could not have been pursued in a previous proceeding. Accordingly, Martinez is essentially asking this Court to overrule *Finley* and *Giarratano*. He has not, however, provided a compelling reason for doing so.

In alleging a right to counsel in state post-conviction proceedings, Martinez improvidently relies on *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 543 U.S. 605 (2005). *Douglas* holds that there is a right to counsel on direct appeal, 372 U.S. at 355-58; *Halbert* holds that the right to counsel applies to discretionary review in post-conviction appellate proceedings involving defendants who pled guilty and thus waived their right to a direct appeal. A key rationale for both of those decisions, however, was that the proceedings at issue were the first and perhaps only review of the defendant's convictions and sentences. *Halbert*, 545 U.S. at 607; *Douglas*, 372 U.S. at 357. That rationale does not apply to defendants like Martinez, whose convictions and sentences have already been reviewed on direct appeal.

Martinez urges this Court to find that the right to counsel is claim specific and should extend not only to proceedings that provide the first review of a conviction and sentence, but also to proceedings that provide the first review of a particular claim. Martinez argues that, because Arizona requires that ineffective-assistance-of-counsel claims be raised in post-conviction proceedings and not on direct appeal,

the right to counsel should extend beyond direct appeal and include post-conviction proceedings.

Recognizing a right to counsel in collateral proceedings that provide the first opportunity to raise a particular claim would be a monumental change in this Court's jurisprudence and would impose substantial costs on the states. Under Martinez's theory, counsel would be required not only to raise ineffective-assistance claims, but also to raise claims involving "newly-discovered evidence" and other claims cognizable in collateral-review proceedings.

Holding that there is a right to *effective* assistance of post-conviction counsel would be an even more monumental change that would exponentially increase costs to the states. Recognizing a right to effective assistance of post-conviction counsel would require at least one more round of state court proceedings—this time to provide an opportunity for defendants to present claims that their initial collateral-review counsel was ineffective. This would be an unwarranted expansion of this Court's holdings and would substantially interfere with the States' interest in the finality of their criminal convictions.

The fact that Arizona requires that ineffective-assistance claims be raised in collateral proceedings does not change the analysis. This Court has recognized that a collateral, post-conviction proceeding is the appropriate forum for raising ineffective-assistance claims. See *Massaro v. United States*, 538

U.S. 500, 504-05 (2003). Arizona’s framework for addressing ineffective-assistance claims is consistent with this Court’s view that such claims are best considered in the context of collateral review.

Arizona has not shifted claims that are traditionally part of direct review to post-conviction proceedings. Instead, record-based claims typically considered on direct review of a defendant’s conviction and sentence remain part of the direct appeal. Non-record-based claims that have traditionally been raised in collateral proceedings remain the focus of those proceedings.

Even assuming a right to the assistance of counsel in state collateral-review proceedings, this Court should not recognize “ineffectiveness” of such counsel as “cause” to overcome a procedural default in a federal habeas proceeding, because doing so would, *inter alia*, eviscerate congressional intent in enacting the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Under AEDPA, “[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.” 28 U.S.C. § 2254(i). Allowing claims of ineffective assistance of collateral-review counsel to constitute “cause” to overcome a procedural default would improperly permit an end run around section 2254(i).

Furthermore, Congress, by enacting AEDPA, evidenced a clear intent to reduce delay in federal

habeas proceedings. Allowing relief by using ineffective-assistance-of-collateral-review counsel as “cause” to excuse a procedural default would contravene this purpose and would result in consideration of unexhausted claims untethered to a state court decision. Such a result would be contrary to principles of comity and finality underlying AEDPA.

Finally, because the Court is addressing this issue in the context of collateral review, application of any new rule creating a right to the effective assistance of post-conviction-review counsel would have only prospective application to cases that are not yet final on direct review. *See Teague v. Lane*, 489 U.S. 288, 305-11 (1989). *Teague* precludes relief in this case because a petitioner seeking to use a claim of ineffective assistance of post-conviction counsel as cause to overcome a procedural default in a federal habeas proceeding must separately exhaust the ineffectiveness claim in state court. *Edwards v. Carpenter*, 529 U.S. 446, 450-52 (2000). Here, Martinez presented the claim to the Arizona courts, which properly denied it under *Finley* and *Giarratano*. Rejecting the Arizona courts’ holding on this issue based on a new rule overruling *Finley* and *Giarratano* would be improper under *Teague*.



ARGUMENT

Federal courts reviewing a petition for a writ of habeas corpus under 28 U.S.C. § 2254 “will not review

a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Here, the state courts rejected Martinez’s claims of ineffective assistance of trial counsel on procedural grounds because he did not raise the claims in his first state post-conviction proceeding.²

Where a habeas petitioner has defaulted his federal claims in state court, the federal courts may not review the petition “unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750. To establish cause for a procedural default, a petitioner must show that the default was due to an “objective factor” that was “external” to him and could not “fairly be attributed to him.” *Id.* at 753; *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986) (petitioner must show that “some

² As noted previously, the state trial court also rejected Martinez’s underlying claim of ineffective assistance of trial counsel on the merits. The federal Magistrate Judge reviewing Martinez’s federal habeas petition similarly rejected the claim on the merits. Accordingly, the Amicus Brief submitted by Former State Supreme Court Justices misstates the record by suggesting that “no state or federal court has reviewed the merits of Martinez’s claim.” (Amicus Brief of Former State Supreme Court Justices, at 5.)

objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule").

Martinez asserts that ineffective assistance of post-conviction counsel constitutes "cause" sufficient to overcome his procedural default in not raising his claims in his initial post-conviction proceeding. Martinez's argument fails because: (1) there is no constitutional right to post-conviction counsel; (2) even assuming a right to counsel, there is no right to the "effective" assistance of such counsel; (3) AEDPA specifically provides that ineffective assistance of post-conviction counsel shall not provide a basis for relief on federal collateral review; and (4) finding a right to effective assistance of post-conviction counsel would be a new rule that may not be applied retroactively to cases already final on direct appeal.

I. THERE IS NO CONSTITUTIONAL RIGHT TO COLLATERAL-REVIEW COUNSEL.

The Federal Constitution does not require the States to provide appellate review of criminal convictions. *McKane v. Durston*, 153 U.S. 684, 687-88 (1894). Nevertheless, this Court has concluded that equal protection and due process require the appointment of counsel to indigent defendants if the State provides an appeal process. *Douglas*, 372 U.S. at 356-57. The right to counsel under this theory, however, has not been extended past a first appeal of right, *Ross v. Moffitt*, 417 U.S. 600, 614-19 (1974),

and this Court has specifically held that there is no right to counsel in collateral-review proceedings. *Finley*, 481 U.S. at 559; *see also Coleman*, 501 U.S. at 752; *Giarratano*, 492 U.S. at 7-15.

In *Douglas*, this Court recognized the right of an indigent criminal defendant to the assistance of counsel in his first appeal of right in state court. 372 U.S. at 355-56; *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The petitioners in *Douglas* were two indigent defendants who had been jointly tried and convicted in California. 372 U.S. at 353-54. They requested, but were denied, the assistance of counsel on appeal. Under California's procedural rules, the type of appeal available to a criminal defendant hinged upon whether he could afford counsel. If he could not, his case was subjected to *ex parte* review on the merits without benefit of any argument by counsel. *Id.* at 355-56. The appellate court would "pre-judge the merits" before determining whether counsel should be provided. *Id.* at 356. In contrast, criminal defendants who could afford counsel were not faced with a preliminary "*ex parte* examination of the record," but had their arguments presented to the court in fully briefed form. *Id.*

Douglas concluded that this was not a fair procedure: "When an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Id.* at 357. The California procedure denied equal protection to the poor because the "merits of the one and only appeal an indigent has as of right are decided without

benefit of counsel,” resulting in an unconstitutional line drawn between rich and poor. *Id.*

In *Ross*, however, this Court declined to extend the right to counsel beyond a defendant’s first appeal of right. 417 U.S. at 617-18. The *Ross* petitioners sought appointment of counsel for a second-tier discretionary appeal to the state supreme court and for certiorari review to this Court. This Court ruled that counsel need not be appointed for those proceedings.

This Court rejected the *Ross* petitioners’ due-process argument, noting that “there are significant differences between the trial and appellate stages of a criminal proceeding.” *Id.* at 610. The purpose of trial “is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt,” while in the appellate process, a defendant seeks “not to fend off the efforts of the State’s prosecutor but rather to overturn a finding of guilt made by a judge or a jury below.” *Id.* This difference is significant because, while a State may not dispense with the trial stage without a defendant’s consent, the State “need not provide any appeal at all.” *Id.* at 611. Because of these differences, this Court reasoned, the question at issue was more “profitably considered under an equal protection analysis.” *Id.*

This Court also rejected the *Ross* petitioners’ equal-protection argument, noting that the Fourteenth Amendment “does not require absolute equality or precisely equal advantages.” *Id.* at 612.

The State has no duty to duplicate “the legal arsenal that may be privately retained by a criminal defendant . . . but 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.” *Id.* at 616. Thus, an indigent defendant was not denied meaningful access to the state supreme court simply because counsel was not appointed. This Court further noted that at the stage of a “second-tier” appeal, the criminal defendant would have already received the assistance of counsel in connection with his first appeal. *Id.* at 615. Counsel’s work, supplemented by a defendant’s own submissions, would provide the state court with an adequate basis for its decision to grant or deny review. *Id.*

In *Finley*, this Court ruled categorically that the right to counsel does not apply to collateral-review proceedings. 481 U.S. at 555. Following direct appeal, the trial court appointed counsel to represent the defendant in post-conviction-relief proceedings. Counsel concluded, however, that there were no arguable bases for relief. Accordingly, he advised the trial court in writing of his conclusion and requested permission to withdraw. The trial court agreed that there were no arguably meritorious issues and dismissed the petition for post-conviction relief.

The defendant acquired new appointed counsel and appealed that ruling. The state appellate court concluded that counsel’s conduct violated the defendant’s constitutional rights because counsel did not comply with the requirement of *Anders v. California*,

386 U.S. 738, 744 (1967), that direct appeal counsel who fails to find meritorious issues identify “arguable” issues and provide the defendant an opportunity to file his own brief.

This Court reversed the state court, ruling that “since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.” *Finley*, 481 U.S. at 555. The Court found that the considerations underlying the decision not to apply the right to counsel to discretionary review “apply with even more force to postconviction review.” *Id.* at 556. This is because “[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review.” *Id.* Furthermore “States have no obligation to provide this avenue of relief,” and when they do, neither the fundamental fairness mandated by the Due Process Clause nor the equal-protection guarantee are implicated. *Id.* Finally, this Court stated:

At bottom, the decision below rests on a premise that we are unwilling to accept—that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review.

Id. at 559; *see also Giarratano*, 492 U.S. at 7-15 (applying *Finley* to capital cases).

Martinez does not mention *Finley* and *Giarratano* in his opening brief notwithstanding the obvious relevance these cases have to the issue he raises. Martinez is ostensibly seeking an exception to the rule announced in *Finley* and *Giarratano* for claims that can only be raised for the first time in a state collateral proceeding. However, collateral proceedings in Arizona (and in other states) are generally limited to claims that could not have been pursued in a previous proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding post-conviction relief on any ground “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding”). Accordingly, Martinez is essentially asking this Court to overrule *Finley* and *Giarratano*. He has not, however, provided a “special justification” for this court to overrule this precedent. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *see also Harris v. United States*, 536 U.S. 545, 556-57 (2002) (plurality opinion) (noting that *stare decisis* is not an “inexorable command,” but the doctrine is “of fundamental importance to the rule of law”) (citations and internal quotation marks omitted).

In *Coleman*, 501 U.S. at 755, this Court was asked to make an exception to the *Finley* rule “in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction.” This Court declined to entertain the suggestion because the issue before it was the effectiveness of counsel appealing from the collateral proceeding and

not the effectiveness of collateral-review counsel. *Id.* In *Giarratano*, however, the Court had previously concluded that there was no right to counsel in collateral proceedings, notwithstanding the dissent's protest that such proceedings are generally the first opportunity for the defendant to raise a claim of ineffective assistance of trial or appellate counsel. *See* 492 U.S. at 24 (Stevens, J., joined by Brennan, J., Marshall, J., and Blackmun, J., dissenting).

This Court's more recent decision in *Halbert*, on which Martinez heavily relies, is consistent with *Finley*, *Giarratano*, and *Coleman* and does not portend the new rule Martinez seeks. In *Halbert*, this Court extended the right to counsel to discretionary appeals involving defendants who had pled guilty and who had thus waived their right to a direct appeal. This Court noted that, in cases involving a guilty plea, the state court of appeals' discretionary review at issue "provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." 543 U.S. at 619. Thus, unlike the instant case, review of an application for leave to appeal under those circumstances "rank[ed] as a first-tier appellate proceeding requiring the appointment of counsel under *Douglas*." *Id.* at 609.

This Court has attached great significance to the difference between direct and collateral review. For example, in *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993), the Court stated that "[d]irect review is the principal avenue for challenging a conviction." This

Court further noted that “[t]he principle that collateral review is different from direct review resounds throughout our habeas jurisprudence.” *Id.*

The conclusion of direct review renders a conviction “final” and no longer subject to “new rules” announced thereafter. *Teague*, 489 U.S. at 311; *see also id.* (“Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing.”) (quoting *Mackey v. United States*, 401 U.S. 667, 693-94 (1971) (Harlan J., concurring in judgments and dissenting in part)); *Herrera v. Collins*, 506 U.S. 390, 399 (1993) (“Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.”); *Ross*, 417 U.S. at 610-11 (noting that after conviction, a defendant will not be using an attorney “as a shield to protect him against being ‘haled into court’ by the State and stripped of his presumption of innocence,” he will be using the attorney “as a sword to upset the prior determination of guilt”). Thus, there is a significant distinction between direct and collateral review. *Cf. Finley*, 481 U.S. at 559 (stating that a defendant in a post-conviction-relief proceeding is in a “fundamentally different position” than a defendant who is on trial or pursuing a first appeal as of right).

Ineffective-assistance-of-trial-counsel claims are properly viewed as being collateral to the conviction

and sentence because they do not seek to upset a verdict or sentence by showing error in the record; they seek reversal by attempting to litigate the litigation of the trial. *Cf. Strickland v. Washington*, 466 U.S. 668, 689-90 (1984) (noting that collateral review of ineffective-assistance claims sometimes becomes an “intrusive post-trial inquiry” of trial counsel’s performance that can result in “a second trial, this one of counsel’s unsuccessful defense”) (citation and internal quotation marks omitted). Unlike a record-based direct review, collateral proceedings provide a forum for developing facts that were not presented at trial. The post-conviction court may take testimony from witnesses for the defendant and the prosecution, and the trial court makes factual and credibility determinations based on the evidence before it. *See Massaro*, 538 U.S. at 506.

Additionally, collateral claims of ineffective assistance of counsel differ from record-based claims raised on direct appeal because they reflect a defendant’s second chance to raise—using ineffective assistance of counsel as a conduit—issues that could have been pursued at trial. *See Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 788 (2011) (noting that ineffective-assistance claims “can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial”). Moreover, a defendant raising a claim of ineffective assistance of counsel necessarily waives the attorney-client privilege, and counsel alleged to have been ineffective can be called

on to explain his or her conduct. *See State v. Cuffle*, 828 P.2d 773, 775-76 (Ariz. 1992).

The significant differences between collateral and direct review warrant the categorical distinction this Court has drawn in *Finley* and *Giarratano* regarding appointment of counsel in collateral proceedings. Once a conviction is final, attempts to “re-litigate” the litigation come at significant cost to the criminal-justice system, and those costs would expand significantly if appointment of counsel is required every time a “new” issue is raised in a collateral proceeding.

Accepting Martinez’s proposed rule would require appointment of counsel not only to raise ineffective-assistance claims on collateral review, but every other “new” claim, including, for example, claims asserting newly-discovered evidence that “probably would have changed the verdict or sentence,” or a “significant change in the law” applicable to a petitioner whose convictions and sentences are final on direct review. *See* Ariz. R. Crim. P. 32.1(e), (g). Thus, Martinez’s proposed rule would overrule *Finley* and *Giarratano* and would represent a sea change in this Court’s jurisprudence regarding the right to counsel.

Martinez’s argument that Arizona’s procedures for raising ineffective-assistance claims mandates a departure from *Finley*’s categorical rule is unpersuasive. The fact that Arizona requires that ineffective-assistance claims be raised in collateral proceedings is neither surprising nor unusual, as evidenced by this Court’s recognition that a post-conviction

proceeding is the appropriate forum for litigating the collateral issue of trial counsel's performance.

In *Massaro*, in rejecting an assertion that ineffective-assistance-of-counsel claims are procedurally barred when not raised on direct appeal, this Court noted that “[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time.” 538 U.S. at 504 (quoting *Guinan v. United States*, 6 F.3d 468, 474 (7th Cir. 1993)). The “right tribunal at the right time” for raising ineffective-assistance claims is generally a collateral proceeding in the trial court:

In light of the way our system has developed, in most cases a motion brought under Section 2255 is preferable to direct appeal for deciding claims of ineffective assistance.^[3] When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. . . .

Under the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the [trial] court, the forum best suited to developing the facts

³ This provision (28 U.S.C. § 2255) provides a mechanism for post-trial collateral review for federal prisoners.

necessary to determining the adequacy of representation during an entire trial.

Massaro, 538 U.S. at 505-06.

Although leaving open the possibility that an ineffective-assistance claim could be raised on direct appeal, this Court made clear in *Massaro* that “few such claims will be capable of resolution on direct appeal and thus few will benefit from earlier resolution.” *Id.* at 507. This Court in fact noted that it would be a “rare” instance in which a defendant would benefit from earlier resolution of an ineffective-assistance claim. *Id.*

In 2002, the Arizona Supreme Court ruled that ineffective-assistance claims would not be considered on direct appeal. *See State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). Like this Court in *Massaro*, the Arizona Supreme Court noted that “[t]he trial court is the most appropriate forum” for raising ineffective-assistance claims. *Id.* at 526. The court then reiterated that such claims “are to be brought in Rule 32 [post-conviction] proceedings” in the trial court in the first instance to avoid a possible preclusion of remedies for the defendant if the claims were pursued in a piecemeal manner. *Id.* at 527.

Arizona’s framework for addressing ineffective-assistance claims is entirely consistent with *Massaro*’s pronouncement that such claims are best considered in the context of collateral review commenced in the trial court. Arizona has not shifted claims that are traditionally part of direct review to

post-conviction proceedings. Instead, record-based claims that are traditionally considered on direct appeal of a defendant’s conviction and sentence remain part of the direct appeal. Collateral review is reserved for non-record-based claims that are more properly asserted in a forum where the record can be developed.⁴

This Court “exercis[es] the utmost care” when it is asked to impose a new constitutional requirement on the States’ criminal-justice systems. *District Attorney’s Office for Third Judicial Dist. v. Osborne*, ___ U.S. ___, 129 S.Ct. 2308, 2322 (2009) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). This is because the “judicial imposition of a categorical [rule] . . . might pretermit other responsible solutions being considered in Congress and state legislatures.” *Osborne*, 129 S. Ct. at 2322 (quoting *Giarratano*, 492 U.S. at 14 (Kennedy, J., joined by O’Connor, J., concurring in judgment)). Further, principles of federalism—as expressed in the Tenth Amendment—dictate deference to the States in these matters. *See Bond v. United States*, 131 S. Ct. 2355, 2366 (2011) (“Impermissible interference with state sovereignty is not

⁴ Although an Arizona defendant technically cannot allege a claim of ineffective counsel on direct appeal, any “record-based” claim underlying the ineffective-assistance claim can be reviewed on direct appeal under Arizona’s fundamental error review standard. *See State v. Henderson*, 115 P.3d 601, 607, ¶¶ 19-20 (Ariz. 2005) (holding that a defendant may prevail based on an unobjected-to error if he can show that the error was fundamental and prejudicial).

within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States.”) (internal citation omitted). This Court should decline Martinez's invitation to impose on the states a requirement that counsel be appointed in all collateral proceedings in which a “new” issue is raised.

II. ANY RIGHT TO COUNSEL IN A COLLATERAL PROCEEDING DOES NOT INCLUDE THE CONSTITUTIONAL RIGHT TO “EFFECTIVE” ASSISTANCE OF COUNSEL.

Martinez's assertion of a right to effective assistance of collateral-review counsel fails under a due-process analysis.⁵ Because there is no substantive right to collateral post-conviction-relief proceedings, any contention that a state post-conviction-review process violates due-process must be based on a claim of “procedural due process.” *See Osborne*, 129 S. Ct. at 2316-23 (concluding that because convicted prisoner did not have a substantive right to DNA testing, his claim that he was denied access to testing necessarily involved a claim of procedural due process).

Given the wide discretion states are accorded in enacting post-conviction-review legislation, a procedural due-process challenge in this context faces a

⁵ Martinez's claim is necessarily based on due process, rather than equal protection, because the state provided counsel to represent Martinez in his collateral proceeding.

formidable hurdle.⁶ *See Finley*, 481 U.S. at 559 (rejecting the contention that “when a State chooses to offer help to those seeking relief from [their] convictions, the Federal Constitution dictates the exact form such assistance must assume”). As a result of this deference to the States in these matters, “[f]ederal courts may upset a State’s postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.” *Osborne*, 129 S. Ct. at 2320; *see also Skinner v. Switzer*, 562 U.S. ___, 131 S. Ct. 1289, 1293 (2011) (stating that the Court’s analysis in *Osborne* “left slim room for the prisoner to show that the governing state [post-conviction procedure] denies him procedural due process”).

The procedures Arizona follows in collateral post-conviction-relief proceedings—which include the appointment of counsel, the right to discovery, *see Canon v. Cole*, 115 P.3d 1261, 1263 (Ariz. 2005), an opportunity to seek further review, *see Ariz. R. Crim. P. 32.9*, and unlimited opportunities to assert actual innocence, *see Ariz. R. Crim. P. 32.1(h)*—exceed any possible constitutional requirements for post-conviction review. *See Osborne*, 129 S. Ct. at 2320

⁶ In other contexts, this Court has viewed procedural due process claims in light of the process provided at common law. *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994) (collecting cases). Under this view, Martinez’s claim is unavailing because there is no common law right to appeal, let alone a right to collateral-review proceedings.

(“We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction-relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence.”); *Giarratano*, 492 U.S. at 14-15 (Kennedy, J., and O’Connor, J., concurring) (concluding that due process was satisfied where capital defendants had access to prison’s “institutional lawyers” to assist them in preparing their post-conviction-relief petitions); *Finley*, 481 U.S. at 559 (holding that state-court procedures for providing prisoners access to post-conviction review were constitutionally adequate).

Moreover, when determining whether there is a violation of procedural due process, a federal court looks at the procedures in general and not whether, in the court’s opinion, the procedures produced a fair result. *See, e.g., Swarthout v. Cooke*, 562 U.S. ___, 131 S. Ct. 859, 862 (2011) (stating that where parolees received the procedures they were constitutionally entitled to, “[t]hat should have been the beginning and the end of the federal habeas courts’ inquiry into whether [they] received due process”); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (“We hold that the power vested in the Connecticut Board of Pardons [under state law] to commute sentences conferred no rights on respondents beyond the right to seek commutation.”). Instead, once it is established that the required procedures were followed, any error in the proceedings would be a “mere error of state law,” “not a denial of due process.”

Cooke, 131 S. Ct. at 863 (quoting *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982)).

Martinez does not allege that, as a general matter, attorneys appointed to represent Arizona defendants in collateral-review proceedings are not competent to do so. Thus, he has not established that Arizona’s collateral-review procedures were “fundamentally inadequate to vindicate [his] substantive right[]” to seek review of any ineffective-assistance-of-trial-counsel claims. *Osborne*, 129 S. Ct. at 2320. *Cf. Herrera*, 506 U.S. at 399 (rejecting the contention that due process requires “that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person” because “[t]o conclude otherwise would all but paralyze our system for enforcement of the criminal law”) (internal citation and quotation marks omitted).

Martinez has essentially argued that, under *Evitts*, any constitutional right to counsel automatically entitles him to the right to effective assistance of counsel. However, this Court has cautioned against declaring rights “absolute to their logical extreme.” *Ross*, 417 U.S. at 612; *see also Douglas*, 372 U.S. at 357 (“lines can be and are drawn. . .”).

In *Finley*, which was decided after *Evitts*, the Court expressly held that—even if due process required the appointment of counsel in a state habeas proceeding—it did not require the “effective” assistance of counsel; instead, the Court concluded there was no due-process violation where the state prisoner

received “exactly that which she is entitled to receive under state law—an independent review of the record by competent counsel.”⁷ 481 U.S. at 558; *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (rejecting contention that *Evitts* created “a new ‘strand’ of due process analysis,” and noting that other decisions of the Court “make clear that there is no continuum requiring varying levels of process at every conceivable phase of the criminal system”).

Here, Martinez received an independent review of the record by appointed counsel. Although he refers to his post-conviction proceeding as “truncated” (Opening Brief at 11) and “aborted” (*id.* at 14), that proceeding was no more “truncated” or “aborted” than the proceeding upheld in *Finley*. The fact that his post-conviction counsel found no meritorious issues (a conclusion the state trial court and the Magistrate Judge agreed with in rejecting Martinez’s ineffective-assistance claims on the merits) does not mean that Martinez was denied due process.

As noted previously, this Court has cautioned against allowing “intrusive post-trial inquiry” of a trial counsel’s performance, which can result in “a second trial, this one of counsel’s unsuccessful defense.” *Strickland*, 466 U.S. at 689-90. Accepting

⁷ Because *Finley* rejects the contention that the state prisoner had the right to “effective” assistance of post-conviction counsel, the reference to “competent counsel” necessarily meant competence as a general matter, *e.g.*, an attorney licensed to practice in law who is competent in a particular field.

Martinez's position and allowing the alleged ineffectiveness of collateral counsel to establish cause for the procedural default of ineffective-assistance-of-trial-counsel claims would require yet *another* layer of collateral-review proceedings in state court, this one to allow the defendant to exhaust his claim that collateral-review counsel was ineffective. Accepting Martinez's position, therefore, would improperly shift the focus further from the initial trial and would amount to a "third trial," this one to litigate the re-litigation of the litigation. *See Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (recognizing that "the state trial on the merits [should be] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing").

Also, this Court has also cautioned against attaching "familiar preconviction trial rights" to state collateral-review proceedings. *Osborne*, 129 S. Ct. at 2319. The Sixth Amendment right to effective assistance of counsel is a preconviction right designed to ensure the accused receives "a fair trial." *United States v. Cronin*, 466 U.S. 648, 658 (1984). It is not a necessary component of a state-created procedure. *See Finley*, 481 U.S. at 558.

Further, the States' interest in the finality of their criminal convictions would be significantly compromised if this Court were to recognize a right to the effective assistance of counsel in collateral-review proceedings. As noted previously, recognizing such a right would mean that the claim would have to be litigated in a second collateral proceeding, not only

when claims of ineffective assistance of trial counsel are raised, but also when any other “new” claim is raised for the first time in collateral proceedings.

Martinez attempts to limit the effect of the rule he seeks by agreeing that he is not entitled to counsel in a second collateral-review proceeding.⁸ (Cert. Reply Brief, at 7.) This concession, however, demonstrates the fallacy of his argument. If, as Martinez contends, a defendant is incapable of raising an ineffective-assistance-of-trial-counsel claim without the assistance of counsel, it would be unreasonable to expect him to challenge the effectiveness of collateral-review counsel in a second collateral proceeding without counsel, particularly because an allegation that collateral-review counsel was ineffective necessarily requires a showing that trial counsel was ineffective. Thus, consistent with Martinez’s assertion that the appointment of counsel is necessary to a “meaningful” collateral proceeding, counsel would have to be appointed in a second or subsequent successive

⁸ Martinez asserts he is not entitled to counsel for a second collateral-review proceeding under the fiction that a second collateral-review proceeding would be a “**second**-tier review of the underlying trial-counsel claim. . . .” (Cert. Reply Brief, at 7.) This is incorrect. Under Arizona law, the second-tier review of a post-conviction-relief proceeding is commenced by filing a petition for review in the Arizona appellate courts. Ariz. R. Crim. P. 32.9(c). A challenge to the effectiveness of collateral-review counsel, on the other hand, would constitute a new proceeding with yet another opportunity to petition for review from any adverse decision.

collateral proceeding as well.⁹ *See Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993) (noting that recognizing a right to effective assistance of counsel in a first post-conviction-relief proceeding to raise claims that trial counsel was ineffective would logically result in “an infinite continuum of litigation in many criminal cases”).

The new rule Martinez proposes would come at great cost to the criminal-justice system, with little chance of any positive return. In Arizona, the new rule would not measurably increase the likelihood of an innocent defendant obtaining relief, because claims of actual innocence can already be raised at any time and are never precluded in collateral proceedings. *See Ariz. R. Crim. P. 32.1(h)*. Moreover, the likelihood of obtaining relief based on ineffective assistance would obviously decrease with each round of collateral review, because such relief would be premised on the assumption that each prior attorney

⁹ Conversely, if Martinez’s concession that he would not be entitled to counsel in a second collateral proceeding is accepted at face value, his claim is effectively moot. This is because Martinez had the opportunity to file his own petition after his appointed counsel filed a notice that she could not find any colorable claims to raise. (Pet. App. at 82a [“Because Martinez was granted leave to file a pro se petition for post-conviction relief in his first proceeding, he could have raised a claim then that trial counsel had been ineffective.”].) For all practical purposes, this opportunity served the same function as allowing Martinez to challenge his collateral-review counsel’s performance in a second post-conviction-relief proceeding.

failed to raise a winning claim. Finally, in the instant case, Martinez faces the additional hurdle of having already had two reviewing courts reject his ineffective-assistance-of-trial-counsel claim on the merits.

In sum, assuming *arguendo* Martinez had a right to counsel in his collateral-review proceeding to raise ineffective-assistance-of-trial-counsel claims, that right was a state-created right that did not entail the further right to the “constitutionally effective assistance of counsel” under either the Sixth or Fourteenth Amendments. This Court should decline Martinez’s invitation to create a new procedural due-process right that would dramatically alter the criminal-justice system. More “process” further removed from the trial would be unlikely to measurably improve the system and would require the expenditure of resources that could be better employed in proceedings more closely related to the “main event.”

III. TREATING INEFFECTIVENESS OF COLLATERAL-REVIEW COUNSEL AS “CAUSE” TO OVERCOME A PROCEDURAL DEFAULT WOULD DEFEAT CONGRESS’S INTENT IN ENACTING AEDPA.

AEDPA provides that “[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a [federal habeas proceeding].” 28 U.S.C. § 2254(i). Martinez seeks to evade § 2254(i) by claiming he is only asserting the ineffectiveness of

collateral-review counsel as cause to excuse his procedural default of his underlying claims. (Reply Brief, at 9.) However, as several lower courts have concluded, “[t]he language of this statute is clear,” and “[i]t expressly bars relief grounded on claims of incompetent or ineffective counsel in federal post-conviction proceedings.” *Post v. Bradshaw*, 422 F.3d 419, 423 (6th Cir. 2005). “And it bars ‘relief,’ not simply particular kinds of relief” *Id.*; *see also Spears v. Mullin*, 343 F.3d 1215, 1255 (10th Cir. 2003) (citing § 2254(i) for the proposition that “ineffective representation in state post-conviction proceedings is inadequate to excuse a procedural default”); *Whelchel v. Bazzle*, 489 F. Supp. 2d 523, 537 (D.S.C. 2006) (“[The habeas petitioner] attempts to establish ‘cause’ due to the ineffective assistance of [collateral review] counsel, but § 2254(i) prevents such a claim.”); *United States ex rel. Easley v. Hinsley*, 305 F. Supp. 2d 867, 879 (N.D. Ill. 2004) (concluding that § 2254(i) precluded habeas petitioner from alleging his post-conviction counsel’s performance as cause).

The word “relief” includes “equitable” relief. *See Sossamon v. Texas*, ___ U.S. ___, 131 S. Ct. 1651, 1660 (2011) (noting that “relief” is defined as “[t]he redress or benefit, esp. equitable in nature . . . , that a party asks of a court”) (quoting Black’s Law Dictionary 1295 (7th ed. 1999)). A finding of cause and prejudice is an equitable ground for excusing a procedurally-defaulted claim. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004) (“[W]e have recognized an equitable exception to the bar when a habeas applicant can

demonstrate cause and prejudice for the procedural default.”). Moreover, this Court has never recognized the right to counsel in Federal or State collateral post-conviction proceedings. Consequently, construing § 2254(i) to only preclude the granting of a petition for writ of habeas corpus on these grounds would “render[] the provision entirely superfluous.” *Post*, 422 F.3d at 423 n.1 (noting that to interpret § 2254(i) to only bar habeas relief would require the conclusion “that Congress enacted the provision to bar only . . . relief that is clearly not a valid form of habeas relief” based on existing law). Thus, 28 U.S.C. § 2254(i) bars a federal court from using the ineffectiveness of collateral-review counsel as a ground for relieving a procedural default.

Furthermore, even assuming that the statute’s plain language does not preclude Martinez’s argument, adopting Martinez’s position would thwart Congress’s general intent in passing AEDPA. “Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases. . . .” *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Allowing ineffective assistance of post-conviction counsel to serve as “cause” to overcome a procedural default would be particularly problematic in capital cases, where ineffective-assistance claims are routinely asserted. *See* U.S. Judicial Conference, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal, 5 (1989) (“The inmate under capital sentence, whose guilt frequently is never in

question, has every incentive to delay the proceedings that must take place before that sentence is carried out.”); *see also* Hoffman & King, Rethinking the Federal Role in State Criminal Justice, 84 N.Y.U. L. REV. 791, 806-10 (2009) (noting that because as a practical matter, it is difficult for the “vast majority” of non-capital defendants to seek federal habeas relief before their sentences expire).

Allowing the ineffectiveness of collateral-review counsel to serve as cause would also violate the spirit, if not the letter, of § 2254(i) because, even though the claim would only go to cause, a federal court would still have to conclude that a habeas petitioner’s collateral-review counsel was ineffective before granting habeas relief. Further, state proceedings would be delayed to allow the exhaustion of collateral-review claims in state court.

Additionally, if the underlying ineffective-assistance-of-trial-counsel claim is not resolved on the merits in state court, federal court consideration of the merits of the claim results in an end-run around AEDPA’s deferential standard of review. *See* 28 U.S.C. § 2254(d) (providing that habeas relief may not be granted “with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim” was unreasonable either legally or factually). This would frustrate Congress’s intent in enacting AEDPA, *i.e.*, to promote comity, finality, and federalism. *See Cullen v. Pinholster*, ___, U.S. ___, 131 S. Ct. 1388, 1401 (2011).

This Court does not “lightly assume that Congress meant to restrict the equitable powers of the federal courts. . . .” *Miller v. French*, 530 U.S. 327, 336 (2000). Allowing the ineffectiveness of collateral-review counsel to constitute “cause,” however, would directly contravene AEDPA. Thus, this Court should conclude that Congress intended to limit the Court’s equitable powers by not allowing the ineffectiveness of collateral-review counsel to constitute cause for procedurally defaulted claims in federal habeas proceedings.¹⁰ *See id.* at 336 (“[W]here Congress has made its intent clear, we must give effect to that intent.”) (citation and internal quotation marks omitted).

IV. TEAGUE PREVENTS MARTINEZ FROM ESTABLISHING “CAUSE” BASED ON ANY NEWLY-RECOGNIZED RIGHT TO COLLATERAL-REVIEW COUNSEL.

Even if Martinez could convince this Court that he had a constitutional right to the effective assistance of collateral-review counsel (to raise an

¹⁰ There is no constitutional problem with finding that the ineffectiveness of collateral counsel does not constitute cause. Congress has plenary authority to define the scope of habeas relief in § 2254. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (recognizing “that judgments about the proper scope of the writ [of habeas corpus] are ‘normally for Congress to make’”) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)). Consequently fashioning a rule consistent with Congress’s clear intent does not raise any constitutional issues.

ineffective-assistance-of-trial-counsel claim), he could not show cause because this would amount to a “new rule” that would not be applicable to his case. *Teague*, 489 U.S. at 305-11.¹¹

A rule is new if it “was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague*, 489 U.S. at 301. The Arizona Supreme Court denied review of Martinez’s convictions and sentences on September 21, 2004. (Pet. App. at 40a.) Martinez’s conviction became final 90 days later on December 20, 2004, when the time for filing a petition for writ of certiorari expired. *See Caspari v.*

¹¹ At the certiorari stage, Martinez argued that the State waived a *Teague* argument by not adequately raising it below. This Court, however, “undoubtedly” has the discretion to reach the argument. *Schiro v. Farley*, 510 U.S. 222, 229 (1994). It should do so for at least two reasons. First, the district court and the court of appeals were both bound by circuit precedent concluding there was no right to counsel in post-conviction-relief proceedings. *See Ellis v. Armenakis*, 222 F.3d 627, 633 (9th Cir. 2000) (holding there is “no constitutional right to counsel during state habeas proceedings even if that was the first forum in which a defendant could challenge the constitutional competence of counsel”). The three-judge panel that decided Martinez’s federal appeal was bound by this case law. *Delia v. City of Rialto*, 621 F.3d 1069, 1080 (9th Cir. 2010). Thus, because the Court of Appeals denied Martinez’s rehearing *en banc* without requiring a response (Resp. App. at 85a), there was no need to make a *Teague* argument in the lower courts. Second, the State *did* raise *Teague* in its brief in opposition to the petition for certiorari. *See Farley*, 510 U.S. at 229 (declining to reach *Teague* argument, but suggesting argument would have been reached if it had been raised in the brief in opposition to the petition for certiorari).

Bohlen, 510 U.S. 383, 391 (1994). The rule Martinez seeks in the instant case “was not *dictated* by precedent existing when his conviction became final.” *Id.* (quoting *Teague*, 489 U.S., at 301). In fact, even after Martinez’s conviction became final, this Court noted that there is “no constitutional right to counsel” in the post-conviction context. *Lawrence v. Florida*, 549 U.S. 327, 337 (2007).

Under *Teague*, a “new rule” only applies retroactively in a collateral proceeding if: (1) the rule changes the scope of conduct previously held criminal; or (2) the rule is a “watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (citations and internal quotation marks omitted). Neither exception applies in this case.

First, the creation of a right to the effective assistance of counsel on collateral review has no bearing on the “proscribed conduct” for which Martinez was convicted. See *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (finding *Teague*’s first exception inapplicable where the new rule did not affect the defendant’s “proscribed conduct”). Second, the creation of a new rule in this case would not be a “watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” *Summerlin*, 542 U.S. at 353. This is because the “criminal proceeding” at issue for the purposes of *Teague* is the trial, not a subsequent proceeding provided to a defendant as a matter of

grace. See *Beard v. Banks*, 542 U.S. 406, 417-20 (2004) (noting that the only example the Court has cited as a rule of criminal procedure that would be retroactive under *Teague* is the right to counsel at trial in felony cases).

In *Simmons v. Kapture*, 516 F.3d 450, 451 (6th Cir. 2008), the Sixth Circuit concluded that this Court's decision in *Halbert* is not applicable to cases on collateral review at the time it was decided. This Court should similarly decline to retroactively apply a new rule relating to the effectiveness of post-conviction counsel in non-plea cases, to any extent such a new rule is announced.

In his reply in support of his petition for certiorari, Martinez notes that the rule announced in *Douglas* was applied retroactively. (Cert. Reply Brief, at 10-11.) This, however, was long before *Teague*. In contrast, this Court has recognized in a post-*Teague* case that a new rule cannot be a “watershed rule of criminal procedure” if it only affects a criminal defendant's appellate rights. See *Goeke v. Branch*, 514 U.S. 115, 120 (1995) (concluding that rule barring state courts from dismissing recaptured fugitive's appeal was “not among the small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty . . . [b]ecause due process does not require a State to provide appellate process at all”) (citations and internal quotation marks omitted). Likewise, because States are not required to provide collateral review, a new rule requiring the appointment of counsel in such proceedings—as a matter of logic—is not a watershed rule of criminal procedure.

Finally, even though Martinez is attempting to use a new rule as “cause” and not as a substantive ground for relief, *Teague* still applies. First, *Teague* does not limit the general rule of non-retroactivity to an underlying ground for relief; instead, *Teague* stands for the broad proposition that new rules are not “applicable” in any “case” on collateral review. *See id.* 489 U.S. at 310 (“Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”). Second, the rule adopted in *Teague* “effectuates the States’ interest in the finality of criminal convictions and fosters comity between federal and state courts.” *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993). These same interests—finality, comity, and federalism—are also at issue when a new rule is asserted as cause. This is because an entitlement to relief would be based, at least in part, on the application of a new rule that was not in existence when the state court ruled on the claim.

This Court has held that an ineffective-assistance-of-counsel claim cannot constitute cause for a procedural default unless *that* claim has been properly presented to the state courts.¹² *Edwards*, 529

¹² This Court has not determined whether a state court’s rejection of an ineffectiveness claim is entitled to deference under 28 U.S.C. § 2254(d)(1) when the claim is being asserted as cause as opposed to a substantive ground for relief. *Edwards*, however, suggests an affirmative answer to the question because, otherwise, the deference owed to a state court decision

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U.S. at 451. Here, Martinez presented his ineffective-assistance-of-post-conviction-counsel claim to the state courts, and the courts properly rejected it under settled law. A new rule should not be applied in this instance to effectively reverse the state court ruling. *See Teague*, 489 U.S. at 306 (noting that the possibility of habeas relief provides an incentive for state courts to properly apply “established constitutional standards,” but further noting that “the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place” to “perform this deterrence function”).



rejecting such a claim under § 2254(d)(1) would be “illusory.” 529 U.S. at 452. Here, the Arizona Court of Appeals’ rejection of Martinez’s contention that he was entitled to the effective assistance of collateral-review counsel was clearly not “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1).

CONCLUSION

For these reasons, the State respectfully requests this Court to affirm the opinion of the Court of Appeals.

Respectfully submitted,

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