APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 65)

PERSONAL INFORMATION

1. Full Name: **Lacey Alexandra Stover Gard**

2. Have you ever used or been known by any other name? **Yes.** If so, state name: **Lacey Alexandra Stover.**

3. Office Address:

   Office of the Arizona Attorney General
   400 West Congress, Bldg. S-315
   Tucson, Arizona 85701

4. How long have you lived in Arizona? What is your home zip code?

   I have lived in Arizona for 42 years (with the exception of a summer clerkship in Washington, D.C.). My home zip code is 85739.

5. Identify the county you reside in and the years of your residency.

   I reside in Pinal County. I have resided here since December 2015.

6. If nominated, will you be 30 years old before taking office? **x** yes ☐no

   If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? **x** yes ☐no

7. List your present and any former political party registrations and approximate dates of each:

   (The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

Republican: 2013-Present
Democrat: 1997-2013

8. Gender: **Female**

Race/Ethnicity: **Caucasian**

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

University of Arizona James E. Rogers College of Law
Tucson, Arizona
Juris Doctor, 2003

University of Arizona
Tucson, Arizona
Bachelor of Arts, Summa Cum Laude and Honors, 2000

10. List major and minor fields of study and extracurricular activities.

My undergraduate major was political science and my minor was psychology.

Both as an undergraduate and in law school, my primary extracurricular activity was student teaching. As an undergraduate, I served as a preceptor (undergraduate teaching assistant) for a general-education course in the Planetary Sciences Department. I served as a graduate teaching assistant for the same Planetary Sciences course during my first year of law school. I also served as a Writing Fellow (akin to a teaching assistant for first-year legal writing classes) during my second year of law school.

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

I graduated from the University of Arizona's Honors College in obtaining my bachelor's degree; this required me to complete various honors-designated courses and author an honors thesis. My thesis was entitled, *The Vietnam War and the Changing Influence of Public Opinion on Foreign Policy Formation*. In addition, I was employed on-campus by the Teaching Teams Program, a grant-funded program that facilitated the preceptor (undergraduate teaching assistant) concept. I was responsible for editing the program's newsletter, for performing outreach between the program and faculty

members across campus, and for providing training for students serving as preceptors.

With respect to law school, as discussed above, *see* Question 10, I worked for a period as a paid graduate teaching assistant and as a Writing Fellow. During my first summer (2001), I worked at the United States Department of State. I spent the first half of the summer working for the International Visitors Program, where I helped coordinate visits from foreign dignitaries. I spent the second half of the summer working for the Office of the Inspector General, Office of Counsel, where I researched various legal issues relating to internal employee investigations. During my second summer (2002), I worked for the Mesa City Attorney's Civil Office, where I researched multiple issues of civil and municipal law.

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for any administrative bodies that require special admission to practice.

Arizona Supreme Court: October 24, 2003

United States Supreme Court: April 21, 2008

United States Court of Appeals for the Ninth Circuit: June 1, 2005

United States Court of Appeals for the District of Columbia Circuit: June 15, 2020

United States District Court for the District of Arizona: December 12, 2003

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No.**

If so, explain. **Not applicable.**

b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No.**

If so, explain any circumstances that may have hindered your performance. **Not applicable.**

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
Office of the Arizona Attorney General, Deputy Solicitor General and Chief Counsel of Capital Litigation Section	**4/2015-present**	**Tucson, Arizona**
University of Arizona James E. Rogers College of Law, Adjunct Professor of Legal Writing (part-time)	**2012-2016**	**Tucson, Arizona**
Office of the Arizona Attorney General, Unit Chief Counsel, Capital Litigation Section	**1/2010-4/2015**	**Tucson, Arizona**
Office of the Arizona Attorney General, Assistant Attorney General, Capital Litigation Section	**2/2007-1/2010**	**Phoenix and Tucson, Arizona**
Office of the Arizona Attorney General, Assistant Attorney General, Criminal Appeals Section	**10/2004-2/2007**	**Phoenix, Arizona**
Arizona Court of Appeals Division Two, Law Clerk to the Honorable J. William Brammer, Jr.	**9/2003-9/2004**	**Tucson, Arizona**
Full-time law student/preparing for bar exam	**8/2002-8/2003**	**Tucson, Arizona**
Summer law clerk, Mesa City Attorney	**5/2002-8/2002**	**Mesa, Arizona**
Full-time law student	**8/2001-5/2002**	**Tucson, Arizona**
Summer clerkship, United States Department of State	**5/2001-8/2001**	**Washington, D.C.**
Full-time law student (also worked as paid teaching assistant for undergraduate course)	**8/2000-5/2001**	**Tucson, Arizona**

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

Please see Attachment A, which is a list of current Assistant Attorneys General supplied by my office's Human Resources department. Below, I supplement Attachment A with attorneys who have worked for the Capital Litigation Section within the last five years but have since departed.

Jon Anderson

Susanne Blomo

Julie Done

Meri Geringer

Jacinda Lanum

Jason Lewis

Karin Royle

Kristina Reeves

Andrew Reilly

John Todd

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

For the last five years, I have served as Chief Counsel of the Attorney General's Capital Litigation Section, where I supervise sixteen attorneys and carry my own full caseload of capital cases. I also hold the title of Deputy Solicitor General. The Capital Litigation Section handles all post-sentencing matters in capital cases, including direct appeals before the Arizona Supreme Court, petitions for post-conviction relief originating in superior court, and habeas corpus actions and related appeals in federal court. The Section also responds to habeas corpus petitions in non-capital cases and represents the Arizona Department of Corrections, Rehabilitation and Reentry in civil method-of-execution challenges. I estimate that my practice is divided as follows:

Direct appeals/post-conviction proceedings in state court: 49%

Federal habeas corpus and related appeals: 50%

Non-habeas civil matters: 1%

17. List other areas of law in which you have practiced.

I worked for just over two years in the Attorney General's Criminal Appeals Section, where I handled non-capital appeals, primarily in the Arizona Court of Appeals, and responded to non-capital federal habeas corpus petitions. I also completed two summer clerkships during law school, at the United States Department of State and the City of Mesa, as described in response to Question 11, *supra*.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state.

Not applicable.

19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

My practice consists almost exclusively of drafting important legal documents. I routinely draft briefs, responses, motions, memoranda, and petitions in all levels of state and federal court. On occasion, I also draft affidavits and negotiate settlement agreements.

I also have experience drafting and negotiating procedural rules. I served on the Arizona Supreme Court's Task Force to revise Rule 32 of the Arizona Rules of Criminal Procedure. In that capacity, I worked with other committee members (consisting of defense attorneys, judges, and prosecutors) to draft and propose to the Arizona Supreme Court substantive revisions to Rule 32. Of particular note, I personally drafted and proposed to the Task Force a significant revision to Rule 32.1(h), which enables a defendant in certain circumstances to challenge his or her death sentence in an untimely or successive post-conviction proceeding. The Task Force voted to propose to the Arizona Supreme Court a revision offered by another member, but also sent my version as part of the rule-change petition. The court adopted the version I drafted, which is the current version of Rule 32.1(h).

Finally, I have overseen or assisted with the drafting of several substantive comments in response to petitions to change various provisions of the Arizona Rules of Criminal Procedure. These comments were filed on behalf of the Attorney General's Office.

20. Have you practiced in adversary proceedings before administrative boards or commissions?

Yes. I have appeared in a single, quasi-adversarial administrative proceeding, as explained in response to Question 20a, below.

If so, state:

a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency.

Beginning in 2017, I was the lead attorney pursuing Arizona's petition to be certified by the United States Department of Justice for expedited federal habeas procedures in capital cases. *See* 28 U.S.C. § 2261, *et seq.* To be certified, we were required to show that Arizona had adopted a mechanism for the appointment and performance of competent post-conviction counsel in death-penalty cases. Our petition was vigorously opposed by defender organizations and other groups that filed robust comments in opposition. We responded to a number of follow-up inquiries from the Department based on those comments and supplied both argument and data to support our position that Arizona met the requirements for certification. In April 2020, the United States Attorney General granted our certification and it is currently pending review before the United States Court of Appeals for the District of Columbia Circuit. The materials submitted to the Department of Justice, as well as the Attorney General's decision, are publicly available at: https://www.justice.gov/olp/pending-requests-final-decisions.

b. The approximate number of these matters in which you appeared as:

Sole Counsel: **0**

Chief Counsel: **1**

Associate Counsel: **0**

21. Have you handled any matters that have been arbitrated or mediated?

Yes. I appeared in a supervisory capacity with the assigned case attorney in at least one mediation conference pursuant to the Ninth Circuit's mediation program. However, the issue in dispute concerned the court's jurisdiction and thus could not be mediated. The case was *Washington v. Ryan*, Ninth Circuit Nos. 07–15536 & 05–99009.

If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: **0**

Chief Counsel: **0**

Associate Counsel: **1**

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case.

Because my practice involves primarily criminal appellate and federal habeas corpus law, I do not routinely negotiate cases to settlement. Accordingly, I have only one case to report:

***Wood, et al. v. Ryan, et al.*, United States District Court for the District of Arizona (No. CV–14–01447–PHX–NVW), June 2014-June 2020.**

Summary of substance: This civil litigation, brought under 42 U.S.C. § 1983, was initiated in 2014 by the First Amendment Coalition and a group of death-sentenced inmates. The complaint challenged the Arizona Department of Corrections, Rehabilitation and Reentry's (ADCRR's) lethal-injection protocol on numerous First and Eighth Amendment grounds. Over the course of the case, the parties entered three different settlement agreements to resolve various claims. I participated as co-counsel in negotiating the first two; I personally negotiated the third. The settlement I negotiated resolved a First Amendment claim that the Ninth Circuit remanded in part after finding error in the district court's dismissal of the claim under Federal Rule of Civil Procedure 12(b)(6). The Ninth Circuit specifically found that the plaintiffs had stated a claim that the public possesses a right to hear an execution from its beginning to its end and that ADCRR's protocol impermissibly burdened this right by providing for the execution chamber's microphones to be turned off after an inmate's last statement. Rather than further appeal this issue, or litigate its merits on remand, ADCRR agreed to amend its protocol to provide that the chamber's microphones be left on for the duration of an execution. I worked with opposing counsel to negotiate a stipulated order dismissing the remanded First Amendment claim and ending the proceeding.

Statement of significance: Death-row inmates have filed several lawsuits challenging ADCRR's lethal-injection protocol, and it has been the subject of intense litigation over the last decade. The six years of litigation in this case and the various settlements reached ensured that ADCRR has a constitutionally compliant execution protocol to be used going forward. The final settlement ended this litigation and cleared any remaining legal obstacle to resuming executions in Arizona.

Counsel information: Each litigation team in this case had multiple members, and there were several counsel changes over the course of the case. Accordingly, please see Attachment B for a list of all attorneys who appeared in the case over its lifespan.

23. Have you represented clients in litigation in Federal or state trial courts?

Yes. I frequently appear on behalf of the State in superior courts across Arizona to answer post-conviction relief petitions filed by death-row inmates, *see* Ariz. R Crim. P. 32, and to represent the State in post-conviction evidentiary hearings and oral arguments. I also frequently appear in federal district court to represent the Director of the Arizona Department of Corrections, Rehabilitation and Reentry (ADCRR) and other ADCRR personnel, who are typically the named defendants in both capital and non-capital habeas corpus cases; in these matters, I respond to habeas petitions and, occasionally, appear for evidentiary hearings or oral arguments. I also represent ADCRR personnel in civil litigation related to method-of-execution challenges.

In addition, I note that my name appears as chief counsel on all capital pleadings filed by the Office of the Arizona Attorney General. Although I review and approve for filing all responses to post-conviction and habeas petitions in capital cases, and I oversee all state and federal evidentiary hearings in those cases, I have included in the estimation below only those cases in which I had substantial personal involvement in drafting a response or I personally appeared for an evidentiary hearing or other significant court appearance.

If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **120**

State Courts of Record: **30**

Municipal/Justice Courts: **0**

The approximate percentage of those cases which have been:

Civil: **75%**

Criminal: **25%**

Note: Federal habeas-corpus cases are technically civil, although they have a significant criminal component. I have therefore included my federal habeas experience in the civil category.

The approximate number of those cases in which you were:

Sole Counsel: **135**

Chief Counsel: **Not included (see explanation above)**

Associate Counsel: **15**

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion: **95%**

You argued a motion described above **5%**

You made a contested court appearance (other than as set forth in the above response) **10%**

You negotiated a settlement: **<1%**

The court rendered judgment after trial: **10%**

Note: I have included in this number decisions issued after evidentiary hearings.

A jury rendered a verdict: **0**

The number of cases you have taken to trial:

Limited jurisdiction court	**0**
Superior court	**10**
Federal district court	**3**
Jury	**0**

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

I have provided an exact count. However, I wish to clarify that the above numbers reflect the post-conviction evidentiary hearings, federal habeas evidentiary hearings, non-jury sentencing hearings, and other trial-court litigation that I have handled. These matters do not fit neatly into any other category on this application. I present them here because capital post-conviction and habeas evidentiary hearings are

akin to bench trials; they generally involve the examination of witnesses and presentation of complex evidence before a trial-court judge, and generally span several days.

24. Have you practiced in the Federal or state appellate courts?

Yes. I routinely practice in the Arizona Supreme Court and the United States Court of Appeals for the Ninth Circuit. I also frequently file briefs in the United States Supreme Court, as most death-sentenced inmates pursue their appeals all the way to that Court. I have also filed a number of petitions for writ of certiorari in the Supreme Court on behalf of the State and have appeared once as co-counsel for merits briefing and oral argument. Occasionally, I respond to special-action petitions in the Arizona Court of Appeals. When I worked in the Office of the Arizona Attorney General's Criminal Appeals Section, I routinely practiced in the Arizona Court of Appeals.

As explained in Question 23, *supra*, as Chief Counsel I review and approve for filing all appellate briefs in capital cases and my name appears on all of them. However, I have not included in the estimation below cases in which that was my only function. I have only included cases in which I had substantial personal involvement.

If so, state:

The approximate number of your appeals which have been:

Civil: **50 (*See* Question 23, *supra*, for explanation)**

Criminal: **200**

Other: **0**

The approximate number of matters in which you appeared:

As counsel of record on the brief: **250**

Personally in oral argument: **20**

25. Have you served as a judicial law clerk or staff attorney to a court? **Yes.**

If so, identify the court, judge, and the dates of service and describe your role.

After law school, I served as a law clerk to Judge J. William Brammer, Jr., on the Arizona Court of Appeals, Division Two. I served in this position from September 2003 to September 2004. In this role, I assisted Judge Brammer by

conducting legal research, drafting opinions and memorandum decisions, and serving as bailiff for oral arguments.

26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

***David Shinn v. George Russell Kayer*, United States Supreme Court (No. 19–1302); February 2020-December 2020**

Summary of substance: A divided three-judge panel of the Ninth Circuit awarded habeas relief to George Kayer, an inmate on death row for murdering his friend over a gambling debt. Like all habeas petitions filed after April 24, 1996, Kayer's case was governed by the Anti-terrorism and Effective Death Penalty Act (AEDPA), which requires a federal habeas court to give extraordinary deference to a state court's resolution of a federal claim. In Kayer's case, however, the Ninth Circuit granted relief and proclaimed the Yavapai County Superior Court's judgment unreasonable despite it being legally and factually supported; in effect, the court reviewed Kayer's federal claim de novo and set aside his sentence merely because it disagreed with the state court's assessment. After twelve judges dissented from the denial of rehearing en banc, I led a team of attorneys in filing a petition for writ of certiorari. The United States Supreme Court granted our petition and reversed the Ninth Circuit in a per curiam opinion reported at *Shinn v. Kayer*, 141 S. Ct. 517 (2020).

Statement of significance: It is always an accomplishment to convince the United States Supreme Court to accept certiorari. However, it is especially difficult to persuade the Court to take a case for summary reversal, where there is no conflict between the circuits or novel matters of nationwide importance. This case is significant because we not only succeeded at that task but also persuaded the court to issue a strongly worded opinion reaffirming AEDPA's contours and reminding federal courts to give state courts the benefit of the doubt. This opinion, in turn, will provide support to other states' Attorneys General when they seek to defend their valid state-court judgments on federal habeas review.

Counsel for Kayer:

Jean-Claude Andre (jcandre@bclplaw.com)

Bryan Cave Leighton Paisner
310-576-2148

Collin P. Wedel (cwedel@sidley.com)
J. Manuel Valle (manuel.valle@sidley.com)
Sidley Austin LLP
202-736-8468 (Mr. Valle)
213-896-6649 (Mr. Wedel)

Dale Baich (Dale_baich@fd.org)
Jennifer Garcia (Jennifer_garcia@fd.org)
Office of the Federal Public Defender
602-382-2768

Co-counsel for Arizona:

Beau Roysden (Beau.Roysden@azag.gov)
Jeffrey Sparks (Jeffrey.Sparks@azag.gov)
William Scott Simon (Scott.Simon@azag.gov)
Laura P. Chiasson (Laura.Chiasson@azag.gov)
Office of the Arizona Attorney General
602-542-5025 (Mr. Roysden)
602-542-4686 (Mr. Sparks and Mr. Simon)
520-628-6520 (Ms. Chiasson)

O.H. Skinner (o.h.skinner@allianceforconsumers.org)
(Former Solicitor General)
Executive Director
Alliance for Consumers
617-852-6190

Counsel for amici curiae Idaho, *et al*:

Kale Gans (kale.gans@ag.idaho.gov)
Office of the Attorney General for the State of Idaho
208-334-4152

***Frank Jarvis Atwood v. Charles L. Ryan, et al.*, United States Court of Appeals for the Ninth Circuit (No. 14–99002), Judges Sandra S. Ikuta, Consuelo M. Callahan, and M. Margaret McKeown; United States District Court for the District of Arizona (No. CV–98–116–TUC–JCC), Judge John C. Coughenour; January 2009-September 2017**

Summary of Substance: Atwood abducted and murdered 8-year-old Vicki Lynne Hoskinson in 1984 and was sentenced to death. His case remains one of the most high-profile and exhaustively litigated criminal cases Arizona has

seen. I assumed responsibility for the case in 2009. At that point, our Office was litigating Atwood's allegations that police officers fabricated the forensic evidence proving his guilt. To ensure that Atwood's serious claims were fully investigated, I facilitated his attorneys' access to evidence, the now-retired case detectives, and a trial expert. These claims were not resolved until 2012, when, after protracted litigation in both state and federal court, the district court denied relief based on the dearth of evidence supporting Atwood's allegations. Once the police-misconduct claims were resolved, the district court ordered an evidentiary hearing on Atwood's claim that his attorney was ineffective in investigating and presenting mitigating evidence at sentencing. That multi-day hearing involved the presentation of complex expert mental-health testimony. Ultimately, the district court denied relief. I then briefed and argued the case on appeal in front of a three-judge panel of the Ninth Circuit. That court affirmed the district court's finding in a unanimous opinion in 2017, which is reported at *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017).

<u>Statement of Significance</u>: This case involved a large and complex record, highly sensitive mental-health issues, and serious allegations of law-enforcement misconduct that had to be investigated thoroughly. The case's high-profile nature further complicated matters, as local media covers this case intensely and it still generates strong emotions from community members. My work on the Atwood case illustrates my ability to perform effectively under pressure and to maintain professionalism under the most difficult of circumstances. It also illustrates the diversity of my practice and skill set: to successfully defend this death sentence, I had to facilitate discovery and investigation, appear for a complicated adversarial evidentiary proceeding, file numerous pleadings in state and district court, file a primary and a supplemental appellate brief in the Ninth Circuit, and appear for oral argument in both the district court and the Ninth Circuit.

Finally, this case has a great deal of personal significance to me. I was five years of age when Ms. Hoskinson disappeared from an area not far from my home. I vividly remember her abduction's impact on the community. The months-long search for Ms. Hoskinson consumed the city, and when her body was found in the desert the whole community mourned. Even though I was very young, I was acutely aware that Ms. Hoskinson's murder proved that our then-small community was not as safe as we believed.

<u>Counsel for Atwood</u>:

Paula Harms (Paula_Harms@fd.org)
Office of the Federal Public Defender
816-471-8282

Golnoosh Farzaneh
Office of the Federal Public Defender (Former)
949-701-6622
gfarzaneh@gmail.com

Larry Hammond (deceased)

Daniel Davis (deceased)

Co-counsel for Ryan:

Hon. Kent Cattani
Contact information in reference section

Jeffrey Zick
Contact information in reference section

***State v. Dale Shawn Hausner*, Arizona Supreme Court (No. CR–09–0077–AP); April 2011-July 2012**

Summary of Substance: Beginning in June 2005, Hausner and co-defendant Samuel Dieteman—deemed the "Serial Shooters"—terrorized the Phoenix metropolitan area with a series of random and seemingly unmotivated drive-by shootings. At the end of Hausner and Dieteman's year-long shooting spree, six people were dead, eighteen others were injured, and several dogs and horses were dead or wounded. In all, a jury found Hausner guilty of eighty criminal offenses and imposed on him six death sentences. I handled the case on direct appeal, filing a 192-page answering brief and arguing the case before the Arizona Supreme Court. The case presented two difficult issues of first impression: 1) the scope, construction, and constitutionality of Arizona's emergency wiretap statute, A.R.S. § 13–3015, which the police had employed during the investigation, and 2) the constitutionality of the former A.R.S. § 13–751(F)(13) aggravating factor, which made a defendant eligible for the death penalty when he or she murdered in a cold-and-calculated manner. The Arizona Supreme Court affirmed Hausner's convictions and sentences, with the exception of a single count of animal cruelty. The published opinion is reported at *State v. Hausner*, 230 Ariz. 60 (2012).

Statement of Significance: The Hausner case is the most factually and legally complicated matter I have handled in sixteen years as an appellate prosecutor. Keeping track of the evidence presented, and the counts to which each witness and exhibit related, was a monumental task. In addition, the two novel legal issues required intensive research into both Arizona law and the law of other jurisdictions.

Counsel for Hausner: Hausner was represented on direct appeal by Thomas Dennis, formerly of the Maricopa County Legal Advocate's Office. Mr. Dennis is retired and I do not possess his current contact information.

***State v. Darrel Peter Pandeli*, Arizona Supreme Court (No. CR–15–0270–PC); August 2015-May 2017**

Summary of Substance: Pandeli is on death row for murdering and mutilating a Phoenix woman in 1993. The Arizona Supreme Court affirmed his convictions and death sentence, and he sought post-conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure based on counsel's purported ineffectiveness at sentencing. After an evidentiary hearing, the post-conviction judge granted relief as to Pandeli's sentence in a partially handwritten order that failed to make specific findings of fact and conclusions of law as Rule 32 requires. I led the successful effort to petition the Arizona Supreme Court to review the judge's decision, and then argued the case before the court. The Arizona Supreme Court reversed the post-conviction judge's ruling and reinstated Pandeli's death sentence. The decision is reported at *State v. Pandeli*, 242 Ariz. 175 (2017).

Statement of Significance: Crafting the petition for review in this case was particularly challenging. The legal and factual bases for the post-conviction judge's ruling were unclear, which in turn made it difficult to identify specific errors for the Arizona Supreme Court to remedy. Ultimately we argued, and the court agreed, that no deference was owed to the post-conviction judge's decision given his failure to enter the requisite findings. Because counsel's ineffectiveness is a mixed question of law and fact, the Arizona Supreme Court itself reviewed the trial and hearing evidence and found no ineffective assistance. This case illustrates the importance of standards of review in appellate law and my knowledge of them. It also illustrates the importance of creating a complete and thorough record for appeal, as the Arizona Supreme Court was only able to reinstate Pandeli's sentence because the record was sufficient for its review.

Counsel for Pandeli:

Kenneth Countryman (kenneth@countrymanlaw.com)
602-258-2928

Julie Hall (julieshall@hotmail.com)
520-896-2890

Co-counsel for State:

Jason B. Easterday (Jason.easterday@azag.gov)

Office of the Arizona Attorney General
602-542-4686

Counsel for amici curiae Arizona Association of Criminal Justice and Arizona Capital Representation Project:

David Euchner (David.euchner@pima.gov)
Pima County Public Defender's Office
520-724-6800

Amy Armstrong (amy@capitalproject.org)
Arizona Capital Representation Project
520-229-8550

Amy Knight (info@amyknightlaw.com)
Knight Law Firm, PC
520-878-8849

Hon. Amy Kalman
Maricopa County Superior Court
602-506-3381

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

Not applicable.

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

Not applicable.

29. Describe any additional professional experience you would like to bring to the Commission's attention.

As my answers above establish, I have extensive experience in appellate advocacy and legal writing, making me an ideal candidate for the Arizona Supreme Court. However, I also have abundant supervisory and administrative experience, which has helped me develop the patience and temperament necessary to be an effective Supreme Court Justice. I have been a supervisor in the Attorney General's Office for eleven years. I first served as a Unit Chief, directly overseeing the Capital Litigation Section's Tucson attorneys and reporting to the then-Section Chief. Upon my promotion to Section Chief in 2015, I assumed responsibility for both the Tucson and Phoenix offices. I vowed early on not to be an absentee supervisor for the Phoenix-based members of our Section. In keeping with this vow, before the pandemic drove us all into our homes, I made weekly trips to the Phoenix office, often to conduct meetings or other official duties but, sometimes, simply to develop and maintain rapport with the Phoenix staff.

My supervisory duties include making budgetary, hiring, and personnel decisions; managing attorney workflow; and making both case-specific determinations and broad policy ones. I have had many uncomfortable personnel meetings and I have dealt with a wide range of personalities. My experience as a supervisor has taught me to lead by example; to be firm but reasonable; to be sensitive to the feelings of those with whom I interact; to listen with an open mind; and, above all, to be patient and respectful. These qualities are integral to being a good Supreme Court Justice.

BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **No.** If so, give details, including dates.

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No.** If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service. **Not applicable.**

    Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? **Not applicable.** If not, explain your decision.

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes.** If not, explain.

33. Have you paid all state, federal and local taxes when due? **Yes.** If not, explain.

34. Are there currently any judgments or tax liens outstanding against you? **No.** If so, explain.

35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No.** If so, explain.

36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **No.** If so, identify the nature of the case, your role, the court, and the ultimate disposition.

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No.** If so, explain.

38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No.** If so, explain.

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No.** If so, provide details.

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No.**

    If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition. **Not applicable.**

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not applicable.**

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice. **Not applicable.**

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42. **Not applicable.**

44. List and describe any sanctions imposed upon you by any court.

In 2017, the State's litigation team in *Wood, et al. v. Ryan, et al.*, No. CV–14–01447–PHX–NVW, Doc. 179, of which I was a part, lost a discovery dispute.

We explained to the court our belief that our objections to the discovery requests at issue were justified and made in good faith. The court disagreed, found that our objections were not substantially justified, and awarded attorneys' fees as a sanction against the State.

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction?

I have not received any notice of formal charges, private admonition, referral to a diversionary program or any other conditional sanction from a disciplinary body. I have, however, received a letter from bar counsel notifying me that the State Bar dismissed a bar charge, without a screening investigation; that letter included a cautionary, advisory comment, as discussed below.

If so, in each case, state in detail the circumstances and the outcome.

In 2013, a death-row inmate filed a bar charge against me, alleging that I had disseminated a document he believed was subject to a confidentiality order. He further alleged that the document was shown at a prosecutorial training and that a non-attorney attendee overheard a group of prosecutors making insensitive comments about it. In reality, the document was not subject to the confidentiality order, I did not disseminate it beyond those involved in the case, and I was not even present at the training at issue. Bar counsel reviewed related court pleadings; dismissed the charge at the intake stage, without requesting a response from me; and found that further investigation was not warranted. However, the letter informing me of the dismissal also advised that, if I were to be involved in the document's dissemination, I should take more care in the future to avoid a similar situation. The case number was 13–1043.

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No.** If your answer is "Yes," explain in detail.

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No.** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.

48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No.** If so, state the date you

were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No.** If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties.

PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? **Yes**. If so, list with the citations and dates.

John J. Egbert, Lacey S. Gard, & Jeff Sparks, *Chapter 8: Appellate Briefs*, *in* ARIZONA APPELLATE HANDBOOK 2.0 (Hon. Samuel Thumma, Hon. Kent Cattani, & Kimberly Demarchi, eds., State Bar of Arizona 2020).

Lacey A. Stover, Kirstin A. Story, Amanda M. Skousen, Cynthia E. Jacks, Heather Logan, & Benjamin T. Bush, *The Teaching Teams Program: Empowering Undergraduates in a Student-Centered Research University*, *in* STUDENT-ASSISTED TEACHING: A GUIDE TO FACULTY-STUDENT TEAMWORK (Judith E. Miller, James E. Groccia & Marilyn S. Miller, eds., Anker Publishing Company, Inc. 2001).

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes.** If not, explain.

52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **Yes.** If so, describe.

From 2012 to 2016, I served as an Adjunct Professor of Legal Writing at the University of Arizona James E. Rogers College of Law, where I primarily taught a course entitled "Advanced Legal Writing and Introduction to Appellate Advocacy," but also taught a first-year legal-writing course for one semester. I have also served as a guest lecturer on topics of capital sentencing and post-conviction remedies for various courses at the University of Arizona James E. Rogers College of Law, the Arizona State University Sandra Day O'Conner School of Law, and the University of California, Hastings College of Law.

In addition, I have presented numerous internal, statewide, and national trainings on topics of criminal law, capital sentencing, and federal habeas

corpus. A list of trainings in which I have participated, to the best of my recollection and record-keeping, is attached hereto as Attachment C.

53. List memberships and activities in professional organizations, including offices held and dates.

Member, Federalist Society (2018–present)

Member, Association of Government Attorneys in Capital Litigation (as the representative for the Office of the Arizona Attorney General) (2015–present)

Member, State Bar of Arizona's Appellate Practice Section

Member, State Bar of Arizona's Criminal Justice Section

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **Yes. I have served on the following committees:**

Arizona Attorney General, Forensic Science Advisory Committee (2019–present)

Arizona Supreme Court, Rule 32 Task Force (2018–2019)

Arizona Supreme Court, Capital Case Oversight Committee (2015–present)

State Bar of Arizona, Arizona Attorney Editorial Board (2013–2016)

State Bar of Arizona, Fee Arbitration Committee (2010–2013)

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like. **Not applicable.**

54. Describe the nature and dates of any relevant community or public service you have performed.

I have no community service to report outside of my service to the legal community discussed above. *See* Questions 52 and 53, *supra*. However, I have spent the entirety of my legal career in positions of public service.

55. List any relevant professional or civic honors, prizes, awards or other forms of recognition you have received.

Association of Government Attorneys in Capital Litigation's Board of Directors Advocacy Award (2018-2019) (National Award)

Office of the Arizona Attorney General's Michael C. Cudahy Mentoring Award (2015)

Office of the Arizona Attorney General's Victims' Services Law Angel Award (April 11, 2014)

Office of the Arizona Attorney General's Attorney of the Year Award (2013)

Nominee, Arizona Prosecuting Attorneys' Advisory Council's Appeals Prosecutor of the Year Award (2011-2012)

Office of the Arizona Attorney General's Emerging Star Award (2008)

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates. **Not applicable.**

Have you ever been removed or resigned from office before your term expired? **Not applicable.** If so, explain.

Have you voted in all general elections held during the last 10 years? **Yes.** If not, explain.

57. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

I am a wife and a mother to two young children, ages 10 and 6. Between my family and my job duties, I have little spare time. However, I am devoted to physical fitness and make time to exercise intensely nearly every day—even if I have to do it late at night. My other significant non-legal interest is gardening. In particular, I am an avid collector of rose plants. I am fortunate to have a sizeable yard, where we built a large, terraced planting area. To date, I have acquired 69 different varieties of rose bushes, as well as various other interesting types of foliage. Each spring, when nurseries debut newly created rose varieties, I try to add at least one to my collection.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? **Yes.**

ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the state's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

Arizona's population is growing rapidly and becoming increasingly diverse. My appointment would help align the court's composition with Arizona's population in two ways. First, only one woman sits on the Arizona Supreme Court and this has been the case since 2015. My appointment would therefore bring needed gender diversity to the court.

Second, my appointment would bring geographic diversity. Southern Arizona is not represented on the court and only one of the six current Justices hails from a county other than Maricopa. I was born in Pima County and still maintain roots there; however, my home is now Pinal County, a growing county with a distinct culture and community, where I have lived for five years with my husband and children. And my roots extend into Maricopa County as well, as that is where I began my career at the Attorney General's Office and where I still spend significant time fulfilling my professional duties.

Moreover, because I work for Arizona's chief law-enforcement officer, I am privileged to have a statewide legal practice permitting me to appear in courts across Arizona. I have represented the State in post-conviction evidentiary hearings in La Paz, Yavapai, Cochise, Maricopa, and Pima Counties. My appointment would therefore not only bring to the court geographic diversity through a Southern Arizona representative, but it would also bring a unique view, forged by personal and professional experience that spans the entire state. This perspective would be an obvious asset to the Arizona Supreme Court—the only court with statewide jurisdiction.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention.

My experience makes me uniquely qualified for an Arizona Supreme Court appointment. I am a career appellate attorney. I have authored hundreds of appellate briefs and have argued numerous times before the Arizona Supreme Court and the United States Court of Appeals for the Ninth Circuit. I have briefed a number of cases in the United States Supreme Court, including one in which I persuaded the court to summarily reverse an adverse opinion, *Shinn v. Kayer*, No. 19–1302, and one in which I appeared as co-counsel for merits briefing and oral argument, *see McKinney v. Arizona*, No. 18–1109, after which the Court rejected a capital defendant's challenge to an Arizona Supreme Court opinion. I have taught appellate writing to law students and I have presented numerous state and national trainings on appellate writing, capital sentencing, and federal habeas corpus. My federal habeas experience, including my work assisting on the *McKinney* case both in the Ninth Circuit and at the United States Supreme Court, has shown me the potential ramifications of a single misplaced word or ambiguous phrase in a published court opinion. This, in turn, has given me especially valuable insight for the collaborative work done by the Arizona Supreme Court. And I have significant

in-court litigation experience to complement my appellate expertise. My background thus gives me the broad perspective necessary to be an effective Supreme Court Justice.

In addition, although conflicts would likely prevent me from immediately hearing many death-penalty cases, I am a death-penalty specialist. The Arizona Supreme Court has exclusive jurisdiction over death-penalty appeals and post-conviction proceedings in Arizona, and a significant percentage of the court's yearly published opinions are in capital cases. If selected, I would begin my tenure with a base of background knowledge in one of the court's most complicated and significant areas of jurisprudence. In fact, I helped to create much of that jurisprudence.

Finally, the Arizona Supreme Court does more than settle disputes and publish opinions. Its members are leaders in the legal community: they chair committees, teach continuing legal education courses, authorize rule changes, speak to community groups, and perform other important roles. My background—in particular, my experience teaching law students, training prosecutors, and serving on professional committees—is replete with relevant experience preparing me for these duties. I have tried to be a role model for the students I have taught, and I have sought to lead by example in my supervisory role at the Attorney General's Office. I look forward to continuing this leadership, serving as a role model for the community at large, and doing my part to inspire confidence in the legal profession.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **Yes.** If not, explain.

62. Attach a brief statement explaining why you are seeking this position.

Please see Attachment D.

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Please see Attachments E and F.

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than three written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample**

should be no more than ten pages in length, double-spaced. You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

Not applicable.

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews.

Not applicable.

LIST OF ATTACHMENTS

Attachment A: List of Assistant Attorneys General (*See* Question 15 of application).

Attachment B: List of counsel for *Wood et al. v. Ryan et al.*, No. CV–14–01447–PHX–NVW) (*See* Question 22 of application).

Attachment C: List of trainings (*See* Question 52 of application).

Attachment D: Personal statement (*See* Question 62 of application).

Attachment E: Writing Sample # 1 (*See* Question 63 of application).

Attachment F: Writing Sample #2 (*See* Question 63 of application).

Attachment A:
Attorney List

Office of the Attorney General Attorney Staff March 2021

ABBEY, DEBORAH K
ACOSTA, JOE
ACOSTA-COLLINGS, CLAUDIA R
ADAMS, AMANDA L
ADAMS, CATHERINE S
ADAMS, KRISTI M
AHL, DAVID E
AMOO, MUKAI
ANDERSON, ANDREA R
ANDERSON, CALLEY R
ANDERSON, KIM S
ANZINI, LAUREN M
ASCHENBACH, RON J
ASTA, SARAH A
BACAL, JOSEPH E
BACON, JAMES N
BAEK, RICHARD L
BAIER, DONALD J
BALDNER, VICTORIA A
BALL, CASEY D
BANES, REBECCA A
BARRICK, JENNIFER E
BARRY, WILBUR F
BASKIN, MONA E
BAUMANN, AARON A
BECKLUND, MARJORIE S
BEHNKE, KALYN D
BELJAN, JOTHI
BENNETT, ERIN D
BENNETT, THOMAS D
BENTLEY, KAREN G
BERENDSEN, ELIZABETH A
BERGIN, VICTORIA J
BEVINS, ERIN S
BEVINS, WILLIAM F
BINGERT, ELIZABETH T
BIRKEMEIER, SARA E
BISHOP, RYAN G
BLUM, JENNIFER R
BODDINGTON, LISA C
BOND, MICHELLE L
BONHAM, JENNIFER L
BORES, JACQUELINE S
BOTTA, ALISON M
BOYD, MICHAEL E
BOYLE, PATRICK J
BRACCIO, MYLES A
BRACHTL, MARK C
BROWN, LINDA M
BROWN, LISA B
BURTON, MICHELLE
BURZ, REBEKAH J
CAMPBELL, ELIZABETH A
CAMPBELL, SEAN M
CANNON, MATHEW B
CANTRELL, JEFFREY D
CAPLINGER, SAMANTHA L
CARTER, PAUL E
CASE, NANCY K
CHAMBERLAIN, KIMBERLY D
CHAMPAGNE, DEANA M
CHAPMAN, AMY S
CHAPMAN-HUSHEK, NICHOLAS
CHAVEZ, JULIE A
CHRISTENSEN, SCOTT A
CHYNOWETH, SUZANNE M
CIAFULLO, MARK J
CLARK, DOUGLAS L
CLAW, GRACYNTHIA D
COFFMAN, BRIAN R
COHEN, ERIN D
COLL, SEAN P
CONLEY, JACQUELINE
CORLEY, JASON D
CORTINA, DARLENE M
COUNTS, SHALLON L
CRESTIN, KEVIN P
CRITZ, ANNA G
CUMMINGS, KYLE R
CURIGLIANO, ROBERT J
CURTISI, NATHAN
CUTTS, SHELLEY D
CYGAN, KIMBERLY J
DAMSTRA, KATHRYN A
DAULT, RICHARD D
DAVIS, CHRISTOPHER B
DAVIS, SUSAN E
DEVANY, ERIC
DHAS, ASHWINI P
DIVIS, KATLYN J
DOLL, HOLLY A
DONALD, SCOTT B
DYLLA, CHRISTOPHER J
DYLO, JOSEPH E
DYSART, ANDREW B
EASTERDAY, JASON B
EHREDT, AMANDA R
EKLUND, MATTHEW P
ELLIOTT, STEPHANIE
EMERSON, JORDAN E
ENRIQUEZ, LAURA I
ESPINOSA, GIOCONDA A
ESPIRITU, EDGARD FRANCIS B
FALGOUT, JOANN
FALLON, JANE S
FERRIS, CHARLES W

FITZGERALD, LISA J
FORSCH, ERICA B
FOSTER, ALYSON M
FOX, SAMUEL P
FRANCIS, JILLIAN B
FREESTONE, SHYLA R
FULLER, CATHLEEN E
FULLER, SHELBY N
GALUSHA-TROICKE, NICHOLE J
GALVIN, JEANNE M
GARBUTT, BART T
GARDNER, AMELIA A
GARNER, DEBORAH L
GAUGHAN, MICHAEL G
GENTRY, GWYNDOLYNN D
GEVERS, ALICIA
GILBERT, ISAAC A
GILLOTT, WENDY M
GILMAN, LINDSEY E
GODDARD, KYRA
GOLOB, ELCHONON D
GOODWIN, MICHAEL K
GOUDREAU, CONSTANCE G
GOURLAY, VIRGINIA W
GREY, CHRISTINA M
GRUBE, CHARLES A
GUERRERO, CAROLINE
GUILLE, MISTY D
HACHTEL, LAURIE A
HALL, DANIEL P
HALL, ROGER W
HANDY, JO-ANN A
HARGRAVES, SETH T
HARPER, SHAWN L
HARRINGTON, KATHLEEN
HARRIS, VERNON L
HECKATHORNE, SARAH E
HEINTZ, RACHEL
HENDERSON, CHRISTINA A
HERLIHY, MATTHEW T
HESSINGER, MARK E
HICKS, SARAH K
HOBART, ANN
HODGSON, MARK A
HOLDER, JENNIFER L
HOLGUIN, HOLLIE C
HOLLYWOOD, KAITLIN
HOLYA, ROBERT B
HORN, JEREMY D
HORN, SOPHIA N
HORNE, WILLIAM M
HOWARD, ZACHARY S
HUCKABY, LINDSAY B
HUDSON, JOHN E
HUGHES, KENNETH R
HUGHES, LINDSAY M
HUMPHRIES, JOHN L
HUNTER, JENNIFER R
HYNES, GREGORY M
INIGUEZ, ADOLFO
JACKSON, LAWTON L
JAMES, DINITA L
JAQUET, LORENA
JASCULCA, NANCY H
JESSEN, KATHERINE H
JOHNSON, ELIZA B
JOHNSON, JANNA L
JOHNSON, KYLE M
JONES, DYLAN K
JONES, REBECCA K
JOSE, THOMAS J
KAGIE-SHUTEY, MARIE D
KAISERMAN, JULIA R
KARLSON, KARA M
KATZ, PAUL A
KELLY, TANJA K
KENNELLY, REBECCA N
KERFOOT, DESIREE M
KING, RENEE L
KLEIN, JESSICA R
KNAUER, NICHOLAS A
KNOBLOCH, ERIC K
KOZLIK, JACQUELINE A
KRAMER, COURTNEY L
KREYMER, RITA
KRISHNA, SUNITA A
KUNZMAN, MICHELLE L
KUTER, SHAUN T
LACAILLADE, COURTNEY T
LAMAGNA, PATRICIA C
LANDEEN, NEIL
LARSON BURGGRAF, JENNIFER M
LEAVITT, ISABELLA M
LEONE, ASHLEY J
LESUEUR, LEO J
LEVINE, JONATHAN M
LEWIS, SHANNON M
LIVERIS, KRYSTA A
LOMBINO, MICHELLE C
LOWE, BRITTANY A
LOWE, LAUREN J
LUTTINGER, ALINE
MAHERI, AMEER
MAKAR, ROBERT J
MAKSEMOUS, TOM
MANGIN, DAVID F

MANLEY, JONATHAN E
MANLUCU, VALERIE R
MANSUR, ERIKA C
MANTY, ZACHARY R
MARCIANO, VALERIE L
MARTIN, CARROL S
MARTONCIK, KATHLEEN E
MAY, ROBERT F
MCBRIDE, JENNIFER E
MCCOY, DIANE S
MCCRAY, MATTHEW
MCDONALD, KRISTIN E
MCKAY, NEIL T
MEDIATE, CARMINE V
MEDRANO, JOANNA A
MEHES, KRISTI M
MEISLIK, ALYSE C
MELVIN, LEILA E
MONAGHAN, SEAMUS P
MONRO, CATHERINE V
MOODY, KAREN E
MOORE, JOSEPH T
MORALES, KRISTIAN M
MORLACCI, MARIA A
MORROW, NANETTE C
MORSE-BAILEY, ROBIN G
MOSS, ELIZABETH C
NAHIGIAN, SANDRA L
NAPOLITANO, ANTHONY R
NARANJO, NANSI D
NEAVERTH, DORIANE F
NELSON, ORIEN P
NEUVILLE, LISA A
NIES, DANIEL E
NORRIS, BENJAMIN R
NOWLAN, REX C
NYE, KIMBERLY D
O'CONNOR, GAVIN J
O'CONNOR, JACK L
OELZE, DEBORAH M
OLSON, JAMES C
OVERHOLT, ELIZABETH M
PACKARD, SAMUEL S
PALMER, TYLER K
PARSONS, CYNTHIA M
PATEL, KEENA
PATEL, SAMIR R
PEISER, PAMELA J
PERKINS, RONALD K
PIGNATELLA CAIN, AMY S
PIZZINGRILLI, PIHRA H
PLATTER, BONNIE N
POLLOCK, LINDA J
PRECIADO, HUMBERTO R
PULVER, ROBERTO
RAINE, MICHAEL D
RAND, LUCY M
REH, DEANIE J
REMES, RACHEL M
RENNICK, REBECCA C
RHODES, JULIE M
RIVERA, MELISSA
ROBINSON, DAVID A
RODRIGUEZ, JOSEFA A
ROLSTEAD, JAMES H
RONALD, DAVID M
ROUN, HEATHER E
SAKOL, JEFFREY N
SALVATI, CAROL A
SANDERS, ROBERT K
SAUER, LINDA A
SAWYER, KATE B
SCHAACK, DANIEL P
SCHAUPP, HEATHER Y
SCHULTZ, ANGELA R
SCHWABE, KAREN L
SCHWARTZ, ADAM J
SCHWARTZ, JONATHAN H
SCHWARZ, ERIC T
SHAKER GUERRERO, NICOLE
SHAW, VINEET M
SHEIRBON, JUDY A
SHERIDAN, TODD A
SHREVES, TERESA E
SIEDARE, SABRA A
SIMON, WILLIAM S
SIMONS, FOLKE N
SINGH, NEILENDRA
SKARDON, JAMES T
SLOOT, CHRISTOPHER M
SMITH, CARRIE H
SMITH, JOSHUA C
SMITH, KEVIN R
SPENCE AMBRI, MARIETTE S
SPRITZER, AUTUMN L
ST JOHN, LINDSAY P
STEINER, EMILY A
STERLING, DEBRA G
STOKES, EMILY M
STORY, KIRSTIN A
STRATTON, ELLIOT C
STRITTMATTER, MAURA C
STRUCKMEYER-CROXEN, FREDERICK S
STURTZ, ASHLEY D
SWEENEY, KATHLEEN P
TABER, ALEXANDER M

TEASDALE, SCOT G
TELLIER, JOHN R
THORSON, AMY M
TIBBEDEAUX, LISA M
TRUMAN, EDWARD B
TYRELL, SYREETA A
UPDIKE, BENJAMIN H
VAITA, ELENI M
VALADEZ, TONI M
VALENZUELA, DENISE W
VALENZUELA, MICHAEL F
VAMPOTIC, MICHAEL J
VILLARREAL-REX, KRISTI L
WAGNER, KELLY M
WALKER, DARYL R
WAN, HOLLY
WHITE, CHRISTOPHER P
WHITE, TARAH L
WILLIAMS, DAWN R
WILLIAMS, MATTHEW K
WOOTEN, PHILIP R
WORCESTER, BROOKE A
WRIGHT, JENNIFER J
ZAGORSKI, STEVEN B
ZEISE, CARL E
ZINMAN, JANA M

Attachment B:
Counsel list, *Wood et al. v. Ryan et al.*

Counsel for Wood, *et al.*

Aimee G. Mackay
(Former Sidley Austin)
Morgan Lewis
213-612-7341
Aimee.mackay@morganlewis.com

Alycia Ann Degen
Sidley Austin LLP
213-896-6682
adegen@sidley.com

Collin P. Wedel
Sidley Austin LLP
213-896-6649
cwedel@sidley.com

Joshua Anderson
Sidley Austin LLP
213-896-6687
janderson@sidley.com

Lauren Ann McCray
Former Sidley Austin
Current Contact Information Unknown

Mark E. Haddad
Former Sidley Austin
Current Contact Information Unknown

Amanda V. Lopez
Former Sidley Austin
Current Contact Information Unknown

Katherine Roberts
Sidley Austin LLP
213-896-6039
Kate.roberts@sidley.com

Matt Light
(Former Sidley Austin)
Shook, Hardy & Bacon
424-285-8830
mlight@shb.com

Dale Baich
Federal Public Defender's Office
602-382-2768
Dale_baich@fd.org

Jessica Felker
Former Federal Public Defender's Office
Current Contact Information Unknown

Robin Konrad
Former Federal Public Defender's Office
Current Contact Information Unknown

Co-counsel for Ryan, *et al.*

John Todd
(Former Assistant Attorney General)
The Law Offices of John Pressley Todd, PLLC
480-238-1658
Johnpressleytodd.law@gmail.com

Jeffrey Sparks
Office of the Arizona Attorney General
602-542-4686
Jeffrey.sparks@azag.gov

Jeffrey Zick
(Former Assistant Attorney General)
Contact Information in Reference Section

Julie Done
(Former Assistant Attorney General)
Maricopa County Attorney's Office
602-506-5780

donej@mcao.maricopa.gov

Hon. David Weinzweig
(Former Assistant Attorney General)
Judge of the Arizona Court of Appeals
602-452-6730

Matthew Binford
Current Contact Information Unknown

Laura Chiasson
520-628-4686
Laura.chiasson@azag.gov

Keith Miller
Fennemore Craig
602-916-5369
kjmiller@fclaw.com

O.H. Skinner
Executive Director
Alliance for Consumers
617-852-6190
o.h.skinner@allianceforconsumers.org

Attachment C:
List of Trainings

Title of Training	Date and Location	Sponsor	Subject Matter
National Habeas Corpus Training (Upcoming)	April 12-13, 2021 (virtual)	National Association of Attorneys General, Training and Research Institute (NAGTRI)	Federal habeas corpus
Capital Litigation Conference: Delving Into Defense Experts	February 25, 2021-February 26, 2021 (virtual)	Arizona Prosecuting Attorneys' Advisory Council (APAAC)	Capital Sentencing
Apprendi, *Ring*, *Alleyne*, and More: A Refresher on Jury Findings for Sentencing Purposes in Arizona	May 27, 2020 (virtual) (original presentation); December 8, 2020 (virtual) (repeat presentation)	APAAC (original presentation) Office of the Arizona Attorney General (repeat presentation)	Criminal law/Capital Sentencing
Evaluating and Rebutting Sexual Abuse Mitigation in Capital Cases Involving Sexual Violence Against Women	February 28, 2020 (Phoenix, Arizona)	APAAC	Capital Sentencing
Post-conviction relief program	June 13, 2019 (Phoenix, Arizona)	Office of the Arizona Attorney General	Post-conviction litigation
Judicial Capital Training	May 30, 2019 (Phoenix, Arizona)	Administrative Office of the Courts (AOC)	Capital Sentencing
Jury Selection for Death Penalty Cases	March 1, 2019 (Phoenix, Arizona)	APAAC	Capital Sentencing
Appellate Advocacy for Prosecutors:	November 16, 2018	APAAC	Appellate advocacy

Title of Training	Date and Location	Sponsor	Subject Matter
Tips and Considerations for Writing Briefs	(Phoenix, Arizona)		
National Habeas Corpus Training	August 22-23, 2017 (Austin, Texas)	NAGTRI	Federal habeas corpus
Judicial Capital Training	May 8, 2017 (Phoenix, Arizona)	AOC	Capital Sentencing
Capital Litigation for Arizona Prosecutors	October 28, 2016 (Phoenix, Arizona)	APAAC	Capital Sentencing
National Advanced Habeas Corpus Training	October 13-14, 2016 (Sacramento, California)	NAGTRI	Federal habeas corpus
Live Oral Argument: Become Game-Ready With Major League Coaching	June 28, 2017 (Tucson, Arizona)	State Bar of Arizona	Appellate advocacy
Appellate Autopsy of a Capital Case	August 21, 2015 (Phoenix, Arizona)	APAAC	Capital sentencing
National Advanced Habeas Corpus Training	April 30, 2015-May 1, 2015 (Denver, Colorado)	NAGTRI	Federal habeas corpus
Making an Appellate Record	February 11, 2011 (Tucson, Arizona)	State Bar of Arizona	Appellate advocacy

Attachment D:
Personal Statement

I am a career public servant. I am also a native Arizonan, a Pinal County resident, a wife, and a mother. I have spent the past sixteen years as an Assistant Attorney General handling some of the most complicated and high-stakes appeals in Arizona's state and federal courts. I am dedicated to the welfare of Arizona's residents and to preserving their confidence in Arizona's justice system. I now seek to continue serving my beloved home state in a position on the Arizona Supreme Court. There, I would ensure fidelity to the rule of law and bring my skills, experience, knowledge, and work ethic to an already outstanding court.

I specialize in capital appeals, and it is not easy. A capital case begins with a premature and violent death and, when all appeals are exhausted, it ends with another death. In addition to being legally complicated, it is an emotionally fraught and politically charged practice area. I have sat across courtrooms from some of Arizona's most dangerous offenders. I have encountered victims who have suffered unimaginable grief and loss, and some defendants with painful and disturbing backgrounds. More than once, I have had to fulfill the unenviable duty of initiating the process of carrying out a death sentence. My job is a difficult and often thankless one, but I have approached it with dignity and professionalism, duty-bound to serve the public and to enforce the law without passion, prejudice, or personal agenda, in the most solemn of circumstances.

To succeed in this challenging practice area, I have embraced three principles, all of which have prepared me well for a role on Arizona's highest court. First, I have remained faithful to the rule of law and have advocated for courts to do the same. In the criminal context, applying the law as written promotes finality and predictability for victims and the public, while still providing the means to remedy genuinely prejudicial errors and ensure justice for defendants. In any legal context, departing from the rule of law to reach a desired result (as happens all too often across the country in death-penalty cases) diminishes the legal system's effectiveness and reliability. Judicial consistency and fidelity to the law is the bedrock of a dependable and fair justice system.

Second, I have taken seriously my role as a public servant. In these times of deep social division, it is more important than ever that those of us charged with enforcing the law do so in a manner that ensures public confidence. A prosecutor owes duties both to society and to the defendants he or she prosecutes. These duties do not evaporate on appeal. An appellate prosecutor's primary role is to defend convictions and sentences and to safeguard the finality of jury verdicts. But on occasion the system malfunctions in a way that is irremediable and, when that happens, an appellate prosecutor must not turn a blind eye. To this end, I have vigorously and successfully defended many convictions and sentences on appeal, where the law and the facts supported them. I have received many adverse rulings that were, in my view, unjustified, as well as some that were justified. And on a few rare occasions, I have learned of grave, undeniable, and prejudicial errors that could not be defended on appeal or repaired by any remedy short of resentencing. In those instances, my duties compelled me to concede that relief was warranted. Sometimes, being faithful to the rule of law requires a prosecutor to admit that, in a particular instance, the legal process did not function properly.

Third, I have learned to maintain a degree of objectivity without compromising my effectiveness as an advocate. I refrain from personalizing the cases I handle, and I scrupulously avoid becoming embroiled in acrimonious personal battles with opposing counsel. Experience has taught me that this type of personal investment blinds an attorney to the weaknesses of his or her case and compromises both advocacy and justice. An advocate with clear, unbiased eyes can anticipate and be prepared to rebut opposing arguments, but one with tunnel vision will never see those arguments coming, let alone be prepared to meet them or assess whether they have merit.

Fidelity to the law, devotion to public service, and clear-eyed objectivity, all of which have defined my practice, are essential traits for any jurist, and I would bring these traits to the Arizona Supreme Court. I would also bring the writing and analytical skills that I have honed through years of intensive appellate litigation, teaching, and training others. And I would bring my federal habeas experience, where I have seen many cases reversed by a federal court based on real or perceived state-court error. This experience has given me a unique understanding of the importance of carefully crafting legal opinions to ensure consistency and longevity.

Primarily, I ask for this appointment based on a genuine and long-standing desire to improve the legal system and to serve Arizona's residents. On a personal level, though, I look forward to the new challenges and insights a judicial appointment would bring and to engaging with complicated legal questions in various areas of the law. I look forward to applying my skills, integrity, proven work ethic, and unique perspective and experience to the important work of an Arizona Supreme Court justice.

Attachment E:
Writing Sample 1

Excerpt from Reply Brief in *Shinn v. Kayer*, United States Supreme Court No. 19–1302
Filing date: September 2, 2020

(Document is publicly available on Supreme Court website and is thus submitted unredacted)

The Ninth Circuit panel majority defied the Antiterrorism and Effective Death Penalty Act (AEDPA) in the same manner this Court condemned in *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018), and *Harrington v. Richter*, 562 U.S. 86 (2011). The majority conducted a de novo review, in the process contorting Arizona law by using an unrelated, 40-year-old case involving dissimilar facts and aggravation to dictate the outcome of Kayer's sentencing-ineffectiveness claim. Ultimately, the majority granted relief even though the state court's finding that Kayer had failed to prove prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), was—at a minimum—subject to fairminded disagreement. *See Richter*, 562 U.S. at 101–02.

Kayer minimizes the panel decision's significance and the need for review, even though twelve Ninth Circuit judges and eight states have compellingly explained the need for the Court to speak here. *See* App. 289 (Bea, J., dissenting) ("[I]t is likely time for the Supreme Court to remind us of AEDPA's requirements."); Idaho Amicus (decision creates issues of nationwide concern and impedes the very interests AEDPA was meant to protect); *see also Richter*, 562 U.S. at 103.

Kayer's remaining arguments do not militate against review but, instead, bring the panel majority's missteps into even sharper focus. Kayer attempts to confine *Richter* and *Beaudreaux* to cases involving *Strickland*'s deficient-performance prong, but he misapprehends the scope of those cases and ignores this Court's broad application of *Richter* outside the ineffective-assistance context. Kayer defends the panel majority's reliance on an unrelated and antiquated Arizona case—a mode of analysis "that is quite literally unprecedented," App. 277 (Bea, J., dissenting)—but his mistake-laden discussion

of Arizona law adds to the confusion already created by the panel majority. This confusion, in turn, highlights the negative consequences of departing from AEDPA's reasonableness standard and binding the *Strickland* inquiry to a federal court's ill-informed interpretation of state law.

This case calls for summary reversal from this Court. This Court's jurisprudence is replete with summary reversals for similar failures to comply with AEDPA. *See, e.g., Sexton*, 138 S. Ct. at 2560; *Shoop v. Hill*, 139 S. Ct. 504 (2019) (per curiam); *Kernan v. Cuero*, 138 S. Ct. 4 (2017) (per curiam); *Lopez v. Smith*, 574 U.S. 1 (2014) (per curiam). And as Justice Scalia so well explained in *Cash v. Maxwell*, keeping a watchful eye on cases like this out of the Ninth Circuit is critical, even if it requires what might otherwise look like mere error correction:

> The only way this Court can ensure observance of Congress's abridgment of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task, which we have found particularly needful with regard to decisions of the Ninth Circuit.

Cash v. Maxwell, 132 S. Ct. 611, 616–17 (2012) (Scalia, J., dissenting from denial of certiorari) (collecting cases).

I. The Ninth Circuit's Most Recent AEDPA Evasion Is Worthy of the Court's Attention.

AEDPA is not a discretionary guideline; it is a substantive and "important limitation[]" on a federal court's power to grant habeas relief. *Hill*, 139 S. Ct. at 506. Yet the panel majority failed to "determine what arguments or theories supported or … could have supported" the state court's finding of no *Strickland* prejudice, and then failed to "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102. In

other words, the majority failed to answer "the only question that matters under [28 U.S.C.] § 2254(d)(1)." *Id.* (quotations omitted).[1]

A. The Panel Majority Inverted the Mode of Analysis This Court Articulated in *Richter*.

The Petition establishes the striking similarities between *Richter*, *Beaudreaux*, and the decision here. Pet. 17–22. In each case, the Ninth Circuit failed to consider arguments or theories supporting the state court's ruling and instead found the state court's decision unreasonable merely because the Ninth Circuit reached a different conclusion on de novo review. *See Beaudreaux*, 138 S. Ct. 2558–60; *Richter*, 562 U.S. at 100–04. In both *Beaudreaux* and this case, the Ninth Circuit granted relief based on arguments never presented in state court. 138 S. Ct. at 2560. And in all three cases, there was ample room for fairminded jurists to disagree whether the state-court decisions were consistent with this Court's precedent, thus proving the decisions' reasonableness and precluding habeas relief under AEDPA. Pet. 23–25; *Beaudreaux*, 138 S. Ct. at 2559–60; *Richter*, 562 U.S. at 104–13.

The AEDPA methodology this Court articulated in *Richter* and applied in *Beaudreaux* is not limited to *Strickland*'s deficient-performance prong (which receives "double deference" under *Strickland* and AEDPA, *see Richter*, 562 U.S. at 105) or even to the ineffective-assistance context. *See* BIO 1, 17–18, 21– 22; *see also Hill*, 139 S. Ct. at 506 (citing *Richter* standard in resolving intellectual-disability claim); *Dunn v. Madison*, 138

[1] Kayer complains (at 2, 13) that Petitioner did not "articulat[e] what exactly the purported error was." But the Petition (at 16-26) was clear: the majority failed to apply AEDPA deference, instead conducting a de novo review tainted by its misunderstanding of Arizona law and using that review's results to proclaim the state court's contrary decision unreasonable, even though proper AEDPA review would have produced no relief.

S. Ct. 9, 11 (2017) (applying *Richter* standard to competency-to-be-executed claim).[2] Rather, this Court's recognition in *Richter* of the "only question that matters under § 2254(d)(1)," and its directive that courts deny habeas relief if a state-court decision is arguably correct under any theory, was a construction of AEDPA itself, untethered to either prong of *Strickland*. *Richter*, 562 U.S. at 100–04. And in fact, this Court in *Richter* addressed the prejudice prong under the standard it had pronounced. *Id.* at 111–13.

This Court did not reach *Strickland*'s prejudice prong in *Beaudreaux*, but that does not make *Beaudreaux* irrelevant. *Contra* BIO 17. This Court in *Beaudreaux* expressly applied § 2254(d)(1), and double deference was not essential to its decision; in fact, this Court did not mention double deference until the second part of its opinion, after it had already found an AEDPA violation, when it chastised the Ninth Circuit for its repeated errors. *Beaudreaux*, 138 S. Ct. at 2558–62 & n.3. The critical problem in *Beaudreaux*—as here—was the Ninth Circuit's inversion of the *Richter* standard that is applicable to all AEDPA-governed claims.[3]

[portion omitted]

C. AEDPA Precludes Habeas Relief—at a Minimum, Fairminded Jurists Could Debate Whether Kayer Had Proved *Strickland* Prejudice

In asserting that Petitioner has failed to explain "what a 'more deferential' opinion would have looked like" in this case, BIO 23-24, Kayer overlooks that Petitioner has explained

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[2] In addition to trying to ward off the import of *Richter* and *Beaudreaux*, Kayer (at 18) works to distinguish *Cuero* and *Smith*—each cited in the petition and herein as examples of this Court's summary reversals in AEDPA cases. But the specific constitutional right at issue in these cases is beside the point, which is that this Court specifically and decisively intervened to rectify the court of appeals' AEDPA violations.

[3] Kayer also relies (at 22 n.4) on *Porter v. McCollum*, 558 U.S. 30 (2009), for the proposition that the omitted humanizing evidence proves prejudice and the state court was unreasonable for concluding otherwise. But in *Porter*, the state courts, in resolving the *Strickland* claim, had failed entirely to consider certain categories of mitigation, rendering the prejudice assessment unreasonable. *Id.* at 40–44. There is no allegation of that here.

exactly what such a review should have looked like, *see* Pet. 23–25. Petitioner has established (at 23-25) why the state postconviction judge's ruling was, at a minimum, debatable among reasonable jurists.[4] And Petitioner highlighted (at 23-25) multiple reasonable theories that supported the state court's ruling. Unlike either the panel majority or Kayer, Petitioner asked and answered "the only question that matters under § 2254(d)(1)"—whether fairminded jurists could disagree that the state postconviction court's decision reasonably applied *Strickland*'s prejudice prong— and demonstrated that the decision was reasonable. *Richter*, 562 U.S. at 102 (quotations omitted).

Kayer offers no meaningful response to the multiple reasonable theories Petitioner laid out. Rather, he parrots a talking point common to capital defendants: that mental-health evidence or other humanizing-type mitigation is often found to warrant a life sentence. BIO 23. To be sure, a sentencer has discretion to weigh this type of evidence heavily, but it would not be unreasonable for a sentencer not to do so. That is particularly true here, where there are two substantial aggravating factors and Kayer's actions evidence significant planning and preparation, undermining any theory that his mental-health issues, addictions, or any other factor explains his conduct. Because AEDPA applies, the panel majority should have recognized a reasonable basis for the state court's judgment and ended its analysis there, with the denial of habeas relief.

[4] Kayer attributes to the Petition a quote that a "jury" might have disregarded mental-impairment evidence and discusses the perceived difference between judge and jury sentencing under Arizona law. BIO 19. But the word "jury" appears on the page only in a case parenthetical. *See* Pet. 25. Petitioner discussed the evidence's impact on a reasonable sentencer in general. *Id.* In any event, as previously discussed, the sentencer's identity is irrelevant to the *Strickland* analysis.

Attachment F: Writing Sample 2

Excerpt from Petition for Writ of Certiorari in *Shinn, et al. v. Ramirez, et al.*, United States Supreme Court No. 20–1009
Filing date: January 20, 2021

(Document is publicly available on Supreme Court website and is thus submitted unredacted)

INTRODUCTION

This petition presents the question this Court left open in *Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018): whether AEDPA, 28 U.S.C. § 2254(e)(2), bars evidentiary development on a procedurally defaulted habeas claim that passes through the *Martinez v. Ryan*, 566 U.S. 1 (2012), gateway to merits review. The *Ramirez* and *Jones* cases are ideal vehicles for this Court to answer that question in the affirmative and to clarify that § 2254(e)(2) imposes an independent bar to evidentiary development, unaffected by *Martinez*, that applies to all habeas claims reviewed on the merits.

In *Martinez*, this Court held that a prisoner may, in certain circumstances, invoke post-conviction counsel's ineffectiveness as cause to excuse the procedural default of a substantial trial-ineffectiveness claim. 566 U.S. at 9, 14, 18. If a prisoner carries his burden under *Martinez*, that accomplishment "merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Id.* at 17. *Martinez* thus operates as a gateway to merits review—nothing more, nothing less. Once a default is excused, *Martinez*'s work is done, its relevance ends, and the rules generally applicable to merits review take over and govern the availability of habeas relief.

One of those rules—imposed by Congress through AEDPA—bars federal evidentiary development for prisoners who did not diligently develop their claims in state court. *See* 28 U.S.C. § 2254(e)(2). The rule is subject to two narrow, statutorily defined exceptions, neither of which have been invoked here. *Id.* Post-conviction counsel's ineffectiveness is not one of these exceptions, *see id.*; to the contrary, a prisoner is bound by his attorney's negligence in failing to develop the state-court record and such negligence

activates the statutory bar. *See Holland v. Jackson*, 542 U.S. 649, 653 (2004); *Williams v. Taylor*, 529 U.S. 420, 432–33, 438–40 (2000).

Here, two separate Ninth Circuit panels concluded that § 2254(e)(2) does not apply to a merits review conducted after a claim has passed through *Martinez*'s narrow gateway. In *Jones*, the panel held that enforcing the statute would frustrate this Court's concern in *Martinez* that trial-ineffectiveness claims receive review by one court, because such claims often require expanded records to resolve. App 4–5, 17–20. And in *Ramirez*, the panel concluded—without mention or acknowledgement of § 2254(e)(2)—that the prisoner was "entitled" to additional factual development of his claim's merits solely because he had excused that claim's procedural default under *Martinez*. App. 248. The panel reasoned that the prisoner had been "precluded" from state-court factual development "because of his post-conviction counsel's ineffective representation." *Id.* (citing *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) (plurality opinion of Fletcher, J.)).

Judge Daniel Collins, joined by seven other Ninth Circuit judges, dissented from the denial of en banc rehearing in each case. App. 185–212, 349–76. Judge Collins faulted the panels for overlooking the fact that procedural default and § 2254(e)(2) are separate and unrelated obstacles to habeas relief; engrafting an equitable rule onto a statute intended to limit judicial authority; and ignoring this Court's governing precedent in *Holland* and *Williams*, which hold that post-conviction counsel's ineffectiveness triggers § 2254(e)(2)'s statutory bar. *Id.* Judge Collins concluded that *Holland* and *Williams* cannot be reconciled with the panels' use of that same ineffectiveness to excuse compliance with the statute. *Id.*

Judge Collins and his seven colleagues were correct. The *Ramirez* and *Jones* panels declined to follow § 2254(e)(2) because they considered the statute an impediment

to effectuating *Martinez*. The panels thus elevated a court-created equitable rule over a statute that Congress adopted specifically to restrict judicial discretion and to abolish pre-AEDPA equitable exceptions. *See Williams*, 529 U.S. at 433–34. Permitting a court to decide whether it will or will not comply with Congressional limitations on its power affronts separation-of-powers principles. And the decisions jeopardize other provisions of AEDPA, such as 28 U.S.C. § 2254(d)(1), by serving as precedent for invoking equitable principles to bypass important statutory restrictions on the power to grant habeas relief.

Further, as *Ayestas* shows, the § 2254(e)(2)/*Martinez* relationship is a recurring matter of national concern. This Court's intervention is critical at this juncture, as the panel decisions threaten irreparable harm to the interests in comity, finality, and federalism AEDPA was meant to protect. *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

This Court should thus grant certiorari to address the important question presented. This Court should reaffirm that procedural default and § 2254(e)(2) are separate and distinct bars to habeas relief, clarify that a claim excused from procedural default under *Martinez* is still subject to the *separate* § 2254(e)(2) bar, and remind lower courts that they are not free to disregard binding provisions of AEDPA merely because they believe those provisions reduce a court-created doctrine's effectiveness.

[portion omitted]

B. A statutory command such as § 2254(e)(2) cannot be overridden merely to advance a judge-made equitable doctrine.

[portion omitted]

The *Ramirez* and *Jones* panels declined to apply § 2254(e)(2) because, in their view, the statute prevented *Martinez* from being fully effectuated. The *Jones* panel expressly concluded that limiting a post-*Martinez* merits review to the state-court record

would render *Martinez* "'a dead letter'" because, when *Martinez* applies, the defaulted claims generally were not developed in state court due to post-conviction counsel's failures. App. 17–20 (quoting *Detrich*, 740 F.3d at 1447 (opinion of Fletcher, J.)). And the *Ramirez* panel found the prisoner "entitled" to evidentiary development on his claim's merits merely because the claim had passed through *Martinez*'s gateway. App. 248 (citing *Detrich*, 740 F.3d at 1247 (opinion of Fletcher, J.)). In effect, the panels concluded (contrary to *Martinez*'s plain language, *see* § I(C), *infra*) that the *Martinez* procedural-default exception created a right to a thorough merits review on a well-developed record, and that this right was superior to and therefore trumped the statute.

But as Judge Collins explained, a court cannot ignore a statutory command like § 2254(e)(2) merely to effectuate a judge-made equitable doctrine like *Martinez*. App 189, 203–12. And allowing a court to decline at will to comply with a statute limiting its authority presents a stark separation-of-powers violation. *See Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (courts have authority to create exceptions to "judge-made … doctrines" but, with statutory provisions, "courts have a role in creating exceptions only if Congress wants them to"); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315 (1981) (court cannot "judicially decree[] what accords with common sense and the public weal when Congress has addressed the problem") (quotations omitted); *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981) ("[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.").

This is particularly true where § 2254(e)(2) is concerned. As previously discussed, Congress enacted § 2254(e)(2) in part to abolish the pre-AEDPA *Keeney* cause-and-

prejudice standard, which is coterminous with the cause-and-prejudice standard at issue in *Martinez*. *See Williams*, 529 U.S. at 433. The decisions here effectively restore the pre-AEDPA standard that Congress eliminated. Even worse, the decisions *expand* the pre-AEDPA standard to include a basis for excusing a lack of factual development that even *Keeney* did not contemplate: state counsel's ineffectiveness. *See Keeney*, 504 U.S. at 3–11. The panels' reasoning on this point cannot be reconciled with *Holland*, 542 U.S. at 434–34, and *Williams*, 429 U.S. at 432–34, which recognize that the very fact that establishes the *Martinez* exception (post-conviction counsel's negligence) triggers § 2254(e)(2)'s general bar. [footnote omitted]

"Where, as here, Congress has specifically modified and limited pre-existing equitable doctrines that otherwise would have applied, [a court has] no authority to ignore those limitations." App. 206 (Collins, J., dissenting) (citing *McQuiggin v Perkins*, 569 U.S. 383, 395–96 (2013)); *see also Ross*, 136 S. Ct. at 1857; *Nw. Airlines Inc.*, 451 U.S. at 97. This maxim applies with special force where an exhaustion statute like § 2254(e)(2) is involved. *See* App. 206–07 (Collins, J., dissenting) (citing *Ross*, 136 S. Ct. at 1857); *Williams*, 529 U.S. at 436–37. The Ninth Circuit's invocation of an equitable rule applicable to procedural default to free itself from a statute governing evidentiary development on the merits warrants certiorari.