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# NOTE

## *SHINN V. RAMIREZ*: WHEN "INNOCENCE IS NOT ENOUGH"

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In 2018, U.S. District Court Judge Timothy Burgess overturned Barry Jones's felony murder conviction and death sentence, ruling that but for the constitutionally deficient performance of trial counsel, jurors likely "would not have convicted [Barry Jones] of *any* of the crimes with which he was charged and previously convicted."[1] The Ninth Circuit Court of Appeals twice upheld Judge Burgess's core findings.[2] But in *Shinn v. Ramirez*,[3] a pair of consolidated cases, the U.S. Supreme Court ripped

[*] Juris Doctor Candidate, Oklahoma City University School of Law, May 2025. I want to thank the OCU Law Review and my faculty sponsor, Professor Maria Kolar—working on this Note with you was a true honor, and your feedback was invaluable. Above all, I would like to dedicate this Note to my mom, who has always believed in me, and to my husband, Richard, who remains by biggest champion, even while facing the most challenging years of our lives. Their unwavering love and support have truly made everything possible for me. I also dedicate this Note to all the fearless advocates who tirelessly fight to correct such grave miscarriages of justice. And to the wrongfully convicted and their loved ones—never give up.

1. Jones v. Ryan, 327 F. Supp. 3d 1157, 1218 (D. Ariz. 2018).

2. *See* Shinn v. Ramirez, 596 U.S. 366, 374 (2022) (citing Jones v. Shinn, 943 F.3d 1211, 1220–22 (9th Cir. 2019)).

3. *Shinn*, 596 U.S. at 366.

away the relief granted to Jones, despite the compelling evidence of his innocence, and thrust him back on the merciless execution track.[4] Simply put, the *Shinn* Court held, in a 6-3 decision, that the evidentiary hearing that unearthed the crucial evidence in Jones's case should have never happened.[5] The Court thereby effectively extinguished Judge Burgess's findings, which Jones's life depended on, because federal courts "lack the competence and authority to relitigate a State's criminal case."[6] As counsel for Arizona chillingly and bluntly stated at oral argument: "[I]nnocence is not enough."[7]

For capital defendants, such devastating legal blows are often the final tragic chapter in an already nearly impossible postconviction battlefield. But a year after Barry Jones was left to die by the highest Court in the land, his harrowing legal tale proved to be the rare exception. On June 15, 2023, one year after the U.S. Supreme Court's decision, Jones finally walked free after serving twenty-nine years in prison for a crime that he always maintained he did not commit.[8] Hence, Jones's freedom serves as a powerful symbolic rebuke of the Court's decision in *Shinn*. It underscores what Justice Sotomayor described in her dissent as a "perverse" and "illogical" decision,[9] as well as the sheer brutality of America's broken death penalty system and just how wrong the Court got it here. Far from what Judge Learned Hand once dismissed as the "unreal dream" of the "ghost of the innocent man convicted,"[10] the *Shinn* majority had, in fact, sanctioned the execution of an innocent man, who is now walking free among us.[11]

4. *Id.* at 384, 391.

5. *Id.* at 382.

6. *Id.* at 390.

7. Transcript of Oral Argument at 22, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 20-1009) (statement by counsel for Petitioner), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1009_5j31.pdf [https://perma.cc/Z8GY-HX27].

8. Michael Levenson, *Arizona Man Is Freed After 28 Years on Death Row*, THE N.Y. TIMES (June 16, 2023), https://www.nytimes.com/2023/06/16/us/arizona-barry-jones-conviction-overturned.html.

9. *Shinn*, 596 U.S. at 392 (Sotomayor, J., dissenting).

10. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.").

11. *See* Levenson, *supra* note 8.

## I.

Critical to understanding *Shinn* is the complex doctrinal backdrop against which it was decided. Specifically, the Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel at trial and for direct appeal.[12] Hence, when criminal defendants receive *ineffective* assistance of counsel, they may bring an ineffective assistance of counsel claim on appeal.[13] But in a subset of states like Arizona, state law bars capital defendants from filing ineffective assistance of counsel claims until their postconviction appeal, which is *after* the direct appeal, where there is *no constitutional right to counsel*.[14] Thus, capital defendants in these states have little recourse if their appointed ineffective postconviction counsel fails to raise or inadequately raises their ineffective assistance of trial counsel claims.[15] The doctrine of "procedural default"[16] further compounds matters, as it renders claims that were not previously raised in state court forever barred from federal habeas review.[17] In other words, a state like Arizona could execute a prisoner despite their egregious ineffective assistance of trial counsel claim never being reviewed by *any* court simply because procedural rules did not allow it.[18] The consequences of such state procedural frameworks are particularly dire given the fact that an ineffective assistance of trial counsel claim is "the most common federal constitutional claim raised in capital habeas petitions."[19]

However, the Supreme Court's 2012 decision in *Martinez v. Ryan*[20] carved out a narrow equitable exception to these strict habeas procedural rules to ensure that the subset of prisoners in states like Arizona who had been provided with two constitutionally ineffective lawyers both at trial and for the postconviction appeal would have *at least* one meaningful opportunity to raise a claim of ineffective assistance of trial counsel before

12. Murray v. Giarratano, 492 U.S. 1, 7 (1989).

13. *See generally* Strickland v. Washington, 466 U.S. 668 (1984).

14. *See generally* Martinez v. Ryan, 566 U.S. 1 (2012).

15. *Id.*

16. *See* Wainwright v. Sykes, 433 U.S. 72, 84 (1977) (explaining the *procedural default* doctrine bars federal habeas review unless state prisoners present their habeas corpus claims to state courts in compliance with state procedural rules).

17. Shinn v. Ramirez, 596 U.S. 366, 378 (2022).

18. *Martinez*, 566 U.S. at 7.

19. Brief of Fed. Def. Cap. Habeas Units as Amici Curiae in Support of Respondents at 4, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 20-1009).

20. *Martinez*, 566 U.S. at 1.

their sentence could be carried out.[21] In essence, *Martinez* recognized that in states like Arizona, the postconviction proceeding functions as "the equivalent of a prisoner's direct appeal."[22] Therefore, as an equitable matter in these limited contexts, *Martinez* extended the traditional rule for direct appeal counsel and applied it to postconviction counsel, whereby ineffective assistance in failing to raise an ineffective assistance of trial counsel claim can constitute "cause" to excuse a procedural default.[23]

Thus, the *Martinez* Court held that if state law only allows "claims of ineffective assistance of trial counsel [to] be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."[24] The 7-2 majority decision in *Martinez*, joined by Chief Justice Roberts and Justice Alito, was of critical importance because at bottom—it eliminated the injustice of allowing prisoners to be executed in violation of their Sixth Amendment right to counsel.[25]

Importantly, the *Martinez* Court noted the "particular concern" posed by claims of ineffective assistance of counsel because "the right to counsel is the foundation for our adversary system" and that "[t]he right to effective assistance of counsel at trial is a bedrock principle in our justice system."[26] *Martinez* likewise emphasized the fundamental importance of effective *appellate* counsel to a prisoner's ability to challenge the effectiveness of his trial counsel because such claims "often require investigative work and an understanding of trial strategy," which "often turns on evidence outside the trial record."[27]

A year later, the Court re-affirmed and extended *Martinez*'s core holding in *Trevino v. Thaler*.[28] Critically, *Martinez* and *Trevino* explicitly acknowledged that there would be further evidentiary development of the ineffective assistance of counsel claim if the procedural default were

21. *Id.* at 14-15.
22. *Id.* at 11.
23. *Id.* at 13-15; *see also Shinn*, 596 U.S. at 400 (Sotomayor, J., dissenting).
24. *Martinez*, 566 U.S. at 17.
25. *Id.* at 3, 9.
26. *Id.* at 12.
27. *Id.* at 11-12.
28. Trevino v. Thaler, 569 U.S. 413, 429 (2013) (extending *Martinez* to apply where a State's procedural framework makes it technically possible, but "virtually impossible," to raise ineffective assistance of counsel claims on direct appeal).

"excused."[29] The *Martinez* Court also recognized that prisoners are in "no position" to develop the extra-record evidence necessary for an ineffective-assistance of counsel claim.[30] Notably, allowing such evidentiary development was not a controversial result, as evidenced by the fact that not a single justice in the *Martinez* majority or dissent contemplated otherwise.[31] Hence, the *Martinez-Trevino* framework established a vital lifeline intended to prevent a prisoner in a state like Arizona, who had been appointed "two . . . constitutionally ineffective lawyers," from being "trap[ped] . . . in a procedural double-bind through which they would be consigned to prison' - even death - 'without a court ever hearing the merits of their constitutional claim.'"[32]

In the decade following *Martinez*, federal courts applied the exception "narrowly and only in extraordinary circumstances."[33] Specifically, in a nine-year sample of three states, federal courts adjudicated 1,200 habeas petitions raising *Martinez* claims, but these courts granted habeas relief on *Martinez*-related claims in only thirty-eight cases, of which only three were capital cases.[34] And out of these thirty-eight cases, only nineteen received an evidentiary hearing.[35] Thus, the "less than two percent"[36] of cases that invoked *Martinez* and received an evidentiary hearing demonstrates that the lower federal courts are "perfectly capable of policing *Martinez*'s limits"[37] and that, contrary to the later *Shinn* majority's unfounded suggestion otherwise, *Martinez* does not imperil principles of "finality, comity, and the orderly administration of justice."[38]

But what the Court granted in *Martinez*, it eviscerated in *Shinn*, perversely holding that while prisoners may still bring *Martinez* claims, the Antiterrorism and Effective Death Penalty Act (AEDPA)[39] bars

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29. *Martinez*, 566 U.S. at 8-10.
30. *Id.* at 12.
31. *See* Brief of Fed. Def. Cap. Habeas Units as Amici Curiae in Support of Respondents, *supra* note 19, at 7.
32. *Id.* at 12 (citing Mitchell v. Genovese, 974 F.3d 638, 651-52 (6th Cir. 2020)) (citation omitted).
33. Brief of Amici Curiae Habeas Scholars in Support of Respondents at 5, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 20-1009).
34. *Id.*
35. *Id.*
36. Shinn v. Ramirez, 596 U.S. 366, 407 (2022) (Sotomayor, J., dissenting).
37. *Id.* at 408 (Sotomayor, J., dissenting).
38. *Id.* at 379 (quoting Dretke v. Haley, 541 U.S. 386, 388 (2004)).
39. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 *et seq.*

prisoners from developing the evidence necessary to support the claim.[40] In doing so, the *Shinn* majority effectively slammed the courthouse doors on countless prisoners, showcasing a clear prioritization of "finality" and "comity" over protecting the bedrock Sixth Amendment right to effective assistance of counsel and guarding against the most extreme malfunctions in state criminal justice systems.[41]

## II.

Barry Jones's decades-long nightmare began early on the morning of May 2, 1994, when he drove his girlfriend's four-year-old daughter, Rachel Gray, "to the hospital, where she was pronounced dead on arrival."[42] The medical examiner ruled Rachel's cause of death to be an abdominal blow that ruptured her small intestine, resulting in a fatal peritonitis infection.[43] At trial, prosecutors relied on a shoddy police investigation that was further stunted by the tunnel vision of the detectives, along with flimsy circumstantial evidence, junk science, and dubious expert testimony.[44] The State's case, compounded by the failures of trial counsel, led the jury to convict Jones of "sexual assault, three counts of child abuse, and [the] felony murder" of Rachel Gray.[45] Consequently, Jones's death sentence was plagued from the start by many of the known hallmarks of a wrongful conviction.[46]

Jones's conviction and death sentence were then automatically appealed to the Arizona Supreme Court, as required by state procedure.[47] But in Arizona, direct appeals are limited to claims of error based strictly on the trial record.[48] In other words, extra-record claims, like an ineffective

40. *Shinn*, 596 U.S. at 387-88.
41. *Id.* at 407, 410 (Sotomayor, J., dissenting).
42. *Id.* at 373-74 (citation omitted).
43. *Id.* at 374.
44. *See* Jones v. Ryan, 327 F. Supp. 3d 1157, 1198-1218 (D. Ariz. 2018).
45. *Shinn*, 596 U.S. at 374 (citation omitted).
46. *See* MICH. STATE UNIV. COLL. L., *2023 Annual Report*, NAT'L REGISTRY EXONERATIONS, Mar. 18, 2024, https://www.law.umich.edu/special/exoneration/Documents/2023%20Annual%20Report.pdf.
47. Office of the Fed. Pub. Def. for the State of Ariz., Comment to Office of Legal Policy in Opposition to the State of Arizona's Application for Opt-in Under 28 U.S.C. § 2256(a) (Feb. 22, 2018), https://downloads.regulations.gov/DOJ-OLP-2017-0009-0126/attachment_1.pdf.
48. *Id.*

assistance of counsel claim based on evidence outside the trial record, cannot be raised on direct appeal. Therefore, the second appeal stage—postconviction—is critical because it is the first and *only* opportunity for appellate counsel to fully investigate, discover, and present these "extra-record claims."[49] Hence, the postconviction appeal is especially vital in states like Arizona for uncovering wrongful convictions and ensuring that capital defendants' constitutional claims are properly preserved for later federal habeas review.[50]

However, Jones's postconviction appeal was essentially squandered by state-appointed postconviction counsel who lacked the minimum qualifications set by Arizona state law for appointment in a capital case.[51] For example, Jones's postconviction counsel twice moved to "appoint an investigator under the wrong state provision . . . and failed to properly support [the] motion both times."[52] Moreover, Jones's postconviction counsel repeated trial counsel's original failures by again failing to conduct any investigation that could support potential postconviction claims and help prove that Jones did not rape and murder Rachel Gray.[53] Critically for Jones, postconviction counsel also failed to develop and raise an ineffective assistance of trial counsel claim concerning trial counsel's failure to "adequately investigate[] and present[] medical and other expert testimony to rebut the State's theory" of how and when Rachel died.[54] Consequently, this meant that Jones's ineffective assistance of trial counsel claim was "procedurally defaulted" and barred from federal habeas review.[55]

For Jones, it was not until federal habeas counsel was appointed to represent him that the desperately-needed investigation into his case was finally conducted.[56] In doing so, federal habeas investigators uncovered trial counsel's egregious failure to investigate the key facts of Jones's case prior to his capital murder trial.[57] Specifically, trial counsel did not investigate the police work or the obvious alternative suspects and possible

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49. *Id.* at 16.
50. *Id.*
51. *Shinn*, 596 U.S. at 393-94 (Sotomayor, J., dissenting).
52. *See* Brief for Respondents at 10, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 20-1009).
53. *Id.*
54. *Id.* at 15.
55. *Id.* at 11-12; *see also Shinn*, 596 U.S. at 374.
56. *See* Brief for Respondents, *supra* note 52, at 11.
57. *Id.*

explanations for Rachel's death.[58] For example, Rachel's mother was known for physically abusing her children, and Rachel's older sister, as well as the other children at the trailer park, had reported that a little boy had hit Rachel in the stomach with a "stick" or a "metal bar" the day before her death.[59] Likewise, there were questions concerning sexual allegations regarding Rachel's older brother and the abusive former boyfriend of Rachel's mother, with whom the family had been living with a month prior to Rachel's death.[60] Trial counsel also failed to investigate the State's flawed medical evidence, such as the State's timeline regarding when Rachel's "sexual assault" and fatal injury occurred.[61] Trial counsel also failed to "conduct [a] sufficient mitigation investigation for sentencing," which is crucial in a death penalty case.[62] But because Jones's state postconviction counsel had procedurally defaulted his ineffective assistance of trial counsel claim regarding this failure to investigate, federal habeas counsel would now have to satisfy the onerous "cause-and-prejudice" test, or pass through the even higher "fundamental miscarriage of justice" gateway, in order to present this ineffective assistance of trial counsel claim in a federal habeas petition.[63] Notably, the "cause-and-prejudice" path was *only* even possible for Jones because of the *Martinez* decision.[64]

In 2017, the federal district court in Jones's case held a *Martinez* hearing to determine whether Jones had, in fact, suffered two levels of constitutionally ineffective representation.[65] First, this required establishing that Jones had received constitutionally ineffective representation at trial.[66] And second, it required showing that

58. *Id.*

59. Jones v. Ryan, 327 F. Supp. 3d 1157, 1188-89 (D. Ariz. 2018).

60. *Id.* at 1189.

61. *See* Brief for Respondents, *supra* note 52, at 11.

62. *Id.*

63. *Id.* at 11-12; *see also* Wainwright v. Sykes, 433 U.S. 72, 84 (1977) (explaining the "cause and prejudice" standard for excusing a procedural default); *see also* Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (stating the "fundamental miscarriage of justice" exception requires showing that a "constitutional violation has probably resulted in the conviction of one who is actually innocent"); *see also* Schlup v. Delo, 513 U.S. 298, 327 (1995) (explaining the fundamental miscarriage of justice exception requires prisoners to show that but for the constitutional error, it is "more likely than not that no reasonable juror" would have found the prisoner guilty beyond a reasonable doubt).

64. *See generally* Martinez v. Ryan, 566 U.S. 1, 15 (2012).

65. Brief for Respondents, *supra* note 52, at 12.

66. *Id.*

postconviction counsel was also ineffective for failing to raise in Jones's postconviction appeal, a claim regarding this ineffectiveness of his trial counsel.[67] For Jones, this meant satisfying the onerous ineffective assistance of counsel standard as set forth in *Strickland v. Washington*,[68] not just once, but *twice*. Specifically, under the two-part *Strickland* test, a defendant must first show that "counsel's performance was deficient," and second, that this deficiency "prejudiced the defense" to the point of depriving the defendant of a fair trial.[69] The standard for adequate attorney performance is simply "reasonableness" under prevailing professional norms.[70] Hence, *Strickland* is a highly deferential standard, and a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[71] Thus, to satisfy the prejudice prong, a defendant must show that, considering the "totality of the evidence,"[72] there is "a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different."[73] Consequently, a defendant must satisfy both prongs in order to demonstrate that their "conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."[74]

*Strickland* claims rarely prevail.[75] For example, one study of over 2,500 *Strickland* claims found that only four percent were granted.[76] Notably, this notoriously demanding "ineffectiveness" standard has contributed to a distorted perception of what qualifies as constitutionally *sufficient* defense counsel. Illustrating this are the scores of capital cases haunted by disturbing tales of lawyers deemed not constitutionally "ineffective" despite being drunk, high, or even asleep in the courtroom.[77] Needless to say, when the intended constitutional safety net of defense

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67. *Id.*
68. *See* Strickland v. Washington, 466 U.S. 668 (1984).
69. *Id.* at 687.
70. *Id.* at 688.
71. *Id.* at 689 (citation omitted).
72. *Id.* at 695.
73. *Id.* at 694 (emphasis added).
74. *Id.* at 687.
75. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W.L. REV. 263, 323-24 (2009).
76. *Id.*
77. *See* Ken Armstrong, *What Can You Do With a Drunken Lawyer?*, THE MARSHALL PROJECT (Dec. 10, 2014, 10:50 AM), https://www.themarshallproject.org/2014/12/10/what-can-you-do-with-a-drunken-lawyer [https://perma.cc/V649-E95Y].

counsel crumbles, it provides fertile ground for devastating breakdowns in the adversarial process upon which the life of the capital defendant quite literally depends.

Unsurprisingly, the National Registry of Exonerations "lists a staggering 779 exonerations since 1989 in which 'inadequate legal defense' was the sole or a contributing factor in the [wrongful] conviction."[78] Likewise, in a review of the first 255 DNA exonerations, the Innocence Project found that fifty-four exonerees (about one in five) had raised claims of ineffective assistance of counsel.[79] Yet, the rate of error due to inadequate defense counsel is likely much higher, due in part to the difficult standard set in *Strickland*, but also because of the unique impact this type of failure has on a criminal case. Indeed, many of the other known causes of wrongful convictions, such as faulty eyewitness identifications, false confessions, junk science, perjured witnesses, and official misconduct, would not be allowed to so tragically poison a trial *but for* the co-occurring failure of constitutionally inadequate defense counsel.[80] As Professor Adele Bernhard explains, "it [is] defense counsel's responsibility to protect [the innocent] from the mistakes of others: from witnesses' misidentifications, police officers' rush to judgment, and prosecution's reluctance to reveal potentially exculpatory material."[81]

For Jones, the *Martinez* hearing took place over the course of seven days.[82] It included testimony from "no fewer than 10 witnesses, including defense trial counsel, defense postconviction counsel, the lead investigating detective, three forensic pathologists, an emergency medicine and trauma specialist, a biomechanics and functional human anatomy expert, and a crime scene and bloodstain pattern analyst."[83] The *Shinn* majority later criticized this hearing as a "wholesale relitigation of Jones' guilt."[84] In doing so, the Court failed to appreciate both the

78. Brief of Fed. Def. Cap. Habeas Units as Amici Curiae in Support of Respondents, *supra* note 19, at 12; *see also* MICH. STATE UNIV. COLL. L., *supra* note 46.

79. EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 1, 3 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf [https://perma.cc/7DSA-8B8Z].

80. *Id.* at 1.

81. ADELE BERNHARD, EFFECTIVE ASSISTANCE OF COUNSEL, WRONGLY CONVICTED: PERSPS. ON FAILED JUST. 236 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

82. Shinn v. Ramirez, 596 U.S. 366, 388 (2022).

83. *Id.* (citation omitted).

84. *Id.*

magnitude of the breakdown in the adversarial process that had occurred and the significance of the newly discovered evidence, which seriously undermined the State's underlying case against Jones.[85]

In particular, the timing of Rachel's fatal injury had always been the linchpin of the State's case against Jones.[86] Pima County Sheriff's Detective Sonia Pesqueira and medical examiner Dr. John Howard were the primary architects of the State's timeline, which posited that Rachel's sexual assault and fatal injuries were inflicted twelve hours before her death.[87] Conveniently, this timeline coincided with a very specific two-hour window during which Rachel was known to have been alone with Jones.[88] But expert testimony elicited at the federal habeas evidentiary hearing established that Rachel's fatal injury "could not possibly have been inflicted on the day prior to her death."[89] Rather, the medical experts called by Jones's attorneys concluded that Rachel's fatal injury "occurred *at least* 48 hours (and probably many more hours) before her death."[90] Moreover, the "prosecution's key bruise evidence," which went totally unchallenged at trial, likewise "turn[ed] out to be scientifically unsupportable and untrue."[91] In part, this is because the forensic community has recognized that a "visual determination of the age of any bruise," as Dr. Howard did, is "very inexact [i.e., inaccurate], and should not be done."[92] More importantly, there were several legitimate explanations for Rachel's injuries.[93] Notably, Rachel's bruising and vaginal bleeding were consistent with the final stages of peritonitis and "disseminated intravascular coagulation . . . which is a cellular process the body experiences when in shock . . . during the death process."[94]

Dr. Howard's timeline between injury and death proffered at trial was further undermined when it was revealed that he gave totally inconsistent testimony in the trial of Rachel Gray's mother—just weeks before Jones's

85. *Id.* at 408 (Sotomayor, J., dissenting).
86. Brief for Respondents, *supra* note 52, at 9.
87. Liliana Segura, *Arizona Prosecutors Double Down on Murder Theory as the Evidence Crumbles Around Them*, THE INTERCEPT (Feb. 9, 2018, 12:21 PM), https://theintercept.com/2018/02/09/arizona-death-row-barry-jones-evidentiary-hearing/ [https://perma.cc/S8J7-X4VE].
88. *Id.*
89. Brief for Respondents, *supra* note 52, at 12.
90. Jones v. Ryan, 327 F. Supp. 3d 1157, 1190 (D. Ariz. 2018) (emphasis added).
91. Brief for Respondents, *supra* note 52, at 13 (citation omitted).
92. Jones v. Ryan, 327 F. Supp. 3d 1157, 1193 (D. Ariz. 2018).
93. *Id.* at 1188-95.
94. *Id.* at 1193-94 (citation omitted).

capital murder trial.[95] In that separate trial, Dr. Howard testified that Rachel's injury *could* have occurred up to twenty-four hours or more prior to her death, i.e., prior to the window of time during which she was alone with Jones.[96] At one point during Jones's habeas evidentiary hearing, Judge Burgess actually asked Dr. Howard: "You understand that in these trials there was a lot at stake, right?"[97] In doing so, Judge Burgess highlighted the troublesome nature of Dr. Howard's shockingly inconsistent testimony.

Compounding this now debunked fatal injury timeline was the shoddy police investigation led by Detective Pesqueira.[98] At the habeas evidentiary hearing, twenty-two years after Arizona sent Jones to death row, it became disturbingly clear that Pesqueira had failed to investigate various alternative suspects and neglected to follow critical leads.[99] In particular, Pesqueira failed to even look for the clothing worn by Rachel and Jones during the time that the State alleged the rape and fatal beating had occurred.[100] On this point, Pesqueira was forced to concede that she "could not remember any sexual assault case where there was not a documented effort to identify and locate the victim's clothing."[101] Among the many other alarming revelations, investigators for Jones discovered that Pesqueira had conducted her own "examination" of Rachel's body a day before the scheduled autopsy.[102] Hence, the initial conclusions drawn by Pesqueira evidently shaped her personal theory of the crime, which she then sought to reinforce, at the expense of simply *investigating* what truly happened to Rachel Gray.[103]

Jones's trial attorneys also testified at the habeas evidentiary hearing regarding their own respective failures in their defense of Jones. Chief among these failures was their decision to call only Jones's twelve-year-old daughter to the stand at trial, while neglecting to develop the necessary evidence or call a single expert witness to rebut the State's timeline and medical testimony.[104] In response to trial counsel's admitted failures, the

95. *See* Segura, *supra* note 87.
96. *Id.*
97. *Id.*
98. *Id.*; *see also* Brief for Respondents, *supra* note 52, at 11-15.
99. *See* Segura, *supra* note 87; *see also* Brief for Respondents, *supra* note 52, at 13.
100. Brief for Respondents, *supra* note 52, at 13.
101. *Id.*
102. Segura, *supra* note 87.
103. *Id.*
104. Jones v. Ryan, 327 F. Supp. 3d 1157, 1169 (D. Ariz. 2018).

State asserted that Jones had nonetheless received constitutionally *sufficient* representation at trial.[105] Arizona simply doubled down on its case against Jones, resuscitating dubious prosecution theories and recasting inexcusable omissions.[106]

Despite the *Shinn* majority's later characterization of the "case" against Jones,[107] the habeas evidentiary hearing revealed the gaping flaws in Jones's conviction. Hence, Judge Burgess concluded that "cause" and "prejudice" did, in fact, exist under *Martinez* to excuse postconviction counsel's procedural default of Jones's substantial ineffective assistance of trial counsel claim.[108] Likewise, in considering the merits of that claim, Judge Burgess held that Jones's trial counsel's lack of investigation "pervaded the entire evidentiary picture" of Jones's convictions, rendering the result of Jones's trial "fundamentally unreliable."[109] Judge Burgess further concluded: "Had [Jones's] counsel adequately investigated and presented medical and other expert testimony to rebut the State's theory that [Jones] beat and sexually assaulted Rachel . . . there is a reasonable probability that the jury would not have unanimously convicted [Jones] of any of the counts with which he was charged."[110] Thus, Judge Burgess granted habeas relief to Jones with respect to all of the charged counts and ordered Arizona to retry or release Jones immediately.[111]

But Jones's glimmer of potential freedom via this hard-won victory proved fleeting, as the State signaled its determination to reinstate Jones's convictions.[112] In particular, the Arizona Attorney General's Office appealed to the Ninth Circuit Court of Appeals, essentially seeking to undo Judge Burgess's order granting broad habeas relief.[113] Steadfastly, the State invoked procedural bar and advanced the same arguments that had failed to persuade Judge Burgess at the evidentiary hearing.[114] Then, foreshadowing what was to come, Arizona argued that under the

105. *Id.* at 1168.
106. *Id.*
107. Shinn v. Ramirez, 596 U.S. 366, 373-74 (2022).
108. *Jones*, 327 F. Supp. 3d at 1163.
109. *Id.* at 1209.
110. *Id.* at 1211.
111. *Id.* at 1218.
112. *Shinn*, 596 U.S. at 374.
113. *Id.*
114. *Id.*

AEDPA,[115] Jones was not even entitled to the evidentiary hearing granted by Judge Burgess.[116]

## III.

At the Ninth Circuit oral argument in Jones's case, the discomfort of the three-judge panel was on full display.[117] Like Judge Burgess, the panel was unimpressed with the State's attempts to whitewash the new evidence developed at the evidentiary hearing.[118] At one point, responding to Arizona's shifting evidentiary explanations, Circuit Judge Watford interjected: "[Y]ou're now asking us to hypothesize an entirely different trial that never occurred."[119] Likewise, regarding the problematic fatal injury timeline, Circuit Judge Clifton noted: "[W]e're close to the O.J. anniversary and [if] things don't fit, you got to acquit. Right?"[120]

The panel's bewilderment continued as Arizona then pivoted to its AEDPA argument. In particular, counsel for Arizona argued that Judge Burgess overstepped his bounds because § 2254(e)(2) of the AEDPA prohibits federal courts from holding evidentiary hearings on claims that were not previously developed in state courts.[121] Thus, counsel for Arizona continued, while Judge Burgess could consider the newly developed evidence for the purpose of evaluating the procedural default issue, Jones was not entitled to use that same evidence to *prove* the merits of the underlying ineffective assistance of counsel claim.[122] Circuit Judge Clifton interjected:

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115. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 *et seq.*

116. Brief for Petitioners at 19-22, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 20-1009).

117. *See generally* Oral Argument, Jones v. Ryan, 52 F.4th 1104 (9th Cir. 2019) (No. 18-99006), http://www.ca9.uscourts.gov/media/audio/?20190620/18-99006/ [https://perma.cc/R67A-C2V8]; *see also* Liliana Segura, *Intent On Restoring His Conviction And Death Sentence, Arizona Reinvents Its Case Against Barry Jones*, THE INTERCEPT (Aug. 13, 2019, 7:00 AM), https://theintercept.com/2019/08/13/arizona-death-penalty/ [https://perma.cc/LW9A-PUUJ].

118. Segura, *supra* note 117.

119. Oral Argument at 20:47, Jones v. Ryan, 52 F.4th 1104 (9th Cir. 2019) (No. 18-99006) (statement of Watford, J.), https://www.ca9.uscourts.gov/media/audio/?20190620/18-99006/ [https://perma.cc/R67A-C2V8].

120. *Id.* at 4:23 (statement of Clifton, J.).

121. *Id.* at 1:02:40 (statement of Arizona).

122. *Id.*

> Are you aware of the concept of catch-22? Because this seems like exactly that. You're saying, okay, we're opening the door to the court to consider a claim that has never been developed, so once you get there, there will be nothing for you actually to consider and act on.[123]

But Arizona remained steadfast in its argument and continued to press through the panel's questions.[124] Ultimately, the Ninth Circuit unanimously affirmed Judge Burgess's order granting habeas relief to Jones, and then later denied Arizona's petition for rehearing en banc.[125]

Undeterred, Arizona raised the same "catch-22" procedural argument in its petition for certiorari to the U.S. Supreme Court.[126] Hence, Arizona's petition essentially placed the *Martinez* lifeline and AEDPA bulwark squarely on a collision course.[127] For Jones, this was both dismaying and perilous given the very real possibility that the State could effectively "erase" the newly established evidence of his innocence.[128] At the same time, Arizona Attorney General Mark Brnovich had begun publicly pushing to resume executions in the state.[129]

Looking back, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996 during the wake of the Oklahoma City federal building bombing and at the height of the 1990s "tough-on-crime era."[130] It marked a definitive sea change for state prisoners seeking federal

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123. *Id.* at 1:09:38 (statement of Clifton, J.).

124. *See generally* Oral Argument, *supra* note 117.

125. *See* Jones v. Shinn, 971 F.3d 1133 (9th Cir. 2020).

126. *See* Brief for Petitioners, *supra* note 116, at 3-5.

127. *Id.*

128. *See* Liliana Segura, *Gutting Habeas Corpus*, THE INTERCEPT (May 4, 2016, 1:54 PM), https://theintercept.com/2016/05/04/the-untold-story-of-bill-clintons-other-crime-bill/ [https://perma.cc/X3XU-ELJJ]; *see also* Lauren Castle, *Arizona attorney general asks governor for help getting drugs to resume executions*, AZCENTRAL (July 26, 2019, 3:51 PM), https://www.azcentral.com/story/news/politics/arizona/2019/07/26/attorney-general-mark-brnovich-asks-doug-ducey-getting-drugs-resume-executions/1840637001/ [https://perma.cc/36WZ-5EC7].

129. *Id.*

130. Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1751-52 (2022); *see also* Emily Bazelon, *The Law That Keeps People on Death Row Despite Flawed Trials*, THE N.Y. TIMES (July 17, 2015), https://www.nytimes.com/2015/07/17/magazine/the-law-that-keeps-people-on-death-row-despite-flawed-trials.html.

habeas review.[131] Specifically, Congress heeded aggressive calls for "habeas reform" by introducing new strict time limits to help "streamline" death penalty appeals and speed up executions.[132] But critics warned of the dangers the AEDPA posed, especially for the wrongfully convicted.[133] In the decades since its passage, those concerns proved soberly prescient given the scores of prisoners who have found themselves hopelessly confined by the AEDPA's strict provisions.[134] As Judge Alex Kozinski has since noted, the "AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering."[135]

Moreover, the practical effect of the AEDPA's dramatic curtailing of federal power over state habeas petitions means, as Judge Kozinski laments, that federal courts "regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted."[136] Similarly, Judge Stephen Reinhardt likened the Court's construction of the AEDPA as having fashioned a "twisted labyrinth of deliberately crafted legal obstacles that make it as difficult for habeas petitioners to succeed in pursuing the Writ as it would be for a Supreme Court Justice to strike out Babe Ruth, Joe DiMaggio, and Mickey Mantle in succession."[137] Notably, relief rates for capital defendants in federal court have drastically "plummeted since the enactment of AEDPA."[138] Specifically, data reveals that while "prior to AEDPA death row inmates prevailed somewhere between half and two-thirds of the time, they now prevail, nationwide, approximately [twelve] percent of the time. [And] the success rate, in most jurisdictions, appears to be declining."[139]

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131. Garrett & Phillips, *supra* note 130, at 1740-47.

132. *Id.* at 1743-44.

133. *See* Segura, *supra* note 128.

134. DAVID R. DOW & ERIC M. FREEDMAN, *The Effects of AEDPA on Justice*, THE FUTURE OF AMERICA'S DEATH PENALTY 261, 270-91 (Charles S. Lanier et al. eds., 2009); *see also* Bazelon, *supra* note 130.

135. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xlii (2015).

136. *Id.* at xli (footnote omitted).

137. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1220 (2015) (footnote omitted).

138. *See* DOW & FREEDMAN, *supra* note 134, at 262.

139. *Id.* at 267 (footnote omitted).

Yet, despite Arizona's effort to now bring the two into tension, the AEDPA and *Martinez* had existed harmoniously together for almost a decade.[140] In fact, the *Martinez* opinion itself expressly noted that the "AEDPA . . . does not speak to the [*Martinez*] question."[141] The same should have been true in Jones's case. As the *Martinez* Court explained, while the AEDPA precludes a prisoner from asserting the ineffectiveness of postconviction counsel as an independent ground for relief (because there is no Sixth Amendment right to postconviction counsel), "[c]ause . . . is not synonymous with 'a ground for relief.'"[142] Therefore, when a state like Arizona specifically bars prisoners from raising ineffective assistance of trial counsel on direct appeal, postconviction ineffectiveness can be used to establish "cause" to excuse the procedural default of a "substantial" ineffective assistance of trial counsel claim, which is "a ground for relief" not barred by the AEDPA.[143] Nevertheless, in Jones's case, Arizona was seemingly determined to test how loyal the Court's new conservative supermajority would be to protecting its recent *Martinez* and *Trevino* precedents.

In its certiorari petition to the Court, Arizona consolidated Jones's case with that of David Ramirez, another Arizona death row inmate. Like Jones, Ramirez had twice been appointed constitutionally ineffective counsel who failed to investigate, develop, and present key mitigation evidence that could have potentially spared Ramirez from the death penalty.[144] As in Jones's case, ineffective state postconviction counsel had procedurally defaulted Ramirez's substantial ineffective assistance of trial counsel claim by failing to raise it and develop the facts to support the claim in the postconviction appeal.[145] And, like Jones, Ramirez availed himself of the narrow *Martinez* exception for such claims and was permitted to develop new evidence to support his claim through a federal court evidentiary hearing.[146] But while the district court in Ramirez's case

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140. Cary Sandman, *Supreme Court Turns a Blind Eye to Wrongful Convictions, Guts 6th Amendment Rights to Effective Counsel*, N.Y. STATE BAR J. (Aug. 9, 2022), https://nysba.org/supreme-court-turns-a-blind-eye-to-wrongful-convictions-guts-6th-amendment-rights-to-effective-counsel/ [https://perma.cc/5JMM-5NGC].

141. Martinez v. Ryan, 566 U.S. 1, 17 (2012).

142. *Id.*; *see also* Murray v. Giarratano, 492 U.S. 1, 7-8 (1989) (explaining that the Sixth Amendment right to counsel does not extend to postconviction proceedings because a habeas challenge is a civil action, not a criminal action).

143. *Martinez*, 566 U.S. at 17.

144. Shinn v. Ramirez, 596 U.S. 366, 372 (2022).

145. *Id.* at 372.

146. Brief for Respondents, *supra* note 52, at 18-20.

"excused" the procedural default of his ineffective assistance of trial counsel claim, it rejected Ramirez's trial-level ineffectiveness claim on the merits.[147] However, "[t]he Ninth Circuit [Court of Appeals] reversed and remanded, holding that Ramirez had satisfied the requirements of *Martinez* because postconviction counsel had provided ineffective representation and Ramirez's trial-ineffectiveness claim was substantial."[148] Therefore, the Ninth Circuit held that "Ramirez was 'entitled to evidentiary development to litigate the merits of his ineffective assistance of trial counsel claim.'"[149] Yet, as with Jones, Arizona now argued that § 2254(e)(2) barred federal courts from granting Ramirez an evidentiary hearing because the claim was never developed in state court.[150]

## IV.

At the Supreme Court's oral argument in the *Shinn* case, which combined the cases of Jones and Ramirez, the justices seized on Arizona's perplexing and formalistic argument. Justice Thomas cut in almost immediately: "Counsel . . . it seems rather odd that . . . we would . . . excuse a [procedural] default under *Martinez* but not allow the prisoner to make his underlying claim or develop his evidence . . . for his underlying claim. . . . [I]t seems pretty worthless . . . to say, well . . . we'll excuse a procedural default. To what end?"[151] Likewise, Chief Justice Roberts asserted: "[I]t's a basic syllogism. The idea is, if you do get the right to raise the claim for the first time, because your counsel was incompetent before, surely, you have the right to get the evidence that's necessary to support your claim."[152] Later in the questioning, Justice Kavanaugh remarked:

> [D]oesn't it really gut *Martinez* in a huge number of cases and then . . . what's the point of *Martinez*? The Court obviously . . . crafted an opinion to give you the right to raise an ineffective assistance [of trial counsel] claim, to

147. *Id.* at 20.
148. Shinn v. Ramirez, 596 U.S. 366, 397 (2022) (Sotomayor, J., dissenting).
149. *Id.* at 373 (quoting Ramirez v. Ryan, 937 F.3d 1230, 1248 (9th Cir. 2019)).
150. *Id.*
151. Transcript of Oral Argument, *supra* note 7, at 5 (statement of Thomas, J.).
152. *Id.* at 6 (statement of Roberts, C.J.).

> make sure it's considered at least once, and this would really gut that in a lot of cases.[153]

Nevertheless, despite all these points raised at oral argument, Justice Thomas, writing for the six-justice majority, adopted Arizona's argument wholesale, i.e., the very same formalistic argument that "stupefied" the Ninth Circuit and had seemed so illogical to the justices.[154] Specifically, Justice Thomas began by discussing the cause-and-prejudice test that state prisoners must satisfy to overcome procedural defaults.[155] Moreover, Justice Thomas acknowledged that while *Martinez* did create a narrow exception in a specific limited context, by which "ineffective assistance of postconviction counsel [can] constitute 'cause' to forgive procedural default" of an ineffective assistance of trial counsel claim, *Martinez* does *not* simultaneously "forgive" an underdeveloped state-court record.[156]

Therefore, while a prisoner may bring a *Martinez* claim in federal court, evidentiary hearings to allow development of the necessary evidence to *prove* that same claim are prohibited.[157] To reach this mind-bending result, the Court selectively read the strict evidentiary hearing requirements codified in 28 U.S.C. § 2254(e)(2) and focused on the Court's statement in *Williams v. Taylor* that § 2254(e)(2) "raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings."[158] But while the *Shinn* Court seized on the "raised bar" language, it ignored the important qualification that the "raised bar" prisoners must meet to obtain an evidentiary hearing *only* applies to "prisoners who were not diligent."[159] In other words, a prisoner must be deemed "at fault," meaning that the prisoner bears responsibility for the attorney's "failure to develop" the evidentiary basis of a claim in state court proceedings.[160]

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153. *Id.* at 10 (statement of Kavanaugh, J.).

154. *See* Liliana Segura, *Supreme Court Guts Its Own Precedent To Allow Arizona To Kill Barry Jones*, THE INTERCEPT (Mar. 28, 2022, 7:00 AM), https://theintercept.com/2022/05/28/barry-jones-supreme-court-arizona-shinn-martinez [https://perma.cc/579A-WJSY].

155. *Shinn*, 596 U.S. at 371.

156. *Id.* at 380.

157. *Id.* at 387.

158. *Id.* at 385 (quoting Williams v. Taylor, 529 U.S. 420, 433 (2000)).

159. *Williams*, 529 U.S. at 433; *see also Shinn*, 596 U.S. at 405 (Sotomayor, J., dissenting).

160. *Williams*, 529 U.S. at 433-34.

But *Martinez* and *Trevino* clearly established that prisoners like Ramirez and Jones "do not lack diligence and are not at fault for the failures of their ineffective trial and postconviction counsel."[161] The *Shinn* majority, however, hollowed out this logical protection, holding that these same prisoners are now, in fact, "at fault" for the failures of their constitutionally ineffective counsel to adequately develop the record and thus, these prisoners are subject to the daunting requirements of § 2254(e)(2).[162] Therefore, because Jones could not meet either of the two extremely limited § 2254(e)(2) criteria to expand the state-court record,[163] the evidentiary hearing held by the federal court in Jones's case was "an affront to the State and its citizens who returned a verdict of guilt after considering the evidence before them."[164]

In her dissent, Justice Sotomayor pointed out that the "sprawling" seven-day evidentiary hearing "bemoan[ed]" by the majority was only necessary and so "wide-ranging precisely because the breakdown of the adversarial system in Jones' case was so egregious."[165] Justice Sotomayor recognized that the *Shinn* majority's insistence on the values of "finality" and "comity," through "maximal deference to state-court convictions over [the] vindication of the constitutional protections at the core of our adversarial system,"[166] seriously constrains the federal courts' authority to safeguard those bedrock constitutional rights. In doing so, the *Shinn* majority undermines the historic role of federal habeas corpus in "promoting fundamental fairness in the imposition of the death penalty."[167] And if there was any doubt as to where the ideological lines have now been drawn, the *Shinn* majority's stance was made brutally clear in its invocation of the infamous *Herrera v. Collins* decision,[168] in which

161. *Shinn*, 596 U.S. at 405 (2022) (Sotomayor, J., dissenting).
162. *Id.* at 384.
163. *See* 28 U.S.C. § 2254(e)(2)(A)(i), (ii) (restricting evidentiary hearings unless the habeas petitioner's claim relies on (1) a "new" and "previously unavailable" "rule of constitutional law" made retroactively applicable by the Supreme Court, or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence").
164. *Shinn*, 596 U.S. at 390.
165. *Id.* at 408 (Sotomayor, J., dissenting).
166. *Id.* at 406 (Sotomayor, J., dissenting).
167. *Id.* at 407 (Sotomayor, J., dissenting) (citation omitted).
168. *Id.* at 390 (citing Herrera v. Collins, 506 U.S. 390 (1993)).

the Court held that under the Eighth Amendment here was no blanket constitutional prohibition against executing the innocent.[169]

For the *Shinn* dissent, the proper approach to Jones's claim under *Martinez* and its progeny is likewise clear. If a state like Arizona deliberately requires prisoners to bring their ineffective assistance of trial counsel claims in an initial postconviction proceeding, rather than on direct appeal, and if ineffective postconviction counsel fails to do so, prisoners must be able to bring this claim for the first time during federal habeas review as long as "cause" and "prejudice" can be satisfied to excuse the postconviction procedural default of this ineffective assistance of counsel claim.[170] Again, this equitable exception ensures that substantial trial-level ineffectiveness claims do not escape *at least* one level of judicial review.[171] First, to establish "cause," the prisoner must establish that his postconviction counsel was ineffective under the standard set forth in *Strickland*.[172] Second, to establish "prejudice," the prisoner must demonstrate that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one . . . that . . . has some merit."[173]

For Jones, it was undisputed that his ineffective assistance of trial counsel claim cleared the procedural default hurdle under *Martinez* and *Trevino*.[174] Therefore, the question for the Court in *Shinn* turned on whether a prisoner like Jones could be "excused" for a procedural default of an ineffective assistance of trial counsel claim because the error was that of his postconviction counsel, yet still be deemed to be "at fault" under § 2254(e)(2) of the AEDPA for his trial counsel's underdeveloped state-court record, and thereby barred from seeking an evidentiary hearing to develop the evidence necessary to support his habeas ineffective assistance of counsel claim.[175]

On this point, the dissent noted that given the *Martinez* Court's focus on preserving an equitable pathway for a prisoner to present a substantial

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169. *Id.*; *see Herrera*, 506 U.S. at 428 (Scalia, J., concurring) ("I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate.") (footnote omitted).

170. Martinez v. Ryan, 566 U.S. 1, 11 (2012).

171. *See* Trevino v. Thaler, 569 U.S. 413, 429 (2013).

172. *Martinez*, 566 U.S. at 11.

173. *Id.* at 14 (citation omitted).

174. *Shinn*, 596 U.S. at 400 (Sotomayor, J., dissenting).

175. *Id.* at 400-01 (Sotomayor, J., dissenting).

ineffective assistance of trial counsel claim, it logically follows that a prisoner must also have a pathway to develop and present the essential evidence to "prove up" that same claim on the merits.[176] Moreover, the standard for obtaining an evidentiary hearing in federal court prior to the AEDPA was originally set forth in *Keeney v. Tamayo-Reyes,*[177] which described the "excuse" doctrines for excusing a procedurally defaulted claim and excusing an underdeveloped evidentiary record for that same claim as "inextricably intertwined."[178] *Keeney* noted that any attempt to distinguish the two "excuse" doctrines is "irrational" and trumped by the overriding "value of uniformity" in habeas corpus law.[179] *Keeney* emphasized that "little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court" and a different "standard for failing to develop the factual basis of that claim."[180]

In the post-AEDPA case *Williams v. Taylor*, the Supreme Court examined the language of § 2254(e)(2), which limits a prisoner's ability to obtain an evidentiary hearing in federal court, and concluded that the "failed to develop" language "echoes *Keeney*" and thus imposed a fault-based standard.[181] In other words, *Williams* noted that when Congress enacted the AEDPA, it "codifie[d] *Keeney*'s threshold standard of diligence" in the opening clause of § 2254(e)(2).[182] Therefore, § 2254(e)(2) "erects a bar only to those [prisoners] who bear some responsibility for a lack of evidentiary development in state-court proceedings."[183] Hence, a prisoner "'is not at fault when his diligent efforts to perform an act are thwarted' by an external force"[184] such as ineffective assistance of counsel attorney error. The same reasoning should apply with equal force in the context of *Martinez* claims. Simply put, if a prisoner is not "at fault," there is no lack of diligence, and thus the heightened requirements of § 2254(e)(2) do not apply.[185]

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176. *Id.* at 398 (Sotomayor, J., dissenting).

177. Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

178. *Id.* at 10; *see also* Brief of Amici Curiae Habeas Scholars in Support of Respondents, *supra* note 33, at 14.

179. *Keeney*, 504 U.S. at 7-8, 10.

180. *Id.* at 10.

181. Williams v. Taylor, 529 U.S. 420, 433 (2000).

182. Shinn v. Ramirez, 596 U.S. 366, 405 (2022) (Sotomayor, J., dissenting) (quoting *Williams*, 529 U.S. at 422 (2000)).

183. *Id.* at 401 (Sotomayor, J., dissenting).

184. *Id.* (Sotomayor, J., dissenting) (quoting *Williams*, 529 U.S. at 432).

185. *Id.* at 401, 405 (Sotomayor, J., dissenting); *see also Williams*, 529 U.S. at 432-33.

Consequently, in the context of a *Martinez* claim, a prisoner like Jones, who has satisfied the demanding cause-and-prejudice test to advance his otherwise procedurally defaulted ineffective assistance of trial counsel claim is likewise not "at fault" for the under-developed state court record that resulted from his trial counsel's ineffectiveness.[186] Thus, these prisoners are not barred from being allowed to develop evidence in federal court to support their underlying ineffective assistance of trial counsel claims.[187] The AEDPA did not disturb this.[188] Instead, Congress raised the habeas bar via the AEDPA with heightened requirements to obtain an evidentiary hearing under § 2254(e)(2), which *only* applies to prisoners deemed to be "at fault" for the deficiencies in the state-court record in their case.[189] Hence, for prisoners who are diligent in state court or deemed not to be "at fault" for any deficiencies, the "excuse" doctrines for both procedural default and eligibility for an evidentiary hearing work the same after the AEDPA as before.[190] Moreover, the AEDPA's incorporation of the "failure to develop" language from *Keeney* "makes plain Congress's intent to codify the fault standard developed in the caselaw, including the prisoner-attorney agency rules that go with it."[191]

And while the AEDPA "froze prisoner fault as the trigger for § 2254(e)(2)'s restrictions . . . it did not freeze the agency rules that determine when a prisoner bears responsibility for his lawyer's negligence."[192] Specifically, the Court initially recognized in *Coleman v. Thompson* that while principles of agency law generally hold prisoners constructively responsible for "mere attorney error," violations of the Sixth Amendment right to counsel are considered "external" and require "responsibility for the default [to] be imputed to the State."[193] Subsequently, the lawyer-agency rules regarding habeas continued to appropriately evolve with cases like *Martinez* and *Trevino*, which clearly carved out a critical exception to general agency principles, under which

186. *Id.* at 403 (Sotomayor, J., dissenting).
187. *Id.* at 402-04 (Sotomayor, J., dissenting).
188. *Id.* at 404-05 (Sotomayor, J., dissenting); *see also* Brief of Habeas Scholars as Amici Curiae in Support of Respondents at 16, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 20-1009).
189. *Williams*, 529 U.S. at 433-34.
190. Brief of Habeas Scholars as Amici Curiae in Support of Respondents, *supra* note 188, at 20.
191. *Id.* at 16.
192. *Id.* at 24.
193. Coleman v. Thompson, 501 U.S. 722, 754 (1991) (citation omitted).

prisoners would not be deemed "at fault" regarding attorney errors by their trial and postconviction counsel in states like Arizona.[194] On this point, Justice Sotomayor noted that "it is not uncommon for Congress to adopt statutory language that incorporates an evolving judicial doctrine," such as the traditional habeas limits on imputing attorney error to the prisoner.[195]

Therefore, as Justice Sotomayor makes clear in her impassioned dissent, *Martinez*, *Trevino*, and *Williams* demonstrate that when a state structurally removes ineffective assistance of trial counsel claims from the direct appeal process and then twice provides a criminal defendant with ineffective counsel (i.e., at trial and for his postconviction appeal), the "ineffectiveness [of his attorney] cannot fairly be attributed to the defendant, and he therefore has not 'failed to develop the factual basis of [his] claim,'" under § 2254(e)(2).[196] Thus, controlling precedent makes clear that due to the "external impediments" of constitutionally ineffective counsel and the structure of Arizona's review process, Jones had not "failed to develop" the evidence presented at his federal evidentiary hearing, and § 2254(e)(2) "poses no bar to evidentiary development in federal court."[197]

Finally, while the *Shinn* majority dismissed *Martinez* as simply a judge-made equitable rule that cannot override the commands of the AEDPA statute,[198] the alleged "tension" did not exist until Arizona suggested it. As Justice Sotomayor underscored: "Make no mistake. Neither AEDPA nor this Court's precedents require this result."[199] Further evidencing this fundamental truth is the fact that in the decade following the *Martinez* decision, "not a single lower federal court . . . adopted *Shinn*'s twisted construction of the habeas statute."[200] As attorney Bob Loeb, who argued for Jones before the Court, has since emphasized: "The decision misreads the federal statute, produces untenable results never envisioned

194. Brief of Amici Curiae Habeas Scholars in Support of Respondents, *supra* note 33, at 4-5.

195. Shinn v. Ramirez, 596 U.S. 366, 406 (2022) (Sotomayor, J., dissenting) (citation omitted).

196. *Id.* at 402 (Sotomayor, J., dissenting).

197. *Id.* at 404 (Sotomayor, J., dissenting).

198. *Id.* at 385-87.

199. *Id.* at 393 (Sotomayor, J., dissenting).

200. Sandman, *supra* note 140 (footnote omitted).

by Congress, and amounts to an assault on basic fairness in the criminal justice system."[201]

When President Clinton signed the AEDPA into law, he stated, in no uncertain terms, that the "AEDPA would be unconstitutional if it precluded independent federal review of constitutional claims."[202] Hence, Justice Sotomayor rightfully condemns the *Shinn* majority's analysis as "improperly reconfigur[ing] the balance Congress struck in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) between state interests and individual constitutional rights."[203] As she emphasized, "finality" and respect for state-court judgments were core purposes of the AEDPA, but "Congress . . . did not pursue these aims at all costs."[204] Therefore, the "AEDPA does not render state judgments unassailable, but strikes a balance between respecting state-court judgments and preserving the necessary and vital role federal courts play in 'guard[ing] against extreme malfunctions in the state criminal justice systems.'"[205]

Consequently, the *Shinn* majority's evisceration of the narrow but crucial safety valve established by *Martinez*—ensuring that substantial trial ineffectiveness claims receive *at least* one level of meaningful review—slams the federal habeas courthouse doors and betrays the promise of the Sixth Amendment right to the effective assistance of counsel for countless criminal defendants.[206] Justice Scalia once warned as follows: "[H]onoring *stare decisis* requires more than beating [a precedent] to a pulp and then sending it out to the lower courts weakened, denigrated . . . and yet somehow technically alive."[207] But the *Shinn* majority failed to heed this warning, effectively gutting two recent precedents and ignoring bedrock principles concerning the crucial constitutional protection of the Sixth Amendment and also the protective role of "the Great Writ."[208] In *Shinn*, the Court wields its power of judicial

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201. Press Release, Bob Loeb, Att'y for Barry Jones and David Ramirez, Statement on *Shinn v. Ramirez* (May 23, 2022, 10:04 AM) (on file with author) https://twitter.com/BobLoeb/status/1528753737266864130.

202. Reinhardt, *supra* note 137, at 1244; *see also* Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 720 (Apr. 24, 1996).

203. *Shinn*, 596 U.S. at 392-93 (Sotomayor, J., dissenting).

204. *Id.* at 407 (Sotomayor, J., dissenting).

205. *Id.* (quoting Harrington v. Richter, 562 U.S. 86, 102-03 (2011)).

206. *Id.* at 391 (Sotomayor, J., dissenting).

207. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 636 (2007) (Scalia, J., concurring in judgment).

208. *See Shinn*, 596 U.S. at 407 (Sotomayor, J., dissenting) (citation omitted).

review to significantly restrict habeas review in this context—effectively shielding convictions that were wrongly and unfairly obtained, thereby allowing for the continued imprisonment and *execution* of the wrongfully convicted and even the innocent.[209]

Likewise, the Court's driving focus on "federalism,"[210] where states' rights reign supreme at the expense of protecting the individual constitutional rights of the accused, showcases a fundamental misunderstanding and underappreciation of the role of habeas corpus itself.[211] This is epitomized by the *Shinn* majority's lament that "federal habeas review overrides the States' core power to enforce criminal law, [because] it 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'"[212] But this position only serves to reinforce an erroneous view of habeas corpus as a suspect mechanism used by federal courts to interfere with state court judgments.[213] In doing so, the Court buries the core inquiry at the heart of the "Great Writ" of whether an individual is being held *in violation of their constitutional rights*.[214] As Justice Brennan once put it: "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him."[215] But years of result-oriented decisions and the routine uprooting and undermining of important precedents have left a very bleak habeas landscape, where prying the wrongfully convicted free from the binds of their unconstitutional state convictions is harder than ever.

## V.

In the aftermath of the *Shinn* decision, Jones found himself in the hopeless void that pervades death rows around the United States. With Jones's convictions and death sentence reinstated, a hearing before Judge Burgess (the same federal judge who had ordered Jones released or retried)

209. *Id.* at 408-09 (Sotomayor, J., dissenting) (decrying the majority's "assertion that the virtues of finality override fundamental fairness to such a degree that meaningful review of life-or-death judgments obtained through such deeply flawed proceedings should be foreclosed").

210. *Id.* at 387.

211. Reinhardt, *supra* note 137, at 1239-40.

212. *Shinn*, 596 U.S. at 376 (citation omitted).

213. *Id.*

214. *Id.* at 407 (Sotomayor, J., dissenting).

215. Fay v. Noia, 372 U.S. 391, 430–31 (1963).

was scheduled to decide how the case should proceed.[216] Yet, with Judge Burgess's hands legally tied and the evidence of Jones's innocence effectively extinguished by the decision in *Shinn*, Jones's options were starkly limited.[217] Jones could attempt to litigate his ineffective assistance of trial counsel claim in federal court based on the incomplete state court record in his case, which was the futile "catch-22" path suggested by Arizona and blessed by the U.S. Supreme Court. Alternatively, Jones could return to state court and make a Hail Mary attempt to litigate his "actual innocence" claim under the demanding Arizona statute, which was designed to provide a forum for such claims.[218] This latter option included the peril of Arizona's continued relentless opposition.[219] In the end, likely sensing the bleakness of Jones's litigation options, Judge Burgess suggested the possibility of settlement negotiations.[220]

Increasingly, such "compromise" plea negotiations are proving to be a common "out" for the wrongfully convicted.[221] And in a system built to ensure that the state holds virtually all the winning cards, it is not difficult to see why—when decades in prison have been lost and the threat of being strapped to an execution gurney is terrifyingly close—a ticket out becomes a ticket *out*. After all, while it remains a bitter pill for most, *some* "justice" and actual freedom are better than no justice and no freedom. Simply put, Jones had a difficult choice to make. Fittingly, on May 23, 2023, the one-year anniversary of the *Shinn* decision, an Arizona judge approved the terms of a plea deal, by which—despite the significant evidence of his

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216. *See* Liliana Segura, *Barry Jones Is Running Out Of Options. Will He Ever Leave Death Row?*, THE INTERCEPT (Oct. 2, 2022, 9:20 AM), https://theintercept.com/2022/10/02/barry-jones-arizona-death-row-hearing/ [https://perma.cc/A8VG-YZ89].

217. *Id.*

218. *Id.*; *see also* Transcript of Oral Argument, *supra* note 7, at 55 (statement by counsel for Respondents) ("To say that you have . . . a forum for hearing and . . . one where no one's ever succeeded in to raise an actual innocence claim is not giving you a forum to vindicate . . . one of the most vital rights, the right to effective trial counsel . . . whether you're innocent or guilty, you have a right to a fair hearing. You have a right to an effective trial counsel. And . . . you have a right to have that vindicated.").

219. *See* Segura, *supra* note 216.

220. *Id.*

221. *See* Megan Rose & ProPublica, *The Deal Prosecutors Offer When They Have No Cards Left to Play*, THE ATLANTIC (Sept. 7, 2017), https://www.theatlantic.com/politics/archive/2017/09/what-does-an-innocent-man-have-to-do-to-go-free-plead-guilty/539001/.

factual innocence—Jones pled guilty[222] to a lesser charge of second-degree murder in exchange for a twenty-five-year sentence with credit for time served.[223] Soon thereafter, on June 15, 2023, the judge signed the order, and Barry Jones was finally a free man.[224]

Yet, for many other state prisoners, the *Shinn* decision effectively sealed their fate.[225] Jones's longtime attorney, Cary Sandman, called for Congress to "reverse th[e] unconscionable decision,"[226] and others have since joined the growing chorus for action and reform.[227] But the obscure complexities of such decisions often relegate them to the shadows for lawmakers and allow their devastating effects to quietly proliferate. If anything, the *Shinn* decision—particularly in light of Jones's freedom—bluntly highlights the broader indigent defense crisis that critics have been sounding alarm bells about for decades.[228]

Historically, the Framers understood the perils of forcing the accused to stand alone against the state.[229] Hence, the Sixth Amendment right to the "Assistance of Counsel" in criminal cases was intended to serve as a

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222. Barry Jones presented significant evidence that he was "factually innocent" of the rape and murder of Rachel Gray. However, the plea deal Jones signed to escape execution prevents him from being declared "legally innocent" and from receiving compensation for his wrongful conviction. This distinction is illustrative of the various ongoing injustices faced by the wrongfully convicted, even after winning their freedom.

223. *See* Ord. Granting Postconviction Relief, Accepting Change of Plea, and Imposing Sentence at 4, State v. Jones, 188 Ariz. 388, 937 P.2d 310 (1997) (No. CR-045587); *see also* Liliana Segura, *After 29 Years On Death Row, Barry Jones Was Dumped At A Bus Station. But He Was Finally Free,* THE INTERCEPT (June 17, 2023, 5:35 PM), https://theintercept.com/2023/06/17/barry-jones-released-arizona-death-row/ [https://perma.cc/B4UR-LQK3].

224. *See* Segura, *supra* note 223.

225. *See* Shinn v. Ramirez, 596 U.S. 366, 410 (2022) (Sotomayor, J., dissenting).

226. *See* Sandman, *supra* note 140.

227. Emily Olson-Gault, *Supreme Court "Guts" Case Law Protecting the Right to Counsel*, AMERICAN BAR ASS'N (May 22, 2022), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/supreme-court-shinn-ramirez/.

228. Leah Litman, *The Supreme Court Just Gutted Another Constitutional Right*, SLATE (May 23, 2022, 2:30 PM), https://slate.com/news-and-politics/2022/05/scotus-constitutional-right-habeas-corpus-prison-death-row.html [https://perma.cc/V4EG-ADFX].

229. U.S. CONST. amend. VI; *see generally* William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961) (James Madison Lecture); *see also* THE FEDERALIST NO. 84 (Alexander Hamilton) (providing context for Framers' views on individual rights and limitations on government power, supporting rationale for such rights as Sixth Amendment right to counsel).

critical safeguard protecting the right of the accused "to rely on counsel as a 'medium' between him and the State."[230] Critically, as the U.S. Supreme Court later recognized, the life and liberty of the accused depends on the "guiding hand of counsel . . . . Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[231]

But it was not until 1963 that the Court handed down its landmark decision in *Gideon v. Wainwright*, which established the Sixth Amendment right to counsel for indigent criminal defendants.[232] In doing so, the Court recognized that the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[233] Yet *Gideon*'s promise has never been fully realized and remains illusory for far too many criminal defendants facing the ultimate punishment.[234]

As a result, indigent defendants are overwhelmingly represented by public defenders who are chronically overworked, underpaid, under-resourced, and inexperienced.[235] The ABA has noted in recent years that public defenders carry "outlandish, excessive workloads" that make "a mockery of the constitutional right to counsel."[236] Unsurprisingly, these burdens have a trickledown effect that compromises every aspect of defense representation, particularly counsel's ability to conduct adequate pre-trial investigations, which time and again proves to be the chief failure of defense counsel in wrongful conviction cases.[237] In fact, the National Registry of Exonerations found in one study that investigative failures appeared in 80.6% of the 366 reviewed wrongful conviction cases

230. Maine v. Moulton, 474 U.S. 159, 176 (1985).
231. Powell v. Alabama, 287 U.S. 45, 69 (1932).
232. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).
233. *Id.* at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).
234. *See generally* Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N. U. L. REV. 597, 619 (2011).
235. Litman, *supra* note 228.
236. Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, THE N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html [https://perma.cc/RA7M-L934].
237. *See Inadequate Legal Defense,* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Inadequate-Defense.aspx [https://perma.cc/YF5X-DPDL].

involving ineffective trial counsel.[238] Moreover, inadequate pre-trial investigation increases the risk to an intolerable degree that exculpatory evidence will be undiscovered prior to the "main event" of a defendant's state criminal trial and thus fundamentally compromises "the essential truth-seeking function of trial."[239] Consequently, when trial counsel's investigation is inadequate, "the reliability of the verdict or capital sentencing decision is diminished, and the risk of a wrongful conviction or wrongful death sentence increases dramatically."[240]

Therefore, adequate judicial review of ineffective-assistance-of-counsel claims is imperative to ensure that wrongful convictions are discovered and corrected.[241] Yet, the indigent defense "crisis" is not restricted to trial counsel; it also plagues post-conviction counsel, who are similarly overworked, underfunded, and often stymied by the "Byzantine morass of"[242] state procedures, which further handicap the development of potential claims.[243] Critical investigations again often fail to occur during appeals, and the impacted cases then quietly progress further into the depths of procedural default, where even the most egregious constitutional violations become progressively harder, if not impossible, to correct.

Tellingly, Chapter 154 of the AEDPA actually permits the "fast-tracking" of federal habeas review of state capital cases.[244] The relevant provision requires the Attorney General of a state to ensure that the state's "appointed [capital postconviction] counsel are competent and timely appointed and provided . . . with sufficient compensation and resources to do their jobs."[245] However, no state has ever met this basic requirement.[246]

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238. *Id.*

239. Amici Curiae Brief of Bipartisan Former Dep't of Just. Offs. and Former Fed. Prosecutors, in Support of Respondents, at 3, Shinn v. Ramirez, 596 U.S. 366 (2022) (No. 20-1009).

240. *Id.*

241. *Id.*

242. Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

243. Litman, *supra* note 228.

244. *See* Antiterrorism and Effective Death Penalty Act of 1966 (AEDPA), 28 U.S.C. §§ 2261-2266.

245. *See* Brief of Fed. Def. Cap. Habeas Units as Amici Curiae in Support of Respondents, *supra* note 19, at 11.

246. Brief of Fed. Def. Cap. Habeas Units as Amici Curiae in Support of Respondents, *supra* note 19, at 11; *see also* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 788 (2002).

In fact, Arizona initially tried to qualify but failed.[247] Thereafter, the Arizona legislature simply decided to amend its requirements, allowing the Arizona Supreme Court, in "exceptional circumstances," to appoint a private attorney as postconviction counsel "who does not meet the qualifications" for representation in a capital case.[248] But this "exception" quickly became the tragic norm, allowing for the regular appointment of unqualified and inexperienced capital postconviction counsel to represent prisoners on Arizona's death row.[249] As one lawyer recounted: "The Arizona Supreme Court was desperate for lawyers to appoint, and I was a live body. That is just how it went for a time."[250] Unfortunately, Jones was one of the unlucky recipients of such an appointment.[251]

To date, Arizona has not improved its appointment mechanism for capital postconviction counsel.[252] For example, Arizona still does not require postconviction counsel to have *any* postconviction experience, nor does it require a timely appointment of postconviction counsel, which may well be fatal for a capital defendant given the AEDPA's strict one-year habeas filing limit.[253] In addition, Arizona does not guarantee the payment of reasonable litigation expenses for postconviction counsel.[254] And as of 2017, Arizona had not increased its compensation for appointed counsel in over 20 years.[255] Additionally, in 1998, Arizona "imposed a 200-hour cap on the amount of work that postconviction counsel could be compensated for," absent a "showing of good cause," which is woefully inadequate in the context of capital cases.[256] In fact, the ABA Death Penalty Representation Project has "targeted Arizona as a state that particularly need[s] attention in part because of the horror stories [the Project] ha[s] consistently heard about ineffective lawyers being appointed

247. Brief of Fed. Def. Cap. Habeas Units, as Amici Curiae in Support of Respondents, *supra* note 19, at 11 n.4.

248. *See* Office of the Fed. Pub. Def. for the State of Ariz., *supra* note 47, at 31 (citation omitted).

249. *Id.* at 27-48.

250. *Id.* at 33 (citation omitted).

251. Liliana Segura, *His Conviction Was Overturned Amid Evidence Of Innocence. The Supreme Court Could Throw It All Out,* THE INTERCEPT (July 31, 2021, 10:50 AM), https://theintercept.com/2021/07/31/death-penalty-supreme-court-arizona-barry-jones/ [https://perma.cc/G8A9-K68S].

252. *See* Office of the Fed. Pub. Def. for the State of Ariz., *supra* note 47, at 4.

253. *Id.* at 4, 44.

254. *Id.* at 4-5.

255. *Id.* at 4.

256. *Id.* at 5.

in the state to handle all stages of capital proceedings, including post-conviction proceedings."[257]

Consequently, if a state like Arizona appoints ineffective trial counsel to the accused and then later appoints ineffective postconviction counsel, who fails to challenge the ineffectiveness of trial counsel and fails to develop the necessary state court record to support such a claim, the consequences could well be deadly.[258] In the words of the *Martinez* Court, when such a situation occurs, "[i]t is likely that no . . . court at any level will hear the prisoner's claim,"[259] which was precisely the problem the Court sought to remedy in *Martinez*, but later inexplicably rolled back in *Shinn*. Therefore, addressing the underlying indigent defense crisis would not only help neutralize one of the major contributing factors to wrongful convictions, but it would also help directly alleviate the serious problem posed by egregious ineffective assistance of counsel claims in states like Arizona that *Shinn* has left without a remedy.

Beyond this, *Shinn* exemplifies a larger and more disturbing systemic attitude, in which the unearthing of evidence of innocence is somehow seen as "offensive" to our system of justice—that, "justice" somehow requires "protecting" the most tainted state convictions, even if that means executing the innocent.[260] This is a far cry from what the Supreme Court once famously described as the government's role in a criminal prosecution as "not that it shall win a case, but that justice shall be done."[261] This duty of *justice* is at its zenith in capital cases.

Yet, in the decades since the AEDPA's enactment and the Court's extremely narrow interpretation of its meaning, the focus seems to have shifted from a fair, balanced, independent federal review of habeas claims to that of stone-cold enforcement of arbitrary process.[262] As the *Shinn* majority bemoaned: "When previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims."[263] The Court went on to describe "intervention" by federal habeas courts as "an affront to the State and its citizens who returned a

257. *Id.* at 36 (citation omitted).
258. Shinn v. Ramirez, 596 U.S. 366, 409-10 (2022) (Sotomayor, J., dissenting).
259. Martinez v. Ryan, 566 U.S. 1, 7 (2012).
260. *See generally* Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 394-97 (2018).
261. Berger v. United States, 295 U.S. 78, 88 (1935).
262. *See* Kozinski, *supra* note 135, at xli-xlii.
263. *Shinn*, 596 U.S. at 376 (quoting Edwards v. Vannoy, 593 U.S. 255, 263 (2021)).

verdict of guilt after considering the evidence before them."[264] This unyielding focus on "finality" and "comity" all but ignores the harrowing plight of the wrongfully convicted. Hence, it is in the depths of this ever-deepening divide between fairness and process that the once unfathomable argument posited by Arizona in *Shinn* has found room to breathe and expand its way into legal legitimacy through the Court's modern habeas jurisprudence.

A telling example of the difference a decade can make occurred in 2009, when the Supreme Court took the extraordinary step of ordering an evidentiary hearing for death row inmate Troy Davis, amid global outcry that Georgia was preparing to execute "an innocent man."[265] In doing so, the Court's per curiam opinion marked the "first time in nearly 50 years" that it took action on a writ of habeas corpus filed directly to the Court.[266]At the time, Justice Scalia, joined only by Justice Thomas, defiantly protested in dissent: "This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[267]

In response, Justice Stevens, joined by Justices Ginsburg and Breyer, outlined what should be several uncontroversial points.[268] First, he noted that knowingly executing an innocent person "would be an atrocious violation of our Constitution and the principles upon which it is based."[269] Second, Justice Stevens emphasized that the provisions of the AEDPA are arguably unconstitutional if they bar relief for death row inmates who establish their innocence.[270] Finally, he recognized that minor procedural error should never trump a robust showing of actual innocence.[271] Underscoring these stakes with sobering precision, Justice Stevens concluded as follows: "[I]magine a petitioner in Davis's situation who

264. *Id.* at 390.

265. Harvard Law School News Staff, *Troy Davis and the Quest for Justice*, HARVARD LAW TODAY (Jan. 7, 2010), https://hls.harvard.edu/today/troy-davis-and-the-quest-for-justice; *see also In re* Davis, 557 U.S. 952 (2009).

266. *U.S. Supreme Court Orders Historic Hearing on Innocence Claim in Troy Davis Case*, DEATH PENALTY INFO. CTR. (Aug. 17, 2009), https://deathpenaltyinfo.org/news/u-s-supreme-court-orders-historic-hearing-on-innocence-claim-in-troy-davis-case [https://perma.cc/4R7X-ASJ5].

267. *In re* Davis, 557 U.S. 952, 955 (2009) (Scalia, J., dissenting) (emphasis omitted).

268. *In re Davis*, 557 U.S. at 953 (Stevens, J., concurring).

269. *Id.* at 953.

270. *Id.*

271. *Id.* at 954.

possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning."[272]

But in the years since the *Davis* decision, the Court's membership has changed, and Justice Scalia's once-outlier position has become the majority rule, raining down on Barry Jones in *Shinn* to effectively "extinguish" the hard-fought evidence of his innocence—a move that Justice Stevens once decried as unthinkable. Sadly, the *Shinn* majority's results-driven, callous indifference to the potential innocent life hanging in the balance is nothing new. Rather, this hardline ("Innocence is not enough") position, originally posited in *Herrera*, [273] has merely shifted from a far-right wing of the Court in years past to the far-right comfort of the current supermajority.

In many ways, *Shinn* is the pinnacle of the Supreme Court's long-game effort to render state court decisions—even those steeped in constitutional violations—virtually *unreviewable* by federal courts.[274] As Judge Reinhardt wrote: "The collapse of habeas corpus as a remedy for even the most glaring of constitutional violations ranks among the greater wrongs of our legal era."[275] Hence, the *Shinn* majority's aggressive prioritizing of state sovereignty over safeguarding bedrock individual rights in our criminal justice system, like the right to effective assistance of counsel, fails to heed what the Court recognized over half a century ago in *Gideon*, namely, that without the "guiding hand of counsel," an innocent person "faces the danger of conviction because he does not know how to establish his innocence."[276] Thus, in an age where wrongful convictions are increasingly front and center, there is a desperate need to reconcile the demise of habeas review with what Professor Leah Litman describes as the Court's "smashing and grabbing precedent and constitutional rights no matter the consequences."[277] Poignantly, the 3,478 exonerations recorded to date, amounting to more than 31,900 years of life ripped away from the wrongfully convicted,[278] devastatingly underscore the desperate need for

272. *Id.*
273. *See* Herrera v. Collins, 506 U.S. 390 (1993).
274. *Id.*
275. Reinhardt, *supra* note 137, at 1219.
276. Gideon v. Wainwright, 372 U.S. 335, 345 (quoting Powell v. Alabama, 287 U.S. 45, 68-9 (1932)).
277. Litman, *supra* note 228.
278. *See* MICH. STATE UNIV. COLL. L., *supra* note 46, at 4.

judicial and systemic reforms. And while Barry Jones narrowly escaped execution—despite the *Shinn* majority's willingness to "let him die," all in the name of "finality" and "comity"—the tragic reality of the new post-*Shinn* landscape is that the next Barry Jones will likely not be so lucky.