INNOCENCE IS NOT ENOUGH?—THE NEGATIVE IMPACT OF *SHINN V. RAMIREZ* ON CRIMINAL DEFENDANTS' SIXTH AMENDMENT RIGHTS.

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I. INTRODUCTION

Imagine you are charged with murder. You know you are innocent, but the jury must be convinced. You can't afford to hire an expensive attorney, so you utilize your Sixth Amendment right to a court-appointed public defender. You have evidence of your innocence, including a strong alibi, but your appointed attorney is so overworked and underpaid that he does not have the time to meet with you before your trial. As a result, he fails to raise your evidence of innocence in court and you are convicted. Frustrated and scared, you appeal and receive a new court-appointed attorney at the appellate level. You tell him about the ineffective counsel below and your evidence. To your dismay, he too fails to raise the evidence of your innocence or any arguments of ineffective counsel at trial. Your conviction is affirmed. At this stage, you have no constitutional right to an attorney, but facing desperation, you manage to hire one. You file a writ of habeas corpus claim in federal court, where you try to raise claims of ineffective assistance of counsel and finally introduce your evidence of innocence. The court tells you that because these claims were not raised at the state court level, they are procedurally defaulted, and you may not bring them. It feels as if you are now being convicted due to procedural defaults and not evidence of guilt, as if you are being punished for relying on your attorneys to adequately represent you. While this scenario feels far-fetched to those who believe strongly in the integrity of our criminal justice system, it is arguably exactly what happened to Barry Jones in *Shinn v. Ramirez,* a case that made its way to the Supreme Court in the 2021 October term.[1]

The right to counsel, a Sixth Amendment due process guarantee designed to protect criminal defendants from wrongful conviction, refers to the right of a criminal defendant to "have the Assistance of Counsel for his"

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1. Shinn v. Ramirez*,* 142 S. Ct. 1718 (2022). Combining the two cases of David Ramirez and Barry Jones. Barry Jones brought ineffective assistance of counsel claims as well as claims of actual innocence. David Ramirez brought ineffective assistance of counsel claims related to his counsel's failure to investigate his mental illness to mitigate his sentence.

defense even if they cannot afford to pay for an attorney.[2] Essentially, the Sixth Amendment guarantees that if you are charged with a crime and you cannot afford to hire an attorney on your own the court must appoint you a qualified attorney at public expense.[3] The right to effective assistance of counsel is crucial to a fair trial, as most defendants do not have legal training and would not know how to adequately defend themselves against criminal charges.[4] Aside from the language of the Sixth Amendment, the right to counsel was incorporated against the states in *Gideon v. Wainwright*.[5] In *Gideon,* the court discerned that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[6] While *Gideon* focused on the right to trial counsel, the Supreme Court has since extended the right to counsel to include any criminal case, yet this right is extended only to direct appeal and not to any other post-conviction proceedings.[7]

While being appointed an attorney is the central guarantee of the Sixth Amendment, the mere appointment is not enough. The Supreme Court has held that part of the guaranteed right to counsel is the right to *effective* assistance of counsel.[8] Because of this right to *effective* assistance of counsel, if a defendant believes that their trial attorney misrepresented them, they may bring an ineffective assistance of counsel claim on appeal.[9] An ineffective assistance of counsel claim can have a major impact; a finding of ineffective assistance of counsel can result in a wide range of relief, up to a reversal of a conviction or a sentence.[10]

To establish a claim of ineffective assistance of counsel, a defendant must show that 1) counsel performed deficiently and 2) this deficient

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2. U.S. CONST. amend. VI.
3. *See generally* Paul Marcus, *The Faretta Principle: Self Representation Versus the Right to Counsel,* 30 AM. J. COMP. L., 551-573 (1982).
4. *Id.*
5. Gideon v. Wainwright, 372 U.S. 335 (1963).
6. *Id.*
7. *Id.*; *See also* John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 2016 SUP. CT. REV. 117 (2017); *See also* McMann v. Richardson, 397 U.S. 759 (1970) ("If the right to counsel guaranteed by the constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . .").
8. *McMann,* 397 U.S. 759 at n.12 ("[T]he right to counsel is the right to the effective assistance of counsel.").
9. Typically, types of claims brought in ineffective assistance of counsel claims are conflict of interest issues, failure to seek DNA testing, failure to investigate, failure to raise evidence, etc. *See* Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases,* Innocence Project, , https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf.
10. *Ineffective Assistance of Counsel,* Barhoma Law, https://www.barhomalaw.com/ineffective-assistance-of-counsel.html.

performance prejudiced the defendant.[11] While the right to bring an ineffective assistance of counsel claim at the appellate level is a valuable method of remediating defendants wronged at the trial level, it is not enough. Consider the scenario from the introduction: if a defendant has an ineffective trial attorney who fails to raise evidence of his innocence, and then an ineffective appellate attorney who fails to raise evidence that the trial counsel was ineffective, what is the defendant's remedy? Shouldn't they be able to bring evidence to support their ineffective assistance of counsel claim at the federal level? Or should that evidence be barred because it was never brought at the state level and, therefore, not preserved?

In the 2020 term, in a 6-3 decision, the Supreme Court answered that question in responding to a factual scenario similar to that of the hypothetical scenario previously raised.[12] The Court held in *Shinn v. Ramirez* that new evidence not introduced in the lower courts due to ineffective assistance of counsel at *both* the state trial and the appellate level could *not* be used in an appeal to the federal court.[13] While individuals are allowed to bring ineffective assistance of counsel claims, they are not allowed to bring new evidence to support those claims.[14] The Court, in essence, closed the door to evidence of ineffective assistance of counsel claims not first brought in state court. The majority wrote that under the Court's precedent, the prisoners were "at fault" for the underdeveloped record in the state court, even though the state trial and appellate counsel were negligent.[15] Under this rationale, the Court is essentially holding criminal defendants responsible for the shortcomings of their court-appointed attorneys despite their constitutional right to effective assistance.[16]

In essence, *Shinn v. Ramirez* holds that a state prisoner on death row can be executed because they were stuck with negligent counsel at the trial and appellate level. [17] More bluntly, innocent people can now be executed because they were appointed ineffective lawyers. Accordingly, I argue that the holding in *Shinn v. Ramirez* violates constitutional due process because

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11. Strickland v. Washington, 466 U.S. 668 (1984).
12. *See* Shinn v. Ramirez*,* 142 S. Ct. 1718 (2022).
13. *Id.*
14. *Id.* at 1728; ("Often, a prisoner with a defaulted claim will ask a federal habeas court not only to consider his claim but also to permit him to introduce new evidence to support it . . . in all but these extraordinary cases, AEDPA 'bars evidentiary hearings in federal habeas proceeding initiated by state prisoners.")
15. *Id.* at 1734 (Justice Thomas wrote that "under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner.").
16. U.S. CONST. amend. VI. *See also* McMann v. Richardson, 397 U.S. 759 (1970).
17. *Shinn,* 142 S.Ct. 1718.

the Sixth Amendment requires more than the mere ability to raise an ineffective assistance of counsel claim in federal court. Defendants must also be able to support that ineffective assistance of counsel claim by introducing new evidence of innocence that their counsel has failed to bring due to their ineffectiveness.[18] Otherwise, the Sixth Amendment guarantee of effective assistance of counsel is essentially moot.

This note argues that the Sixth Amendment right to effective assistance of counsel can only be guaranteed if criminal defendants raising an ineffective assistance of counsel claim have the ability to introduce new evidence during their habeas proceedings. In denying this ability, *Shinn v. Ramirez* violates due process. Further, this note argues that by limiting the evidence that can be brought in federal proceedings, *Shinn v. Ramirez* unfairly puts the responsibility of justice solely on overworked and underpaid state public defenders, opening the door for an influx of wrongful convictions in a misguided effort to achieve finality. Finally, I argue that this Supreme Court decision leaves criminal defendants at the mercy of their state-appointed counsel and responsible for their counsel's failure to develop the record and introduce their evidence. Such an understanding of the Sixth Amendment is directly contrary to prior case law guaranteeing a right to effective assistance of counsel.

In this note, I first provide a detailed analysis of the overall purpose and history of the right to effective assistance of counsel. I then conduct a brief case study of *Shinn v. Ramirez,* exploring and comparing the arguments of the majority with the arguments of the dissent. This leads to a discussion of the Supreme Court's holding and its impact on the right to counsel and the right to bring ineffective assistance of counsel claims. I then argue that the holding of *Shinn v. Ramirez* essentially deprives defendants of their Sixth Amendment guarantee of effective counsel. To conclude, I offer several potential solutions that can mitigate the detrimental impact of *Shinn v. Ramirez* on criminal defendants' due process rights.

II. THE PURPOSE & HISTORY OF THE RIGHT TO EFFECTIVE COUNSEL

A. The Purpose of the Sixth Amendment Guarantee

The primary purpose of the Sixth Amendment's right to effective assistance of counsel is to increase fairness and the likelihood of a just

18. *See Effective Assistance at Critical Stages*, Sixth Amendment Center: Ensuring Fairness & Equal Access to Justice, https://sixthamendment.org/.

verdict ultimately being reached in a criminal case.[19] The criminal justice system works by placing individuals and the government in an adversarial relationship, as the individual is being prosecuted by the government itself. This adversarial relationship means that the government is no longer working to serve the defendant, putting the defendant in a state of vulnerability.[20] Additionally, the government has access to more resources than the individual, likely has more knowledge of the legal issue at hand, and is better positioned to argue its stance.[21] Because of the adversarial relationship between the individual defendant and the government, as well as the fact that the defendant likely does not have the same resources as the government, the guaranteed right to effective assistance of counsel was created to ensure that the defendant has the option to obtain the help of an attorney with adequate resources and knowledge of legal issues. However, the right to effective assistance of counsel only extends to trial court and state post-conviction, but not to federal post-conviction.[22] Additionally, recent Court decisions have put further limits on how far the right to effective counsel can really go.[23]

B. The History of the Right to Assistance of Counsel

The Sixth Amendment was ratified in 1791 as part of the Bill of Rights of the United States Constitution.[24] The amendment itself focuses on the rights of the accused in criminal prosecutions, but here I am focused on the right to effective counsel provision.[25] This provision has not always been well-defined or well-enforced. Case law developing the right has existed for almost a century. In 1932, the U.S. Supreme Court reversed the convictions and death sentences of nine African-Americans, known as the "Scottsboro Boys," holding that they were denied their Sixth Amendment right to effective assistance of counsel because they had not seen an attorney until

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19. U.S. CONST. amend. VI; *See also* Bryan Stull, *The Importance of the Sixth Amendment Right to Counsel in Capital Cases,* ACLU, https://www.aclu.org/news/smart-justice/importance-sixth-amendment-right-counsel-capital-cases.

20. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998).

21. *Id.*

22. Daniel Givelbar, *The Right to Counsel in Collateral Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1393 (1999).

23. Shinn v. Ramirez*,* 142 S. Ct. 1718 (2022); *see also infra* Section III.

24. U.S. CONST. amend. VI.

25. *Id.* ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and **to have the Assistance of Counsel for his defense.**") (emphasis added).

the morning of the trial.[26] The Court reasoned that this delay meant they had no true chance to put on a meaningful defense. Then, in 1942, the Court held that attorneys with conflicts cannot give effective counsel.[27] In 1967, the Court extended the right to effective counsel to encompass criminal appeals, holding that defense attorneys have a duty to fully investigate the merits on appeal and fully justify their reasons for refusing to file an appeal.[28] Moreover, if the client wants to appeal, the attorney should ensure that they can do so.[29]

The violation of the right to effective counsel finally became a more defined and testable claim in 1984. In *Strickland v. Washington*, the Supreme Court established a two-part test to decide whether an attorney provided effective or ineffective assistance to a criminal defendant.[30] The first prong requires the court to assess the attorney's actual performance to determine if it was deficient.[31] If the attorney's conduct is deemed to be deficient, the next prong requires the court to look at whether there is a "reasonable probability" that the case would have had a different outcome if the attorney had not been deficient.[32] After establishing this test, the Supreme Court then expressly held in 1985 that assistance of counsel on appeal must also be effective.[33]

Violation of the Sixth Amendment guarantee is not often an actual denial of counsel but instead a constructive denial due to ineffective counsel.[34] If a defendant is not given an effective attorney, their Sixth Amendment rights are violated. There are several factors that are evaluated when looking at whether an attorney's performance was deficient. These factors were

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26. Powell v. State of Ala., 287 U.S. 45 (1932).

27. Glasser v. United States, 315 U.S. 60 (1942) (U.S. Supreme Court reversed the conviction of a defendant whose attorney was also appointed to represent a co-defendant. Evidence that was favorable to Glasser was not favorable to the co-defendant, so it was impossible for the appointed attorney to zealously represent Glasser).

28. In *Anders v. California,* the Court held that the court appointed trial attorney's constitutional duties were violated when he failed to represent the defendant on appeal. 386 U.S. 738 (1967).

29. *See* Roe v. Flores-Ortega, 528 U.S. 470 (2000) (holding that the Sixth Amendment does not require the defense counsel to file an appeal unless the defendant specifically asks him to do so; if he denies the request, he will be found ineffective).

30. Strickland v. Washington, 466 U.S. 668 (1984).

31. *Id.*; When evaluating if counsel is insufficient, the court will look at the amount of time counsel spent on the case, how much counsel discussed the case with the client, how well prepared and researched the counsel was, and whether counsel was adequately trained and licensed. *Id.*

32. *Id.*; for further review of the Supreme Court analysis of the test set forth in *Strickland*, see *Reeves v. Alabama*, 348 U.S. 891 (2017), *Dunn v. Reeves*, 141 S. Ct. 2405 (2021), and *Shinn v. Kayer*, 141 S. Ct. 517 (2020).

33. Evitts v. Lucey, 469 U.S. 387 (1985).

34. *Effective Assistance at Critical Stages, supra* note 18.

developed in *Strickland* and discussed further in *United States v. Cronic*.[35] In *Cronic,* the Court discussed that relevant factors include the attorney's qualifications, training, resources, time spent on the case, and whether the attorney had independence in defense.[36] Then, if attorney performance is deemed insufficient, the court determines if there is a reasonable probability that with a competent attorney there would have been a different outcome.[37] The defendant has the burden of proof in showing that, absent the attorney errors, the decision-maker would have had reasonable doubt in determining guilt.[38]

C. Right to Counsel and Ineffective Assistance of Counsel Claims in Collateral, Post-Conviction Proceedings.

As previously noted, "the Supreme Court has rejected arguments that either the Due Process Clause or the Equal Protection Clause require that the right to counsel apply to collateral, post-conviction proceedings."[39] Therefore, while many believe it should be to the contrary, it is an established principle that the government has no obligation to provide counsel to a defendant outside of their first trial and first appeal.[40] If appellate counsel fails to bring an ineffective assistance of counsel claim related to the trial counsel on the initial appeal, and in turn fails to provide the evidence of innocence to support the claim, the defendant will no longer have the constitutional right to counsel, nor will they be able to introduce their evidence of innocence.

As has been previously alluded to, the default doctrine provides that a defendant can only bring evidence in federal court that was previously brought in state court.[41] If the evidence is not preserved at the state level,

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35. United States v. Cronic*,* 466 U.S. 648 (1984).

36. *Id.* The Court discussed the relevant factors in determining if provided counsel was insufficient; the Court held that counsel was insufficient because he was a young lawyer with no experience in the area needed to adequately defend the defendant, he had only 25 days to prepare when the government took four years to prepare the case, and the gravity of the case was severe. The Court found that inexperience and lack of preparation time are enough to allege insufficient assistance of counsel. *Id.*

37. *Strickland,* 466 U.S. 695.

38. *Id.*

39. Givelbar, *supra* note 22, at 1393.

40. For an argument on why it should be to the contrary, see Jonathan G. Neal, *Critical Stage: Extending the Right to Counsel to the Motion for New Trial Phase*, 45 WM. & MARY L. REV. 783 (2003); *see also* Emily Garcia Uhrig, *Why Only Gideon? Martinez v. Ryan and the 'Equitable' Right to Counsel in Habeas Corpus*, 80 MO. L. REV. 1 (2015).

41. This is called preserving the evidence. Often, state-level attorneys will try to bring as many claims as possible even if they do not think that the claims will win, simply in an effort to make sure that all evidence of innocence is brought at the state level and can be used in federal court if necessary. Anything that is brought in state court is then preserved for federal court. *See* Jennifer Braster, *The*

the federal habeas court may not hear it; this includes claims of actual innocence and ineffective assistance of counsel.[42] However, the court has introduced an exception in the interest of fairness. In *Martinez v. Ryan*, the Supreme Court created a new equitable exception to the default doctrine that allows a prisoner to bring evidence of ineffective assistance of counsel upon showing that the state post-conviction counsel failed to bring the ineffective assistance of counsel claim at state court.[43] The Court's rationale was based on the notion that a prisoner is not at fault for failing to bring a trial-ineffectiveness claim in state court because it is up to their appointed appellate counsel.[44] *Martinez* gives prisoners the ability to bring ineffective assistance of counsel claims that would have otherwise been procedurally defaulted.[45] This case was monumental in ensuring due process rights to prisoners; however, the holding in *Shinn v. Ramirez* limits the *Martinez* holding by asserting that while it is permissible for the prisoner to bring the ineffective assistance of counsel claim, they *may not bring any evidence* to support that claim.[46] Without the ability to bring evidence to support the claim, the claim is moot. Therefore, *Shinn* essentially stripped prisoners of the rights that *Martinez* ensured them. The impact of *Shinn* on *Martinez* is discussed more below.[47]

Before *Shinn,* there were already many limitations on federal habeas claims. Notably, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) heavily limits defendants seeking to bring a federal habeas claim.[48] AEDPA's habeas reform provisions included a one-year statute of limitation for habeas claims and restrictions on filing second habeas petitions. Moreover, case law has held that federal habeas relief may only be granted on the ground that the prisoner is in custody in violation of the U.S. Constitution.[49] However, the added restrictions do not amount to a suspension of the ability to bring a writ which would be contrary to Article

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Importance of Pre-Litigation Preservation of Evidence, AMERICAN BAR ASSOCIATION, (July 31, 2015),https://www.americanbar.org/groups/litigation/committees/corporatecounsel/practice/2015/importance-of-pre-litigation-preservation-of-evidence/.

42. *Id*.

43. Martinez v. Ryan, 566 U.S. 1 (2012) (holding that because defendant's counsel in the initial review collateral proceeding was ineffective, there is no procedural default bar to bringing new claims of ineffective assistance of counsel claims).

44. *Id.*

45. *Id.*

46. Shinn v. Ramirez*,* 142 S. Ct. 1718, 1719 (2022).

47. *Infra* Section III.

48. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

49. *See* Shoop v. Twyford, 142 S.Ct. 2037, 2043 (2022) (holding that the question to ask under the AEDPA is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable–"a substantially higher threshold for a prisoner to meet").

One protections.[50] AEDPA also narrowed the type of situations that allow for a successful habeas claim by allowing claims to succeed only when state court decisions are either contrary to clearly established federal law or are based on an unreasonable determination of the facts in the light of the evidence presented.[51]

III. SHINN V. RAMIREZ

A. Overview

In the words of Justice Sotomayor, "The Court's decision will leave many people who were convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful chance to vindicate their right to counsel."[52]

In separate cases, David Ramirez and Barry Jones were sentenced to death for murder.[53] While their cases are starkly similar in terms of procedure, they are drastically different in terms of the facts; I will take a moment to discuss the facts of each case.

Barry Jones was convicted in 1995 for the rape and murder of his girlfriend's four-year-old daughter. The relevant facts in Jones' case are that the autopsy found that there was no way that the daughter could have died at the precise time that the prosecution claimed she was injured by Mr. Jones, there was no real investigation of this evidence from the autopsy, and the county sheriff never considered any possibilities for her death other than Jones. Jones' trial lawyers never brought this information into evidence to cast doubt on his guilt, and thus, he was convicted.[54] David Ramirez was convicted of murdering his girlfriend and her teenage daughter in 1998.[55] He did not have an actual innocence claim, but he did have claims related to significant mental impairments and a long history of childhood trauma, abuse, and neglect. The issue with this case was that Ramirez's lead trial attorney had never handled a death penalty case and was not trained to do so; he failed to investigate or bring any of Ramirez's evidence of childhood trauma or mental impairments, which should have been used to mitigate his

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50. Felker v. Turpin, 518 U.S. 651, 664 (1996).
51. Antiterrorism and Effective Death Penalty Act of 1996, *supra* note 48.
52. Shinn v. Ramirez, 142 S. Ct. 1718, 1740 (2022) (Sotomayor, J., dissenting).
53. *Id.* at 1728-29.
54. Janine Jackson, *But for the Failures of His Attorneys, He Would Not Have Been Convicted: CounterSpin interview with Liliana Segura on Supreme Court v. Innocence,* FAIRNESS & ACCURACY IN REPORTING (June 10, 2022), https://fair.org/home/but-for-the-failures-of-his-attorneys-he-would-not-have-been-convicted/.
55. *Shinn,* 142 S. Ct. at 1742.

sentence and prevent him from receiving the death penalty.[56]

The Arizona Supreme Court affirmed both of their convictions and sentences.[57] While both men instituted state post-conviction relief proceedings, their state appellate counsel failed to raise the claims of ineffective assistance of trial counsel in a timely manner.[58] In Jones' case, the post-conviction attorney failed to raise trial-ineffectiveness and bring the evidence from the autopsy, which was crucial in proving his innocence. In Ramirez's case, the post-conviction attorney failed to raise trial-ineffectiveness and bring evidence of mental impairment, which could have mitigated his sentence. In federal court, the Ninth Circuit Court of Appeals held that Ramirez and Jones should not be responsible for the shortcomings of their trial and post-conviction attorneys and decided that the evidence for the ineffective assistance of counsel claims should be allowed to be considered in federal court on a federal habeas claim, despite the fact that they were not properly brought at trial or on appeal.[59]

In a 6-3 decision, the Supreme Court reversed. In an opinion written by Justice Thomas, the Court held that "under 28 U.S.C. § 2254(e)(2),[60] a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."[61] In making this decision, the Court denied both Jones and Ramirez the right to bring their ineffective assistance of counsel claims and introduce evidence of their innocence.[62] Put plainly, the Court held incarcerated individuals responsible for the failures and shortcomings of their court-appointed state defense counsel.

B. The Majority

The majority's reasoning focused considerably on the federal courts' interest in the finality of state decisions. Justice Thomas emphasized the need to respect federal-state dual sovereignty, specifically the state courts'

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56. Jackson, *supra* note 54.

57. State v. Ramirez, 178 Ariz. 116 (Ariz. 1994); State v. Jones, 188 Ariz. 388 (Ariz. 1997).

58. *Shinn,* 142 S. Ct. at 1728.

59. *Id*. 1729.

60. 28 U.S.C. § 2254(a). "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." It provides that, if a prisoner has failed to develop the factual basis of a claim in state court proceedings, a federal court may hold an evidentiary hearing on the claim only if 1) a new and previously unavailable rule of constitutional law made retroactively applicable by the US Supreme Court, or 2) a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. §§ 2254(e)(2)(i), (ii).

61. *Shinn,* 142 S. Ct. at 1734.

62. *Id.*

right to control criminal proceedings.[63] To respect state decisions, the majority argued that the availability of federal habeas relief is narrowly circumscribed. The majority further explained that federal habeas review is not just a simple substitute for ordinary appeal but an "extraordinary remedy that guards only against extreme malfunctions in the state criminal justice system."[64] Justice Thomas argued that federal review imposes significant costs on state criminal justice systems, a cost that is not outweighed by the potential need to reopen a case and evaluate innocence.[65]

However, the majority emphasized that just because they believe in the prevailing importance of state finality, they still want to leave some defendants with the ability to bring federal habeas claims when necessary.[66] Justice Thomas acknowledged the holding of *Coleman v. Thompson*, which states that a federal habeas court can make an exception to the default rule of deference to the state judgement if the defendant can demonstrate cause and prejudice.[67] However, after recognizing this exception, Justice Thomas then noted that the defendants in *Shinn* could not demonstrate cause because the Constitution does not guarantee the assistance of counsel in federal post-conviction hearings. Because assistance of counsel is not guaranteed, attorney error may not qualify as cause.[68] This follows Supreme Court precedent, which attributes error in developing the state court record to the prisoner rather than the prisoner's counsel. Justice Thomas states:

> Respondents['] primary claim is that a prisoner is not "at fault" ... and therefore has not "failed to develop the factual basis of a claim in State Court proceedings,"§ 2254(e)(2), if state postconviction counsel negligently failed to develop the state record for a claim of ineffective assistance of trial counsel. But under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is *attributed to the prisoner*."[69]

63. *Id.* at 1730 ("From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States…the power to convict ad punish criminals lies at the heart of the states residuary and inviolable sovereignty.").

64. *Id.* at 1731*; see also* Uhrig, *supra* note 40.

65. *Shinn,* 142 S. Ct. at 1731.

66. *Id.* at 1732. "When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse. Likewise, if the state-court record for that defaulted claim is undeveloped, the prisoner must show that factual development in federal courts is appropriate." *Id.* at 1732-33.

67. Coleman v. Thompson, 501 U.S. 722, 750 (1991) (holding that federal courts may excuse procedural default only if a prisoner can demonstrate cause for the default and actual prejudice because of the alleged violation of federal law). *See also* 28 U.S.C. § 2254.

68. *Shinn,* 142 S. Ct. at 1733.

69. *Id.* at 1734 [emphasis added].

In sum, the majority highlighted the importance of respecting the procedures that protect our principle of federalism. In their view, permitting federal fact-finding would encourage federal litigation of defaulted claims and give defendants an incentive to "' sandba[g]' state courts by 'select[ing] a few promising claims for airing on state postconviction review, 'while reserving others for federal habeas review' should state proceedings come up short."[70]

C. The Dissent

In her dissent, Justice Sotomayor argued that the majority relies upon its own mistaken understanding of the AEDPA[71] policy interests at issue. In fact, Justice Sotomayor argued that Federal Habeas review exists to correct the very issues that the Court said cannot be brought to federal court.[72] Additionally, the dissent made the point that a prisoner should not be responsible for developing the factual record. She stated, "Jones and Ramirez acted diligently, but their attorneys' errors, paired with the State's choice of how to structure their review proceedings, constituted external impediments."[73]

Contrary to the majority's claims, Justice Sotomayor argued that precedent provides that prisoners should never be held responsible for the shortcomings of court-appointed counsel. The majority mischaracterized precedent and effectively diminished *Martinez*.[74] The *Martinez* holding was meant to afford habeas petitioners, like Jones and Ramirez, the opportunity to bring certain trial-ineffectiveness claims for the first time in federal court. This was the very point of the holding in *Martinez*, which the dissent claimed the majority ignored. Justice Sotomayor states:

> This decision is perverse. It is illogical: It makes no sense to excuse a habeas petitioner's counsel's failure to raise a claim altogether because of ineffective assistance in postconviction proceedings, as *Martinez* and *Trevino* did, but to fault the same petitioner for that postconviction counsel's failure to develop evidence in support of the

70. *Id.* at 1739.
71. *Id.* at 1740 (Sotomayor, J., dissenting); Braster, *supra* note 41.
72. *Shinn,* 142 S. Ct. at 1747 (Sotomayor, J., dissenting) ("[T]he Court gives short shrift to the egregious breakdowns of the adversarial system that occurred in these cases, breakdowns of the type that federal habeas review exists to correct.").
73. *Id.* at 1747.
74. *Id.* Justice Sotomayor discusses *Martinez* & *Trevino,* explaining that they established that petitioners are not at fault for any failure to bring a trial-ineffectiveness claim in state court. Justice Sotomayor believes that the majority holding in *Shinn* guts the holdings in *Martinez* and *Trevino. Id.*

> trial-ineffectiveness claim. In so doing, the Court guts *Martinez*'s and *Trevino*'s core reasoning.[75]

In sum, the dissent argued that based on the precedent of *Martinez*, Jones and Ramirez simply had to show evidence in support of trial ineffectiveness, which they have done. Jones showed that his post-conviction attorney neither evaluated the facts of his trial attorneys' failure nor his innocence, while Ramirez showed that his attorneys never evaluated his mental health records. Both defendants effectively showed that their post-conviction attorneys failed to bring their ineffective assistance of counsel claims. Under *Martinez*, they should have been able to bring these claims, and evidence to support them, for the first time in federal court.[76]

D. 2023 Arizona State Court Decision

On June 15, 2023, the Arizona Attorney General agreed that Barry Jones was innocent of the alleged first-degree murder of his girlfriend's daughter.[77] The attorney general based her finding of innocence on the medical evidence that the child did not sustain her fatal injuries during the time when she was in Jones' care.[78] This is the exact evidence that the Supreme Court prohibited Jones from bringing in *Shinn*. The attorney general's office independently reviewed the case and, after doing so, agreed to a settlement agreement. Jones plead guilty to second-degree murder for failing to take his girlfriend's daughter to the hospital, and he was released from prison for time served.[79] If it wasn't for the attorney general agreeing to review the case, Barry Jones, now expressly held to be innocent of first-degree murder, would still be on Arizona's death row. Even though Jones is now free, *Shinn v. Ramirez* is still the law of the land, and it is still working to keep people with innocence claims, people like Jones, in prison.[80]

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75. *Id.* at 1740.
76. *Id.* at 1749.
77. Michael Levenson, *Arizona Man Is Freed After 28 Years on Death Row*, N.Y. TIMES (June 16, 2023), https://www.nytimes.com/2023/06/16/us/arizona-barry-jones-conviction-overturned.html.
78. 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/.
79. *See Id.*
80. As of June 2023, David Ramirez is still on death row in Arizona. Because he has no innocence claims, I focus mostly on Barry Jones in this paper.

IV. ANALYSIS OF *SHINN*: ISSUES WITH THE MAJORITY OPINION

I find many issues with the reasoning of the majority. For one, as Justice Sotomayor expressed, the Court wrongfully interpreted *Martinez* in making this decision. Moreover, the Court placed their own interests in finality and federalism higher than an innocent defendant's interest in staying off death row. There are no circumstances under which we should hold the interest in federalism to be more valuable than the life of an innocent person.

A. The Court Wrongfully Interpreted Martinez

The majority argued that "[the] wholesale relitigation of Jones' guilt [at the habeas proceeding] is plainly not what Martinez envisioned."[81] In my view, any plain reading of Martinez shows that the very purpose of the holding was to forgive defaults like in Jones' and Ramirez's cases and review the merits of ineffective assistance of counsel claims. The holding in Martinez states that "[w]here . . . ineffective-assistance-of trial-counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if . . . there was no counsel or counsel in that proceeding was ineffective."[82] Martinez expressly held that a man should not be killed by the state for largely procedural reasons, and the holding in *Shinn* directly contradicts that holding.[83]

While the ruling in *Shinn* did not expressly overturn *Martinez,* it hollowed the ruling and took the meaning out of it. It can be inferred that *Martinez,* in holding that one may bring ineffective assistance of counsel claims in this specific scenario, was also meant to hold that evidence could be brought to support those claims. Given that the second prong of the *Strickland* test requires a defendant to show that but for counsel's ineffectiveness, the result of the proceeding would have been different, the ability to admit evidence is necessary to prove that the proceeding could have been different if not for counsels' negligence. Without the ability to bring the evidence that trial counsel should have put on, there is no way to show that counsel was truly ineffective. The ability to bring the ineffective assistance of counsel claim then loses all meaning.

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81. *Shinn,* 142 S. Ct. at 1738.

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

83. "[T]o protect prisoners with potentially legitimate ineffective-assistance claims, it is necessary to recognize a narrow exception to *Coleman's* unqualified statement that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default, namely, that inadequate assistance of counsel at initial-review collateral proceedings may establish cause." *Id.* at 2.

When *Martinez* was decided in 2012, "it was meant to be a narrow remedy, a sort of safety valve, precisely to avoid miscarriages of justice, and to ensure that people on death row and people incarcerated are able to vindicate their Sixth Amendment rights."[84] The cases of Jones and Ramirez fall precisely within this category. Jones and Ramirez were denied their Sixth Amendment rights; they were appointed ineffective counsel both at the state trial level and the state appellate level—they both have evidence that could erase or mitigate their sentence, evidence that was not brought. This is precisely the miscarriage of justice that *Martinez* was meant to protect against; this is precisely the type of case that is meant to be caught in the safety valve of *Martinez.* To hold otherwise is to deprive Jones and Ramirez of their ability to vindicate their Sixth Amendment rights.[85]

B. The Court Wrongfully Prioritized Finality and Federalism Over Justice

There is great issue with the Court's prioritization of finality and federalism over justice. Justice Thomas justified the opinion by arguing that federal review simply imposes too significant of a cost on state criminal justice systems. Essentially, he argued that overriding the state's sovereign power to control criminal law would be a detrimental consequence of a ruling in Jones' and Ramirez's favor.[86] In her dissent, Justice Sotomayor articulated what she and many others believe should have been the majority holding. She argues that the Court should not be executing innocent people simply because they had negligent lawyers. The Court should have a greater interest in ensuring that innocent people are not convicted or killed than protecting the state's right to control the criminal justice system.[87]

Moreover, I argue that these "significant costs" that Justice Thomas so heavily relies on are much less significant than the costs of his ruling. For one, housing a man who may have committed no actual crime on Arizona's death row imposes significant costs on the state.[88] Housing someone on death row can cost upwards of $70,000 per year.[89] Additionally, convicting

84. Jackson, *supra* note 54.
85. For further discussion, *see* Uhrig, *supra* note 40.
86. *Shinn,* 142 S. Ct. at 1725.
87. *Id.* at 1750 (Sotomayor, J., Dissenting).
88. Michael A. Cohen. *The Supreme Court Just Said That Evidence of Innocence Is Not Enough*, DAILY BEAST (May 24, 2022, 4:10 AM), https://www.thedailybeast.com/the-supreme-court-just-said-in-in-shinn-v-ramirez-that-evidence-of-innocence-is-not-enough.
89. Dalia Perez, *Legal Expert Explains Cost Behind A Death Row Sentence,* ALIVE (May 18, 2022, 4:36 PM), https://www.11alive.com/article/news/crime/trials/high-cost-behind-death-row-explained/85-f5d6dfa4-6a44-4724-aa87 b6c9fbdd8a56#:~:text=What%20is%20the%20cost%20of,%2460%2C000%20to%20%2470%2C000 %20per%20year.

and subsequently executing an innocent man imposes significant societal costs. It brings doubt to the legitimacy of the criminal justice system and leaves society feeling less trusting of the court's accuracy and fairness. But the costs are clearly the greatest when it comes to the man whose life the Court decides to end despite his evidence of innocence. This holding impacts the lives of many. The convicted loses his life while his friends and family lose their loved one. The most significant cost of this ruling is a man's life, a cost that Justice Thomas and the majority are willing to value as less than the interest in upholding the values of federalism.

However, even if the costs of intruding on the states' rights are as great as Justice Thomas claims, I argue that we, as a society, and especially those working in the criminal system, should want to pay that price to make sure innocent people are not wrongly executed by our institutions of justice. After all, isn't ensuring that justice be done the very purpose of the criminal justice system? The issue is summarized as this: "for the highest court in the land, the state of Arizona killing an innocent man is not a perversion of the criminal justice system, but rather emblematic of its smooth functioning."[90] This idea is contradictory to the promises of due process.

V. ANALYSIS OF *SHINN*: THE HOLDING'S NEGATIVE IMPACT ON DEFENDANTS' SIXTH AMENDMENT RIGHTS

By holding prisoners responsible for the shortcomings of their court-appointed, state-level attorneys and not allowing them to bring evidence of actual innocence to back their ineffective assistance of counsel claims, the Court is depriving defendants of their due process rights; specifically, they are depriving them of their right to effective counsel. If we are to stand true to the constitutional guarantees of effective counsel, we must cringe at the idea that someone who is denied that right at the state level cannot bring evidence of innocence to support his grievances in federal habeas proceedings.

I argue that the *Shinn* decision denies defendants their due process rights for two reasons. First, it is now impossible for victims of trial-ineffectiveness, who are also misfortunate enough to be stuck with ineffective counsel on appeal, to bring evidence of ineffective assistance of counsel claims at the federal level. This undermines the entire purpose of the federal post-conviction process. Because defendants cannot bring evidence of ineffective counsel, the system deprives them of the ability to vindicate their Sixth Amendment rights. Second, this holding leaves the

90. Cohen, *supra* note 88.

burden of getting to the truth and ensuring justice for every criminal defendant completely on the state systems.[91] These state systems are filled with undervalued, underpaid, and overworked public defense attorneys who, no matter how much they may want to fully and effectively represent a defendant, simply do not have the time or resources to be as effective as they may wish.[92]

A. The Holding Means That the Sixth Amendment Guarantee of Effective Assistance of Counsel is No Longer Guaranteed

The clearest issue with *Shinn* is summarized by the very words of the Arizona state prosecutor during the trial: "innocence is not enough."[93] The Court essentially holds that even if there is evidence of innocence, a federal court will no longer be able to open the record to allow new evidence to come in— punishing the defendant for the ability, resources, and motivation of their court-appointed counsel. This entirely denies Sixth Amendment rights to defendants who, by sheer happenstance, are appointed state appellate attorneys that failed to raise trial-ineffectiveness claims and, therefore, never received an effective attorney at any point during their time on trial.

This concept is even more perverse when it is understood that the number of wrongful convictions in the U.S. is not small; the state fails defendants at too frequent a rate to justify limiting habeas relief in this way. It is estimated that between 4-6% of people incarcerated in U.S. prisons are actually innocent, meaning that there could be anywhere from 46,000 to 230,000 innocent people behind bars.[94] These wrongful convictions mainly occur for six reasons: mistaken witness or eyewitness misidentification, false confessions, false or misleading forensic evidence, perjury or false accusation, official and government misconduct, and ineffective assistance of counsel.[95] It is notable that ineffective assistance of counsel is one of the

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91. The purpose of the appellate process is to review the procedures and decisions in the lower courts to make sure that the proceedings were fair and that the proper law was applied correctly. *See* Freedman, *supra* note 20.

92. *See* Theodore Schoneman, *Overworked and Underpaid: America's Public Defender Crisis*, FORDHAM POLITICAL REVIEW, http://fordhampoliticalreview.org/overworked-and-underpaid-americas-public-defender-crisis/. *See also infra* Section V, part b.

93. Referring to Mr. Roysden, the Arizona Prosecuting Attorney, who stated "I think, in (e)(2)(B) that innocence isn't enough here." Trial Tr. vol. 1, 12.

94. Clare Gilbert, *Beneath the Statistics: The Structural and Systemic Causes of Our Wrongful Conviction Problem*, GEORGIA INNOCENCE PROJECT, https://www.georgiainnocenceproject.org/2022/02/01/beneath-the-statistics-the-structural-and-systemic-causes-of-our-wrongful-conviction-problem/.

95. Gerald M. LaPorte, *Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science*, National Institute of Justice (Sep. 7, 2017),

largest contributors to wrongful convictions.[96] In other words, the situations of Jones and Ramirez were not one-off situations. This happens to an alarming number of criminal defendants and plays a large role in the frequency of wrongful convictions.[97]

To illustrate the large number of wrongful convictions that occur due to ineffective assistance of counsel, Dr. Emily West of the Innocence Project completed a study of how many times the Court found ineffective assistance of counsel in post-conviction appeals, looking specifically at 255 DNA exoneration cases.[98] In her review of published appeals, she found that 54 out of the first 255 DNA exonerees raised ineffective assistance of counsel claims and that the courts rejected all but 8; in the other 46, the court found that there was no prejudice due to counsel's ineffectiveness. This study shows two things: first, that even if defendants do raise ineffective assistance of counsel claims on state appeal, the chances of state courts finding prejudice are low. Second, even if Jones' and Ramirez's state appellate counsel had managed to raise trial-ineffectiveness on appeal, it is likely that the courts would not have found ineffective assistance of counsel, even though it was clearly present. This further shows that it is not necessary to have ineffective counsel at both levels to be injured by this holding. Even those who merely have ineffective counsel at the trial level will feel the consequences of the Court's holding in *Shinn*.

The ability to bring ineffective assistance of counsel claims and evidence to support them is what gives criminal defendants the ability to vindicate their Sixth Amendment rights when those rights were not satisfied by trial counsel. To hold that the defendant is responsible for the shortcomings of their attorneys makes the Sixth Amendment Constitutional guarantee of effective counsel essentially moot.[99] The very purpose of the right to

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https://nij.ojp.gov/topics/articles/wrongful-convictions-and-dna-exonerations-understanding-role-forensicscience#:~:text=Mistaken%20witness%20identification%20or%20eyewitness,Official%20misconduct.

96. *See* Cristina Swarns, *Innocence Project Statement from Executive Director Christina Swarns on Shinn v. Ramirez and Jones*, INNOCENCE PROJECT, (May 24, 2022), https://innocenceproject.org/innocence-project-statement-from-executive-director-christina-swarns-on-shinn-v-ramirez-and-jones/.

97. "Since 1989, more than 3,000 people have been wrongfully convicted of crimes in the United States—including 186 who were condemned to death. Bad lawyering, including poor preparation, inadequate investigation and intrinsic bias, is a leading cause of these injustices." *Id.*

98. West, *supra* note 9 (Emily West decided to use cases where DNA had been used to exonerate the defendant because she wanted to focus on cases where innocence had already been proven. She felt that when readers see that the person is not just claiming innocence but has already been proven innocent, it better portrays the drastic impact of ineffective assistance of counsel.).

99. For more commentary on how *Shinn v. Ramirez* compromises the very purpose of the Sixth Amendment right to counsel, see Emily Olson-Gault, *Supreme Court 'Guts" Case Law Protecting the Right to Counsel,* American Bar Association (May 22, 2022), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_bl

effective counsel is to guarantee that a criminal defendant has their case effectively and thoroughly litigated and has the best chance at a just outcome. The holding in *Shinn* compromises this purpose.

B. The Holding Unfairly Shifts the Burden of Ensuring Justice to the States.

Shinn's holding means that state courts and state public defenders are now entirely responsible for ensuring that Sixth Amendment guarantees are satisfied. In holding that evidence of innocence and ineffective assistance of counsel claims may not be brought in federal court, the Court is putting a substantial amount of new pressure on the state public defense offices and state court systems.[100] The state courts, as well as state public defenders, can typically rely on federal appeals to remedy blatant state errors. The Court, by not allowing the introduction of evidence of innocence not preserved in state court to be brought in federal court, is essentially removing this safeguard and placing responsibility solely on state court and state public defense systems to ensure that justice is done and the truth is found. The Court is putting it all on the states to ensure not only that each person charged with a crime has educated and resourced trial counsel, but also that any trial –ineffectiveness can be litigated at the state appellate level.[101] In a perfect world this seems like a fine expectation of the state courts–of course they should be able to effectively litigate a defendant's claim. But the U.S. state systems are not in a perfect world; public defenders are extremely overworked and underpaid due to a lack of national regulations and funding.[102]

The vast majority of criminal cases are handled by public defenders.[103] Public defenders across the board claim to be overworked and overpaid. These claims are backed by statistics. The Justice Policy Institute reported that a public defender handles either 150 felonies, 400 misdemeanors, 200

og/supreme-court-shinn-ramirez/. This explains that "the Court's decision permits a prisoner to 'raise' a claim, but not introduce the evidence necessary to prove that he should win," essentially making the right of effective counsel moot.

100. *Id.* ("This decision underscores the urgent need to ensure the provision of adequate resources and training to state post-conviction lawyers and to create meaningful state-based post-conviction defender programs. And while the ABA and many other individuals and organizations continue to fight for these reforms, today's decision shines a light on the critical role played by pro bono lawyers who volunteer to step up and provide exceptional representation where the Constitution—and the Court—guarantee none at all.")

101. Jackson, *supra* note 54.

102. Schoneman, *supra* note 92.

103. Swarns, *supra* note 96.

juvenile cases, 200 mental health cases, or 25 appeals per year.[104] Additionally, only 21% of public defense offices claim to have an adequate number of attorneys to effectively litigate their caseloads.[105] The government has not put enough regulations nor funding programs in place for state public defense offices, which is the main cause of the underfunded programs and overworked attorneys. Dr. Emily West, a director of research for the Innocence Project, described the issue well;

> Unfortunately, the lack of national standards for creating and funding such a system has left most states with inadequate, underfunded, systems. This problem has led to overburdened and sometimes incompetent defense lawyers and a lack of funding for the investigative process, all of which can contribute to inadequate defenses, and in some cases, wrongful convictions.[106]

The combination of large caseloads and severely understaffed public defense offices have led public defenders to, on average, only be able to work about an hour per case.[107] This is highly inadequate. To effectively represent a criminal defendant, an attorney should, at the very least, have the time and resources to research, prepare, and meet with clients to discuss procedures. This process takes much more than a single hour. The American Bar Association found that felony cases require about 47 hours of work to be prepared for effective litigation.[108] The contrast in available time is stark. Even if an appointed public defender would like to zealously represent their client, which many public defenders have the heart and passion to do, with only an hour of time per case, it is nearly impossible to satisfy the client's right to effective counsel. Through no fault of their own, *most* appointed public defenders are giving ineffective assistance of counsel.

VI. PROPOSED SOLUTIONS

Although the Supreme Court is the final arbiter of the law and functions as the interpreter of the Constitution, I do believe that there are a few steps that the state and federal legislatures can take to mitigate the impact that the holding in *Shinn v. Ramirez* has on criminal defendants' due process rights.

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104. Schoneman, *supra* note 92.

105. *Id.*

106. West, *supra* note 9.

107. Schoneman, *supra* note 92. The situation is even worse in some states such as "[i]n New Orleans, Louisiana, attorneys spend only an average of seven minutes per case." *Id.*

108. *Id.*

First, the states could create "cause" for federal habeas review under *Coleman v. Thompson* if they explicitly guarantee effective assistance of counsel at the state post-conviction level in their state constitutions.[109] Second, Congress can adopt federal standards to increase resources to state public defense offices, which would decrease their burden and increase their effectiveness. A significant increase in effectiveness would decrease the need to bring ineffective assistance of counsel claims at the federal level. Third, just like what happened in Barry Jones' case, state attorneys general and prosecutors can undertake a review of cases in their state where the defendant is claiming actual innocence.

A. The States Can Create "Cause" to Justify Federal Review

If a state wants to help mitigate the impact of *Shinn v. Ramirez* on defendants, there is a potential solution. If a state legislature were to adopt a post-conviction scheme that explicitly guaranteed the effectiveness of counsel in state post-conviction proceedings, then based on the ruling in *Shinn,* the Supreme Court should be compelled to find "cause" in future cases of ineffective assistance of counsel that come from that state.

As the current doctrine stands, the only way to overcome the default procedural bars and introduce evidence of ineffective assistance of counsel is to have "cause;" *Shinn* held that there was no "cause" when there was ineffective assistance of counsel.[110] Justice Thomas argued that this was strictly because the Sixth Amendment does not guarantee that counsel for state post-conviction review is effective, meaning that there cannot be "cause" that justifies federal habeas review and meets the requirements of §2254(e)(2).[111] This leads to the conclusion that while guaranteed

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109. Coleman v. Thompson*,* 501 U.S. 722, 750 (1991) (Holding that "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.").

110. The Criminal Justice Section Standards discuss the meaning of "cause." Under Standard 22-6.1, Finality of the Judgement of Conviction and Sentence, part (c)(ii), states "having raised the contention in the court, failed to pursue the matter on appeal, a court may deny relief on the ground of an abuse of process. Abuse of process should be an affirmative defense to be pleaded by the respondent. Where a rule or procedure governing conduct of criminal prosecutions requires that specified defenses or objections be presented at a certain time, and an applicant raises in a postconviction proceeding an issue that might have been but was not presented in a timely manner in the proceeding leading to judgement of conviction, the applicant *should be required to show cause for the failure to comply with the rule of procedure* [emphasis added]. In other instances, the burden of proof of abuse of process should be borne by the respondent." ABA, Standards for Criminal Justice: Fair Trial and Public Discourse (2016).
https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_postconviction_blk/.

111. Shinn v. Ramirez*,* 142 S. Ct. 1718, 1733 (2022) (citing Davila v. Davis, 582 U.S. 521, 6

effectiveness of state post-conviction counsel would have numerous benefits, the biggest benefit would be that it could lead to a finding of "cause" under *Coleman v. Thompson,* which in turn would allow for federal habeas review of ineffective assistance of counsel claims.

Under *Coleman v. Thompson,* a federal habeas court can make an exception to the default rule of deference to the state judgement if the defendant can demonstrate cause and prejudice.[112] However, *Coleman* held that an attorney's errors in the post-conviction proceeding did not qualify as cause to excuse procedural default because there is no guaranteed effective assistance of counsel in state post-conviction proceedings.[113] *Martinez,* as discussed previously,[114] reversed course and held that inadequate assistance of post-conviction counsel could be sufficient cause to excuse a procedural default.[115] The Court reasoned that if state post-conviction counsel unreasonably and prejudicially fails to raise a viable claim of ineffective assistance of trial counsel, then there is cause and, therefore reason for federal habeas review.[116] However, *Trevino v. Thaler,*[117] in applying *Martinez,* held that the scope of *Martinez* is relatively narrow. Justice Thomas leaned on this interpretation in his holding in *Shinn,* which concluded that *Martinez* did not mean for the holding to reach state post-conviction proceedings because the Sixth Amendment does not guarantee effective counsel at that stage.[118]

Therefore, if a state legislature were to adopt a post-conviction scheme that guaranteed the effectiveness of counsel in state post-conviction proceedings, then the Supreme Court would be inclined to find cause. For example, the New Jersey Supreme Court has a unique approach to post-conviction review. "[O]ur court rules, in an initiative unique among our sister-jurisdictions, state that every defendant is entitled to be represented by effective counsel on the first post-conviction petition . . . counsel should

(2017)) ("It follows, then, that in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default.").

112. *Coleman,* 501 U.S. 722.

113. *Id.*

114. *Supra* section IV.

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

116. *Id.*

117. Trevino v. Thaler, 569 U.S. 413 (2013) (Holding that a defendant may bring an ineffective assistance of trial counsel claim in federal habeas corpus court despite procedurally defaulting if there was no counsel or ineffective counsel in the initial collateral-review proceeding. However, this holding is limited to instances where state law requires the ineffective assistance of counsel claim to be raised in the initial collateral proceeding/first state appeal. Because Texas state law permitted Trevino to bring his ineffective assistance claim on direct appeal, but in practice he was unable to do so, he was not afforded a full opportunity to litigate his claims of ineffective assistance of counsel claims and is not procedurally defaulted from bringing them.).

118. Shinn v. Ramirez*,* 142 S. Ct. 1718 (2022).

advance any grounds insisted on by the defendant notwithstanding those that counsel deems them without merit."[119] Because New Jersey guarantees the appointment of post-conviction counsel and provides a guarantee of that counsel's performance, the Supreme Court would have to recognize that ineffective assistance of counsel claims coming from New Jersey could be found as cause to justify federal habeas review.

B. The Legislature Can Create National Standards That Better Support State Public Defenders

At the end of the day, if the Supreme Court decides a case in a way that adds a significant burden to the state courts, the legislature must pick up the slack and create a new national standard that mandates a nationwide increase in the funding and resources that state public defender offices receive. Because *Shinn* eliminates the ability to bring new ineffective assistance of counsel claims in federal court, the court-appointed public defenders at the state level must be effective attorneys, making no error, for the defendants' Sixth Amendment rights to be satisfied. For public defenders to operate such that they can represent a client at the level needed to reach effective assistance of counsel, they must be adequately staffed, be adequately funded, and have adequate access to resources.

In 2019, Senator Kamala Harris introduced the Equal Defense Act, which would have boosted resources for public defenders across the country by offering a $250 million grant program on top of case limits for public defenders.[120] While the act was not passed, it serves as a baseline for what the legislature could pass to ensure that public defenders have the ability to be effective. The Equal Defense Act directed the Department of Justice to award grants to state and local governments, tribal organizations, and public defender offices for public defense. In turn, the grant money must be used to establish a data collection process, develop workload limits, satisfy specified compensation requirements, and go to public defender/court-appointed attorney training.[121]

Public defenders nationwide have been anxiously awaiting a statute like the one proposed to be passed. And it's not just public defenders themselves rooting for this increase in resources. It is also leaders in the legal field as

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119. State v. Rue, 811 A.2d 425, 433 (N.J. 2002) (citing N.J. Sup. Ct. R. 3:22-6).

120. EQUAL DEFENSE ACT of 2021, H.R. 1408, 117th Cong.; A similar bill was sponsored by Suzanna Bonamici, Democrat Senator for Oregon's 21st congressional district, in 2022 but it died in Congress as it did not receive a vote. *See* H.R. 1408 (117th): EQUAL DEFENSE ACT of 2021, GOV TRACK (Feb. 26, 2021), https://www.govtrack.us/congress/bills/117/hr1408.

121. H.R. 1408 (117th): EQUAL Defense Act of 2021, GOV TRACK (Feb. 26, 2021), https://www.govtrack.us/congress/bills/117/hr1408.

well as state prosecutors. April Frazier Camara, who is the President and CEO of National Legal Aid & Defender Association, wrote that she would applaud the reintroduction of something like the Equal Defense Act, as she feels that it will increase public defender's ability to provide effective counsel and seek true justice.[122] Moreover, many state prosecutors, in the interest of forming a more just criminal justice system, approve of increased and adequate funding for state public defense offices.[123]

A paper released by the Brennan Center for Justice at NYU Law highlights public defenders' lack of resources compared to their opponents in the courtroom and proposes steps that municipalities, states, and the federal government can take to ensure that public defenders provide adequate legal representation.[124] One of the proposed solutions is an increase in federal funding, specifically passing federal legislation to supplement indigent defense costs.[125] The suggested solution is for federal legislation to establish grant programs for indigent providers. This proposed solution's advantage is that if public defense offices must apply to receive grants, the grants will serve as a check to ensure public defense offices are implementing best practices.[126] This solves issues with funding as well as attorney management. However, the issue with this proposed solution is that public defense offices are already incredibly busy and understaffed. If they must take the time to apply for grants, which is not an easy task, to receive the funding necessary for adequate staffing, the process may be a major deterrent in getting the offices to even apply.

While a full discussion of options for reform is beyond the scope of this note, there are many other reforms that could be made to reduce resource disparity. A few examples are setting state-specific workload standards, establishing statewide indigent defense providers, and funding indigent defense at the state level from general revenue.[127] Moreover, more general criminal justice system reforms, such as not jailing for minor drug possessions, would greatly reduce the number of people who need a public

122. April Frazier Camara stated "People who have been accused of crimes have the right to representation. We essentially undermine due process and compromise the ability of people to seek true justice when public defenders are forced to handle too many cases with too few resources. The Equal Defense Act will ensure that public defenders have the resources they need to ensure that people receive the best representation possible." *Bonamici Introduces Bill to Address Public Defense Shortage* (November, 17, 2022), https://bonamici.house.gov/media/press-releases/bonamici-introduces-bill-address-public-defense-shortage.

123. *See supra* note 110.

124. H.R. 1408 (117th): EQUAL DEFENSE ACT of 2021, GOV TRACK (Feb. 26, 2021), https://www.govtrack.us/congress/bills/117/hr1408.

125. Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*. BRENNAN CENTER FOR JUSTICE. (Sep. 09, 2019), https://www.brennancenter.org/our-work/research-reports/fair-fight.

126. *Id.*

127. *Id.*

defender. These reforms would thereby reduce the demand put on the system. While these are all feasible proposed solutions, they are beyond the scope of this note. I include them here merely to show that any reform that increases resources or decreases the demand for public defenders would act to help ensure that criminal defendants are receiving effective counsel.

C. Attorneys General and Prosecutors Can Review Cases for Evidence of Actual Innocence.

Lastly, if the federal courts refuse to hear evidence that was not preserved at the state level, the states can agree to hear it. In most states, both the attorney general and local elected prosecutors have the ability to reconsider cases when the defendant is claiming actual innocence.[128] A growing number of prosecutors are running on the platform of progressive prosecution and using the implementation of reviewing wrongful convictions as a key platform.[129]

Many prosecutors and attorneys general are implementing Conviction Review Units to evaluate new forensic and non-forensic evidence in innocence claims to help facilitate exonerations; establishing a process for reviewing convictions is becoming a new normal.[130] In their applications, these units allow individuals to include new evidence of their innocence and the prosecutors to look at past convictions to evaluate any evidence of innocence.[131] If the attorney working the Conviction Review Unit believes the applicant may be wrongfully convicted, the local prosecutor then takes steps to help reopen the case and facilitate an exoneration.

However, opening a Conviction Review Unit takes a lot of time and resources. Some small and under-resourced jurisdictions may not find it feasible to staff and fund this kind of unit.[132] In this case, there are other actions that prosecutors' offices can develop to facilitate post-conviction review of actual innocence claims. They can consult with forensic experts, help conduct active reinvestigations, and provide a smaller space for applicants to apply for a review of actual innocence claims.[133] Regardless of the exact action that prosecutors take, it is clear that while our Supreme

128. *Conviction Review Today: A Guide for Prosecutors*, PROSECUTOR'S CENTER FOR EXCELLENCE (Oct. 15, 2020), https://pceinc.org/conviction-review-today-a-guide-for-prosecutors/.

129. Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 81 ALB. L. REV. 101 (2020).

130. *Conviction Review Today: A Guide for Prosecutors*, PROSECUTOR'S CENTER FOR EXCELLENCE (Oct. 15, 2020), https://pceinc.org/conviction-review-today-a-guide-for-prosecutors/

131. *Id.*

132. Webster, *supra* note 129.

133. *Id.*

Court limits federal review of actual innocence claims, state prosecutors' review of actual innocence claims becomes even more important.

VII. CONCLUSION

In *Shinn v. Ramirez,* the Supreme Court made three things very clear. First, innocence is not enough to keep a person off death row.[134] Second, the Supreme Court is okay with keeping an innocent person on death row strictly because of the inefficiencies of their counsel.[135] Third, the Sixth Amendment's guarantee of effective assistance of counsel no longer applies to a large group of vulnerable people who need it the most. Without the ability to bring evidence of ineffective assistance of counsel at the federal habeas level, there is no longer a way for this group of defendants to vindicate their Sixth Amendment rights and no longer a guaranteed Sixth Amendment right to counsel. *Shinn v. Ramirez* essentially gutted the right to effective counsel.

As I have established, while the right to bring an ineffective assistance of counsel claim at the state level is a valuable method of remediating defendants wronged at the trial level, it is not enough. To go back to the scenario referred to in the introduction: if a defendant fails to bring evidence of innocence because they have an ineffective trial attorney, and then an ineffective state post-conviction attorney who fails to raise evidence that the trial attorney was ineffective, what is the defendants remedy? In *Shinn*, the Supreme Court found that the evidence of innocence must be procedurally barred to preserve the finality of a state courts' judgement. I argue that barring this evidence admission is a violation of due process.

I proposed multiple solutions to overcome the barrier that the Supreme Court imposed on criminal defendants. First, the states should expressly guarantee the effectiveness of assistance of counsel in state post-conviction proceedings. Because Justice Thomas based his finding that there is no cause on the fact that there was no state-guaranteed right to effective counsel in state post-conviction proceedings, if state courts were to amend their constitutions to guarantee the assistance of counsel, then the Supreme Court could no longer rely on this line of reasoning when refusing to find cause. That being said, a clear line of weakness in this proposed solution is that it relies on the Supreme Court to stay consistent with its logic in *Shinn.* In a court that prioritizes finality over justice, it is very possible that they

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134. Referring to Mr. Roysden, the Arizona Prosecuting Attorney, who stated "I think, in (a)(2)(B) that innocence isn't enough here." Trial. Tr.vol. 1, 12.

135. Shinn v. Ramirez*,* 142 S. Ct. 1718, 1724 (2022). ("Thus, a prisoner is 'at fault' even when it is his state post-conviction counsel who is negligent".).

continue to find ways to justify limiting federal habeas review no matter what the state courts guarantee.[136] Therefore, while I think that any guarantee of effective counsel at the state post-conviction level would be beneficial for several reasons, it may not get us where we need to be.

Second, in an effort to mitigate the negative impact of *Shinn* on state public defense offices, I proposed that legislatures must pick up the slack and create a new national standard that mandates a nationwide increase in the funding and resources that state public defenders receive. If we expect state public defenders to be perfectly effective, the state public defense offices need the resources to practice at this level of efficiency. However, one weakness of this proposal is that this type of national standard, while proposed, has never been passed. As mentioned, Kamala Harris, as well as several other senators thereafter, has proposed an Equal Defense Act to boost resources across the country. The Equal Defense Acts have never been passed. Although there has never been such a drastic need for an increase in public defender resources as in the aftermath of *Shinn*, and although I have not completely lost faith in our legislators, the track record of the Equal Defense Act gives me pause. However, while the likelihood of passage is slim, it is a solid solution for mitigating the impact of *Shinn* if passed.

Third, I proposed that attorneys general and prosecutors in each state can review cases in their state where the defendant is claiming actual innocence. If the attorneys general and prosecutors take it upon themselves to review cases of actual innocence, the federal courts are simply not needed for this purpose, and the effects of *Shinn* are moot. This solution is strong because it is already occurring in many states, especially with the rise of Conviction Review Units. However, a weakness of this proposal is that reviewing these cases is not something that attorneys general or the prosecutors will likely view as a top priority of their job. Therefore, it is likely that many cases just like Jones' will not be reviewed. Moreover, while many states do have statutes allowing prosecutors to reopen a case, this authority is not uniform, so the true effectiveness of this solution will vary by state.

In sum, the majority opinion of *Shinn v. Ramirez* deprives criminal defendants of their Sixth Amendment right to the effective assistance of counsel. The Court, in the interest of federalism, planned to execute a man with innocence claims, a man later found to be innocent of his first-degree murder conviction. One can hope that the Court eventually decides that due process requires their interest in justice to exceed their interest in finality or that new justices get appointed with different priorities. For now, those who desire to protect criminal defendants from the aftermath of *Shinn* should

136. Cohen, *supra* note 88.

adapt from this ruling and take action to support state public defenders and criminal defendants in the aim for justice. For now, I, alongside many others, am dreaming of the day when innocence will be enough to keep a man off death row.