School of Law
UNIVERSITY OF GEORGIA
Prepare. Connect. Lead.

Georgia Criminal Law Review

Volume 2 | Number 2 Article 4

2024

Burning the Candle at Both Ends: A Case for the Right to Counsel at the State Habeas Level

Sierra Stanfield
University of Georgia School of Law

Burning the Candle at Both Ends: A Case for the Right to Counsel at the State Habeas Level

Cover Page Footnote

* Sierra Stanfield is a third-year student at the University of Georgia School of Law. She received her undergraduate degree in political science from Berry College. She would like to extend her sincerest thanks to the Georgia Criminal Law Review Editorial Board, as well as Professor Jessica Heywood, for their continued help with this Note. Additionally, she would like to thank her husband, Andrew Thacker, for his perpetual support of her endeavors.

BURNING THE CANDLE AT BOTH ENDS: A CASE FOR THE RIGHT TO COUNSEL AT THE STATE HABEAS LEVEL

Sierra Stanfield[*]

Shinn v. Ramirez *is the latest in a line of court decisions that place debilitating restrictions on the habeas corpus process, making it more difficult than ever for ineffective assistance of counsel claimants to prevail on a federal habeas claim. Paired with the growing restrictions placed on the criminal appellate process, both by the states and by the Supreme Court, these decisions make it near-impossible for many criminal defendants to challenge their convictions and guarantee their rights.*

The decision not to guarantee counsel at the state habeas level is grounded in logic that predated these restrictions. The state habeas hearing has become, for many defendants, the first opportunity to challenge their convictions. For some, it may even be the only opportunity. Due to the increased importance of the state habeas petition itself and the opportunity for evidentiary development at this stage, it is high time to reconsider this decision.

Without a right to counsel at the state habeas proceeding, defendants harmed by ineffective assistance of counsel at prior hearings will face the habeas corpus process without the necessary assistance to make an adequate claim. Without guaranteed counsel, defendants are often forced to represent themselves, leading to faulty evidentiary records. Due to the decision in Shinn, these mistakes cannot be corrected at the federal habeas stage. Therefore, in order for indigent defendants to prevail on their ineffective assistance claims at the federal habeas level, counsel must be provided.

[*] Sierra Stanfield is a third-year student at the University of Georgia School of Law. She received her undergraduate degree in political science from Berry College. She would like to extend her sincerest thanks to the Georgia Criminal Law Review Editorial Board, as well as Professor Jessica Heywood, for their continued help with this Note. Additionally, she would like to thank her husband, Andrew Thacker, for his perpetual support of her endeavors.

The right to counsel stems from the idea that indigent defendants will be left without the same quality of defense afforded to wealthy ones. Like the criminal trial and appellate stage, the state habeas hearing has taken on a level of critical importance: it is the last opportunity to develop the evidentiary record used to support a particular claim. In a system where many petitioners, either through counsel's error or due to state procedural rules, will not be given an opportunity to bring their appeal, the state habeas claim may be the only chance they have to develop this claim. Without affording indigent state habeas petitioners an attorney, a line has been drawn between wealthier and poorer petitioners.

To preserve the opportunity to bring a habeas petition for all criminal defendants, and not just those who have the funds, the decision not to afford state habeas petitioners a right to counsel must be reconsidered.

TABLE OF CONTENTS

I. INTRODUCTION

The 2022 Supreme Court term was widely discussed for its landmark decisions, including the reversal of *Roe v. Wade* and a major restriction on the government's ability to promulgate environmental regulations.[1] One decision that went largely unnoticed, both within the legal community and among laypeople, is the one put forth in *Shinn v. Ramirez*.[2] Through this decision, the Supreme Court inflicted a massive blow upon the Sixth Amendment right to counsel, particularly for individuals in states without a solid capital counsel system. *Shinn* institutes a new restriction on federal habeas corpus claims by barring the development of the evidentiary record past the state habeas level, particularly in ineffective assistance of counsel claims.[3] According to a number of practitioners, a successful federal habeas corpus claim virtually always requires the introduction of new evidence.[4] This presents a number of issues for capital defendants.

Ineffective assistance of counsel claims are the most common federal habeas claim.[5] This new limitation will apply in many of these cases, barring petitioners from pursuing new evidence to support their federal habeas claim. Without this evidence, many federal habeas corpus claims will be unable to prevail. And, perhaps even more unjustly, defendants who have experienced inadequate counsel at both the trial level and the state habeas corpus level will likely be unable to obtain any kind of relief, effectively providing no remedy for those instances of ineffective assistance.[6]

---

[1] *See generally* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022); West Virginia v. EPA, 142 S.Ct. 2587 (2022).

[2] Shinn v. Ramirez, 142 S.Ct. 1718 (2022).

[3] *Id.* at 1728.

[4] *See id.* at 1746 (Sotomayor, J., dissenting) ("Ineffective-assistance claims frequently turn on errors of omission: evidence that was not obtained, witnesses that were not contacted, experts who were not retained, or investigative leads that were not pursued. Demonstrating that counsel failed to take each of these measures by definition requires evidence beyond the trial record.").

[5] Dale Chappell, *Raising Successful Federal Habeas Corpus Claims*, 4 CRIMINAL LEGAL NEWS 22, 22 (2021).

[6] *See* Christina Swarns, *Innocence Project Statement from Executive Director Christina Swarns on Shinn v. Ramirez and Jones*, THE INNOCENCE PROJECT (May 4, 2022), https://innocenceproject.org/news/innocence-project-statement-from-executive-director-christina-swarns-on-shinn-v-ramirez-and-jones-2/ (discussing the impact of the *Shinn* decision on indigent defendants).

In states with robust federal defense systems, defendants are less likely to be provided ineffective counsel and, therefore, less likely to need the relief that can be afforded through an ineffective assistance claim at the federal habeas level. In states where this is not the case, however, the Court's decision will have massive ramifications. This is especially true for those who do not have the resources to select their own counsel. As a result, defendants are not given a choice in who is representing them at the trial level, nor are they able to be selective at the state habeas level—if they are able to obtain counsel at all. The *Shinn* decision ignores this reality entirely, placing the responsibility of obtaining effective counsel, at least at the state level, on these defendants. Due to the restrictions handed down in *Shinn* on admitting evidence at the federal level in ineffective assistance of counsel claims, introducing evidence at the state habeas level is a vital piece of a successful habeas petition—this may be the only opportunity to get it into the record.

By restricting the evidence available to present ineffective assistance of counsel claims in the federal habeas proceeding, the Court is infringing on a long-available remedy to ineffective assistance. For defendants who face the unfortunate reality of ineffective representation at both the trial level and at their state habeas proceeding, the *Shinn* decision leaves them with little opportunity to get relief for these claims.[7] While they are still able to pursue federal habeas relief, the evidentiary bar prevents them from introducing any evidence not already on the record at the state habeas level, rendering many otherwise valid ineffective assistance claims completely without recourse. Without a robust opportunity to introduce evidence and bring these claims, there is no Sixth Amendment right to counsel, at least when it comes to this class of criminal defendants. The appellate process for ineffective assistance claimants has also been circumscribed, both by state restrictions on

[7] *See* Cary Sandman, *Supreme Court Turns a Blind Eye to Wrongful Convictions, Guts 6th Amendment Rights to Effective Counsel,* N.Y. STATE BAR JOURNAL (Aug. 9, 2022), https://nysba.org/supreme-court-turns-a-blind-eye-to-wrongful-convictions-guts-6th-amendment-rights-to-effective-counsel/ (analyzing *Shinn* and its impact on the Sixth Amendment right to effective assistance of counsel).

appellate processes[8] and the implementation of the *Strickland* standard in the ineffective assistance context.[9]

Criminal defendants are now battling restrictions on both ends of the state habeas petition, placing even more emphasis on this petition as a forum for their ineffective assistance claims. Because some defendants are now unable to bring these claims through the criminal appellate process, state habeas proceedings may be their first and only opportunity to be truly heard. Due to the increasing importance of these hearings and of getting that evidence on the record, it is time to reconsider the Court's decision in *Pennsylvania v. Finley*, which ultimately held that there is no right to counsel for state habeas petitioners.[10]

II. HABEAS CORPUS

Habeas corpus is designed to safeguard against unlawful imprisonment. The habeas corpus proceeding grants criminal defendants the ability to challenge their imprisonment in a process protected by the Constitution.[11] Generally, a criminal defendant that has been sentenced to death has "three successive procedures to challenge constitutional defects in their conviction or sentence."[12] The first option is a direct criminal appeal to a higher court.[13] Next, the defendant might choose to pursue state habeas relief.[14] Finally, after those options have been exhausted, the defendant may petition for a federal habeas corpus proceeding.[15] For most capital petitioners, the federal habeas corpus proceeding is the last opportunity to challenge their conviction and subsequent

[8] *See*, *e.g.*, Cook v. State, 870 S.E.2d 758 (Ga. 2022) (holding that the state's longstanding practice of allowing untimely appeals where ineffective counsel initially failed to file an appeal is impermissible and should be pursued through the habeas process instead).

[9] *See* Strickland v. Washington, 466 U.S. 668 (1984) (holding that the proper inquiry in ineffective assistance claims is whether counsel's conduct was (1) unreasonable and (2) was so prejudicial that, but for counsel's error, the outcome of the trial would have been different).

[10] Pennsylvania v. Finley, 481 U.S. 551 (1987).

[11] *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended . . .").

[12] Jillian Redding, DEATH PENALTY APPEALS AND HABEAS PROCEEDINGS, OLR RESEARCH REPORT (Apr. 24, 2009), https://www.cga.ct.gov/2009/rpt/2009-R-0178.htm.

[13] *Id.*

[14] *Id.*

[15] *Id.*

imprisonment prior to their execution.[16] There are opportunities for relief outside of habeas corpus, such as clemency, but pursuing these remedies is rarely successful, particularly in capital cases.[17] As such, the federal habeas proceeding carries a particularly heavy weight for capital defendants.

Guidance for bringing a federal habeas corpus claim is codified in 28 U.S.C. § 2254. Under 28 U.S.C. § 2254(a), (d), and (e), an application for a federal writ of habeas corpus may be entertained when the applicant is "in custody in violation of the Constitution or laws or treaties of the United States,"[18] the prior state adjudication of the claim resulted in (1) a decision "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding[,]"[19] or if the applicant makes a showing that the claim relies on (A) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence" and (B) "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[20]

This statute sets forth the standard for successfully bringing a habeas claim, including a requirement that the applicant "exhaust[t] the remedies available in the courts of the State[.]"[21]

---

[16] *See Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of the Honorable Jerrold Nadler, Chairman of the Subcomm.) (discussing the importance of the writ of habeas corpus as a "defense against . . . injustice in our legal system").

[17] *Clemency*, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/facts-and-research/clemency (last visited Dec. 29, 2023) ("Aside from the occasional blanket grants of clemency by governors concerned about the overall fairness of the death penalty, less than two have been granted on average per year since 1976. In the same period, more than 1,500 cases have proceeded to execution.")

[18] 28 U.S.C. § 2254(a)(1996).

[19] *Id.* at § 2554(d).

[20] *Id.* at § 2254(e)(1).

[21] *Id.* at § 2254(b)(1)(A).

These available remedies include the defendant's criminal trial, appellate opportunities, and the state habeas proceeding. The statute also outlines exceptions to this requirement, including circumstances where there is an "absence of available State corrective process[es]" and where certain circumstances have made available processes ineffective.[22] This exception may apply in situations where the defendant has been deprived of the opportunity to challenge their conviction through one of these earlier proceedings, allowing defendants to bring their claim even if they have not technically exhausted the corrective processes available.

An important question throughout this process, as any process in the criminal justice system, is if and when the right to counsel applies to these proceedings. Through the Sixth and Fourteenth Amendments, the Court has held that criminal defendants retain the right to counsel both at the trial and throughout their "first appeal of right."[23] Once criminal defendants exhaust those appeals, however, the Court has limited the right to counsel. In state habeas proceedings, habeas corpus petitioners are not guaranteed counsel.[24]

Some states have chosen to appoint state habeas counsel despite the Supreme Court's holding that it is not constitutionally required.[25] Because the Court has held there is no implicit right to this counsel, however, the process of appointing counsel varies state-by-state.[26] As for states without these resources, many defendants must hope for continued representation by their trial or appellate counsel. If that kind of continued representation is not available, they are left with only a few options: obtaining new pro bono counsel, paying out of pocket for an attorney, or filing a pro se habeas petitions.

---

[22] *Id.* at § 2254(b)(1)(B).

[23] *See generally* Pennsylvania v. Finley, 481 U.S. 551 (1987).

[24] *Id.*

[25] *See* Dianna Cummiskey, *The Appointment of Counsel in Collateral Review*, 24 U. PA. J. CONST. L. 939, 943–49 (2022) (examining the lack of a right to counsel in the habeas corpus context and various state appointment procedures).

[26] *Id.* at 946 ("[T]he state and federal systems have adopted a variety of approaches including public defender systems, assigned counsel programs, or contract attorneys.").

III. LIMITATIONS ON FEDERAL HABEAS CORPUS

While it is impossible to discuss every change that has been made to federal habeas review since the Court decided *Pennsylvania v. Finley*, there are a number of notable events in the habeas landscape that create a baseline for the analysis. This section addresses (1) The Antiterrorism and Effective Death Penalty Act, (2) *Shinn v. Ramirez*, and (3) other ineffective assistance of counsel case-specific limitations.

A. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

Enacted in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes."[27] Title I of AEDPA focused on habeas corpus reform, effectuating a number of provisions that would restrict the circumstances from which criminal defendants, especially those on death row, could bring federal habeas corpus claims.[28]

The AEDPA sought to decrease the number of federal habeas claims brought after the Supreme Court made habeas review available to state prisoners.[29] In most federal habeas claims, 28 U.S.C. § 2254 is the most relevant provision. This provision outlines the requirements for mounting a federal habeas petition. For a federal habeas petition to be granted, it must "appea[r] that: (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (B)(ii) circumstances exist that render such process ineffective to protect the rights of the applicant."[30] This is often referred to as the "exhaustion requirement."

---

[27] 104th Congress Pub. L. No. 104-132.

[28] *See generally* S. 735, 104th Cong. (1996) (enacting several provisions limiting the circumstances in which defendants may bring federal habeas corpus claims).

[29] *See* Brittany Glidden, *When the State Is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 NYU REV. OF L. & SOCIAL CHANGE 177, 179–81 (2001) (describing the legislative purposes of AEDPA).

[30] 28 U.S.C. § 2254(b)(1996).

Section 2254(d) sets out the substantive requirements for a successful federal habeas petition. A petition will not be granted unless the state's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[31]

Congress articulated narrow exceptions to § 2254(d)'s requirements. Those exceptions include when the failure to raise the claim is (1) the result of State action in violation of the Constitution or laws of the United States; (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or (3) based on a factual predicate that could not have been discovered through the exercise of due diligence.[32]

Altogether, 28 U.S.C. § 2254 has presented significant difficulties for federal habeas petitioners. After AEDPA was passed, non-capital cases "take longer to reach federal court after state judgment" and "include more claims per petition," while capital cases "include fewer evidentiary hearings in district court."[33] In both capital and non-capital cases, proceedings "take longer to complete in district court" and "are less likely to end in a grant of the writ."[34]

B. THE *SHINN* DECISION

The respondents in *Shinn v. Ramirez*, David Ramirez and Barry Jones, were both convicted and sentenced to execution following their respective criminal trials.[35] A jury convicted Ramirez of two counts of first-degree murder arising from the death of his girlfriend and her daughter.[36] Jones was convicted of sexual assault, three counts of child abuse, and felony murder following the death of his girlfriend's daughter.[37] Following their convictions, both

[31] *Id.* at § 2254(d).

[32] *Id.* at § 2254(e).

[33] NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 3 (2007).

[34] *Id.*

[35] *Shinn*, 142 S.Ct. at 1728–29.

[36] *Id.* at 1728.

[37] *Id.* at 1729.

respondents exhausted their criminal appeals process and filed for state postconviction relief.[38] Ramirez's initial petition centered upon an assortment of claims, but he did not raise the issue of ineffective-assistance of trial counsel until he filed a subsequent state habeas petition that was ultimately denied due to untimeliness.[39] Jones alleged ineffective assistance of trial counsel in his initial petition for postconviction relief, but did not allege the specific issue raised in his federal habeas petition: a failure to conduct sufficient trial investigation.[40] Both respondents' petitions for this relief were denied by the U.S. District Court for the District of Arizona because they had been procedurally defaulted.[41]

After their claims were denied, both respondents invoked ineffective assistance of postconviction counsel as a basis for forgiving the default.[42] In order to prevail on their ineffective assistance of pretrial counsel claims, both respondents sought to introduce new evidence and build upon the state evidentiary record.[43] In Jones's case, the District Court permitted a 7-day evidentiary hearing, and relying on evidence introduced in that hearing, held that Jones's trial counsel had provided ineffective assistance.[44]

For Ramirez, the District Court allowed him to file new evidence to support his claim, subsequently excusing the default but denying his ineffective-assistance claim on the merits.[45] Ramirez appealed and the Ninth Circuit reversed and remanded, holding that his state court ineffective assistance of trial claim was "substantial, and that Ramirez therefore had suffered prejudice" and, therefore, he should be entitled to engage in evidentiary development prior to a decision on the merits of the claim.[46]

Arizona appealed both decisions to the Ninth Circuit.[47] Arizona's argument relied upon 28 U.S.C. § 2254(e)(2), a provision within AEDPA that bars states from conducting an evidentiary hearing for

[38] *Id.* at 1728–29.
[39] *Id.* at 1728.
[40] *Shinn*, 142 S.Ct. at 1729.
[41] *Id.* at 1728–29.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 1729–30.
[45] *Id.* at 1729.
[46] *Shinn*, 142 S.Ct. at 1729.
[47] *Id.* at 1729–30.

federal habeas claims where "the applicant has failed to develop the factual basis of a claim" on the state court record.[48] The Ninth Circuit denied the appeals, holding that the provision did not apply due to the ineffectiveness of the respondents' postconviction counsel.[49] Because Ramirez's postconviction counsel did not properly raise and develop the trial-ineffective-assistance claim, the Ninth Circuit reasoned that this failure was grounds to forgive the procedural default.[50] After Arizona's appeal was denied, the state petitioned for an en banc rehearing, which the Ninth Circuit denied.[51] After the denial, Arizona petitioned for and was granted a writ of certiorari in the United States Supreme Court.[52]

The central issue in *Shinn* was whether, under 28 U.S.C. § 2254(e)(2), a federal court could order evidentiary development as a response to postconviction counsel's failure to develop the state-court evidentiary record.[53] The respondents did not dispute that the evidentiary records developed in their respective state court claims were, taken alone, insufficient to constitute a meritorious ineffective assistance of counsel claim.[54] Instead, they hoped to build upon their respective evidentiary records at the federal habeas level to make out sufficient ineffective assistance claims.[55]

In a 6-3 decision authored by Justice Thomas, the Court ultimately held that federal habeas corpus claims based on the ineffective assistance of postconviction counsel do not warrant an evidentiary hearing, deciding that the evidence introduced in these claims would be restricted to the evidence already on the state-court record.[56] The Court's decision was based upon a number of factors, the most important being that the states' right to enforce criminal law and the respondents' alleged failure to provide an adequate basis for abridging those rights.[57]

---

[48] 28 U.S.C. § 2254(e)(2) (1996).
[49] *Shinn*, 142 S.Ct. at 1729–30.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 1730.
[53] *Id.* at 1728.
[54] *Id.* at 1730.
[55] *Shinn*, 142 S.Ct. at 1729–1730.
[56] *Id.* at 1728.
[57] *See id.* at 1730–31 (discussing the states' role as the principle enforcing body of criminal law and the considerations relevant to how allowing these claims would impact that role).

It is a settled principle that the states have primary responsibility for criminal law enforcement.[58] Habeas corpus, particularly federal habeas corpus, is a necessary exception to this responsibility. In the *Shinn* decision, however, the Court characterizes federal habeas corpus as an intrusion on this traditional responsibility of the states.[59] According to the Court, federal habeas review is an extreme imposition on state sovereignty, an intrusion "'matched by few exercises of federal judicial authority.'"[60] In addition to the interference it presents upon state sovereignty, federal habeas review also "imposes significant costs on state criminal justice systems."[61] Due to this interference with the principles of comity and the resulting costs of a large number of federal habeas corpus claims, the Supreme Court acknowledges a need to limit the number of these claims that may be brought.[62]

The Court concluded that, due to its interference with states' responsibilities and the significant costs that the process imposes, petitioners for federal habeas review should only be entitled to relief when there is an "'extreme malfunctio[n] in the state criminal justice systems.'"[63] Through provisions such as AEDPA and the doctrine of procedural default, Congress and the courts have limited federal habeas review to claims that have been presented to state courts in compliance with the state's procedural rules.[64]

While these provisions are intended to limit the number of federal habeas claims that affect state criminal court decisions, federal courts may still forgive procedural default if the prisoner provides an adequate excuse.[65] The respondents in this case allege that the ineffective assistance of both their trial counsel and their state postconviction counsel are to blame for their failure to develop

[58] *See* Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law.").

[59] *See Shinn*, 142 S.Ct. at 1731 (characterizing habeas relief as an "extraordinary remedy" that should only interfere with state law enforcement when necessary).

[60] *Id.* at 1731 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

[61] *Id.*

[62] *Id.* at 1734 ("Like the decision to grant habeas relief itself, the decision to permit new evidence must be informed by principles of comity and finality that govern every federal habeas case.")).

[63] *Id.* (quoting *Harrington*, 562 U.S. 86 at 102).

[64] *See id.* ("To ensure that federal habeas corpus retains its narrow rule, AEDPA imposes several limits on habeas relief and we [the court] have prescribed several more.").

[65] *Id.* at 1732.

a state-level evidentiary record, but the Court ultimately determined that these facts do not constitute an adequate excuse to forgive the procedural default of their claims.[66]

The Court's determination that ineffective assistance is not a sufficient cause to excuse their failure to develop the state evidentiary record was based largely upon two principles. The first is that, because there is no guaranteed right to counsel in state postconviction proceedings, attorney error is not sufficient cause to excuse a default.[67] The second is that, because the respondents' failed to develop the state-court record, AEDPA provides that they are "'at fault[.]'"[68] The Court's reasoning behind assigning this mistake to the respondents, rather than their counsel, arises from the notion that there is no right to counsel at the state habeas level.[69] Because there is no right to counsel, courts have traditionally held that the failure to properly develop the evidentiary record lies with the habeas petitioner.[70]

According to the Court, when a federal a habeas petitioner is at fault for this kind of failure, only two scenarios exist to hold an evidentiary hearing: (1) where a "'new' and 'previously unavailable' 'rule of constitutional law'" is "made retroactively available" by the Supreme Court, or (2) when it is based on "'a factual predicate that could not have been previously discovered through the exercise of due diligence.'"[71] The Court determined that neither of these circumstances applied in the *Shinn* respondents' case.[72]

In addition to these exceptions, the prisoner must show that additional factfinding would demonstrate his innocence by clear and convincing evidence.[73] Because the Court characterizes the respondents in *Shinn* as "at fault" for the failure to develop the state evidentiary record pertaining to their ineffective assistance of trial counsel claims, it held that they would not be entitled to introduce

[66] *See Shinn*, 142 S.Ct. at 1733 (asserting that excusing procedural default based upon attorney error is inappropriate where there is no guaranteed right to counsel, such as in state postconviction proceedings).

[67] *Id.*

[68] *Id.* at 1735.

[69] *Id.* at 1733.

[70] *Id.* at 1734.

[71] *Id.* at 1734 (quoting 28 U.S.C. § 2254(e)(2) (1996)).

[72] *Shinn*, 142 S.Ct. at 1734.

[73] *Id.*

new evidence to support their federal habeas review claims.[74] Without the opportunity to further develop the evidentiary record, the respondents are unlikely to meet this clear and convincing evidentiary standard, as they are left to utilize the record developed by their allegedly incompetent counsel.

Justice Sonya Sotomayor drafted a strong dissent against the *Shinn* Court's decision to bar any development of the evidentiary record in federal habeas review of ineffective-assistance claims.[75] Her criticism focuses on three major points: *Shinn's* impact on the Sixth Amendment right to counsel, the treatment of precedential cases like *Martinez* and *Trevino,* and the interpretation of AEDPA.[76] Considering these criticisms is important, as they may help effectively navigate future cases that fall under the *Shinn* standard. Additionally, these criticisms may be helpful when the courts must reevaluate existing contradictory precedent. The *Shinn* dissent can be broken down into three essential points: (1) the decision violates the Sixth Amendment, (2) the decision improperly analyzes precedent, and (3) the decision is based on a faulty AEDPA analysis.

It is true that *Shinn* does not outright ban the ability of federal habeas petitioners to bring claims based upon the ineffective assistance of trial or state postconviction counsel.[77] Instead, *Shinn* bars the introduction of new evidence beyond what is available in the state court record. Without the ability to introduce new evidence regarding these claims, most petitioners will be unable to sufficiently flesh out their claims. By excusing the procedural default and allowing the court to hear these claims while simultaneously forbidding them from introducing new evidence, the Court implements a nonsensical application of its former decisions that leaves many petitioners without a remedy for the inadequate representation they have received.[78] At oral argument, even

[74] *Id.* at 1740.

[75] *See generally Shinn*, 142 S.Ct. at 1740 (Sotomayor, J. dissenting).

[76] *Id.*

[77] *See* Pullan & Young, *Don't Panic Over Shinn v. Ramirez*, PULLAN & YOUNG BLOG (May 30, 2022), https://www.texascriminalappeals.law/dont-panic-over-shinn-v-ramirez-but-also-make-sure-to-hire-competent-state-habeas-counsel/ (arguing that the *Shinn* decision will not affect those with competent state postconviction counsel).

[78] *See Shinn*, 142 S.Ct. at 1740 (Sotomayor, J. dissenting) ("It is illogical: it makes no sense to excuse a habeas petitioner's counsel's failure to raise a claim altogether . . . but to fault the same petitioner for the postconviction counsel's failure to develop evidence in support of the trial-ineffectiveness claim.").

Justices Thomas, Kavanaugh, and Chief Justice John Roberts noted the peculiarity of excusing the default but not "allow[ing] the prisoner to make his underlying claim or develop his evidence."[79] It is easy to agree: the Court has decided to allow prisoners to bring these federal claims, but gives them no opportunity to introduce new evidence in order to sustain them. For those whose ineffective assistance claims are based on their counsel's failure to develop the evidentiary record, allowing such an opportunity is essentially pointless, as the very claim at issue is what will prevent those defendants from introducing sufficient evidence to prevail on these claims.

Even for those whose claims are not based upon their counsel's failure to introduce sufficient evidence, *Shinn* presents a major hurdle to prevailing upon ineffective assistance claims. The majority of federal habeas claims are based upon ineffective assistance. It is well-established that, in order to prevail on these claims, petitioners must often introduce new evidence into the record.[80] Without the ability to do so, these claims are doomed from the start, effectively cutting off any available remedy for those who have dealt with inadequate representation at both the trial and the state postconviction level. This is not just unfair, but violative of the Sixth Amendment right to effective representation, a core principle of the American justice system. Without the ability to flesh out these claims at the federal habeas level, many habeas petitioners will be left without relief after suffering inadequate representation at both the trial and state habeas level, such as the petitioners in *Shinn* themselves.

Even before *Shinn,* the Supreme Court previously held that restrictions upon the habeas corpus process are not violative of the Sixth Amendment because there is no Sixth Amendment right to counsel at state habeas proceedings.[81] While this may be true, it does not account for defendants, such as the petitioners in *Shinn*, who faced ineffective assistance at both the trial and postconviction

[79] *Supreme Court Restricts Review of Ineffectice Counsel Claims in Death Penalty Cases*, EQUAL JUSTICE INITIATIVE (May 25, 2022), https://eji.org/news/supreme-court-restricts-review-of-ineffective-counsel-claims-in-death-penalty-cases.

[80] *See* Brief of Federal Defender Capital Habeas Units as Amici Curiae in Support of Respondents, Shinn v. Ramirez, 142 S.Ct 1718 (2022) (No. 20-1009) (asserting that "*Martinez* claims virtually always require extra-record evidence").

[81] *See generally* Finley, 481 U.S. 551; Coleman v. Thompson, 501 U.S. 722 (1991).

stages of their case. These defendants are likely facing an insufficient evidentiary record as a result of their trial counsel. When a criminal defendant has the misfortune of incompetent counsel at both the state trial and habeas hearings, this failure is often rooted, at least in part, in their trial counsel's failure to sufficiently develop the evidentiary record in the first place. At the trial level, the Sixth Amendment right to counsel does apply, and therefore, defendants should be afforded the opportunity to bring holistic ineffective assistance claims. In order to remedy violations of this right, some defendants should be entitled to evidentiary development beyond the state habeas level in order to preserve their right to counsel.

Prior to the *Shinn* decision, federal habeas petitioners who faced ineffective assistance of both trial and state habeas counsel were arguably in the same position as the type of claimants discussed in *Martinez.*[82] In both cases, petitioners sought relief for claims that had not yet had a chance to be heard due to attorney error. Like the defendant in *Martinez,* the respondents in *Shinn* were bringing claims that, without federal habeas relief, would not be heard in any court. It is logical, then, to conclude that ineffective assistance of trial and state habeas counsel provides a legitimate basis for excusing any procedural default and hearing the claims anyway. Appropriately, the court in *Shinn* did not hold otherwise: it merely held that federal habeas petitioners could not introduce new evidence to support their claims.

The decision in *Shinn* is plainly illogical, undermining the very reasoning that supports the basis for allowing these claims into federal habeas review.[83] By allowing ineffective assistance claims to be introduced at federal habeas proceedings, the Court acknowledged that the failure to exhaust these claims did not lie with the claimant, but with their attorney.[84] Despite this, in *Shinn*, the Court is comfortable holding petitioners accountable for their attorneys' failure to introduce evidence to support ineffective assistance claims, even in situations where the petitioner's claim is

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

[83] *See Shinn*, 142 S.Ct. at 1743 (Sotomayor, J. dissenting) (discussing the inherent contradiction in the Court's decision).

[84] *See* Martinez v. Ryan, 566 U.S. 1, 9 (2012) (concluding that ineffective assistance of counsel is a sufficient basis for excusing the procedural default of habeas corpus claims).

predicated upon the attorney's failure to do that very thing.[85] Furthermore, the Court emphasized in both of these cases that narrow exceptions to the principle that petitioners should be held responsible are supported by the importance of the Sixth Amendment right to counsel, a right that is considered a "'foundation for our adversary system.'"[86]

The reasoning behind the Court's decisions in *Martinez* and *Trevino* suggests that where the petitioner's federal claim involves ineffective assistance of trial counsel, and that ineffective assistance claim has not and will not be afforded an opportunity to be heard in a prior proceeding, the petitioner should be entitled to have their claim heard for the first time at federal habeas review. Allowing these claims to be heard without implementing some sort of evidentiary discovery process renders such an allowance effectively useless, as claimants will often need to introduce additional evidence in order to flesh out their ineffective assistance claims. Obviously, this is not the conclusion that the Court reached in *Shinn*. As stated above, *Shinn* does not implement an outright ban on these claims, but its effects will constitute such a prohibition. In order to fully enable these petitioners to pursue their Sixth Amendment rights through the opportunity to address their counsel's failures, they must be able to not only bring these claims, but be afforded an occasion to introduce new evidence to support them.

The holding in *Shinn* is contradictory to some of its earlier reasoning. In the opinion, the majority insists that, in order to honor the provisions enacted in AEDPA, federal habeas petitioners must not be allowed to develop the evidentiary record beyond the state level to support inadequate representation claims.[87] The majority argued that, by hearing certain exceptional claims, the courts have robbed the states of their authority in these criminal cases. In its own reasoning, however, the Court engages in an interpretation of the statutory language that substitutes its own judgment for the

[85] *See generally Shinn*, 142 S.Ct. 1728 (determining that federal habeas petitioner must bear their attorneys' error to introduce sufficient evidence to support their habeas claim in the state court record).

[86] Trevino v. Thaler, 569 U.S. 413, 422 (2013) (quoting *Martinez*, 566 U.S. at 12).

[87] *Shinn*, 142 S.Ct. at 1734 ("We now hold that, under § 2254(e)(2), 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.").

legislature by assuming that Congress would object to these exceptions.[88]

In § 2254(e)(2), AEDPA provides that, generally, the habeas petitioner should be considered at fault for the failure to develop evidentiary claims at a postconviction hearing.[89] The Court's previous decisions in cases such as *Martinez* and *Trevino*, where it interpreted exceptions to this rule, have been met by little resistance from the legislature. This implies that, so long as the general principle stands, Congress does not take issue with the Court's jurisprudence creating exceptions to this rule.

The AEDPA was, at least in part, motivated by a desire to institute certain limitations on federal habeas corpus review.[90] This does not mean, however, that it can be used as a catchall provision for the Court's decisions to severely circumscribe the ability of defendants to bring federal habeas claims, especially when they are based on a constitutional right considered fundamental to the American system. Since its enactment in 1996, Congress has maintained the ability to amend the statute to clarify whether it should apply to bar development of the evidentiary record in these cases. Despite a 26-year period to do so, it has not, indicating that AEDPA was not intended to bar evidentiary development in these types of claims. By ignoring Congress's presumably intentional omission of this prohibition from the statute, the Court has engaged in an impermissible analysis of AEDPA and consequently substituted its judgment for that of the legislature.

C. FEDERAL HABEAS PROCEEDINGS AND THE INEFFECTIVE ASSISTANCE OF COUNSEL

AEDPA and *Shinn* were both landmark events in the habeas corpus landscape. It is also important to consider, however, how the case law surrounding ineffective assistance claims developed prior to the Court's decision in *Shinn*. It is especially important to consider how these limiting devices work in tandem, as all of these doctrines could come into play in a given case.

---

[88] *Id.* at 1736 (rejecting respondents' position that Congress "may have actually invited" the lower court's decision).

[89] 28 U.S.C. § 2254(e)(2) (1996).

[90] *See* 104th Congress Pub. L. No. 104-132 (setting forth the reasoning underlying AEDPA's enactment).

In *Pennsylvania v. Finley,* the Court declined to extend the right to counsel to postconviction proceedings.[91] It limited the right to counsel "to the first appeal of right, and no further."[92] The decision in *Finley* was based largely on the same reasoning as the Court's prior decision in *Ross v. Moffit*, 417 U.S. 600 (1974), where the court "rejected suggestions that [it] establish a right to counsel on discretionary appeals."[93] The *Finley* Court adopted language from *Moffitt* that compared exercising the right to an attorney on appeal to using a "sword" used to "upset the prior determination of guilt" rather than as a "shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence[.][94] In doing so, the *Finley* Court implicitly endorsed the position that the latter purpose of an attorney is one that will justify imposing the right to counsel in a given circumstance. Furthermore, the Court emphasized that the "duty of the State . . . is not to duplicate the legal arsenal that may be privately retained . . . but only to assure the indigent defendant an adequate opportunity to present his claims fairly . . . ."[95] It also pointed to other factors: "[p]ostconviction relief is even further removed from the criminal trial" that "normally occurs only after the defendant has failed to secure relief through direct review of his conviction."[96] The Court denied that fundamental fairness required the State to supply a lawyer, holding that "the equal protection guarantee of 'meaningful access'" had not been violated.[97]

Coleman v. Thompson evaluated *Finley's* holding against the question of whether counsel's failure to file a timely notice of appeal would excuse the procedural default that would normally bar habeas review.[98] The Supreme Court ultimately decided that counsel's failure to file a timely application for state habeas review was not sufficient cause to excuse the procedural default of the defendant's state habeas claim.[99] This determination was based on

[91] *Finley*, 481 U.S. at 555.
[92] *Id.* at 555.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 556.
[96] *Id.* at 557.
[97] *Finley*, 481 U.S. at 557.
[98] *Coleman*, 501 U.S. at 725.
[99] *Id.*

the Court's decision in *Finley*.[100] Because the Court held in *Finley* that there is no right to counsel at the state habeas proceeding, the *Coleman* court decided that the habeas petitioner will bear the burden of their counsel's ineffective assistance as it pertains to the failure to follow state procedural rules related to postconviction relief.[101]

Since the Court's decision in *Coleman*, the ineffective assistance of an attorney will not excuse a procedural default in postconviction proceedings.[102] While *Coleman* imposed a harsh restriction on habeas petitioners' ability to excuse procedural default resulting from their counsel's error, two later decisions carved out important exceptions to that rule.[103]

Prior to the *Shinn* decision, one of the most notable interpretations of the effect of ineffective assistance of counsel on these holdings came from *Martinez v. Ryan*, 566 U.S. 1 (2012). In *Martinez,* the Court examined whether AEDPA would bar the petitioner from asserting ineffective assistance of counsel as cause for a procedural default, therefore enabling the petitioner to have their claim heard in federal court despite the fact that it had been technically defaulted.[104] The *Martinez* Court ultimately decided that ineffective counsel at initial review collateral proceedings "may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[105] This created an important exception to the rule in *Coleman* for ineffective assistance petitioners.

In concluding that inadequate representation at initial review collateral proceedings could function as a cause to excuse the petitioner's procedural default, the Court relied on the idea that "it is likely that no state court at any level" would hear the claim due to attorney error if it did not excuse the default.[106] Absent an exception allowing the excuse of procedural default, it is possible that there would be no court available to hear the prisoner's

[100] *Finley*, 481 U.S. at 557.

[101] *Id.*

[102] *Id.* at 9.

[103] *See generally Martinez*, 566 U.S. 1; *Trevino*, 599 U.S. 413 (demonstrating two important exceptions to the Court's holding in *Coleman*).

[104] *Martinez*, 566 U.S. at 17.

[105] *Id.*

[106] *Id.* at 10.

claims.[107] Claims like the one at issue in *Martinez,* without excusing the procedural default, would not be subject to review in any court. This is distinct from the kinds of claims discussed in *Coleman*, which will be heard in at least one court prior to the petitioner's application for postconviction relief.[108] Through this exception to the procedural default rule, ineffective assistance claims may be addressed in an initial review collateral hearing, even if they were not introduced in prior proceedings.[109]

A year later, the Court elaborated upon this exception, holding that the exception in *Martinez* also applies when a state's procedural framework makes it "highly unlikely that a defendant will have an opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal."[110] In *Trevino v. Thaler*, the petitioner's ineffective assistance claim was considered procedurally defaulted due to his failure to raise it in state court on direct appeal, but the Court applied the *Martinez* exception due to the design of the Texas system, which made it "'virtually impossible'" to present an ineffective assistance claim on direct review.[111] Because of Texas-specific rules on filing, disposal, motions for new trial, and the availability of trial transcripts make it virtually impossible for Texas criminal defendants to bring successful ineffective assistance of counsel claims on direct appeal.[112] Like in *Martinez*, the Court emphasized the importance of the right to effective assistance of counsel as a factor underlying this decision.[113] While Texas procedure differed from that discussed in *Martinez*, the court ultimately determined that these differences were irrelevant due to the near-impossibility of bringing such a claim on direct review and the "significant unfairness" that would result from holding *Martinez* inapplicable in these circumstances.[114] While the law at issue in this case provided a theoretical opportunity for bringing these claims, the procedural rules related

[107] *Id.* at 11.
[108] *Id.*
[109] *Id.*
[110] *Trevino*, 569 U.S. at 414.
[111] *Id.* at 417.
[112] *Id.* at 44.
[113] *Id.* at 422.
[114] *Id.* at 423–26.

to its implementation made it effectively impossible to actually do so.[115]

By making exceptions in these cases for ineffective assistance claims, the Court has demonstrated that providing a forum in which these claims can be fully heard is a vital piece of our system. While it seems clear that ensuring defendants have an opportunity to alleviate the effects of ineffective representation should be a high priority, the *Shinn* Court disregards this longstanding principle in favor of adopting a rule that leaves many defendants without relief and removes a vital mechanism for securing the right to effective legal representation for all.

D. STATE COURT CONSIDERATIONS

Federal habeas corpus proceedings are not the only stage where criminal defendants are facing a slow erosion of their rights. States are also implementing various restrictions on the criminal appellate process, challenging longtime practices that have allowed criminal defendants to retain counsel and pursue their appellate claims as necessary.

The Georgia Supreme Court's recent decision in *Cook v. State* is demonstrative of the ways in which the criminal appellate process is changing in the states, leaving criminal defendants with fewer opportunities to pursue their claims through the criminal appellate process.[116] Prior to this decision, Georgia had a longstanding practice of allowing defendants to pursue untimely appeals when those appeals stem from ineffective trial counsel's failure to file a timely appeal.[117] This process established a system that effectively acted as a substitute for the habeas corpus process, providing an opportunity for criminal defendants to present their appeals even after the time to file expired.[118] Because these hearings were classified as untimely appeals rather than habeas proceedings, however, defendants often continued to benefit from the assistance

[115] *Id.* at 426.

[116] Cook v. State, 313 Ga. 471, 471 (2022).

[117] *Id.*

[118] Schoicket v. State, 312 Ga. 825, 831 (2021) (referring to the untimely appeal process as a substitution of Georgia's policy preferences for the habeas corpus process, therefore allowing defendants to "skirt the legislatively established process.").

of counsel.[119] In the *Cook* decision, the Georgia Supreme Court acknowledges this, noting how it relates to the anomaly of "counsel asserting claims of ineffective assistance against themselves" and counsel "being appointed in proceedings where the defendants have no entitlement to appointed counsel."[120] The court held that, in light of the acknowledgment and analysis of the issues created by this untimely appeal process, "these practices may be challenged now that they have been highlighted."[121]

The court's choice to abandon this untimely appeal process relies upon the state's usual stare decisis analysis, hinging upon two particular factors in its decision to bar the practice of allowing these untimely appeals: soundness and workability.[122]

In Georgia, courts have consistently treated soundness as the "most important factor in the stare decisis analysis."[123] As far as soundness goes, the court determined that the precedent of allowing these untimely appeals has little, if any, basis in the law.[124] Instead, this process was created and continuously upheld solely by the court.[125] The court held that this lack of a legal foundation is insufficient to continue upholding the practice, regardless of how longstanding it may be.[126]

The court also decided that there would be an insurmountable workability issue if it continued to allow the untimely appeal process.[127] By upholding this process, the court would be forced to flesh out the procedural details necessary to keep the process moving.[128] This process would require state court judges to continue engaging in a "policy-making exercise that is typically reserved for legislators."[129] Due to the unsoundness of the policy and the immense issues of workability if the court continued to allow these

[119] *Id.* at 502.
[120] *Cook,* 313 Ga. at 502.
[121] *Id.*
[122] *Id.* at 473.
[123] *Id.* at 486.
[124] *Id.* at 487.
[125] *Id.*
[126] *Cook,* 313 Ga. at 487.
[127] *Id.* at 473.
[128] *Id.* at 493.
[129] *Id.* at 494.

untimely appeals, the court decided that these factors were sufficient to support their decision to discontinue this process.[130]

These changes are not just coming from state courts' regulation of their own processes but are also being promulgated by the United States Supreme Court. These changes are particularly relevant to the issue of federal habeas review following *Shinn v. Ramirez* where the Court circumscribes the criminal defendant's ability to develop their ineffective assistance claims. *Strickland v. Washington* is one of the most notable restrictions on these appellate claims, narrowing the viability of ineffective assistance claims to those where counsel's incompetence is prejudicial to the defendant.[131] The prejudice requirement sets a high bar, requiring defendants to prove that the result of the proceeding would have been different if not for their counsel's incompetence.[132] *Strickland's* progeny is demonstrative of this, illustrating the high standard that defendants must apparently meet to make a viable ineffective assistance claim.[133] *Strickland* has resulted in a system where the right to counsel "guarantees little more than the presence of a person with a law license[.]"[134] The prejudice requirement tempts many courts into "skip[ping] evaluation of attorney performance" and instead focusing on how the attorney's conduct may or may not have affected the outcome.[135]

This prong of the analysis stacks the odds against the average criminal defendant, as it is much more difficult to prove that their trial would have had a different outcome than it would be to merely show that their counsel had acted incompetently. This objective standard can deprive the defendant of a rightfully deserved appeal, as incompetence that may be seen as egregious and prejudicial by one court may seem inconsequential to another. Without the opportunity to be heard at the appellate level, defendants are deprived of the opportunity to develop evidence and investigate

---

[130] *Id.* at 503.

[131] *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (defining the standard in ineffective assistance claims).

[132] *Id.*

[133] *See* Burger v. Kemp, 483 U.S. 776, 785, 794–95 (1987) (holding that counsel's assistance was not ineffective where he had engaged in representation of petitioner's coindictee and failed to present mitigating evidence).

[134] William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91, 93 (1995).

[135] *Id.* at 103.

these claims. This lack of an opportunity could harm the defendant later on, particularly in the wake of the *Shinn* decision's bar on evidentiary development in the context of federal habeas.

IV. ANALYSIS

The argument for the right to counsel at the state habeas level is twofold: (1) this is the only way to assure that the right to counsel is honored at both the state trial and state appellate level and (2) *Pennsylvania v. Finley* was decided before a number of strict limitations on federal habeas and state appellate proceedings were imposed, and the logic supporting that decision is no longer sound.

A. TO PRESERVE THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND ADDRESS THE POLICY CONCERNS UNDERLYING ITS IMPOSITION, STATE CRIMINAL DEFENDANTS SHOULD BE AFFORDED THE RIGHT TO COUNSEL AT THE STATE HABEAS LEVEL.

The right to counsel, at least as it is understood today, was not guaranteed in state courts until the Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). This decision represented the Court's understanding that the appointment of counsel is an integral measure to "insure fundamental human rights of life and liberty."[136] The Court emphasized their conclusion that, without counsel, the defendant "cannot be assured a fair trial."[137] This landmark decision secured the Sixth's Amendment guarantee that "the accused shall . . . have the assistance of counsel for his defense."[138]

The unique nature of criminal proceedings and the skill with which one must navigate them requires a heightened level of protection for criminal defendants and, as an extension, habeas petitioners. In *Gideon,* the Court focused on this principle as one of its justifications for extending the right to counsel, stating that laypeople typically "lac[k] both the skill and knowledge" to

[136] Gideon v. Wainwright, 372 U.S. 335, 343 (1963).
[137] *Id.* at 344.
[138] U.S. CONST. amend. VI.

adequately prepare their defense.[139] These defendants face a heightened chance of conviction, not because they are guilty, but because they "d[o] not know how to establish [their] innocence."[140] Preparing an appeal also requires "the services of a lawyer" due to the complexities of the form.[141]

Gideon was not the end of the Court's decision to extend this right to different stages in the criminal law context. Later, in *Douglas v. California*, 372 U.S. 353 (1963), the Court expanded the right to counsel to the first appeal of right. The Court emphasized the discrimination that results from denying indigent defendants this right, holding that when indigent defendants proceed upon their "one and only appeal of right" without counsel's assistance, "an unconstitutional line has been drawn between rich and poor."[142]

Based on the Court's reasoning in *Gideon* and *Douglas,* the right to counsel should now be extended to the state habeas petition. It is true that a state habeas petition is not a defendant's first appeal of right.[143] For some, this renders *Douglas* inapplicable, as it pertains to a different step in the criminal process. In fact, the *Douglas* Court acknowledges these differences, refuting any concerns over problems that may arise due to the denial of counsel at a "stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court."[144] Relying strictly on this language to presume that the right to counsel should never apply beyond the first appeal of right ignores the logic underlying the Court's decision in *Douglas* and too narrowly construes its application.

In ineffective assistance cases, particularly those where there has been ineffective lawyering at both the trial and appellate level, the state habeas petition may present the petitioner's first opportunity for meaningful review. When a petitioner suffers from ineffective assistance at both the trial level and on their first appeal of right, their claims are not properly presented, nor is the question

[139] *Gideon*, 372 U.S. at 345.

[140] *Id.*

[141] *Id.*

[142] Douglas v. California, 372 U.S. 353, 357 (1963).

[143] S. CENT. FOR HUM. RTS., *Know Your Rights: Georgia State Habeas Procedure*, 2, https://www.schr.org/wp-content/uploads/2020/03/Know-Your-Rights-Georgia-State-Habeas-Procedure.pdf (2016) ("A habeas corpus proceeding is not considered part of the criminal appellate process.").

[144] *Id.* at 356.

of their guilt properly determined. These petitioners have potentially been deprived of a fundamental constitutional right that has imposed defects upon any decision rendered based on their ineffective counsel's arguments. Without an opportunity to retain an effective advocate at the state habeas level and correct these deficiencies, these egregious constitutional errors could go unresolved.

Prior decisions, such as *Martinez* and *Trevino,* illustrate the importance of ensuring that petitioners' ineffective assistance claims are heard in at least one forum. While these cases deal with procedural default, not the right to counsel, they stand for an overarching policy of the Court that applies in the right to counsel context as well. The Court wants to limit habeas petitions, but it has also acknowledged the importance of these claims and the unique aspects that render treating them differently under the law whenever they have not received proper consideration.[145]

Furthermore, other principles and concerns that led to the Court's decisions in *Gideon* and *Douglas* are clearly present in the habeas context. For example, habeas petitions are notoriously complex to prepare.[146] The Court has stressed the complexity of the appellate form as one justification for imposing the right to counsel.[147] Like the appellate form, it is necessary for the average person to engage an attorney's assistance in its preparation to present their claims in a "form suitable" for consideration on the merits.[148] This is especially true where the defendant does not have the benefit of effective counsel at the trial and appellate stage, leaving them without the necessary materials to rely upon as they pursue habeas relief.

---

[145] *See Martinez*, 566 U.S. at 11 ("Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."); *Trevino*, 569 U.S. at 417 (excusing procedural default where the "structure and design" of a state's criminal legal process make it "virtually impossible for an ineffective assistance claim to be presented on direct review.").

[146] *See* Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 NOTRE DAME L. REV. 1809, 1809–10 (describing some of the complexities inherent in habeas corpus and the difficulties resulting from its evolution, which demonstrate the hurdles laypeople may face in preparing their own habeas petitions).

[147] *See* Evitts v. Lucey, 469 U.S. 387, 393 (1985) (highlighting the importance of counsel in preparing a suitable appeal).

[148] *Id.*

In *Gideon*, the Court also emphasized the "vast sums of money" the government spends to hire "lawyers to prosecute."[149] Able defendants also hire skilled lawyers to handle their case.[150]According to the *Gideon* Court, these tendencies are strong indicators of the "wide-spread belief that lawyers in criminal courts are necessities, not luxuries."[151] The same can surely be said for habeas petitioners—defendants with the money to do so will undoubtedly retain counsel, and the government will continue to spend large quantities of money throughout the habeas corpus process to secure the defendant's conviction and sentence. This notion suggests that the government acknowledges that a skilled attorney is a necessity when it comes to litigating habeas petitions.

B. BECAUSE THE LOGIC SUPPORTING *PENNSYLVANIA V. FINLEY* HAS BEEN UNDERMINED, THE COURT SHOULD OVERRULE THAT DECISION AND IMPOSE THE RIGHT TO COUNSEL AT THE STATE HABEAS LEVEL.

It is true that the Court considered arguments such as those above when it decided *Pennsylvania v. Finley*, which held that the right to counsel does not extend to the state habeas level.[152] It is also true, however, that the habeas landscape has undergone significant changes that undermine the reasoning behind that decision. In the modern era of habeas jurisprudence, it is necessary to reassess this question in light of these changes.

The *Finley* Court's decision not to extend the right to counsel boils down to this: the denial of counsel at the state habeas level did not violate fundamental fairness, nor meaningful access.[153] The petitioner in *Finley*, despite being denied habeas relief, had already presented her claims at trial and on direct review with the assistance of counsel.[154] Because she then had access to the trial record, appellate briefs, and court opinions related to her case, the Court determined that these were "sufficient tools" for her to gain

[149] *Gideon*, 372 U.S. at 344.
[150] *Id.*
[151] *Id.*
[152] *Finley*, 481 U.S. at 555.
[153] *Id.*
[154] *Id.*

the meaningful access to the courts required by the Constitution at the state habeas level.[155]

While this reasoning may have been entirely sound in 1987 when *Finley* was decided, changing perceptions and increasing restrictions on federal habeas petitions justify reexamining this decision. *Finley* was decided pre-AEDPA, and therefore did not account for the complicated landscape surrounding today's habeas corpus petitions, both at the state and federal level.[156] While there have been a number of changes, this analysis primarily hinges on three: (1) the erosion of state appellate processes, (2) the effects of the *Strickland* standard on ineffective assistance cases, and (3) the heightened importance of the state habeas stage in light of *Shinn*.

The erosion of available state appellate procedures has also exacerbated the risk that a particular litigant will not receive full and fair litigation of their claims. By imposing stricter limitations on appellate processes, the state courts have imposed additional difficulties upon an already-complex process. These restrictions will necessarily result in a lower chance of success on appeal, particularly for defendants who seek to prove that they have been wrongfully convicted.[157] While defendants may still be able to bring a state habeas petition in these circumstances, they will not have access to the necessary materials to mount a successful one.

The heightened standard *Strickland* imposed upon ineffective assistance claims has also aggravated the risk that a defendant will not have a proper forum to present their claims.[158] Prejudice-based standards are highly discretionary, and the opportunity to have the trial or appellate court's decision in these cases reviewed for abuse of discretion is invaluable. Without access to competent counsel at the state habeas level, however, petitioners who received ineffective assistance at both the trial and appellate proceeding will face

---

[155] *Id.*

[156] AEDPA was enacted in 1996, nine years after *Finley*.

[157] Steve Mills, *Questions of Innocence*, CHI. TRIB., Dec. 18, 2000, https://www.chicagotribune.com/news/chi-001218deathp-story.html (filtering the implications of particular appellate restrictions through the lens of Leo Jones's case to demonstrate these difficulties).

[158] *See* Strickland v. Washington, 466 U.S. 668 (1984) (defining the current standard for ineffective assistance of counsel claims; *see also* Greimer, *supra* n. 134 at 114–122 (addressing flaws in the *Strickland* court's logic and how these flaws have made it less feasible to make a successful ineffective assistance claim).

significant difficulties in drafting and obtaining review of their petition on the merits.

Perhaps most importantly, the *Shinn* decision amplified the significance of the state habeas petition. While the defendant may still bring their ineffective assistance claim in a federal habeas petition, the state habeas petition is now their final opportunity to develop the evidentiary record to support these claims.[159] This creates a substantially higher risk of underdevelopment for indigent defendants who will not be able to retain counsel and assure the record is sufficiently developed. Because of this risk, the state habeas proceeding has taken on a substantially higher level of significance, which should inherently justify increasing protections for defendants at this stage. The first, and potentially most important, protection should be extending the right to counsel. This will assure that every defendant stands on equal footing when fleshing out their state habeas claims and will provide much-needed relief for petitioners whose state habeas counsel does not effectively develop the record to support these claims. As the law stands, petitioners are unable to challenge their state habeas attorney's conduct under an ineffective assistance claim,[160] which has even further increased the risk that the defendant will not receive a full and fair opportunity to present their claims.

V. CONCLUSION

The American justice system is often characterized as one of fairness, particularly regarding all the rights that criminal defendants in these courts are entitled to. The same rights that this system is often heralded for are slowly being eroded, one court decision at a time. Interpretations of these rights seem to get narrower and narrower, further limiting the ability of everyday criminal defendants to stand a chance against a resourceful government. The *Shinn* decision is an exemplar of this erosion, limiting petitioners' ability to flesh out their ineffective assistance of counsel claims even further and placing the responsibility of doing so entirely on the petitioners themselves. Through this

[159] *See* Shinn, 142 S.Ct. at 1728 (holding that the evidentiary record cannot be developed at the federal habeas level).

[160] *Id.*

decision, the Court severely circumscribes defendants' ability to bring ineffective assistance claims once they have proceeded to habeas corpus territory. Without the ability to bring these claims, there is little remedy for those who have suffered as a result of incompetent counsel and little consequences for defense counsel that do not carry out their duties effectively. Without these elements, the Sixth Amendment right to effective counsel becomes nearly unenforceable for those who have had ineffective counsel at multiple proceedings.

Due to the Court's misguided decision in *Shinn*, the state courts must carry the burden of incentivizing counsel to perform effectively in criminal cases. While the principle that there is no right to state habeas counsel is a longstanding one, its underlying reasoning is not applicable to the justice system as it is today. *Pennsylvania v. Finley*, the decision that restricted the right to counsel in the state habeas setting, is supported by a reliance on criminal defendants' opportunity to seek postconviction relief in the criminal appeal or federal habeas setting. State courts have promulgated a number of restrictions on the criminal appeals process, and decisions such as *Shinn* have not only limited the availability of federal habeas corpus as a remedy but heightened the importance of having competent counsel at the state habeas level. Because a state habeas hearing may be some defendants' only opportunity for postconviction relief and any higher-level federal habeas claims will now rely on the evidence already on the record, the availability of counsel is more essential than ever. In order to provide a fair opportunity to be heard postconviction, *Finley* must be overturned and the right to counsel must be extended to state habeas petitions and proceedings.