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NOTE

An Overlooked Consequence: How *Shinn v. Ramirez* Paves the Way for New State Collateral Proceedings

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Abstract. The Supreme Court's recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), diminished the role of federal courts in protecting defendants' Sixth Amendment right to effective assistance of counsel by limiting when a defendant can raise an ineffective-assistance-of-counsel (IAC) claim in federal court. Defendants in states like Arizona and Texas—which bar raising IAC claims until state habeas proceedings—will be unable to effectively litigate those Sixth Amendment claims in federal court. In other states that do not defer IAC claims, a defendant has the right on appeal (1) to raise an IAC claim regarding their trial counsel and (2) to raise that claim with the constitutional guarantee of the effective assistance of their appellate counsel. But in states like Arizona and Texas, the first right is deferred to state habeas, and the second right—because there is no constitutional right to effective assistance of counsel in state habeas proceedings—is extinguished altogether.

This Note considers what *Shinn* portends for defendants in states that defer IAC claims to state habeas proceedings. The Note argues that, while there may be no right to a remedy in federal court, the Constitution requires that state courts fill the vacuum left by the departure of the federal courts.

The argument proceeds in three steps. First, where defendants have a Sixth Amendment right to counsel, they may assert that right by raising an IAC claim. Second, that right includes presenting evidence in support of the IAC claim. Finally, when a state defers IAC claims from a proceeding in which the defendant ordinarily would have a right to effective assistance of counsel to one where the defendant ordinarily lacks such a right, for

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example state habeas proceedings, the state must provide the defendant with effective assistance of counsel at that subsequent proceeding.

If all three of these propositions are true, this Note argues defendants in states that defer IAC claims have the right to an additional forum: one where they can raise an IAC claim about the lawyer that first raised an IAC claim on their behalf. Providing such a forum would restore defendants to the same constitutional position as defendants in other states. While the federal courts used to provide this forum, after *Shinn v. Ramirez*, they have bowed out. The task now falls to the state courts.

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Introduction

The Supreme Court's recent habeas corpus decision in *Shinn v. Ramirez* included a blistering dissent and sparked a fierce outcry from habeas experts.[1] Commentators described the impact of the decision as "nightmarish"[2] and "Orwellian."[3] But these reactions overlook how the decision interacts with existing doctrine and what the decision portends for state procedures. This Note takes up those questions and concludes that, while *Shinn* closes the door to federal court, it opens the path for state remedies.

Shinn and its predecessors address a complex procedural issue.[4] Defendants in criminal cases have a constitutional right to counsel at trial and on their first appeal—sometimes called direct review.[5] When defendants have a constitutional right to counsel, they may raise an ineffective-assistance-of-counsel (IAC) claim, challenging the effectiveness of their representation.[6] And if the counsel's performance fails the requisite standard, defendants are entitled to a new trial.[7] Thus, on direct review, a defendant may challenge the efficacy of their trial counsel, and they are entitled to the effective assistance of appellate counsel while they do so.[8]

But Arizona and six other states require defendants to postpone filing IAC claims about their initial trial counsel until the beginning of state habeas

1. 142 S. Ct. 1718 (2022); s*ee id.* at 1750 (Sotomayor, J., dissenting) (decrying the majority's decision as making "illusory the protections of the Sixth Amendment"); Christina Swarns, *Innocence Project Statement from Executive Director Christina Swarns on Shinn v. Ramirez and Jones*, INNOCENCE PROJECT (May 24, 2022), https://perma.cc/YKA3-CJBT; Cary Sandman, *Supreme Court Turns a Blind Eye to Wrongful Convictions, Guts 6th Amendment Rights to Effective Counsel*, N.Y. ST. BAR ASS'N J., Sept.-Oct. 2022, at 17, 18.

2. Swarns, *supra* note 1.

3. Michael A. Cohen, Opinion, *The Supreme Court Just Said that Evidence of Innocence Is Not Enough*, DAILY BEAST (updated May 24, 2022, 4:10 AM ET), https://perma.cc/6JBQ-TAZ2.

4. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012) (holding that where state law prevents a defendant from raising an ineffective assistance of counsel (IAC) claim on direct review, federal courts will excuse procedural default for such claims if the defendant lacked effective counsel in state habeas proceedings); Trevino v. Thaler, 569 U.S. 413, 417 (2013) (extending the holding in *Martinez* to cases where it is technically possible, but "virtually impossible," to raise IAC claims on direct review).

5. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Douglas v. California, 372 U.S. 353, 357-58 (1963); Evitts v. Lucey, 469 U.S. 387, 409 (1985) (referring to the first appeal from a conviction as "direct review").

6. *See* Strickland v. Washington, 466 U.S. 668, 686-87 (1984).

7. *See id.* at 687 (clarifying that a defendant is entitled to reversal of their conviction because of IAC only if they establish first that their counsel "was not functioning as 'counsel'" and second "that the deficient performance prejudiced the defense").

8. *See id.*; *Evitts*, 469 U.S. at 396 ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.").

proceedings (also referred to as "collateral review").[9] In other words, these states bar defendants from raising IAC claims until after their direct appeal.[10] However, there is no constitutional right to counsel under *Gideon v. Wainwright* and its progeny after direct review.[11] Defendants challenging IAC by trial counsel in states like Arizona thus proceed without a constitutional guarantee of the assistance of counsel.[12] This means that even if a defendant's trial counsel were unconstitutionally ineffective, the defendant has no right to a free attorney to help them prove it. Moreover, even if they have the means to secure habeas counsel, there is no constitutional guarantee that the habeas lawyer they hire to challenge the performance of their trial counsel must be effective.[13] If the lawyer raises the defendant's trial-based IAC claim ineffectively, the defendant has no remedy.[14] This procedural rule in states like Arizona is particularly consequential because researchers estimate that defendants raise IAC claims in nearly half of postconviction proceedings.[15]

The lack of a constitutional right to counsel when raising a trial-based IAC claim can also affect a defendant's ability to raise other claims in subsequent proceedings. If the IAC claim is not raised in state habeas, it typically leads to

9. *See* State v. Spreitz, 39 P.3d 525, 526-27 (Ariz. 2002) (describing Arizona's procedural rule). The Supreme Court has identified procedural rules effectively deferring IAC claims until state habeas proceedings in three states. *See Martinez*, 566 U.S. at 6 (Arizona); *Trevino*, 569 U.S. at 417 (Texas); Coleman v. Thompson, 501 U.S. 722, 755 (1991) (Virginia). And the federal courts of appeal have found many states' procedural rules fit within either *Martinez*'s or *Trevino*'s holdings. *See* Brown v. Brown, 847 F.3d 502, 506 (7th Cir. 2017) (Indiana); Coleman v. Goodman, 833 F.3d 537, 541 (5th Cir. 2016) (Louisiana); Fowler v. Joyner, 753 F.3d 446, 463 (4th Cir. 2014) (North Carolina, in some cases); Sutton v. Carpenter, 745 F.3d 787, 790 (6th Cir. 2014) (Tennessee); Sasser v. Hobbs, 735 F.3d 833, 852-53 (8th Cir. 2013) (Arkansas). The majority of states, although they do not completely bar IAC claims on appeal, limit such claims to only those which are apparent from the record—a minority of IAC claims. *See* Commonwealth v. Grant, 813 A.2d 726, 735 n.13 (Pa. 2002) (collecting cases from other states requiring any IAC claims to be litigated in habeas review unless the claim is apparent on the trial record); Shinn v. Ramirez, 142 S. Ct. 1718, 1746 (2022) (Sotomayor, J., dissenting). This Note does not focus on states that bar defendants from raising IAC claims on appeal in only some cases but rather on the seven states—Arizona, Arkansas, Indiana, Louisiana, Tennessee, Texas, and Virginia—that federal courts have concluded categorically or effectively bar defendants from raising IAC claims on appeal in all cases.

10. *See Martinez*, 566 U.S. at 6.

11. 372 U.S. 335 (1963); *see Shinn*, 142 S. Ct. at 1735.

12. *See id.*

13. *See id.*

14. *See id.*

15. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, NAT'L CTR. FOR STATE CTS., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 56 (2007) (finding that 50% of non-transferred cases with available information—which comprised 64% of the cases surveyed—involved IAC claims).

procedural default, precluding review of the claim in a federal petition under 28 U.S.C. § 2254 after state habeas proceedings conclude.[16] Prior Supreme Court precedent held that in such a situation the ineffectiveness of state habeas counsel, in failing to raise the ineffectiveness of trial counsel, could excuse procedural default.[17] *Shinn* altered this arrangement, functionally extinguishing defendants' ability to raise such claims in federal court, albeit without modifying the law of procedural default.[18] In *Shinn*, the Court held that, even if the ineffectiveness of state habeas counsel is a valid excuse for failing to raise an IAC claim, 28 U.S.C. § 2254(e) bars federal district courts from holding evidentiary hearings and receiving new evidence in support of the IAC claim.[19] Without any ability to provide new evidence in support of their IAC claims, there is little chance defendants can successfully litigate the issue.[20]

Effectively litigating IAC claims is vitally important to defendants' chances of relief. Roughly 50% of postconviction cases involve IAC claims,[21] and 53% of terminated capital cases and 13% of terminated noncapital cases involve claims rejected because of procedural default—a result a successful IAC claim could prevent.[22] While defendants would normally be able to raise IAC claims

16. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1218-19 (1996) (codified at 28 U.S.C. § 2254); *see Shinn*, 142 S. Ct. at 1733.

17. *See* Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977); Martinez v. Ryan, 566 U.S. 1, 17 (2012); Trevino v. Thaler, 569 U.S. 413, 422-23 (2013).

18. *See Shinn*, 142 S. Ct. at 1740 (Sotomayor, J., dissenting) ("In reaching its decision, the Court all but overrules two recent precedents that recognized a critical exception to the general rule that federal courts may not consider claims on habeas review that were not raised in state court.").

19. *See id.* at 1734 (majority opinion).

20. *See id.* at 1738-39. A narrow class of defendants may have suffered forms of trial IAC which the trial record will reflect and thus will not need an evidentiary hearing to prove IAC. *See* Michael C. Dorf, *Failure to Extend a Precedent Versus Failure to Apply It: A Comment on Shinn v. Martinez Ramirez*, DORF ON L. (May 25, 2022), https://perma.cc/YT2X-RSEB ("There are some settings in which trial or sentencing counsel's ineffectiveness will be apparent even on the state court record, so that a federal habeas petitioner who was denied effective counsel can prevail even without an evidentiary hearing."). For example, if the defendant's lawyer was noticeably drunk at trial and slurred their words—as reflected on the transcript—the lawyer's ineffectiveness would likely be apparent. This class of claims is not the subject of this Note because *Shinn* does not stand in their way. Here, I focus on the more typical case in which, without an evidentiary hearing, there is no way to establish IAC.

21. *See* KING ET AL., *supra* note 15, at 56 (finding that 50% of non-transferred cases with available information, which comprised 64% of the cases surveyed, involved IAC claims); *see also* Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1118 & n.87 (1999) ("Challenges based on ineffective assistance of counsel are the most frequently filed claims in both federal and state post-conviction relief proceedings.").

22. *See* KING ET AL., *supra* note 15, at 48.

regarding their initial trial counsel with the effective assistance of counsel, state procedural rules deferring the claims to habeas review mean that defendants in at least seven states cannot.[23] Procedural default impedes them from vindicating their constitutional right to counsel—as well as many other rights—because, ironically, they have no right to effective assistance of counsel to help them raise the claim. Although this Note focuses on the seven states that completely bar litigating IAC claims on appeal—Arizona, Arkansas, Indiana, Louisiana, Tennessee, Texas, and Virginia—the logic could extend to the vast majority of states, which bar IAC claims during direct review in most cases.[24]

Commentators have generally addressed the same issue the *Shinn* dissent emphasized: The decision severely diminishes access to relief for IAC in *federal* court.[25] This is certainly important, but in their rush to condemn the Court's opinion on this ground, commentators overlooked the opinion's implications for state collateral review. I argue that in states like Arizona, which defer IAC claims to state habeas proceedings, the Constitution affords defendants the right to a single forum to raise their trial IAC claim with the assistance of effective counsel. Essentially, the Constitution protects their rights just as it does in states which do not defer IAC claims to state habeas. In states that do not defer IAC claims, a defendant has the right on direct review (1) to raise an IAC claim regarding their trial counsel and (2) to raise that claim with the constitutional guarantee of the effective assistance of their appellate counsel. But in Arizona and states like it, the first right is deferred to state habeas while the second right is extinguished because there is no constitutional right to effective assistance of counsel in state habeas proceedings. Therefore, where state habeas is the first opportunity to raise a trial-based IAC claim, and state habeas counsel fails to raise (or fails to adequately raise) a meritorious trial-based IAC claim, there must be a subsequent forum for the defendant to challenge that failure.[26] Because *Shinn* effectively closes the door to federal courts for such claims, the constitutional obligation falls on states to create adequate procedures to protect the right to counsel.

The remainder of this Note proceeds as follows. Part I covers the background of Sixth Amendment doctrine and postconviction relief leading up to *Shinn*. Part II, proceeding in three distinct steps, explains why the lack of

23. *See supra* note 9 (listing states with similar procedures to Arizona).

24. *Id.*

25. *See, e.g.*, Swarns, *supra* note 1 ("This decision will leave thousands of people in the nightmarish position of having no court to hear their very real claims of innocence."); Cohen, *supra* note 3 (characterizing *Shinn* as creating "a truly bizarre, even Orwellian situation"); Sandman, *supra* note 1, at 18 (criticizing *Shinn* as taking "a wrecking ball to *Martinez*, and by turns, *Gideon* and *Strickland*" and emphasizing the dissent's criticism of the decision).

26. That subsequent forum, however, need not include a right to counsel of its own.

access to a forum to litigate trial IAC claims with the assistance of counsel violates the Constitution. First, Part II.A reasons that the Sixth Amendment and procedural due process under the Fourteenth Amendment afford criminal defendants the right to challenge the efficacy of their counsel in at least one forum. Second, Part II.B explains that the constitutional remedy must include the opportunity to present evidence in support of the claim. Third, Part II.C argues that while a state may reasonably defer a defendant's right to challenge the efficacy of their counsel to the state's postconviction review process, it cannot do so without affording them effective counsel in that proceeding. The right to counsel encompasses the right to have that counsel raise legal defenses—including IAC.[27] If all three steps are correct, Arizona's procedural rule—and similar procedural rules in other states—are currently unconstitutional and require additional state procedures to remedy the violation. Finally, Part III considers the implications of the "unconstitutional situation" created by the combinations of the Supreme Court's statutory interpretation of 28 U.S.C. § 2254(e) in *Shinn* and Arizona's procedural rule.

The existing literature is replete with arguments in favor of a postconviction constitutional right to counsel.[28] At least one scholar argues that access to postconviction counsel is a moral imperative.[29] Others contend the Constitution enshrines the right in a variety of provisions, including the Due Process Clause, Equal Protection Clause, Suspension Clause, and Eighth Amendment.[30] These arguments, however, often directly contravene existing

27. *See infra* Part II.C; Evitts v. Lucey, 469 U.S. 387, 394 (1985).

28. *See* DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES & RELIEF HANDBOOK WITH FORMS § 2.8 (West 2022) (collecting articles arguing in favor of a postconviction right to counsel).

29. *See* Ken Strutin, *Litigating from the Prison of the Mind: A Cognitive Right to Post-Conviction Counsel*, 14 CARDOZO PUB. L., POL'Y & ETHICS J. 343, 402-03 (2016) (contending the conditions of confinement and barriers to prisoners' effective litigation necessitate a right to postconviction counsel).

30. *See* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 596 (2009) (tracing a constitutional right to postconviction counsel to both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment); Eric M. Freeman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1092-95 (2006) (analyzing the right to postconviction counsel in death penalty cases under the *Mathews v. Eldridge* due process test and concluding it requires a constitutional right to counsel in postconviction proceedings); Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on* Massaro v. United States, 42 BRANDEIS L.J. 793, 799-800 (2004) (similar); Amy Breglio, Note, *Let Him Be Heard: The Right to Effective Assistance of Counsel on Post-Conviction Appeal in Capital Cases*, 18 GEO. J. ON POVERTY L. & POL'Y 247, 248-49 (2011) (deriving a broad right to postconviction counsel from Fourteenth Amendment procedural due process); 1 RANDY HERTZ & JAMES S. LIEBERMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.2(d) (LexisNexis 2021) (concluding the Suspension Clause protects the right to counsel in postconviction proceedings); Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to*

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Supreme Court precedent, and there is no indication the Court is interested in changing course to recognize a broad postconviction right to counsel. The Court stated in *Pennsylvania v. Finley*: "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."[31] The lower courts have uniformly interpreted *Finley* to reject a blanket constitutional right to postconviction counsel.[32] Thus, whatever the merits of a constitutional right to postconviction counsel in all cases, it is simply unsupported by current law.

Other scholars put forth a narrower argument—closer to the one advanced here—that a constitutional right to counsel in postconviction proceedings exists when it is the first forum in which a defendant could raise the claim. Thomas Place grounds his reasoning for such a right in a line of equal protection and due process cases providing a constitutional right to counsel on appeal.[33] These cases emphasize that, on direct review, defendants lack the benefit of an attorney-prepared brief from a prior proceeding.[34] Place contends that this logic applies with equal force to postconviction proceedings when they are the first forum in which a defendant can raise the claim.[35] This Note's

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Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus, 14 U. PA. J. CONST. L. 1219, 1271-74 (2012) (suggesting the "access-to-courts" constitutional doctrine demands a postconviction right to counsel); Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 106 (1999) (arguing the Eight Amendment requires a postconviction right to counsel in death penalty cases); Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 97-98 (determining that once the government provides a statutory right to "postconviction counsel, it is constitutionally obligated to provide *effective* counsel").

31. 481 U.S. 551, 555 (1987). *But see* 1 HERTZ & LIEBERMAN, *supra* note 30, § 7.2(a) (parsing the Supreme Court's language in *Finley* and subsequent cases and concluding it does not resolve the issue of whether a constitutional right to postconviction counsel exists); *cf.* Honore v. Wash. St. Bd. of Prison Terms & Paroles, 466 P.2d 485, 493 (Wash. 1970) (holding, before the decision in *Finley* came down, that indigent defendants have a federal constitutional right under the Equal Protection Clause to counsel in postconviction proceedings).

32. *See* United States *ex rel.* Simmons v. Gramley, 915 F.2d 1128, 1137 (7th Cir. 1990) (interpreting *Finley* to reject a constitutional right to postconviction counsel); Kitt v. Clarke, 931 F.2d 1246, 1248 n.4 (8th Cir. 1991) (rejecting, in dicta, a constitutional right to effective assistance of counsel in postconviction proceedings); DeLuna v. Lynaugh, 873 F.2d 757, 760 (5th Cir. 1989) ("[T]here is no constitutional right to appointed counsel in collateral proceedings such as a habeas corpus petition.").

33. *See* Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301, 325 (2009).

34. *See id.*; Douglas v. California, 372 U.S. 353, 357 (1963); Ross v. Moffitt, 417 U.S. 600, 614-15 (1974); Halbert v. Michigan, 545 U.S. 605, 617-19 (2005).

35. *See* Place, *supra* note 33, at 325.

argument aligns in some respects with Place's, but it concentrates on claims regarding the effectiveness of initial trial counsel—not the first time any IAC claim is raised. It also differs from Place's argument in a more fundamental way: It derives a constitutional mandate for assistance of counsel from the Sixth Amendment and the Fourteenth Amendment's Due Process Clause—not the Equal Protection Clause. Place's argument under the Equal Protection Clause is not only based on a different right, it offers no limiting principle.[36] Having a limiting principle is important because, without one, the argument both conflicts with existing Supreme Court precedent and would lead to unending IAC litigation.[37]

This Note thus makes an original contribution to the literature in three ways. First, it explores how the Sixth and Fourteenth Amendments guarantee a right to counsel for IAC claims in state habeas proceedings when those proceedings are the first forum where a defendant may raise the claim.[38] Second, it argues this right—unlike other theories for a right to postconviction counsel—is consistent with existing Supreme Court doctrine, including *Shinn v. Ramirez*.[39] Finally, it analyzes how *Shinn*'s narrowing of federal remedies leads to a constitutional requirement for states to adopt remedial procedures if they wish to continue deferring IAC claims to state habeas review.[40]

I. Doctrinal Background on the Right to Effective Assistance of Counsel

This Part walks through the complex doctrine involved in *Shinn v. Ramirez*. It begins with a general overview of the right to counsel.[41] Then, in Part I.B, it delves into postconviction review and the doctrine of procedural default.[42] Finally, Part I.C summarizes the subset of right-to-counsel doctrine pertaining to states that defer IAC claims to postconviction review and explains the Court's decision in *Shinn*.[43]

36. *See id.* at 305.
37. *See infra* Part II.C.
38. *See infra* Part II.
39. *See infra* Part II.C.
40. *See infra* Part III.
41. *See infra* Part I.A.
42. *See infra* Part I.B.
43. *See infra* Part I.C.

A. Effective Assistance of Counsel

The Sixth Amendment enshrines criminal defendants' right "to have the Assistance of Counsel."[44] In early cases, the right simply meant the government could not prevent a defendant from retaining counsel.[45] In the early twentieth century, the Court held that certain circumstances require trial courts to appoint counsel,[46] though the Court quickly clarified that this was not true for all criminal cases.[47] The Court then shifted course in the landmark decision *Gideon v. Wainwright*, holding that the Sixth Amendment encompasses a right to appointed counsel for all indigent criminal defendants in felony cases.[48] This new protection emerged from a recognition that the complexities of the modern criminal justice system required counsel to ensure a fair trial.[49]

With the right to appointed counsel established, the Court faced the question of how effective that counsel must be. The Court answered that question in *Strickland v. Washington*, holding that a state violates the Sixth Amendment when defense counsel's objectively deficient performance prejudices the defense.[50] "Prejudice" requires demonstrating a reasonable probability that constitutionally effective counsel would have achieved a different result.[51] The Court declined to "exhaustively define the obligations

44. U.S. CONST. amend. VI.

45. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006) (describing the Assistance of Counsel Clause's "root meaning" as the right to select one's counsel and contrasting this with the more recent understanding of a right to appointment of counsel).

46. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding the trial courts' failure to appoint counsel to defendants violated the Constitution under the unique circumstances of the case). For a discussion of the tragic facts and history of this case, see N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1333-39 (2004).

47. *See* Betts v. Brady, 316 U.S. 455, 463-64, 473 (1942) (holding that the Constitution did not require courts to appoint counsel in all cases where defendants could not afford representation and limiting *Powell v. Alabama* to specific circumstances), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

48. 372 U.S. at 339, 345. The Court had already held in 1938 that federal criminal defendants had a right to appointed counsel. *See* Johnson v. Zerbst, 304 U.S. 458, 467-69 (1938). The Court later expanded the right to all cases with the possibility of imprisonment. *See* Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972).

49. *See Gideon*, 372 U.S. at 344.

50. *See* 466 U.S. 668, 687 (1984); *see also* Martinez v. Ryan, 566 U.S. 1, 25-26 (2012) (Scalia, J., dissenting) (describing how defense counsel's breaches of the constitutional right to effective assistance of counsel are imputed to the state itself).

51. *Strickland*, 466 U.S. at 694.

of counsel,"[52] but subsequent case law offers examples of objectively deficient conduct.[53]

Although *Gideon* and *Strickland* dealt with trial counsel, the Supreme Court soon extended the right to counsel to include appellate counsel on direct review. In *Douglas v. California*, the Court declared California's failure to appoint appellate counsel to an indigent defendant unconstitutional.[54] The Court grounded its analysis in the Equal Protection Clause of the Fourteenth Amendment, holding that the denial of appellate counsel to indigent defendants discriminated between rich and poor defendants.[55] When the Court extended *Strickland*'s effective assistance of counsel standard to appellate direct review in *Evitts v. Lucey*, it recast the right as falling under the Sixth Amendment, as opposed to the Equal Protection Clause.[56] But this was the end of the line. In *Pennsylvania v. Finley*, the Court declined to extend the right to collateral proceedings,[57] and in *Ross v. Moffitt*, the Court explained the right does not reach discretionary review proceedings.[58]

In sum, criminal defendants have a right to the assistance of counsel at trial and on direct review, and the performance of counsel must be at least minimally effective at both stages.

B. Collateral Review Overview

Although the constitutional right to counsel extends only to trial and direct review, IAC is often litigated in collateral proceedings like habeas review, which attack a prior proceeding outside the traditional appellate process.[59] In some states, defendants may litigate IAC claims only in collateral

52. *See id.* at 688.

53. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 389 (2005) (holding counsel's failure to review the defendant's prior convictions when they knew the prosecution intended to use testimony from them was constitutionally ineffective assistance of counsel); United States v. Mohammed, 863 F.3d 885, 890-92 (D.C. Cir. 2017) (reversing the lower court and holding that counsel's complete failure to investigate potential impeachment evidence was constitutionally ineffective assistance of counsel).

54. 372 U.S. 353, 357-58 (1963).

55. *See id.*

56. *See* 469 U.S. 387, 392, 396-97, 403 (1985).

57. *See* 481 U.S. 551, 555 (1987).

58. *See* 417 U.S. 600, 604-05 (1974). *But cf.* Halbert v. Michigan, 545 U.S. 605, 617-18 (2005) (distinguishing *Moffitt* in cases where the discretionary review is framed as error correction as opposed to considerations of "significant public interest").

59. *See* KING ET AL., *supra* note 15, at 28; Z. Payvand Ahdout, Essay, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 187 (2021). For a helpful visual depicting the many stages of state and federal collateral review and how they add on to the initial criminal proceedings, see *id.* at 167.

proceedings.[60] This was the case in *Shinn*.[61] Thus, understanding *Shinn* and its implications requires delving into the complex world of collateral review.

During Reconstruction, Congress passed the Habeas Corpus Act of 1867.[62] Enacted in anticipation of Southern resistance to Reconstruction legislation,[63] the Act provided for federal collateral review of constitutional or other federal law claims in state convictions.[64] This meant a defendant convicted of a state crime in state court could seek federal court review of the conviction for constitutional or federal statutory defects.[65]

Perhaps the most complicated aspect of federal habeas review, and the most relevant portion for this Note, is the procedural-default requirement, which determines how a federal court reviews a petition that raises a claim the defendant did not raise in prior state proceedings.[66] For a time, the Supreme Court took a permissive approach to procedural default, giving lower federal courts latitude to consider such claims.[67] But the Burger Court imposed a stricter standard: In *Wainwright v. Sykes*, the Court held that federal courts cannot review a claim that was not presented to the state courts unless the defendant could show cause and prejudice to excuse their "default," or their failure to raise the claim first in state proceedings.[68] Procedural default is particularly important because it is one of the principal ways courts dismiss federal habeas claims without reaching the merits.[69]

60. *See infra* Part I.C.

61. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1728-30, 1735-36 (2022).

62. Ch. 28, § 1, 14 Stat. 385 (1867) (codified as amended at 28 U.S.C §§ 2241-43, 2251).

63. *See* Fay v. Noia, 372 U.S. 391, 415-16 (1963), *overruled on other grounds by* Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977). *But see* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 49-50 (1965) (contending the Habeas Corpus Act of 1867 was not aimed at preventing resistance to Reconstruction because its provisions were poorly tailored to that goal).

64. § 1, 14 Stat. at 385-86.

65. *See id.*

66. *See* Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1166 (2005) (describing the procedural-default requirement for federal habeas proceedings); *see also* Wainwright v. Sykes, 433 U.S. 72, 82-83 (1977) (discussing the application of procedural-default requirements and potential for exceptions to the rule).

67. *See Fay*, 372 U.S. at 398-99.

68. *See* 433 U.S. at 84, 87; *see also* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (reaffirming in no uncertain terms that procedural default may be excused only with a showing of cause and prejudice or a showing "that failure to consider the claims will result in a fundamental miscarriage of justice").

69. *See* Martinez v. Ryan, 566 U.S. 1, 22 (2012) (Scalia, J., dissenting); KING ET AL., *supra* note 15, at 45-48.

Generally, IAC is grounds for a finding of cause under the *Sykes* standard.[70] If a defendant demonstrates that their counsel, to whom they were constitutionally entitled, was ineffective, they may be excused for failing to raise constitutional claims in their state proceedings.[71] Once a defendant proves this much, the gates open to litigate their constitutional claim in federal court.

In 1996, Congress returned to the scene, passing the Antiterrorism and Effective Death Penalty Act (AEDPA).[72] The law restricts access to federal habeas by, among other things, requiring defendants to exhaust all available state court remedies before filing in federal court.[73] The law also defines when a federal habeas court may hold an evidentiary hearing.[74] A federal court may do so only when (1) the defendant's constitutional claim relies on a new, retroactive constitutional rule or the factual predicate could not have been discovered earlier and (2) the facts would establish clear and convincing evidence that "no reasonable factfinder would have found the [defendant] guilty."[75] As would become apparent in *Shinn*, this new evidentiary hearing standard is critical to the success of IAC claims.[76]

Putting everything together, a defendant has the right to effective assistance of counsel at trial and on direct review.[77] If their counsel was ineffective, defendants typically raise a Sixth Amendment claim on collateral review; in some states, such as Arizona, they can raise IAC claims *only* during collateral review.[78] To raise an IAC claim on federal habeas review when it was not presented to the state courts, the defendant must show cause for why they failed to raise it previously—either on appeal or, in states like Arizona, in state habeas proceedings.[79] IAC claims are themselves a common form of cause under the *Sykes* standard.[80] Thus, a defendant whose trial counsel was ineffective is often in a position where they must also raise an IAC claim regarding their habeas counsel's failure to raise—or doing so poorly—an IAC claim regarding their trial counsel.

70. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986) ("[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State . . . .").

71. *See id.*

72. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

73. *See* 28 U.S.C § 2254(b)(1)(A).

74. *See id.* § 2254(e)(2).

75. *Id.*

76. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022).

77. *See supra* Part I.A.

78. *See infra* Part I.C.; State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

79. *See* Young, *supra* note 66, at 1166.

80. *See* Voigts, *supra* note 21, at 1117.

If these procedural barriers seem daunting, they are intended to be. Through AEDPA and cases interpreting it, Congress and the Supreme Court have balanced the importance of federal review for constitutional error in state criminal processes against two competing concerns: federalism and finality.[81] With respect to federalism, when federal courts overturn a state court's judgment, they interfere with the state's independent enforcement of its criminal laws and protection of the interests of its people.[82] Of course, federal courts only displace state courts' judgments when they believe the state courts have violated federal law,[83] and the Supreme Court's direct appellate review of state supreme courts also interferes with states enforcing their laws.[84] However, habeas erects a separate system of federal court supervision operating alongside state criminal proceedings.[85] As a result, federal intrusions on state sovereignty come more frequently from federal courts reopening state court judgments than from the Supreme Court's appellate review.[86] Congress and the Court have set high standards for intrusions by federal courts via habeas review.

As for finality, federal habeas cases significantly prolong criminal proceedings. As Judge Henry Friendly once wrote:

> After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not

81. *See* Murray v. Carrier, 477 U.S. 478, 487 (1986) (citing Engle v. Isaac, 456 U.S. 107, 128 (1982)) (acknowledging the "costs" of federal habeas review as a lack of finality and infringing on state sovereignty); KING ET AL., *supra* note 15, at 8 ("For a majority of the members of Congress in the early 1990s, the Court's decisions did not adequately address growing concerns about federal court interference with the finality of state criminal judgments and about delay in the processing of habeas cases."). For a discussion of why the Supreme Court has looked to federal habeas review as a means of redressing constitutional violations in state courts, see Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1035-47 (1977).

82. *See* Martinez v. Ryan, 566 U.S. 1, 26, 28 (2012) (Scalia, J., dissenting) (describing how federal habeas review can "undermine the State's interest in enforcing its laws" (quoting Lee v. Kemna, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting))).

83. *See* 28 U.S.C. § 2254.

84. *See* U.S. CONST. art. III, § 2; *id.* art. VI, cl. 2.

85. *See* 28 U.S.C. § 2254.

86. *Compare* CAROL G. KAPLAN, BUREAU JUST. STAT., HABEAS CORPUS: FEDERAL REVIEW OF STATE PRISONER PETITIONS, 2-4 (Jeffrey L. Sedgwick ed., 1984) (reviewing the frequency of federal habeas petitions), *with* Adam Feldman, *Empirical SCOTUS: The Importance of State Court Cases Before the Supreme Court*, SCOTUSBLOG (Sept. 4, 2020, 10:11 AM), https://perma.cc/KPU2-2K4L (observing the Supreme Court often reviews more cases from state supreme courts than cases from any individual circuit, and that most of those cases are criminal, but noting this amounts to only around a dozen state cases reviewed by the Court per year).

> reached the end, or even the beginning of the end, but only the end of the beginning.[87]

On average, non-capital federal habeas cases take 9.5 months to resolve, while capital cases take 28.7 months.[88] This delay is no idle inconvenience. One analysis forecasted that federal habeas review for 714 death row prisoners in California would cost $775 million.[89] And perhaps more importantly, the time federal habeas adds to criminal proceedings affects the outcome of cases and the assessment of guilt. When a federal court reverses a conviction because of IAC or other procedural errors, it typically vacates the conviction, leaving the state to decide whether to re-prosecute the case.[90] But presenting a strong case years after the fact is often difficult. Witnesses' memories fade, they move out of state, and sometimes they even die.[91] Thus, even if a jury would have convicted the defendant absent the procedural violation, that does not mean a jury would convict them at a new trial years later.[92]

C. A Right Deferred

Into this labyrinth of constitutional doctrine and statutory interpretation, Arizona inserted a new wrinkle. In 2002, the Arizona Supreme Court held that

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87. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (criticizing the focus of federal habeas proceedings on procedural, rather than substantive, issues).

88. *See* KING ET AL., *supra* note 15, at 39-41 (measuring the average duration of terminated, non-transferred cases). This adds onto what will have by this point already been a lengthy criminal proceeding. In capital cases, the time between conviction and execution takes around two decades. *See* TRACY L. SNELL, BUREAU JUST. STAT., NCJ 302729, CAPITAL PUNISHMENT, 2020—STATISTICAL TABLES, at 17 (2021).

89. Arthur L. Alacrón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S93 (2011).

90. *See, e.g.*, United States v. Mohammed, No. 06-357, 2021 WL 5865455, at *12 (D.D.C. Dec. 9, 2021) (vacating Mohammed's conviction due to an IAC claim after the D.C. Circuit's decision in *United States v. Mohammed*, 863 F.3d 885 (D.C. Cir. 2017)).

91. *See* BARRY LATZER & JAMES N.G. CAUTHEN, JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 17 n.27 (2012) (noting prosecutors may decline to re-prosecute a case because it is difficult to find witnesses years after the initial trial); Friendly, *supra* note 87, at 146-47 (observing that substantial delay between initial conviction and reversal in federal habeas proceedings, particularly in cases with guilty pleas, can make re-prosecution very difficult); *see also* Martinez v. Ryan, 566 U.S. 1, 26 (2012) (Scalia, J., dissenting) ("When a case arrives at federal habeas, the state conviction and sentence at issue (never mind the underlying crime) are already a dim memory, on average more than six years old (seven years for capital cases).").

92. Judge Friendly argues that delay can also undermine the deterrent function of the criminal justice system by decreasing the chance the defendant will accept their punishment as just because whether it is just has yet to be finally determined. *See* Friendly, *supra* note 87, at 146.

criminal defendants must wait to raise IAC claims about their trial counsel until state habeas proceedings, barring them from raising the claims on direct review.[93] The court reasoned that IAC claims almost always require new evidence, and postconviction trial courts are better situated to hold evidentiary hearings and conduct intensive factfinding than appellate courts are.[94] However, as explained above, while defendants have a constitutional right to effective assistance of counsel on direct review under *Evitts*, they hold no such right during collateral review.[95] Therefore, defendants in Arizona could no longer challenge the efficacy of their initial trial counsel with the assistance of constitutionally guaranteed counsel. Even if they retained a lawyer in the state postconviction proceeding, that lawyer is not bound by the Sixth Amendment guarantee of effective assistance.[96]

The Supreme Court addressed this problem in *Martinez v. Ryan*. Luis Martinez's state habeas counsel neglected to raise an IAC claim regarding his initial trial counsel.[97] Martinez then filed a second petition for habeas relief in state court, arguing his initial "trial counsel had been ineffective for failing to challenge the prosecution's evidence."[98] After the state court denied relief because he had failed to raise the trial-based IAC claim during the first habeas proceeding, Martinez filed for review in federal court and argued his state habeas counsel was

93. *See* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) ("[W]e reiterate that ineffective assistance of counsel claims are to be brought in [collateral] proceedings. Any such claims improvidently raised in a direct appeal, henceforth, will not be addressed by appellate courts regardless of merit. There will be no preclusive effect under Rule 32 by the mere raising of such issues. The appellate court simply will not address them."); *see also Martinez v. Ryan*, 566 U.S. 1, 6 (2012) (describing Arizona's procedural rule).

94. *See Spreitz*, 525 P.3d at 526 ("The trial court is the most appropriate forum for such evidentiary hearings."); *see also* Shinn v. Ramirez, 142 S. Ct. 1718, 1746 (2022) (Sotomayor, J., dissenting) (observing there is "nothing nefarious" about a state's choice to move IAC claims from direct review to state collateral proceedings); Trevino v. Thaler, 569 U.S. 413, 422 (2013) (explaining some states choose to defer IAC claims to collateral proceedings because defendants receive a new attorney in collateral review, and collateral review gives the attorney more time to investigate). *But see* Place, *supra* note 33, at 316-17 (arguing that the combination of deferring IAC claims to habeas review and the custody requirement for habeas proceedings leaves defendants with shorter sentences without a remedy for IAC).

95. *See supra* Part I.B; Evitts v. Lucey, 469 U.S. 387, 402 (1985); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

96. *See* Martinez v. Ryan, 566 U.S. 1, 18-19 (2012) (Scalia, J., dissenting) (explaining that the right to effective assistance of counsel attaches when there is a Sixth Amendment right to counsel); Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018) (en banc) ("There can be no constitutionally ineffective assistance of counsel where there is no Sixth Amendment right to counsel in the first place.").

97. *See Martinez*, 566 U.S. at 6.

98. *Id.* at 6-7.

ineffective because they failed to raise an IAC claim regarding trial counsel.[99] On appeal, the Supreme Court held that, in the unusual procedural posture created by Arizona's rule, a defendant may raise an IAC claim for the first time on federal habeas review, and that such claims should not be dismissed on grounds of procedural default.[100] The following year, the Court extended *Martinez* to cases where it was technically possible to raise an IAC claim on direct review, but the state had made it de facto impossible to do so.[101] More recently, the Court clarified that *Martinez* applies only to claims regarding ineffective assistance of *trial* counsel—not *appellate* counsel.[102]

As the Court emphasized in *Shinn*, *Martinez* was not a constitutional holding.[103] Instead, the Court used its "'equitable judgment' and 'discretion'" to excuse a defendant's procedural default on the IAC claim in state collateral review when that was their first opportunity to raise the claim.[104] Though *Martinez* allowed defendants to challenge the efficacy of their initial trial counsel in federal court if their state habeas counsel was ineffective in raising the claim, Arizona state courts offered no analogous state remedy for ineffective habeas counsel.[105]

Finally, in *Shinn v. Ramirez* the Supreme Court announced that, while ineffectiveness of state habeas counsel could excuse a defendant's violation of the court-developed rule of procedural default, it could not exempt a defendant from the limits on evidentiary hearings imposed on federal habeas claims by Congress.[106] *Shinn* involved the cases of David Ramirez and Barry Lee Jones.[107]

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99. *Id.* at 7-8. Under current Arizona law, a defendant like Martinez might receive successive state collateral relief if their initial state habeas counsel failed to raise the IAC claim entirely. *See* ARIZ. R. CRIM. P. 32.2(b) (permitting successive collateral review for some claims not raised in prior state collateral review). However, if prior state collateral counsel raised the IAC claim but did so in a manner which was constitutionally ineffective, the defendant would be barred from renewing the claim in successive state habeas proceedings. *See id.*; State v. Evans, 506 P.3d 819, 826-27 (Ariz. Ct. App. 2022) (refusing to adopt a state version of *Martinez* and holding that defendants cannot challenge the efficacy of their state habeas counsel).

100. *See Martinez*, 566, U.S. at 17.

101. *See* Trevino v. Thaler, 569 U.S. 413, 417 (2013).

102. *See* Davila v. Davis, 137 S. Ct. 2058, 2063 (2017).

103. Shinn v. Ramirez, 142 S. Ct. 1718, 1736 (2022). *But cf. Martinez*, 566 U.S. at 8 (describing how a prior case, *Coleman v. Thompson*, 501 U.S. 722 (1991), suggested the Constitution may require states like Arizona to provide effective assistance of counsel in collateral review proceedings).

104. *Shinn*, 142 S. Ct. at 1736 (quoting *Martinez*, 566 U.S. at 13).

105. *See Martinez*, 566 U.S. at 17; State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

106. *See Shinn*, 142 S. Ct. at 1728.

107. *See id.* at 1728-29.

Both defendants challenged their convictions in state habeas proceedings.[108] During these postconviction proceedings, the defendants failed to raise—or, in Jones's case, failed to effectively raise—IAC claims regarding their trial counsel.[109] The state courts denied both defendants relief.[110] Next, the defendants challenged their convictions in federal court, arguing their state habeas counsel was ineffective for inadequately raising their trial IAC claims.[111] In Ramirez's case, the Ninth Circuit held he was entitled to an evidentiary hearing regarding his IAC claim.[112] In Jones's case, the district court permitted a seven-day evidentiary hearing on his IAC claim and held Jones's counsel was constitutionally ineffective—which the Ninth Circuit affirmed.[113] The Supreme Court reviewed the cases together and reversed them both.[114]

The Court, confronting the same Arizona procedure as in *Martinez*, did not overrule *Martinez* or comment on the constitutional validity of Arizona's scheme.[115] Instead, it focused on interpreting 28 U.S.C. § 2254(e)(2), which restricts access to evidentiary hearings in federal habeas proceedings.[116] In other words, while *Martinez* allows defendants to raise an IAC claim in federal court, *Shinn* interprets § 2254(e) as barring them from proving it, and the Court refused to read any exception into the statute's text.[117] Indeed, the Court acknowledged the likely result of its holding would be to render *Martinez* claims in federal court futile.[118]

This is the doctrine as it stands now. But in resolving a novel question about procedural default in *Martinez* cases and the right to an evidentiary hearing, *Shinn* raises a new question: With no federal forum in which a defendant may present evidence in support of an IAC claim regarding state habeas counsel, does the Constitution require states to provide a forum for such evidentiary hearings? The next Part takes on this question and answers it in the affirmative.

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108. *See id.*

109. *See id.* Jones technically did raise an IAC claim, but it was not the IAC claim the Supreme Court reviewed. *See id.* at 1729.

110. *See id.* at 1728-29.

111. *See id.*

112. *See id.* at 1728.

113. *See id.* at 1729-30.

114. *See id.* 1728.

115. *See id.*

116. *See id.* at 1728, 1730.

117. *See id.* at 1728.

118. *See id.* at 1738-39.

II. An Unconstitutional Situation

In this Part, I argue that defendants in Arizona—and states with similar procedural rules—have a constitutional right to effective assistance of counsel in state habeas review to raise IAC claims regarding their trial counsel. This constitutional right in turn requires these states to provide a forum for defendants to vindicate the right.

Currently, Arizona procedural law deprives defendants of the right to effective assistance of counsel while raising IAC claims regarding their trial counsel.[119] State laws deferring IAC claims until state collateral review require defendants first to raise the claims in proceedings where they are not constitutionally entitled to effective assistance of counsel.[120] Thus, if a defendant's state habeas counsel fails to raise the IAC claim regarding the defendant's trial counsel, as was the case in *Shinn*,[121] the defendant has no constitutional recourse. These defendants are therefore deprived of the ability to challenge the efficacy of their initial trial counsel with the assistance of constitutionally adequate counsel. In states where trial IAC claims can be raised on direct appeal, this is not so, because there is a Sixth Amendment right to effective assistance of counsel on direct appeal.[122]

Since Arizona's procedural rule deprives defendants of the right to bring trial IAC claims with the effective assistance of counsel, it violates the Sixth and Fourteenth Amendments as interpreted by the Supreme Court. Thus, the Constitution requires Arizona—and similar states—to institute remedial procedures.[123] Holding otherwise would require either overruling longstanding precedent or upsetting bedrock principles of our constitutional system.

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119. Arizona postconviction defendants are appointed counsel when they allege ineffective assistance of counsel—though this is not true in all states. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 83-84 app. (2002) (documenting state statutes regulating the provision of counsel to indigent defendants in state habeas proceedings, including Arizona's, which generally offers postconviction counsel). But because there is no constitutional right to counsel in these proceedings, they lack a constitutional guarantee of that counsel's efficacy.

120. *See* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002) (establishing that defendants may not raise IAC claims until state collateral review); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (declining to extend the right to counsel to postconviction proceedings).

121. *See Shinn*, 142 S. Ct. at 1728.

122. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985).

123. It bears emphasizing here that this Note's argument is concerned only with a defendant's ability to challenge the efficacy of their *trial* counsel with the effective assistance of other counsel. I do not argue that a defendant is entitled to challenge the efficacy of their *appellate* counsel with the effective assistance of counsel. I argue only that there is a right to challenge the efficacy of appellate counsel—*with or without counsel*. And if appellate counsel cannot raise IAC claims regarding trial counsel, I argue a defendant must have counsel with which to challenge the efficacy of their initial trial

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Proving this claim involves three steps. First, defendants not only have a right to effective assistance of counsel on direct review, they are also entitled to the remedy of challenging the efficacy of that counsel in court.[124] Second, this remedy encompasses presenting evidence in support of the constitutional claim.[125] Third, if a state defers defendants' ability to raise certain constitutional claims from a proceeding where they are entitled to effective counsel under the Sixth Amendment to a subsequent proceeding, this entitlement carries over to the subsequent proceeding.[126]

A. The Sixth and Fourteenth Amendments Entitle Criminal Defendants to Raise IAC Claims About Their Direct Review Counsel

As discussed in Part I.B, *Evitts v. Lucey* held that criminal defendants have a right to the effective assistance of counsel on direct review.[127] In *Evitts*, the defendant successfully challenged the efficacy of his appellate counsel in a collateral proceeding.[128] The question becomes whether the Constitution entitles defendants to raise such a challenge in the face of state procedural rules that would otherwise prevent them from challenging the efficacy of their appellate counsel.

To conceptualize this question, imagine a world without any collateral review—that is, neither state habeas nor federal habeas review.[129] A criminal defendant's only court proceedings would be their trial, direct appeal, and potentially review on certiorari by the state or U.S. supreme court. In this world, could a state constitutionally bar a criminal defendant from raising an IAC claim on direct review? It could not, because in the absence of a forum in which to raise

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counsel. Thus, nothing in the argument contravenes *Davila v. Davis*. *See* 137 S. Ct. 2058, 2062-63 (2017) (declining to extend *Martinez* to IAC claims against appellate counsel).

124. *See infra* Part II.A.

125. *See infra* Part II.B.

126. *See infra* Part II.C.

127. *See supra* Part I.B; Evitts v. Lucey, 469 U.S. 387, 396 (1985).

128. *See Evitts*, 469 U.S. at 390-91.

129. Assume, as well, that this world is consistent with any requirements of the Suspension Clause, so there are no constitutional requirements of collateral attack on state criminal convictions. *Cf.* Felker v. Turpin, 518 U.S. 651, 663-64 (1996) (suggesting the Suspension Clause may require some form of collateral attack on criminal convictions). The Supreme Court recently rejected an argument that the Suspension Clause requires a forum to raise post-conviction challenges to sentences from courts of general criminal jurisdiction. *See* Jones v. Hendrix, No. 21-857, 2023 WL 4110233, at *10-12 (U.S. June 22, 2023).

IAC, the right to effective assistance of counsel would be effectively nullified. There are no effective alternative remedial mechanisms.[130]

Not all constitutional rights entitle individuals to a remedy in court, especially those that can be protected through the political process.[131] But the context of IAC is distinctive. The right to effective assistance of counsel is a personal right designed to ensure the integrity of the judicial process initiated by the state to deprive the right holder of their liberty, or life.[132] Both the Sixth Amendment by its own force, and the Fourteenth Amendment through procedural due process, require defendants have access to a remedy for the ineffective assistance of counsel in enforcement proceedings.

1. The Sixth Amendment requires defendants have a right to raise IAC claims regarding their appellate counsel

The right to raise IAC claims regarding counsel in proceedings during which the defendant had a constitutional right to counsel is firmly rooted in the Sixth Amendment. Indeed, the Supreme Court's decisions regarding the Sixth Amendment right to counsel assume access to a remedy. In *Strickland*, the Supreme Court described constitutionally ineffective counsel as counsel "so defective as to *require* reversal of a conviction," holding that the Constitution requires reversal—a judicial remedy.[133] If constitutionally defective counsel necessitates reversal, there must be some means to achieve that constitutionally required result. And in *Evitts*, the Court acknowledged that the right to effective assistance of counsel on appeal could trump state procedural laws.[134] Thus, the

130. One alternative remedy would be a malpractice claim. However, most states require exoneration to bring such a claim. *See* Clinton L. Firm, *What Constitutes "Exoneration" Sufficient to Sue Criminal Defense Counsel?*, CHI. LEGAL MALPRACTICE L. BLOG (Apr. 28, 2020), https://perma.cc/2T8V-ENK6; *see, e.g.*, Gray v. Skelton, 595 S.W.3d 633, 638-39 (Tex. 2020) (requiring exoneration for malpractice claims by criminal defendants against their lawyers and holding that even a successful IAC claim alone would not constitute exoneration).

131. *See* Webster v. Doe, 486 U.S. 592, 611-14 (1988) (Scalia, J., dissenting) (rejecting the idea that "*all* constitutional violations must be remediable in the courts"); *see, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1853-54, 1860 (2017) (declining to find an implied constitutional right of action for a violation of the plaintiff's Fourth and Fifth Amendment rights). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (1765))); Alden v. Maine, 527 U.S. 706, 812 (1999) (Souter, J., dissenting) ("Blackstone considered it 'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (1765))).

132. *See Evitts*, 469 U.S. at 395-96.

133. *See* Strickland v. Washington, 466 U.S. 668, 686-87 (1984) (emphasis added).

134. *See* 469 U.S. at 398-400.

Court assumed a defendant must have a way to challenge the inefficacy of their appellate counsel, even if state procedural laws stood in the way.

The Sixth Amendment is not unique in this respect. Supreme Court decisions on other procedural rights for criminal defendants have presumed the ability to raise claims regarding those rights. For example, in *Batson v. Kentucky*, the Supreme Court created a multistep process to evaluate claims of racial discrimination in jury selection.[135] *Batson* dealt with a state conviction,[136] and it would be odd for the Supreme Court to describe the steps to proving a *Batson* violation in such depth if states were free to limit or extinguish those claims entirely. Indeed, it is unclear what the purpose of *Batson* would be at all if states were free to disregard it by preventing defendants from raising *Batson* claims in the first place. And that is the crux of the issue. If constitutional procedural protections are to mean anything, they must mean, at a minimum, that individuals have the right to resist criminal punishment by challenging the constitutional validity of the procedures afforded to them. When the state fails to provide constitutionally required procedures to criminal defendants, it fails to uphold the Constitution.[137]

2. The Fourteenth Amendment's procedural due process requires defendants to have a right to raise IAC claims regarding their appellate counsel

Beyond the Sixth Amendment itself, procedural due process requires defendants have a means of remedying the ineffective assistance of appellate counsel. The Court has regularly held that defendants in enforcement proceedings have a right to raise defects in those proceedings.[138]

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law."[139] Though

135. *See* 476 U.S. 79, 96-98 (1986).

136. *See id.* at 82.

137. *See Evitts*, 469 U.S. at 396 ("The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law.").

138. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 524-25 (2004) (plurality opinion) (acknowledging the petitioner's right to challenge, under the Due Process Clause, the procedures used to determine detentions); Londoner v. City & Cnty. Denver, 210 U.S. 373, 386 (1908) (invalidating a state's tax assessment after hearing the taxpayers' due process challenge to the procedures afforded them); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (emphasizing that the only way for the trial court to remedy the violation of the defendant's procedural due process right to be heard was by setting aside the decree in question).

139. U.S. CONST. amend. XIV, § 1.

debate persists about other applications of this clause,[140] at a minimum it entitles defendants to certain procedural protections when they face a deprivation of "life, liberty, or property"—as anyone facing imprisonment or execution does.[141] And raising a constitutional claim defensively does not require a right of action or involve damages.[142]

The Supreme Court has never explicitly held that procedural due process requires that defendants can argue their counsel was constitutionally deficient, but it would strain existing precedent to hold otherwise. A state procedural law violates procedural due process when "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[143] The right to effective assistance of appellate counsel is fundamental because it is a constitutional guarantee integral to the very fairness of criminal procedure.[144] Moreover, the high standard for IAC set forth in *Strickland* means that IAC directly relates to the fairness of a criminal proceeding.

Indeed, that a successful IAC claim reveals a fundamentally unfair criminal proceeding is nearly a tautology because a defendant cannot meet the *Strickland* standard for IAC unless they prove counsel's errors deprived them of a fair, reliable trial.[145] The prejudice prong ensures this—a valid IAC claim is a claim that the outcome of the trial is wrong because the state did not in fact have the authority to impose the punishment on the defendant.[146] In *Strickland* itself, the Court observed that the elements of a fair trial protected under the Due

140. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999) ("There is no concept in American law that is more elusive or more controversial than substantive due process.").

141. U.S. CONST. amend. XIV, § 1; *see* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

142. *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (finding an implied constitutional right of action against conduct by federal agents violating the Fourth Amendment); Ziglar v. Abbasi, 137 S. Ct. 1843, 1857, 1860 (2017) (suggesting Congress would "most often" decide whether a constitutional violation gives rise to damages).

143. Patterson v. New York, 432 U.S. 197, 201-02 (1977) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

144. Evitts v. Lucey, 469 U.S. 387, 395 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.").

145. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding IAC claims require a defendant to prove their counsel's deficient performance deprived them of a fair and reliable trial).

146. *See id.* at 691-92 (detailing the prejudice standard); Martinez v. Ryan, 566 U.S. 1, 24-25 (2012) (Scalia, J., dissenting) (explaining that constitutionally ineffective assistance of counsel is "imputed to the state" because it is the state's failure to conduct a fair proceeding).

Process Clause are largely defined by the provisions of the Sixth Amendment—including the right to counsel.[147] Effective assistance of counsel is essential to the right to a fair trial protected by procedural due process. And the same is true with respect to direct appeals. In *Evitts*, the Court held that an appeal "is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."[148]

Moreover, because the right to counsel is a constitutional right, it is necessarily a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[149] Thus, the right to effective assistance of counsel is distinguishable from other, nonconstitutional procedures the Court had permitted states to modify, such as the procedure at issue in *Patterson v. New York*. In *Patterson*, the Court confronted a state procedural rule placing the burden on defendants—as opposed to the state—to prove the affirmative defense of extreme emotional disturbance.[150] The Court upheld the state rule because it had never been constitutionally required that the prosecution prove the nonexistence of an affirmative defense.[151] Conversely, effective assistance of appellate counsel is constitutionally required.[152] And no state has sought to deny defendants the ability to challenge the efficacy of their appellate counsel since the Supreme Court announced its decision in *Evitts*.

This understanding of procedural due process is consistent with Supreme Court precedent in other circumstances. In *United States v. Mendoza-Lopez*, the Supreme Court considered whether Congress could prevent a defendant from challenging the validity of a previous deportation order in a criminal proceeding that used the order as an element of the crime.[153] The Court held that the constitutional guarantee of due process barred Congress from denying a defendant the opportunity to challenge the sufficiency of the prior proceeding.[154] The same logic requires that defendants have an opportunity to raise their IAC claim. By raising an IAC claim, a defendant calls into question the validity of the prior criminal proceeding—whether that proceeding is an

147. *Strickland*, 466 U.S. at 684-85; *see also In re* Oliver, 333 U.S. 257, 273 (1948) (including the right to counsel in a list of three essential characteristics of due process).

148. *Evitts*, 469 U.S. at 396.

149. Patterson v. New York, 432 U.S. 197, 201-02 (1977) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)) (identifying when procedural rules violate due process); *see Evitts*, 469 U.S. at 395 (naming the right to counsel as fundamental to a fair trial).

150. *See* 432 U.S. at 198.

151. *See id.* at 210.

152. *See Evitts*, 469 U.S. at 395-96.

153. *See* 481 U.S. 828, 833-84 (1987).

154. *Id.* at 837-38.

appeal or a trial.[155] And as in *Mendoza-Lopez*, procedural due process requires that defendants have an opportunity to do so.

Taken together, Supreme Court precedent establishes that the Sixth Amendment and the Fourteenth Amendment's Due Process Clause require defendants have an opportunity to remedy defects in their conviction.

B. The Constitution Entitles Defendants to Present Evidence in Support of Their IAC Claim

Because the Constitution, through the Sixth and Fourteenth Amendments, grants defendants the right to raise IAC claims, it also grants them the right to present evidence in support of those claims. The prior section explained why defendants have a constitutional right to present IAC claims—at least while facing criminal prosecution. But as things stand under *Martinez*, criminal defendants in Arizona and similar states can technically raise a claim that their state habeas counsel ineffectively argued their IAC claim regarding trial counsel.[156] What *Shinn* changed is that now defendants lack a forum in which to provide evidence in support of their claim.[157] *Shinn* brings about the next question: If the Sixth Amendment and procedural due process entitle criminal defendants to a remedy for a constitutional violation, do they also entitle defendants to provide evidence to prove there was a violation in the first place? They must, because a contrary result would deprive defendants of the right in practice.

IAC is not the only constitutional right which, in the context of criminal prosecutions, can give rise to affirmative defenses. For example, the First Amendment's Free Exercise Clause allows defendants to challenge laws burdening their religious exercise that are not neutral or generally applicable.[158] If a state prosecuted a defendant under a law that violated the Free Exercise Clause, could the state prevent the defendant from presenting evidence about their religion or the law in question? Presumably not. And as discussed above, *Batson* contemplates both defendants and prosecutors presenting evidence regarding jury selection.[159] Presumably, a state could not deny defendants the right to present such evidence proving a *Batson* violation either. If states could deny defendants the ability to present evidence in defense

155. *See Evitts*, 469 U.S. at 395.

156. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1737-38 (2022). *Martinez* permits federal courts to hear IAC claims regarding trial counsel that were not raised in state habeas by excusing the procedural default. *See* Martinez v. Ryan, 566 U.S. 1, 17 (2012).

157. *See Shinn*, 142 S. Ct. at 1728.

158. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993); *see also* Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

159. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986).

of their claims, the states would be effectively nullifying the underlying constitutional right.

Perhaps the best example of an affirmative defense protected by the Constitution that requires defendants to present evidence is *Brady v. Maryland*.[160] *Brady* held that the prosecution must turn over exculpatory evidence requested by the defendant.[161] *Kyles v. Whitely* extended the doctrine to situations where the defendant did not request the evidence.[162] Proving the prosecution failed to disclose exculpatory evidence, especially if that evidence was not requested, requires defense counsel to add new evidence to the record.[163] After all, if the evidence in question were already in the record, either the prosecution did disclose it, or the defense found it regardless and the *Brady* violation would likely be considered harmless error.[164]

Like *Brady* claims, IAC claims are particularly vulnerable to a lack of evidentiary proceedings because they almost always require additional evidence beyond the record created by the allegedly ineffective prior lawyer. *Strickland* asks defendants to prove their counsel was constitutionally deficient and that the deficient performance prejudiced them.[165] As Justice Sotomayor's dissent in *Shinn* observed: "Demonstrating that counsel failed to take measures by definition requires evidence beyond the trial record."[166]

The majority agreed.[167] But Justice Thomas, writing for the Court, suggested that defendants' inability to successfully litigate IAC claims without supplemental evidentiary hearings justified dispensing with the IAC claims, rather than adopting a different reading of a federal statute.[168] For reasons that will be discussed at greater length in Part III, nothing in this Note's argument contradicts Justice Thomas's analysis.[169] He is correct that the Court is not required to read a federal statute differently in light of inadequate state

160. 373 U.S. 83 (1963).

161. *See id.* at 87.

162. *See* 514 U.S. 419, 433 (1995).

163. *See, e.g.*, *id.* at 422 (describing how the Louisiana Supreme Court remanded the case for an evidentiary hearing to develop Kyles's new exculpatory evidence argument).

164. *See, e.g.*, United States v. Valencia, 600 F.3d 389, 418-19 (5th Cir. 2010) (holding that the prosecution's failure to disclose its fee arrangement with a witness was a *Brady* violation but constituted harmless error because the defense nonetheless discovered the government was paying the witness).

165. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

166. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1746 (2022) (Sotomayor, J., dissenting). Extra-record evidence is frequently required because IAC claims generally rely on omission—things counsel should have done but did not. *See id.*

167. *See id.* at 1738-39 (majority opinion).

168. *Id.*

169. *See infra* Part III.

procedures. After all, Congress is not constitutionally obligated to legislate solutions for states' constitutional deficiencies.[170]

It remains the case, however, that defendants are now practically unable to present evidence to support their IAC claims respecting their state habeas counsel outside of "extraordinary cases."[171] This is unconstitutional. States may impose reasonable limitations on the evidence presented through their own evidentiary rules or other procedural requirements—as they do in all criminal proceedings.[172] But a categorical bar on new evidence for IAC claims effectively extinguishes those claims entirely because they, almost invariably, rely on additional evidence.[173] Thus, because defendants are entitled to a remedy for constitutional inefficacy of their trial and appellate counsel,[174] they must be allowed to present evidence to prove such IAC claims.

Of course, while the defendants in *Shinn* conceded they could not meet § 2254(e)(2)'s strict standard for a federal court to grant an evidentiary hearing[175] some defendants will be able to meet it. And there is also a narrow class of defendants who can prove IAC without supplementing the record at all. For example, if their lawyer was noticeably drunk during trial and slurred their words on the record. And Congress often limits the right to a new evidentiary hearing on collateral review to only the most egregious cases.[176] Collateral proceedings offer an example of where a defendant might not have a right to an evidentiary hearing even to raise a constitutional claim. The rationale for limiting collateral factfinding is that postconviction review necessarily follows a fully developed state proceeding where defendants could have raised their claims.[177] But this logic is inapplicable to the argument advanced here. As will be discussed at greater length in Part II.C below, in states where procedural rules bar defendants from litigating IAC claims until state habeas, that postconviction proceeding is properly viewed as the direct review proceeding—at least for the

170. *See infra* Part III.

171. *See Shinn*, 142 S. Ct. at 1728.

172. *See, e.g.*, ARIZ. R. CRIM. P. 1.7(a) (requiring that court filings be submitted to the clerk). For example, nothing here suggests states cannot apply their own evidence codes to postconviction proceedings. *Cf.* ARIZ. R. EVID. (establishing which kind of evidence is admissible in Arizona court proceedings).

173. *See Shinn*, 142 S. Ct. at 1746 (Sotomayor, J., dissenting).

174. *See supra* Part II.A.

175. *See* Shinn, 142 S. Ct. at 1734.

176. *See* 28 U.S.C. § 2254(e)(2)(B) (restricting evidentiary hearings to claims where "no reasonable factfinder would have found the applicant guilty of the underlying offense").

177. *See* Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (explaining that AEDPA limits federal court review of state court decisions because "state courts are the principal forum for asserting constitutional challenges to state convictions").

narrow purpose of raising a trial IAC claim.[178] Thus, the state proceeding is not complete, and review of the constitutional claim cannot be limited to only egregious claims. Defendants are entitled to present evidence in support of their non-frivolous IAC claims.

C. Defendants Are Entitled to Constitutionally Competent Counsel in State Habeas Proceedings that Are the Initial Review of Trial Counsel's Efficacy

In states that defer IAC claims to state habeas proceedings, defendants have a constitutional right to counsel in those proceedings for the purpose of raising trial IAC claims. The previous two Parts focused on appellate counsel. Part II.A explained that defendants have a right to raise IAC claims regarding their appellate counsel,[179] and Part II.B explained that they also have a right to present evidence in support of such a claim.[180] However, neither of those principles are at issue in Arizona. Defendants are free to challenge the efficacy of their appellate counsel in collateral proceedings, and they are free to present evidence of such inefficacy.[181] What *Shinn* prevents defendants from doing is presenting evidence to support their IAC claim against their *state habeas counsel*.[182] This Part argues that, even though there is no blanket right to counsel in postconviction review,[183] there is a constitutional right to counsel in state habeas review when a state prevents defendants from raising certain claims outside of state habeas proceedings.

Arizona, like many other states, bars defendants from raising IAC claims on direct review or in any proceeding before state habeas—including federal and state supreme court review.[184] While the rule may exist for sound reasons, it nonetheless defers the remedy for a violation of a constitutional right. In states without Arizona's procedural rule, defendants have a right on direct review (1) to raise an IAC claim about their initial trial counsel and (2) to do so

178. *See infra* Part II.C.

179. See *supra* Part II.A.

180. *See supra* Part II.B.

181. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1738-39 (2022) (acknowledging that defendants may raise *Martinez* claims, even if they are likely futile).

182. *See id.* at 1728-30 (explaining both defendants challenged the efficacy of their postconviction counsel and holding that federal courts could not hold an evidentiary hearing on their claims).

183. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

184. *See* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002); *see also supra* note 9 (listing states that also bar IAC claims on direct review).

with effective assistance of appellate counsel.[185] Arizona's procedural rule defers the first right and extinguishes the second.

Of course, just because a defendant has two rights does not necessarily mean they are entitled to raise them both at the same time. But the right to assistance of counsel is the right to have that counsel conduct an effective defense by engaging with nuanced issues of law.[186] Effective counsel is, in part, one who raises complex legal claims that could win their client's case.[187] Indeed, appellate counsel may be constitutionally ineffective for failing to raise IAC claims in states where they are permitted to do so.[188] Thus, when a defendant has a right to counsel, they possess a right to have that counsel to raise reasonable legal claims in their defense—including IAC claims.[189] To avoid abridging this right, states that defer raising IAC claims until subsequent proceedings must provide adequate counsel in that subsequent proceeding. Otherwise, defendants are prevented from enjoying their right to counsel on direct review because their counsel cannot raise all claims that effective counsel would have raised. Put differently, the state would render the appellate counsel ineffective by preventing them from raising meritorious legal claims. Thus, if states wish to keep this procedure, they must provide effective counsel at the subsequent proceeding for the claims they prevented appellate counsel from raising.

If states could make an end-run around the right to effective appellate counsel by deferring a defendant's ability to raise certain claims until a point when they have no right to counsel, the right to counsel would be undermined. Moreover, if such an end-run is allowed, there is no logical stopping point. A state could prevent defendants from raising any number of constitutional or other challenges to their conviction until collateral proceedings, where defendants lack a constitutional right to counsel. Such a situation would be constitutionally untenable.

When states like Arizona defer defendants' constitutional right to raise an IAC claim with constitutionally effective counsel until state habeas review,

185. *See supra* Part II.A; Evitts v. Lucey, 469 U.S. 387, 396 (1985).

186. *See Evitts*, 469 U.S. at 394.

187. *See, e.g.*, Payne v. Stansberry, 760 F.3d 10, 17-18 (D.C. Cir. 2014) (holding that appellate counsel was constitutionally ineffective because they failed to raise a legal challenge to the jury instructions given at trial).

188. *See, e.g.*, Caver v. Straub, 349 F.3d 340, 348-50 (6th Cir. 2003) (holding that defendant's appellate counsel was ineffective for failing to raise an IAC claim regarding trial counsel).

189. *See Evitts*, 469 U.S. at 394 (explaining that while counsel "need not advance *every* argument," they must "play the role of an active advocate"); *Payne*, 760 F.3d at 17-18 (holding that failure to raise important claims can render counsel constitutionally ineffective); *Caver*, 349 F.3d at 348-50 (holding that failure to raise IAC claims can render counsel constitutionally ineffective).

they defer the entire right. If states could, by delaying the claim of state habeas, extinguish the right to effective counsel while raising the claim, then it was no right at all. Put differently, the Court's holding in *Martinez*—that a defendant may challenge the efficacy of their trial counsel once with effective assistance of counsel—is constitutionally required.[190] However, the specific remedy *Martinez* established—excusing procedural default and allowing the IAC claim to be heard in *federal* court—may not be constitutionally required.[191]

Nothing in *Shinn* contravenes the idea that, in the narrow circumstances where a criminal defendant has no prior opportunity to raise an IAC claim regarding trial counsel, they have a constitutional right to counsel the first time they raise it. As *Shinn* makes clear, *Martinez* relied on the Supreme Court's equitable jurisdiction—not a constitutional rule.[192] The Court's choice, pursuant to the doctrine of constitutional avoidance,[193] to rule on a narrower ground does not influence the merits of the underlying constitutional rule. The Court also cast doubt on *Martinez*'s continued viability when it intimated *Martinez* hearings could be dispensed with entirely.[194] But whether the remedy of *Martinez* hearings in federal court is constitutionally required does not change whether, in their absence, other nonfederal remedies might be.[195] Moreover, in *Coleman v. Thompson*, the Court suggested the Constitution might require some remedy,[196] a possibility the Court left open in *Martinez*.[197]

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190. Because I argue the Constitution requires the effective assistance of counsel in this narrow class of cases, I address the principal basis for the dissent in *Martinez*. Justice Scalia argues the majority erred in *Martinez* because it cannot distinguish its equitable rule from a host of other claims a defendant could only raise in state habeas, such as *Brady* claims. *See* Martinez v. Ryan, 566 U.S. 1, 19 (2012) (Scalia, J., dissenting). But even Justice Scalia acknowledged that the situation is different when there is a constitutional right to counsel. *See id.* at 24-25. He, however, argued that existing Supreme Court precedent precludes the existence of such a constitutional right. *See id.* at 27. But this precedent is distinguished in the remainder of Part II.C.

191. *See infra* Part III.

192. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1736 (2022); *see also Martinez*, 566 U.S. at 9 ("This is not the case, however, to resolve whether that exception exists as a constitutional matter.").

193. *See Martinez*, 566 U.S. at 5 ("While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.").

194. *See Shinn*, 142 S. Ct. at 1738-39.

195. Part III will discuss at greater length what a nonfederal remedy might look like and why such a rule is consistent with *Shinn*.

196. *See* 501 U.S. 722, 755 (1991).

197. *See Martinez*, 566 U.S. at 8 (commenting that where collateral review is the first time a defendant may raise an IAC claim it "may justify an exception to the constitutional rule

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Nor would constitutionalizing *Martinez*'s holding expand existing doctrine. Instead, not affording a right to counsel in these narrow circumstances would require overruling longstanding Supreme Court precedent dating back to *Evitts v. Lucey*.[198] Declining to constitutionalize *Martinez* would require accepting that states may take away defendants' right to effective representation for a claim they are constitutionally entitled to raise. The constitutional guarantee would be meaningless, effectively denying the right.

The theory advanced above is narrow. It does not justify a blanket right to counsel in postconviction proceedings. This is because, unlike the theories advanced by the existing literature,[199] this Note's argument is grounded in the Sixth Amendment itself and a limited conception of procedural due process. A defendant is entitled (1) to challenge the efficacy of their initial trial counsel with the effective assistance of counsel and (2) to challenge the efficacy of their appellate counsel—but without an entitlement to effective counsel while doing so. And if their right to challenge the efficacy of their trial counsel is deferred, as it is in Arizona and many other states, their right to challenge it with the effective assistance of counsel travels with it. No more, no less.

There is a clearly defined limiting principle to this theory: Defendants have only one bite at the IAC apple. That is, the right to effective assistance of counsel does not—at least by its own force—provide a right to present an IAC claim about that counsel *with the effective assistance of counsel*.[200] Such a right exists only when a defendant has the right to effective assistance of counsel at *both* the current stage of litigation and at trial. These criteria are met, under current law, only on direct review and during state habeas if IAC claims are barred on direct review.[201] Therefore, the right to raise IAC claims ends after the first challenge to the efficacy of direct review counsel, or—in the case of states like Arizona—the first challenge to the efficacy of state habeas counsel.

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that there is no right to counsel in collateral proceedings" (citing *Coleman*, 501 U.S. at 755; Douglas v. California, 372 U.S. 353, 357 (1963))).

198. Evitts v. Lucey, 469 U.S. 387, 397 (1985).

199. *See supra* notes 28-35 and accompanying text.

200. *Cf.* Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993) (explaining that the right to effective assistance of counsel cannot extend to every forum in which a defendant can raise an IAC claim).

201. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing a right to effective assistance of counsel at trial); *Evitts*, 469 U.S. at 397 (reaffirming the right to effective assistance of counsel on direct review); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (limiting the right to counsel to the initial trial and direct review); *supra* Part II.C. (arguing the right to counsel should extend to state habeas proceedings when that is the first proceeding where a defendant can raise a trial IAC claim).

Other theories for a right to counsel in habeas proceedings, grounded in other constitutional provisions, lack such a limiting principle. For example, some scholars have argued for a postconviction right to counsel deriving from the Equal Protection Clause.[202] The narrowest version of this argument, stemming from *Douglas v. California*,[203] reasons that, because the Supreme Court held there is a right to counsel for a defendant's "one and only appeal," there is a right to counsel in state habeas claims when defendants raise IAC claims regarding prior counsel.[204] Counsel is necessary because, as was the case in *Douglas*, defendants lack a brief prepared by a lawyer on the relevant issue.[205]

But this is true for IAC claims at every stage. The logic applies equally to a claim in state habeas that appellate counsel was ineffective.[206] If there is a constitutional right to counsel in state habeas for claims against appellate counsel, there must be a right to challenge that habeas counsel's efficacy in subsequent proceedings. Per the theory, in those proceedings, there would be a right to counsel to bring the IAC challenge regarding state habeas counsel because it would be a novel IAC claim. This, in turn, necessitates a subsequent proceeding to challenge that counsel's efficacy too, and a right to counsel at that proceeding. The cycle would never end. This is called the "infinite continuum" problem.[207] The Ninth Circuit took note of the issue when it declined to extend the right to counsel to postconviction proceedings.[208] The infinite continuum problem is not an issue solely because it is practically infeasible; it also means a right to counsel under the Equal Protection Clause—or other provisions with no limiting principle—would require overruling

202. *See, e.g.*, Uhrig, *supra* note 30, at 596; Place, *supra* note 35, at 316-21.

203. *See* 372 U.S. 353, 357-58 (1963) (deriving a right to counsel on direct review from the Equal Protection Clause).

204. *See* Place, *supra* note 35, at 322-23, 325 (quoting *Douglas*, 372 U.S. at 357) (emphasis omitted).

205. *See* Place, *supra* note 35, at 324-25. Emily Uhrig, conversely, presents a more sweeping Equal Protection Clause and Due Process Clause argument. She reasons that the two clauses require that defendants have a right to counsel when they raise *any* new claim in state habeas—not just IAC claims. *See* Uhrig, *supra* note 30, at 597.

206. *See* Place, *supra* note 35, at 325 ("The reasoning of the Court in *Douglas*, *Ross*, and *Halbert* supports a due process and equal protection right to counsel when a state collateral proceeding is the only opportunity to challenge the effectiveness of trial *or appellate counsel*." (emphasis added)).

207. *See* Emily Garcia Uhrig, *Why Only* Gideon*?:* Martinez v. Ryan *and the "Equitable" Right to Counsel in Habeas Corpus*, 80 MO. L. REV. 771, 773 (2015) (explaining the "infinite continuum" problem in postconviction right-to-counsel doctrine).

208. *See* Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993).

existing Supreme Court precedent in *Pennsylvania v. Finley*, which declined to extend the constitutional right to counsel to habeas proceedings.[209]

Conversely, the right-to-counsel theory advanced here has a principled stopping point. Defendants have a right to challenge the efficacy of their trial counsel with the effective assistance of counsel. After that, they have only the right to challenge the efficacy of the counsel who raised the initial IAC claim, whether that is the direct review counsel or state habeas counsel. Because they have no further right to the effective assistance of counsel, they have no further IAC claims.

This reading easily accommodates existing Supreme Court precedent. *Finley* held defendants have no right to counsel in postconviction proceedings.[210] But *Finley* did not confront a procedural scheme like Arizona's, where defendants are barred from raising IAC claims until collateral review.[211] In states like Arizona, initial habeas counsel functions as direct review counsel for the narrow purpose of raising IAC claims regarding trial counsel. Thus, the proper reference point is how *Finley* treated IAC claims regarding direct review counsel. *Finley* never questioned a defendant's ability to raise an IAC claim regarding their appellate counsel.[212] In states like Arizona, initial habeas counsel takes the place of direct review counsel for purposes of trial IAC claims because they are the first counsel who could raise the claim. Allowing defendants in states like Arizona to challenge the efficacy of their state habeas counsel regarding trial IAC claims is thus consistent with *Finley*.

Nevertheless, some may be skeptical because this Note's argument could be read to imply a constitutional right to state habeas review. Even granting the argument set forth in this Part, the logic appears to lead to the conclusion that criminal defendants have a constitutional right to either collateral review or state supreme court review. After all, the argument suggests criminal defendants have a right to raise a claim of IAC regarding their appellate lawyer,[213] and the only place to raise this would be in a collateral proceeding or supreme court review.[214] The Supreme Court has never held that collateral

209. 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."). *But see* Uhrig, *supra* note 30, at 601 (describing concerns about the infinite continuum problem as "vastly overstated").

210. *See Finley*, 481 U.S. at 555.

211. *See* Coleman v. Thompson, 501 U.S. 722, 755 (1991) (contemplating that, in cases where there is no ability to raise IAC claims on direct review, there may be room for an exception to *Finley*).

212. *See Finley*, 481 U.S. at 553-54.

213. *See supra* Part II.A.

214. In states like Arizona, review by the state supreme court does not resolve the issue. Even if review were granted, defendants still could not raise IAC claims because the

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review is constitutionally required.[215] Additionally, it would come as a great surprise to a majority of states and Congress that their current laws of discretionary supreme court review in most criminal cases would be unconstitutional but for collateral review. This would mean that for federal crimes, absent habeas review, the Supreme Court's near-entirely discretionary docket would be unconstitutional.[216]

Not quite. Happily, the argument's consequences are not so dramatic, its logic is consistent with state and federal practice since the Supreme Court first held defendants have a right to adequate assistance of counsel, and it derives from the Supreme Court's own case law.

First, all that is required under this Note's argument is a narrow opportunity to review the adequacy of state habeas trial counsel's performance with respect to one claim—not collateral review of the entire proceeding—and only in the narrow circumstances where states defer IAC claims until postconviction proceedings. Though defendants must be allowed to present evidence of IAC, states could opt to screen out frivolous petitions through something analogous to a motion to dismiss.

Second, this Note proposes a lesser requirement than what states and the federal government have provided since long before *Gideon*. During Reconstruction, Congress passed the Habeas Corpus Act of 1867, which created collateral review for the convictions of both state and federal prisoners.[217] Under this and current law, state convictions are reviewed by federal courts not just for IAC but for any inconsistencies with federal law.[218] Conversely, the *Gideon* Court first held the Sixth Amendment requires states provide counsel to all criminal defendants in 1963—nearly a century later.[219]

True, the Framers might be surprised to learn the Constitution required even this narrow form of review. Trials in federal court at the Founding did not

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state requires that the claims be raised in collateral review, not merely after direct review. *See* State v. Spreitz, 39 P.3d 525, 527 (Ariz. 2002).

215. *Cf.* Felker v. Turpin, 518 U.S. 651, 663-64 (1996) (hinting, but not holding, that the Constitution could require postconviction collateral proceedings for criminal convictions).

216. *See* SUP. CT. R. 11 (limiting Supreme Court review by writ of certiorari to only cases "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in [the Supreme] Court"); SUP. CT. R. 20 ("Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised.").

217. Ch. 28, § 1, 14 Stat. 385 (1867) (codified as amended at 28 U.S.C §§ 2241-43, 2251).

218. *Id.*; *see also* United States v. Hayman, 342 U.S. 205, 211-13 (1952) (discussing the Habeas Corpus Act of 1867 and petitions for relief under it by both state and federal prisoners).

219. Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963); *see also* Powell v. Alabama, 287 U.S. 45, 73 (1932) (announcing a constitutional right to counsel under the Sixth Amendment in certain cases).

provide postconviction collateral review.[220] But the Framers would probably be no more surprised to learn this than that the Sixth Amendment required states to provide counsel to indigent criminal defendants in the first place.[221]

Finally, requiring a minimal opportunity for defendants to raise an IAC claim regarding their appellate counsel is the logical consequence of *Evitts*.[222] As described at length above, if defendants have a right to adequate counsel on their direct appeal,[223] the state cannot incarcerate them without providing at least an opportunity to raise a claim regarding that counsel's competency.

III. What Comes Next?

This Part explains how the Court's decision in *Shinn* creates an unconstitutional situation that requires states like Arizona to create additional procedures. The previous Part argued that defendants in states that defer IAC claims to state habeas proceedings have a constitutional right to counsel in those proceedings—at least for the deferred IAC claims.[224] It also argued that when the Constitution guarantees defendants the right to counsel in a proceeding, they have a right to raise, and present evidence in support of, an IAC claim regarding that counsel.[225] The upshot of all this is that defendants in such states require a forum to raise, and present evidence in support of, IAC claims regarding the state habeas counsel who ineffectively raised (or failed to raise) their trial IAC claim.

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220. *See supra* Part I.B (recounting the creation of collateral review in the mid-nineteenth century); 14 Stat. at 385 (establishing, for the first time, systemic postconviction collateral review).

221. That the Founding generation would be surprised by the current state of constitutional protections for criminal defendants may be more indicative of how the criminal justice system has transformed over the intervening centuries than a difference in how they understood the Constitution. Criminal justice in the Founding and colonial periods looked radically different from the modern era. *See* Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1679-83 (2017) (describing the colonial-era criminal justice system). Rather than a professional class of prosecutors, victims generally prosecuted their own cases. *Id.* at 1679. And the trial focused more on morality than criminal procedure. *See id.* at 1680. When the Supreme Court announced a right to counsel for the indigent in *Gideon v. Wainwright*, it emphasized how much the criminal justice system had changed—particularly with the advent of professional prosecutors. *See* 372 U.S. 335, 344 (1963). Thus, indigents' right to counsel arguably leveled the playing field in a way more analogous to the Founding generation's criminal justice system.

222. *See* Evitts v. Lucey, 469 U.S. 387, 397 (1985) (holding that defendants have a right to effective assistance of counsel on appeal).

223. *See id.*

224. *See supra* Part II.C.

225. *See supra* Parts II.A-B.

At first blush, this argument runs up against the Court's decision in *Shinn v. Ramirez*. *Shinn* held that defendants are not entitled to an evidentiary hearing to support IAC claims regarding state habeas counsel in states like Arizona that require they raise their trial IAC claims in state habeas proceedings—or, for that matter, in any other state.[226] If, as this Note argues, the Constitution requires that defendants have a right to present evidence regarding the inefficacy of their state habeas counsel in states like Arizona, and *Shinn* interprets AEDPA to deny defendants such a right, AEDPA might appear unconstitutional.

This conclusion is wrong for two reasons. First, *Shinn* itself did not declare AEDPA unconstitutional. The majority did not frame its decision as constitutional in nature.[227] Instead, it was an exercise in statutory interpretation.[228] If the Court believed denying an evidentiary hearing in federal habeas proceedings violated the Constitution, it would presumably have read the statute differently or else struck it down.[229] Unless the Court is inclined to revisit its decision in *Shinn*, and there is no reason to believe it is, the federal statute is constitutional.

Second, and more fundamentally, the inability of defendants to vindicate a constitutional right in state court does not render a federal statute unconstitutional. The constitutional violation requires a remedy, but it does not require a remedy in *federal* court.[230] States that defer IAC claims to state habeas are perfectly capable of providing a forum for defendants to challenge the efficacy of state habeas counsel. Their refusal to do so does not compel Congress to legislate a solution.

In essence, federal habeas review had provided a stopgap measure for the states until *Shinn*. Once states began to defer IAC claims to state habeas proceedings, the Supreme Court temporarily resolved the situation via *Martinez* and *Trevino*. Defendants in states like Arizona could challenge the efficacy of their state habeas counsel in federal court—at least if it was a substantial claim.[231] Thus, though such states still lacked procedures adequately protecting the constitutional rights of defendants, the defendants

226. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022).

227. *See id.* 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.").

228. *See id.*

229. *See* Brief for Respondent at 44-47, *Shinn*, 142 S. Ct. 1718 (No. 20-1009), 2021 WL 4197216 (arguing that adopting Arizona's reading of AEDPA would undermine the Sixth Amendment).

230. *Cf.* Young v. Ragen, 337 U.S. 235, 239 (1949) (requiring Illinois state courts to adopt adequate procedures to protect federal rights rather than creating a remedy in federal court).

231. *See* Martinez v. Ryan, 566 U.S. 1, 9 (2012); Trevino v. Thaler, 569 U.S. 413, 417 (2013).

suffered no injury because the federal courts had stepped in to resolve the issue by offering a forum for the IAC claims.

Now, with *Shinn*, the federal courts have stepped away. The federal forum afforded in *Martinez* and *Trevino* no longer remedies the constitutional violation because defendants cannot present new evidence in support of their state habeas IAC claims.[232] The federal courts' departure leaves a constitutional void that the states must fill.

Previously, when the Supreme Court confronted a similar situation, it also left the procedural remedy to the states. In *Young v. Ragen*, the Court addressed the question of what procedures should be afforded to a defendant deprived of their federal rights in state court.[233] As the Court framed it: Illinois state courts of last resort were refusing to consider defendants' claims that their federal rights had been infringed.[234] The Court held the federal Constitution required a means for defendants to challenge deprivations of their federal rights.[235] Yet the Court stressed that it fell to the states to develop procedures that would allow defendants to vindicate their federal rights.[236] Despite the violation of a federal right, the Court did not explore a remedy in federal court.[237] In response to the Court's decision, states did develop a procedural remedy—namely, state habeas proceedings.[238]

The Court's holding in *Ragen* is instructive here. The Constitution requires defendants have an opportunity to challenge the efficacy of their state habeas counsel when it is their first opportunity to raise IAC claims about their trial counsel.[239] It does not require a remedy in the federal courts.[240] And as in

232. *See Shinn*, 142 S. Ct. at 1734; *see also SCOTUS Reverses Ninth Circuit Habeas Win, Cutting Back on Martinez and Trevino by Prohibiting Consideration of Evidence Beyond the State Court Record*, DEFENDER SERVS. OFF. (May 23, 2022), https://perma.cc/2YEK-3VF5 ("In reaching its decision, the Court all but overrules [*Martinez* and *Trevino*, which] recognized a critical exception to the general rule that federal courts may not consider claims on habeas review that were not raised in state court.").

233. *Ragen*, 337 U.S. at 236.

234. *See id.* at 238.

235. *See id.* at 239.

236. *See id.* ("We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless, that requirement must be met.").

237. *See id.*

238. *See* Place, *supra* note 35, at 313 ("States began adopting post-conviction procedures in the 1950s in response to the United States Supreme Court's decision in *Young v. Ragen.*").

239. *See supra* Part II.C.

240. *Cf. Ragen*, 337 U.S. at 239 (directing states to develop their own remedies to constitutional violations rather than creating a remedy in federal court).

Ragen, states can determine the means to accommodate the federal right.[241] If they decline to do so, they cannot defer IAC claims to state habeas proceedings.

Another line of cases confirms that states may have an obligation to provide a forum for federal constitutional claims when the defendant is constitutionally entitled to a remedy.[242] The Court's decision in *General Oil Co. v. Crain* established that states have an obligation to entertain a suit when the moving party has a constitutional right to injunctive relief.[243] In *Crain*, the plaintiff sued to enjoin the enforcement of a Tennessee law on the grounds that the law was unconstitutional.[244] The Tennessee courts dismissed the case because a state statute stripped Tennessee courts of jurisdiction for certain suits against state officers.[245]

The Supreme Court ultimately affirmed the decision below, but only because it held the state did not violate any constitutional rights.[246] It emphatically rejected the defendant's argument that the Tennessee courts could decline jurisdiction when a party possessed a constitutional right to a remedy.[247] The Court explained that, if a party has the right "to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court."[248] Courts, of course, may not give effect to unconstitutional laws.[249]

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241. *See id.*

242. Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905, 929 (2017) (arguing that AEDPA's restrictions on hearing claims regarding new substantive rules of constitutional law in the first instance does not render AEDPA unconstitutional but rather requires states to provide habeas relief in narrow circumstances).

243. *See* 209 U.S. 211, 228 (1908) ("It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court."); Vázquez & Vladeck, *supra* note 242, at 938 ("*Crain* thus held that, if a plaintiff has a constitutional right to injunctive relief, a state law denying its courts jurisdiction to entertain an action seeking such relief was itself unconstitutional.").

244. *See Crain*, 209 U.S. at 214-15.

245. *See id.* at 216.

246. *See id.* at 231.

247. *See id.* at 228. More recently, the Supreme Court has held that if states create a forum to hear federal claims, they must afford relief where substantive federal law prevents the defendant's punishment. *See* Montgomery v. Louisiana, 577 U.S. 190, 204-05 (2016) ("If a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" (quoting Yates v. Aiken, 484 U.S. 211, 218 (1988))).

248. *See Crain*, 209 U.S. at 228.

249. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The logic of *Crain* extends to states' obligation to provide a forum for IAC claims regarding state habeas counsel when there is a constitutional right to the efficacy of that counsel. Like the injunctive relief sought in *Crain*, the right to effective assistance of counsel is a federal right for which defendants are constitutionally entitled a remedy.[250] As in *Crain*, the constitutional violation stems from state action. In *Crain*, it was a state law regulating conduct;[251] here, it is state procedural rules that define when defendants may raise IAC claims.[252] The *Crain* Court mused that because there was no available remedy in federal court, the federal right would be nullified if states courts did not hear the constitutional claim.[253] The same is true here.

The forum that states must create for habeas counsel IAC claims does not need to provide an entirely new trial. States would have considerable flexibility in designing the proceeding. To meet the constitutional minimum, states would only need to provide a mechanism for defendants to allege that their state habeas counsel was ineffective and a forum in which to present evidence in support of that claim. States could, for example, use a sort of pleading standard to screen out frivolous claims, denying an evidentiary hearing to defendants who do not allege conduct that could plausibly constitute ineffective assistance of counsel.

Requiring states to provide a forum for constitutional violations is not only consistent with past Supreme Court practice, but it also addresses the federalism concerns animating the Court's decision in *Shinn* and Justice Scalia's dissent in *Martinez*. Both opinions emphasized how the federal proceedings infringed on state sovereignty.[254] To the *Shinn* Court, the seven-day federal evidentiary hearing in the case below exemplified how IAC evidentiary hearings constituted a "wholesale relitigation of [the defendant's] guilt."[255] A critical aspect of such intrusions into state sovereignty is that these proceedings are conducted in federal courts.[256] They are not subject to state

250. *See supra* Part II.A (arguing that IAC requires a remedy).

251. *See Crain*, 209 U.S. at 213-15.

252. *See, e.g.*, State v. Spreitz, 39 P.3d 525, 526-27 (Ariz. 2002).

253. *See Crain*, 209 U.S. at 226.

254. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1738 (2022) (characterizing federal IAC evidentiary hearings as an "improper burden imposed on states"); Martinez v. Ryan, 566 U.S. 1, 26 (2012) (Scalia, J., dissenting) (assailing the majority for failing to consider respect for the states).

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

256. *See* Engle v. Isaac, 456 U.S. 107, 128-29 (1982) (describing how the use of procedural default to push claims into federal court deprives "state appellate courts" of "a chance to mend their own fences and avoid federal intrusion").

procedural rules, and they are not decided by state judges.[257] If the IAC proceedings, though still required by the federal Constitution, were conducted in state court, they would accommodate the federalism interests protected by AEDPA. This approach is consistent with the growing importance of state habeas proceedings. The retraction of federal habeas review and the increasing salience of constitutional issues requiring additions to the trial record—including IAC—is already elevating the burden state collateral review shoulders in the criminal adjudicatory system.[258]

Thus, this Note's approach is correct not only because it follows existing Supreme Court precedent and doctrine, but also because it meets the substantive concerns animating the doctrines. Relying on states to provide defendants a forum to raise, and present evidence in support of, IAC claims regarding their state habeas counsel balances strong federalism interests with the procedural right the Constitution affords criminal defendants.

Conclusion

Defendants have a constitutional right to raise an IAC claim about their state habeas counsel in states that defer trial IAC claims to state habeas.[259] This constitutional right derives from three propositions. First, the constitutional right to the effective assistance of counsel, which extends to a defendant's first appeal,[260] includes a right to a forum in which to vindicate that right—namely, a proceeding that allows defendants to present an IAC claim.[261] Second, the right to raise an IAC claim includes the right to present evidence in support of that claim.[262] Third, defendants have a right to challenge the efficacy of their initial trial counsel with the effective assistance of counsel, regardless of when a state permits them to first raise that claim.[263]

If all three of these propositions are true, defendants in states that defer IAC claims to state habeas proceedings have a right to counsel in their initial state habeas proceeding.[264] This right would empower indigent defendants to

257. *See id.* at 129 ("Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules.").

258. *See* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 453 (2017).

259. *See supra* Part II.C.

260. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985).

261. *See supra* Part II.A.

262. *See supra* Part II.B.

263. *See supra* Part II.C.

264. *See supra* note 9 (documenting states which defer IAC claims to state postconviction proceedings).

challenge the validity of their initial trial and ensure they were not deprived of their proper day in court. And even defendants in states that already provide counsel in state habeas proceedings would be entitled to a subsequent proceeding ensuring their postconviction counsel represented them effectively. Although it is not the focus of this Note, the logic could extend to more than just the seven states that completely bar defendants from raising IAC claims during direct review,[265] potentially encompassing the majority of states which usually defer IAC claims until after direct review.[266]

Yet these constitutional protections for defendants remain balanced with federalism and states' interest in finality. IAC claims retain clear boundaries, and states are not forced to relitigate their cases in federal court. This is the balance struck by the Constitution and the Supreme Court's precedent.

For a time, the Supreme Court's decision in *Martinez v. Ryan* papered over this constitutional issue, providing a remedy in federal court where none existed in state court.[267] But the Court's decision in *Shinn v. Ramirez* resurrected the constitutional issue by withdrawing the federal courts from most of these cases.[268] As the Supreme Court explained in *Martinez*, states' decisions to defer IAC claims to subsequent proceedings, though premised on sound reasons, "[are] not without consequences."[269] With the federal courts now largely out of the picture, it is time for states to face those consequences. They must either guarantee the effective assistance of counsel in initial state habeas proceedings for trial IAC claims, or they must abandon their procedures deferring IAC claims to state habeas proceedings.

265. *See supra* note 9.

266. *See supra* note 9.

267. *See* 566 U.S. 1, 9 (2012) (holding that defendants may raise IAC claims in federal court if their state habeas counsel was ineffective and the defendants could not have raised IAC claims before).

268. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1738-39 (2022) (explaining that *Martinez* hearings will now serve little purpose).

269. *See Martinez*, 556 U.S. at 13.